SUPREME COURT OF QUEENSLAND

CITATION:	*Newberry v Suncorp Metway Insurance Ltd* [2006] QCA 48
PARTIES:	**CRAIG OWEN NEWBERRY** (applicant/respondent) **v** **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (respondent/appellant)
FILE NO/S:	Appeal No 7137 of 2005 SC No 56 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	3 March 2006
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2006
JUDGES:	de Jersey CJ, Keane JA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed; judgment below is set aside and Mr Newberry's application is dismissed** **2. Respondent to pay appellant's costs of the appeal and of the proceedings at first instance to be assessed on the standard basis** **3. An indemnity certificate is to be issued to the respondent under s 15 of the *Appeals Costs Fund Act* 1973 (Qld)**
CATCHWORDS:	WORKERS' COMPENSATION - ENTITLEMENT TO COMPENSATION - EMPLOYMENT RELATED INJURY, DISABILITY OR DISEASE - where respondent injured while travelling in the course of his employment - where dispute over whether *Civil Liability Act* 2003 (Qld) applied to the respondent's claim - where respondent's claim was stated without suggesting that employment was a significant contributing factor to the breach of duty or resulting injury - whether this was a claim for damages in which the harm resulting from the breach of duty included an injury as defined by the *Workers' Compensation and Rehabilitation Act* 2003 (Qld)

Civil Liability Act 2003 (Qld), s 5(b), s 8
Personal Injuries Proceedings Act 2002 (Qld), s 6(2)(b)
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 10, s 32, s 46

Favelle Mort Ltd v Murray (1975-1976) 133 CLR 580, distinguished
Federal Broom Co Pty Ltd v Semlitch (1964) 110 CLR 626, applied
King v Parsons and Suncorp Metway Insurance Limited [2005] QSC 214; SC No 5038 of 2005, 5 August 2005, cited
Mercer v ANZ Banking Group Ltd [2000] NSWCA 138; No 40024 of 1999, 31 May 2000, considered

COUNSEL: W Sofronoff QC, with R I M Lilley, for the appellant
D V C McMeekin SC, with B J Hartigan, for the respondent

SOLICITORS: Herbert Geer & Rundle for the appellant
MurphySchmidt for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **KEANE JA:** The respondent, Mr Newberry, worked for Dodds Agencies, a firm which delivered smallgoods from Bowen to Airlie Beach and Proserpine. On 8 October 2004, he suffered personal injuries while travelling in the course of his employment in a truck driven by his brother. Mr Newberry claims that he was injured in a collision which occurred because the other vehicle was travelling on the wrong side of the road. The appellant is the CTP insurer of that other vehicle. Mr Newberry makes no claim against his employer.

The issue

[3] The issue for determination turns upon the construction of s 5(b) of the *Civil Liability Act* 2003 (Qld) ("the CLA"), which provides relevantly:

> "This Act does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes–
> …
> (b) an injury as defined under the *Workers' Compensation and Rehabilitation Act* 2003, other than an injury to which section 34(1)(c) or 35 of that Act applies."

[4] Section 32 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the WCRA") provides relevantly as follows:

> "An ***injury*** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.
> …"

[5] It is common ground between the parties that neither s 34(1)(c) nor s 35 of the WCRA has any relevance to Mr Newberry's claim.

[6] The practical significance of this issue for the parties is that if the CLA does not apply to Mr Newberry's claim, the damages which he may recover will not be limited by the provisions of the CLA.

[7] The learned primary judge took what he regarded as a literal approach to the construction of s 5(b) of the CLA. His Honour regarded the "plain meaning" of s 5(b) of the CLA as excluding "from its operation every case where the injury meets the definition in the WCRA other than two specified and presently irrelevant exceptions".[1] His Honour held that, because Mr Newberry's injury was "an injury" as defined by s 32 of the WCRA, the CLA did not apply to Mr Newberry's claim for damages for that injury. In reaching that conclusion, his Honour also held that Mr Newberry's employment was a significant contributing factor to the occurrence of his injury.

[8] The learned primary judge declared that the provisions of the CLA do not apply to Mr Newberry's claim for damages against the appellant. The appellant seeks to appeal against this decision.

[9] To assist in the ascertainment of the intention of the legislature, the parties have agitated a number of arguments founded upon considerations extraneous to the actual language of the legislation. These include the Minister's Second Reading Speech, and the Explanatory Note which accompanied the Bill. These considerations may afford assistance in the event that the effect of the language used by the Parliament is unclear, but a consideration of the proper legal construction of s 5(b) of the CLA must focus upon the language of the provisions of the statute understood within its context.[2] In this case, of course, the statutory context includes the relationship between s 5(b) of the CLA and the WCRA, a relationship made explicit by the text of s 5(b) of the CLA itself.

The parties' contentions

[10] The appellant's principal contention is that, on its proper construction, s 5(b) of the CLA excludes from the application of the CLA those injuries for which damages are payable under the WCRA. The appellant further submits that the learned primary judge erred in concluding that Mr Newberry's injury was a personal injury to which his employment was a "significant contributing factor" within the meaning of the definition of "injury" in the WCRA.

[11] It is clear that the appellant's principal contention cannot be accepted, at least in the terms in which it is stated above and in which it was originally cast in the appellant's written outline of submissions. That is because this contention is predicated on the assumption that damages are "payable under the WCRA". That assumption is quite wrong. The WCRA does not provide for the payment of damages. The WCRA regulates access to damages by injured workers; and so the right to damages which injured workers may recover is affected by the provisions of the WCRA. That this is so is explicit in the provisions of s 10(1) and s 46(2) of the WCRA. In this regard, s 46(2) of the WCRA provides that the WCRA "does not impose any legal liability on an employer for damages for injuries sustained by a worker employed by the employer, though chapter 5 regulates access to damages". The expression

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1 *Newberry v Suncorp Metway Insurance Ltd* [2005] QSC 210 at [28].

2 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995 - 1997) 187 CLR 384 at 408. See also *R v Young* (1999) 46 NSWLR 681 at 687 - 688; *Grice v Queensland* [2005] QCA 272 at [9], [24] and [40].

"damages" is defined by s 10 of the WCRA as "damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay damages to the worker …". The damages which are payable to a worker are not payable under the WCRA, but by reason of rights and obligations which arise independently of the WCRA.

[12] Further, there is force in the submissions of Senior Counsel for the respondent that to read s 5(b) of the CLA as if it referred to an injury occurring in a set of circumstances which would bring a claim for damages for that injury within the regulatory scheme of the WCRA would be impermissibly to read words into s 5(b) of the CLA.

[13] At this point, however, it should be noted that the learned primary judge's view of the "plain meaning" of s 5(b) of the CLA treats s 5(b) as if it operated by reference to a defined injury. The respondent's submissions support that approach. It is an approach which, with the greatest respect, I am unable to accept for the reasons developed by Senior Counsel for the appellant in the course of his oral argument.

[14] In this regard, it is clear that s 5(b) of the CLA is not concerned with the application or non-application of the CLA to "injuries" or even to certain kinds of injury. Section 5(b) of the CLA is, in terms, directed at "claims", and, more precisely, at "civil claims for damages for personal injury" which involve an allegation of a breach of duty which resulted in that injury.

[15] The expression "claim" is defined pursuant to s 8 of the CLA to mean:

> "a claim, however described, for damages based on a liability for personal injury, damage to property or economic loss, whether that liability is based in tort or contract or in or on another form of action, including breach of statutory duty and, for a fatal injury, includes a claim for the deceased's dependants or estate."

[16] It may be noted here that the definition of claim does not contemplate that the claim be reduced to any particular form. It does, however, contemplate an asserted liability for damages for a breach of duty to a claimant or the dependants or estate of a person who has suffered a fatal injury.

[17] As Senior Counsel for the appellant submitted in oral argument, because the exclusion effected by s 5(b) of the CLA operates by reference to the claim, s 5(b) of the CLA necessarily directs attention to the terms of the claim. It contemplates that one should be able to say from the terms of the claim whether the claim is or is not within the purview of the CLA. This exercise is one to be performed before the facts on which the claim is said to be based are finally determined by a court. Indeed, as the learned primary judge observed: "In the absence of guidance as to the applicable statutory regime it is unlikely the claim can be progressed through the settlement process required by the legislation."[3] In order to identify the terms of any particular claim, the attention of the court will not be confined to any particular document, such as the notice of claim form completed by Mr Newberry in this case. The terms of the claim must, however, be established to the court which is called upon to rule upon whether the claim is or is not one to which the CLA applies.

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[3] *Newberry v Suncorp Metway Insurance Ltd* [2005] QSC 210 at [29].

[18] It is necessary now to consider further the kind of claim at which s 5(b) of the CLA is directed. The exclusion effected by s 5(b) of the CLA postulates a claim for damages for personal injury caused by a breach of duty owed to the injured claimant by the specific person against whom the claim is made. That category of claim is necessarily characterised by the assertion that the person from whom damages are claimed is liable for a personal injury suffered by the claimant which is or includes an injury as defined under the WCRA, and which has been suffered as a result of a breach of duty owed to the claimant by the person against whom the claim is made.

[19] It is clear from the provisions of the WCRA that, when s 32 speaks of an "injury", it is necessarily speaking of an injury to a person who is in a relationship of employment with his or her employer. That this is so sufficiently appears from the terms of s 32 itself; but that appreciation is confirmed by other provisions of the WCRA. For example, the WCRA is expressly intended by s 5(1) to provide for "benefits for workers who sustain injury in the course of their employment" and s 46(1) creates a legal liability to pay "compensation" (as opposed to "damages") "for injury sustained by a worker employed by the employer".

[20] The concept of injury referred to in s 32 of the WCRA postulates a worker as the injured person and the existence of a relationship of employment between an employer and that injured worker. A familiar incident of that relationship is the duty owed to the worker by the employer. Thus, for the purposes of a claim within s 5(b) of the CLA, one kind of breach of duty which is clearly in contemplation is that owed by the employer to the worker who is making the claim for damages against the employer. For the purposes of s 5(b) of the CLA then, we may say that it is clearly sufficient to exclude the application of the CLA that the claim seeks damages for an injury caused by a breach of duty owed to the injured worker by the worker's employer.

[21] But as Senior Counsel for the respondent was rightly at pains to emphasise, the circumstance that a claim does not involve the assertion of a breach of duty by the employer resulting in injury to the worker does not, of itself, mean that the claim is not one for damages for breach of duty resulting in "an injury arising out of or in the course of employment". It is readily apparent that the breach of duty resulting in an injury to a worker arising out of, or in the course of, his or her employment may be a breach of duty owed to the worker by an occupier of the premises where the work was being carried out, or, as in this case, by another user of the road where the employee happens to be on the road in the course of his employment when the breach of duty and resultant injury occur.

The proper construction of s 5(b) of the CLA

[22] Because the exclusionary effect of s 5(b) of the CLA operates by reference to the terms of the claim, it is necessary to consider whether the claim addresses the requirement of s 32 of the WCRA that the injury be one where "the employment is a significant contributing factor to the injury". In my respectful opinion, the difficulty with the submission advanced for the respondent at this point, and the conclusion of the learned primary judge which it seeks to support, is that it fails to focus upon the terms of the claim made by the claimant against the person alleged to have caused injury by that person's breach of duty in order to see whether it is claimed that the claimant's injury resulting from that breach of duty was significantly contributed to by the claimant's employment.

[23] As has been seen, s 5(b) is concerned with the claim made by the claimant, not with facts as they may or may not ultimately be established at trial. Section 5(b) of the CLA assumes that it is possible to say whether the claim is within the purview of the CLA before the facts on which the claim is supposedly based are established in court. Further, s 5(b) in speaking of "the breach of duty owed to the claimant" must necessarily mean breach of duty alleged by the claimant. In this context, the words "if the harm resulting" etc in s 5(b) must necessarily be understood to refer to what is asserted by the claim, rather than the facts which may or may not be ultimately established. In my view, it is necessary to understand s 5(b) of the CLA as follows:

> "This Act does not apply in relation to any civil claim for damages for personal injury if **the claim is that** the harm resulting from the breach of duty owed to the claimant is or includes a personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury caused by the breach of duty owed to the claimant by the person against whom the claim is made." (emphasis added)

[24] In short, s 5(b) excludes from the scope of the CLA claims which involve the assertion that the personal injury caused by the breach of duty by a non-employer occurred in circumstances where the claimant's employment activities nevertheless also contributed to the occurrence of that injury in a way which is significant. Whether the contribution of the employment activities was, or was not significant, involves a consideration of issues of causation and causal potency in the relationship between the breach of duty and the employment activities. These issues simply do not arise in the context of a determination of the simpler issue whether an injury falls within s 32 of the WCRA. On this view, if a claim for damages for breach of duty against a person other than an employer is to be excluded from the purview of the CLA by s 5(b), the claim must be one where the employment and its significant contribution to the occurrence of the injury can be seen to be a material ingredient of the claim made against that person.

Mr Newberry's claim

[25] At this point, it may be noted that the claim actually made by Mr Newberry against the appellant in his claim form of 11 November 2004 does not allege that his employment contributed in any way to the injury allegedly caused by the breach of duty owed to him by the appellant's insured. As I have already observed, Mr Newberry was not necessarily confined to this initial formulation of his claim. But, on any view, the formulation of Mr Newberry's claim against the appellant did not include or require any allegation that Mr Newberry's employment made a material contribution to the injury which resulted from the breach of duty owed to Mr Newberry by the insured, whether as a contributing factor to the breach of duty by the appellant's insured or to the occurrence of Mr Newberry's injury as a result of the breach of duty of the appellant's insured.

[26] In the present case, the basis of Mr Newberry's claim was stated in his original claim form without suggesting, in any way, that the exigencies or activities of his employment were a significant contributing factor to the appellant's breach of duty or the injury resulting from that breach by reason of which the appellant is said to be liable in damages. This was clearly appropriate. By way of illustration of this point, if Mr Newberry's claim against the appellant were formulated in a pleading, and included an allegation that Mr Newberry was a passenger in a motor vehicle "**in the course of his employment**", or that the motor vehicle in which he was a

passenger was on the road because of the exigencies of Mr Newberry's employment**,** these allegations would be liable to be struck out as immaterial and embarrassing to his claim.

[27] It cannot be disputed that, when s 32 of the WCRA speaks of "employment" contributing to the worker's injury, it is referring to employment as a set of circumstances, that is to the exigencies of the employment of the worker by the employer. The legislation is referring to "what the worker in fact does during the course of employment".[4] The requirement of s 32 of the WCRA that the employment significantly contribute to the injury is apt to require that the exigencies of the employment must contribute in some significant way to the occurrence of the injury which the claimant asserts was caused by the breach of duty of the person (not the employer) against whom the claim is made.

[28] That Mr Newberry was employed by his employer, and that he was acting in the course of that employment, are facts which are immaterial to his claim against the appellant and any "form of action" on which that claim might legally be based. The breach of duty alleged against the appellant and the injury to Mr Newberry caused by that breach were not such as to involve, or to require, any reference to the exigencies or activities of Mr Newberry's employment. The duty which the appellant's insured owed to Mr Newberry was owed to Mr Newberry as another user of the road. Mr Newberry's activities as an employee were irrelevant to the duty which was owed by the appellant's insured, the breach of that duty and the injury caused to Mr Newberry as a result of that breach. An assertion that the exigencies or activities of Mr Newberry's employment made significant contribution to the occurrence of the injury which was claimed to result from the breach of duty by the appellant's insured would have been nonsense. No doubt it is for that good reason that these assertions of fact were not made in Mr Newberry's initial formal claim against the appellant.

[29] It will be apparent that my interpretation of s 5(b) is different from that which commended itself to the learned primary judge. It may be objected that my approach involves "reading into" the legislation words which are not there; but the interpretation which I prefer gives effect to the language of s 5(b) of the CLA understood within the statutory context in which that provision is required to operate, that context which is concerned with the terms of the claim to which the Act either does or does not apply by reason of the terms of that claim. The interpretation which I would adopt recognises that the exclusionary operation of s 5(b) of the CLA must be determined by reference to the claim made against an alleged, not proven, wrongdoer at a time when the claim is yet to be proved. Further, it will be seen that the interpretation which I prefer does not involve reading the provision as if it referred to "injuries claims for which are regulated by the WCRA".

[30] Further, and importantly so far as my rejection of the approach of the learned primary judge is concerned, to read s 5(b) of the CLA as if it provided: "This Act does not apply if the harm resulting from the breach of duty owed to the claimant is or includes an injury as defined under the WCRA", would be radically to amend the

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[4] See *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 632 - 633, 641; *Mercer v ANZ Banking Group Ltd* [2000] NSWCA 138 at [13]; (2000) 48 NSWLR 740 at 745.

section by deleting words crucial to the true operation of the provision; and Senior Counsel for the respondent did not invite the Court to read s 5(b) in that way.

Considerations extraneous to the text of s 5(b) of the CLA

[31] The construction of s 5(b) of the CLA which I would adopt is not denied by the consideration that the legislature could easily have made its intentions more abundantly apparent by using slightly different language. In this regard, s 6(2)(b) of the *Personal Injuries Proceedings Act* 2002 (the "PIPA") provided that that Act:

> "does not apply to …
>
> …
>
> (b) injury as defined under the *Workers' Compensation and Rehabilitation Act* 2003, but only to the extent that an entitlement to seek damages, as defined under that Act, for the injury is regulated by chapter 5 of that Act."

[32] It is said that such language could easily have been used had it been Parliament's intention to achieve the result which I favour. It is unlikely that the language of s 6(2)(b) of the PIPA was used with this point in mind, for the reasons given at first instance by McMurdo J in *King v Parsons and Suncorp Metway Insurance Limited*.[5] But in any event, the language of s 5(b) of the CLA, concerned as it is with the terms of a claim against a particular defaulter for damages for the injury caused by a particular default, is apt to achieve the effect which I have suggested, and the possibility that the same effect could have been achieved by other language is not a reason to decline to give effect to the language which the legislature has used.

[33] Further, to the extent that any light is to be thrown by the Minister's Second Reading Speech or the Explanatory Memorandum to the Bill upon the problem of statutory construction involved in this case, it does not reveal any reason to depart from the conclusion derived from the analysis of the language of the legislation set out above.

[34] In the Minister's Second Reading Speech in support of the CLA, the following was said:

> "The Bill will apply **to all cases of negligent conduct** whether it results in personal injury, property damage or economic loss, **except for personal injuries that are … within the WorkCover Queensland Scheme.**
>
> It is important to stress that the Government **has specifically excluded all work injuries from the application of this Bill. This exclusion will apply regardless of whether the defendant to the action is an employer, occupier or third party**." (emphasis added)

[35] The construction of s 5(b) of the CLA which I would adopt fully accords with this statement of intention. On that construction, the exclusion is not limited to cases where the employer of the injured worker is a defendant; in some instances the exclusion will cover claims against persons other than an employer. At the same time, however, in order to fall within the exclusion, it must be possible to say that the claim against a person other than an employer is truly a claim in relation to a "work injury". The claim will be such a claim only where it is alleged that the employment was a significant contributory factor to the occurrence of the injury for

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5 [2005] QSC 214 at [23] - [25].

which the person against whom the claim is made is alleged to be liable. In such circumstances, therefore, it would be possible for a claim against a person other than an employer to be excluded from the coverage of the CLA and, at the same time, excluded from the coverage of the damages provisions of the WCRA, which regulate only damages claims against employers. It may be that the legislature had it in mind that, in practice, it was unlikely that claims for an injury to which employment was alleged to be a significant contributing factor even though the injury was also caused by the fault of a person other than the employer, would not also involve a claim for damages against the employer. It is not profitable, however, to speculate further on the considerations of policy which lay behind the language of the statute.

[36] The conclusion which I favour is also fully in accord with the intention to be gleaned from the Explanatory Note in respect of cl 5 of the Civil Liability Bill 2003. It was in the following terms:

> "**This exclusion will result in liability for those injuries in which employment is likely to be a significant factor being decided in accordance with the law as current before the commencement of the Act.**" (emphasis added)

[37] The contrary view cannot, in my view, be reconciled with the Explanatory Note. It was argued that the reference to "liability" was a reference to "liability" in the abstract sense of "fault", rather than in the sense of "liability for damages" but that argument puts a narrow and quite artificial meaning upon language used in the course of a discussion of liability for the payment of damages.

[38] Further, the conclusion which I favour avoids, at least in this case, the distinctly odd result that Mr Newberry, merely because he was employed when injured, and even though he makes no claim against his employer, would be entitled to recover from the appellant damages greater in amount than would be recoverable from his employer (and its insurer), had the employer also been liable for the same injuries. It is impossible to discern in the legislation, or the extraneous materials, any policy thus favouring WorkCover Queensland over other insurers, while at the same time creating a privileged class of employees whose claims for damages for personal injuries are to be free of the restrictions which apply generally to claims for damages by employees who bring their claims against their employers and other defendants. At the practical level, of course, one would usually expect this to be the case where employment has significantly contributed to the injury. To say this is not to say that the legislature could not choose to implement such a policy; it is simply to say that such an oddly discriminatory policy could be expected to be explicitly stated and explained by the legislature.

[39] The construction of s 5(b) of the CLA which I have adopted will not entirely eliminate the possibility that some claims against persons other than employers will be unregulated by statute as a result of the legislature's choice of language in s 5(b) of the CLA. It does, however, serve to limit the extent of such claims by insisting upon close attention to all the language relevantly used by the legislature.

Further reflections on the approach of the learned primary judge

[40] By reason of the interpretation of s 5(b) of the CLA which I have adopted, it is not necessary to resolve the arguments which arise on the appellant's second submission, ie whether Mr Newberry's employment was, in fact, a significant

contributing factor to his injury. The question to be answered is, in my view, whether Mr Newberry's employment was material as "a significant contributing factor" in relation to the injury the subject of Mr Newberry's claim for damages against the appellant. I repeat that the determination of the mixed issue of fact and law as to whether, in truth, a claimant's employment was a "significant contributing factor" to his injury will often not be possible at the kind of hearing which occurred below. Reaching such a determination at the preliminary stage is potentially fraught with practical problems. The construction of s 5(b) of the CLA which I would adopt avoids, at least to some extent, these practical problems by focussing upon the terms of the injured person's claim, as s 5(b) of the CLA requires, rather than speculating upon its likely outcome.

[41] That having been said, however, I should also observe in passing that the fact that an injury has been suffered arising out of employment, or in the course of employment, is not sufficient to establish that the employment has been "a significant contributing factor to the injury". To read s 32 of the WCRA in that way would be to read the latter words out of the section, and in my respectful opinion to accord scant respect to the evident intention of the legislature to require a more substantial connection between employment and injury than is required by the phrases "arising out of employment" or "in the course of employment".[6]

[42] Further, there is no warrant in the language of s 32 of the WCRA for reading the words "if the employment is a significant contributing factor to the injury" as lessening the stringency of the requirement that the injury "arise out of the employment", as was suggested in the course of argument on the appeal. It is clear, as a matter of language, that the words "if the employment is a significant contributing factor to the injury" are intended to be a requirement of connection between employment and injury additional to each of the requirements that the injury occur in the course of employment or arising out of the employment. It cannot, in my respectful opinion, sensibly be read as lessening the stringency of the latter or increasing the stringency of the former.

[43] The decisions on which the learned primary judge relied are readily distinguishable. In *Favelle Mort Ltd v Murray*,[7] the injured worker had been exposed to the virus which caused his injury in the course of carrying out his employment. That was sufficient to entitle him to workers' compensation. In *Mercer v ANZ Banking Group Ltd*,[8] the injured worker suffered injury while actually carrying out the duties of her employment in circumstances where it was common ground that the mechanical task in which she was engaged when injured was part of her employment and that it had made a material contribution to her injury.[9] The only issue was whether that contribution was "substantial".

[44] More importantly, and in my view decisively for present purposes, neither of these cases required a consideration of whether it was claimed that employment was a significant contributing factor to an injury which was alleged to have been caused by the breach of duty of a person other than the employer.

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6 Cf *Mercer v ANZ Banking Group Ltd* [2000] NSWCA 138 at [33] - [34]; (2000) 48 NSWLR 740 at 748, which seems to be to the contrary. For the purposes of this decision it is not necessary to resolve my disagreement with the view apparently expressed in these paragraphs.

7 (1975 - 1976) 133 CLR 580.

8 [2000] NSWCA 138; (2000) 48 NSWLR 740.

9 *Mercer v ANZ Banking Group Ltd* [2000] NSWCA 138 at [9]; (2000) 48 NSWLR 740 at 744.

[45] The rejection of the learned primary judge's approach does not mean, as the learned primary judge considered it would, that "workers would be denied compensation in almost all cases where the injury was incurred while travelling to or from work or while travelling in the course of employment".[10] It is to be emphasised here that we are not concerned with the operation of the WCRA, but with the operation of the CLA. Where a worker is injured while travelling in the course of employment and suffers an injury as a result of activities which are part of his employment, it can readily be said that the employment is a significant contributing factor to the occurrence of that injury.[11] This is a routine example of a claim by an injured worker for workers' compensation where considerations of "fault", and the consequences of fault, are irrelevant. That situation is quite different from that postulated by s 5(b) of the CLA, which requires a determination of the issue whether the employment of the claimant is claimed to be a significant contributing factor to the occurrence of an injury for which a third party is alleged to be liable in damages because the third party has caused the injury by a breach of duty owed to the claimant.

[46] In this latter case, one is necessarily confronted by different issues from those which arise in a claim for workers' compensation by the injured worker. The claim for damages must come to grips with the need to assert that the claimant's employment activities were a significant factor contributing to the injury and that the injury was caused by a breach of duty owed to the claimant by some person other than the employer of the claimant. That raises issues of causation which must address the contribution of the claimant's employment activities to an injury which is also claimed to be caused by the fault of a person other than the employer, and the significance of those activities in a context in which notions of legal fault on the part of the third party are of the essence of the claim. In the case of a claim under s 5(b) of the CLA, these issues of fault and causation as a result of that fault must be addressed. Such issues are entirely absent from, and irrelevant to, the routine claim for workers' compensation for an injury suffered while travelling in the course of employment.

Conclusion and orders

[47] I would allow the appeal, set aside the judgment below and dismiss Mr Newberry's application. I would order that Mr Newberry pay the appellant's costs of the appeal and of the proceedings at first instance to be assessed on the standard basis.

[48] Mr Newberry sought an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973 (Qld) in the event that the appeal was successful. I would grant the respondent's application. The decision below, and the appeal, turned on questions of law. The interpretation of the legislation is not without difficulty. The arguments advanced on behalf of Mr Newberry were fairly arguable. An indemnity certificate should be issued to Mr Newberry.

[49] **MUIR J:** I have read and agree with the reasons of Keane JA and the orders he proposes.

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10 *Newberry v Suncorp Metway Insurance Ltd* [2005] QSC 210 at [22].

11 Similar special provision is made for the case where a worker is travelling to and from work whereby the employment need not be a "significant contributing factor" to give rise to a compensable injury in such circumstances: see s 35(2) of the WCRA.