SUPREME COURT OF QUEENSLAND

CITATION:	*Ballandis v Swebbs & Anor* [2015] QCA 76
PARTIES:	**CHRISTOPHER ROBERT BALLANDIS** (appellant) **v** **JACK JOSEPH SWEBBS** (first respondent) **AAI LIMITED trading as 'SUNCORP METWAY INSURANCE LIMITED'** ABN 48 005 297 807 (second respondent)
FILE NO/S:	Appeal No 6097 of 2014 DC No 2 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	5 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	4 December 2014
JUDGES:	Fraser and Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The appellant pay the respondents' costs of and incidental to the appeal, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – WORKERS' COMPENSATION – ASSESSMENT AND AMOUNT OF COMPENSATION – APPLICATION OF SPECIFIC STATE LEGISLATION – where the appellant's work required him to work at a number of locations – where the appellant travelled to work with other employees in a vehicle owned by the employer – where the appellant was a passenger in the vehicle travelling home from work when the vehicle was involved in an accident – where the appellant suffered a broken nose and exacerbated an earlier rib injury, not caused by the accident – where the primary judge held that because the claim was under s 35 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), the *Civil Liability Act* 2003 (Qld) applied to the assessment of damages – whether s 35 of the *Workers'*

Compensation and Rehabilitation Act 2003 (Qld) applied

Civil Liability Act 2003 (Qld), s 5
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 35

Affleck v Kennedy & Ors [2010] QDC 332, considered
Ballandis v Swebbs & Anor [2014] QDC 129, related
Clement v Backo & Anor [2006] QSC 129, applied
Devitt v Nominal Defendant [2006] QSC 146, considered
Griffiths v Kerkemeyer (1977) 139 CLR 161; [1977] HCA 45, cited
King v Parsons [2006] 2 Qd R 122; [2006] QCA 49, cited
Miles v Brisbane City Council [2010] QDC 501, considered
Newberry v Suncorp Metway Insurance Limited [2006] 1 Qd R 519; [2006] QCA 48, cited

COUNSEL: R D Green for the appellant
R J Douglas QC for the respondents

SOLICITORS: O'Donnell Legal for the appellant
Quinlan Miller & Treston Lawyers for the respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** Mr Ballandis was employed by Mr Thorpe to perform work at locations around Yeppoon and Rockhampton. He was travelling home from work, as a passenger in a utility driven by a co-worker, when the utility rolled. He suffered a broken nose and exacerbated a previous rib injury.

[4] Mr Thorpe employed other workers, Mr Swebbs and the leading hand, Mr Wright. Mr Thorpe owned the utility but provided it to Mr Wright so that he and the other workers could travel to and from the work sites. He also provided the workers' tools and equipment, which were carried in the utility. On occasion the utility was used to collect and transport required building materials. Each day Mr Thorpe would give Mr Wright directions as to the next work sites, and the work to be done.

[5] The utility was kept at the unit occupied by Mr Ballandis and Mr Wright. On the day in question Mr Swebbs drove the utility to day's work site in the morning, and back from it in the afternoon. Mr Wright and Mr Ballandis were passengers on both journeys.

[6] Mr Ballandis sued Mr Swebbs, and the third party insurer of the utility, for damages for personal injuries. Liability was not in issue at the trial.

[7] The learned primary judge held that because the claim came under s 35 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), the *Civil Liability Act*

2003 (Qld) applied to the assessment of damages. His Honour assessed damages on that basis, awarding $9,800 for general damages and nothing for a gratuitous care claim.[1]

[8] Mr Ballandis seeks to challenge those findings. The issues raised by his appeal are:

(1) the application of s 35 of the *Workers' Compensation and Rehabilitation Act*;

(2) if the *Civil Liability Act* does not apply, the appropriate assessment of damages.

Application of s 5 of the Civil Liability Act.

[9] To explain the context of the main issue it is useful to first mention section 5(1)(b) of the *Civil Liability Act*, which provides:

> "(1) This Act does not apply in relation to deciding liability or awards of damages for personal injury if the harm[2] resulting from the breach of duty is or includes—
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> …
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> (b) an injury for which compensation is payable under the *Workers' Compensation and Rehabilitation Act 2003*, other than an injury to which section 34(1)(c) or 35 of that Act applies".

[10] As can be seen, s 5(1) commences with a provision that the *Civil Liability Act* does **not** apply to some awards of damages. Section 5(1)(b) relevantly provides that the excluded awards are those where the harm caused includes an injury which attracts compensation under the *Workers' Compensation and Rehabilitation Act*. However s 5(1)(b) then adds a proviso, limiting the excluded awards. Where the harm caused includes an injury to which s 35 of the *Workers' Compensation and Rehabilitation Act* applies, the exclusion is not applicable.

[11] The convoluted language of s 5(1)(b) means that if compensation for the injury to Mr Ballandis was covered by s 35 of the *Workers' Compensation and Rehabilitation Act*, then the *Civil Liability Act* applied.

Application of s 35 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

[12] Section 35 relevantly provides:

> "(1) An injury to a worker is also taken to arise out of, or in the course of, the worker's employment if the event happens while the worker—
>
> (a) is on a journey between the worker's home and place of employment."

[13] The term "injury" is defined in s 32(1)(a): "An ***injury*** is personal injury arising out of, or in the course of, employment if … the employment is a significant

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1 Often referred to as a *Griffiths v Kerkemeyer* claim, from *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

2 Section 5 was construed as if the words "the claim is that" preceded the words "the harm", in *Newberry v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 519; [2006] QCA 48, at [23]. (***Newberry***)

contributing factor to the injury." However s 35(2) provides that for the purposes of s 35(1), employment need not be a significant contributing factor.[3]

[14] The learned primary judge found that Mr Ballandis was on the journey home from a place of employment, and that his employment was not a significant factor in his being injured.[4]

[15] The challenge to those findings was based on the following contentions:[5]

- there was no static workplace as it varied from day to day; therefore there was no particular location where it could be said that Mr Ballandis worked;
- Mr Thorpe owned the utility, which was provided to take the workers, their tools and equipment to work, and bring them back; the workers met where the utility was in order to travel to locations dictated by Mr Thorpe; the utility was used at Mr Thorpe's direction to pick up and deliver work materials; it was driven to fulfil Mr Thorpe's business activities;
- the work system required Mr Ballandis to attend where the utility was located each day, and travel in it to locations as directed by Mr Thorpe;
- because Mr Thorpe gave daily instructions to Mr Wright as to where the workers were to go that or the next day, Mr Ballandis was under Mr Thorpe's control from the time he left his unit;[6]
- the employment was central to, or a significant contributory factor to, the occurrence of the injuries;[7] but for Mr Ballandis' employment he would not have been involved in the accident.

[16] I do not consider that the contentions can be sustained. There was a body of compelling evidence supporting the learned primary judge's conclusion that at the relevant time Mr Ballandis had finished work, left his place of employment and was returning home.

[17] That evidence included:

(a) Mr Ballandis gave a description of when the accident occurred, in the Notice of Accident form given to the third party insurer; that was that "we were travelling home to Yeppoon from Rockhampton…";[8] when cross-examined he agreed that it was correct to say that it was a journey from the worksite to the unit where they lived;[9]

(b) in his evidence Mr Ballandis said he was "Returning from a job site." and "We were travelling home.";[10] Mr Wright agreed that they "were heading home" to the unit;[11]

(c) Mr Swebbs drove his own car to the unit where Mr Ballandis and Mr Wright lived, and then drove them from the unit in the utility;[12] Mr Swebbs was

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3 This provision mirrors s 32(2) which provides that employment need not be a significant contributing factor to the injury if s 35(2) applies.

4 *Ballandis v Swebbs* [2014] QDC 129, at [105]-[107]. (**Reasons**)

5 Paragraphs 8-16 of Mr Ballandis' outline.

6 Relying on *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, at 404; *Stevens v Brodribb Sawmilling Co Pty Ltd* [1985-1986] 160 CLR 16, at 27.

7 Relying on *Newberry* at [24] and *King v Parsons & Anor* [2006] QCA 49 (**King**)

8 AB 433.

9 AB 95.

10 AB 10.

11 AB 155, 165.

driving the utility because neither Mr Ballandis nor Mr Wright had a driver's licence;[13] Mr Ballandis agreed that after they had finished at the worksite Mr Swebbs was driving him back to his unit;[14]

(d) most of the time they would drive from there to Mr Thorpe's house where they would then get into in Mr Thorpe's "work ute" to drive to the work site;[15]

(e) Mr Wright said that they would clock on when they got to the worksite and clock off when they left it,[16] and that was required by Mr Thorpe;[17] Mr Thorpe agreed;[18]

(f) the utility was kept at the unit,[19] and Mr Wright, Mr Ballandis and Mr Swebbs used it to get to work; neither Mr Ballandis nor Mr Wright had a driver's licence and Mr Swebbs' own vehicle was unsuitable for work use as it was a sedan;[20]

(g) the utility was owned by Mr Thorpe's company but had been given to Mr Wright on the basis that Mr Wright would pay it off over time, and so "we had a vehicle to get to work";[21] Mr Thorpe said that Mr Wright couldn't afford a car "so I bought him one to help him to get to and from work", and outside work hours he was free to use it as he pleased ;[22] Mr Wright was responsible for paying for the petrol;[23] Mr Thorpe said "It was [Mr Wright's] car. He did what he wanted to do with it".[24]

[18] Apart from the evidentiary position there are a number reasons why, in my view, the contentions cannot be accepted.

[19] First, s 35(1) is, in effect, a deeming provision. It provides that an injury which happens on a journey between the place of employment and the worker's home **is taken to arise** out of, or in the course of, the worker's employment. It operates so that even if the injury does not actually arise out of, or in the course of, the worker's employment, it will be taken to do so, if it occurs on the journey between home and the place of employment. On its plain words it applies even if the employee has finished work or is not then performing any work under their employment. Thus it applies to a journey outside working hours, such as to the workplace before work starts, or home after work has finished for the day, just as much as it does to a journey during working hours.

[20] Because it applies even where the employee decides how and when the journey is undertaken, the provision does not depend on any element of control by the employer over the employee. It applies equally to a situation where the employee

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12 Mr Swebbs, AB 100-101, 104; Mr Wright, AB 154.
13 Mr Ballandis at AB 18; Mr Wright, AB 155.
14 AB 95.
15 Mr Ballandis at AB 18.
16 AB 154.
17 Mr Wright AB 159.
18 AB 168, 173.
19 Mr Wright, AB 154.
20 Mr Wright, AB 155.
21 Mr Wright, AB 155, 158-159, 161. Mr Thorpe, AB 168, 175.
22 AB 168, 176.
23 Mr Thorpe, AB 172. Mr Wright, AB 179, 180A.
24 AB 176.

tells the employee how to get home, and provides the means (such as letting a vehicle be used, or providing a bus ticket or cab fare), as it does to where the employer says and does nothing at all.

[21] Secondly, implicit (or perhaps explicit) in the contentions is that the "place of employment" for the purposes of s 35 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) included the utility itself. The term "place of employment" is defined in Schedule 6 to the Act as being:

> "…the premises, works, plant, or place for the time being occupied by, or under the control or management of, the employer by whom a worker concerned is employed, and in, on, at, or in connection with which the worker was working when the worker sustained injury."

[22] A vehicle used to drive home after work, even if it is provided by the employer, would not be "premises" or "works", nor would it readily fit within "place", which seems to refer to a location. It might be "plant" but that contention confronts the requirement for "control or management" by the employer, which was absent here. Similarly it confronts the additional requirement, "in … or in connection with which the worker was working when the worker sustained the injury". Mr Ballandis was not working when he sustained the injury.

[23] In *Clement v Backo & Anor*[25] mine workers took advantage of a lift home from a co-worker, Mr Backo. They had not left the land on which the mine was located when they were injured because Mr Backo lost control of the car. As to the application of s 35 to those facts, Dutney J said:[26]

> "Once the workers cease their physical activities, get into the vehicle in which they are to be driven home, leave the place where they had carried out their activities and drive in the direction of home, it seems to me to be unrealistic to say they have not left the place of employment or commenced the homeward journey."

[24] Thirdly, the mere fact that Mr Ballandis was driven home in a utility provided by his employer does not compel the conclusion that his employment was a significant factor in his being injured. The employees had finished for the day, clocked off, and were heading home. They detoured to the house of one of Mr Wright's friends so Mr Wright could see him, but he was not in and "we continued to head home".[27] Beyond providing the utility to Mr Wright, Mr Thorpe had nothing to do with where they went after work.

[25] Fourthly, the contentions proceed on the basis that the employees were still at the "place of employment" until they exited the utility back at their unit. That would mean that the only scope for the operation of s 35 of the *Workers' Compensation and Rehabilitation Act* was the "journey" between the parked utility and the unit.

[26] Fifthly, such a conclusion would attribute a degree of control over these employees that the employer did not accept, or wield. Mr Thorpe did not accept that he could, or attempt to, direct what they did once they left the worksite.

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25 [2006] QSC 129. (***Backo***)

26 *Backo* at [39]. This aspect was not in issue on the appeal: [2007] 2 Qd R 99.

27 Mr Wright, AB 155.

[27] Sixthly, *Newberry* and *King* are distinguishable. *Newberry* involved a claimant who was injured while being driven in the course of his duties, but the injury happened when another driver crossed onto the wrong side of the road. Thus, his employment had nothing to do with the breach of duty or injury. Further, no question of the application of s 35 arose. In *King* the claimant, a postman, was driving in the course of his duties. He was required to drive on footpaths and that led directly to his injury which resulted from a car reversing out of a driveway.

[28] In my view this ground of appeal does not succeed.

The appropriate assessment of damages.

[29] Given the finding above in respect of the *Civil Liability Act* 2003 (Qld), it is not strictly necessary to deal with what the appropriate award should have been if that finding was not made. However, there are only two areas of contention on this aspect of the appeal. The first is the award for general damages. The second is the award for gratuitous care and assistance.

General damages

[30] The learned primary judge's findings relevant to this head of damages, and evidence he evidently accepted though not the subject of a specific finding, are:

- about five days prior to the accident Mr Ballandis fell about 2.4 metres from a platform, onto scaffolding, injuring his ribs;[28]
- the utility accident was on 18 May 2010; the main injury was a broken nose, which Mr Ballandis cracked back into place himself; his previous rib injury was exacerbated; he was taken to hospital for an hour and a half;[29]
- Mr Ballandis went back to work the next day;[30] he had time off work between 31 May and 4 June;[31] in the week commencing 23 June he worked for a week and a half helping renovate a mate's house;[32] he stopped working at the end of June because there was not enough work;[33]
- there was some remaining facial abnormality, with distortion of the nasal septum and depressed left nasal bone; this resulted in nasal displacement, and a degree of nasal obstruction; this affected the airways, and with an increase in mucus production, caused some wheezing when asleep;[34] his breathing was affected for some time; however the nasal injury did not affect his ability to work as at 2011 or into the future;[35] Mr Ballandis will undergo surgery to correct the nasal issues;[36]

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28 Reasons at [18].
29 Reasons at [7].
30 Reasons at [8].
31 Reasons at [27].
32 Reasons at [24].
33 Reasons at [27].
34 Reasons at [43].
35 Reasons at [43].
36 This is implicit in the learned primary judge's inclusion of the cost of that surgery, and a component for lost time off work, in his award: Reasons [142], [144]. There was no challenge to that part of the award.

- the aggravation to the rib injury lasted about eight months, with a lot of discomfort over that time;[37] any rib symptoms had settled by 2011;[38] notwithstanding that discomfort Mr Ballandis was able to work and engage in social activities including surfing;[39] however there was no lasting impairment from the aggravation to the ribs;[40]

- there was no impairment from the accident in the utility.[41]

[31] Mr Ballandis referred to *Affleck v Kennedy*,[42] *Miles v Brisbane City Council*[43] and *Devitt v Nominal Defendant*,[44] in support of an award in the range of $45,000.[45]

[32] *Affleck* involved much more serious facial injuries leaving permanent disability, the probability of future surgery, and a psychological impact. The award of $35,000 for general damages is, in my view, not a good guide to the award here.

[33] *Miles* involved injuries to the face, upper arm and right shoulder, surgery on the right shoulder, and a permanent impairment to that shoulder. More importantly there was an ongoing (albeit reducing) psychological impact. The award of $40,000 for general damages is therefore of limited assistance here.

[34] *Devitt* concerned much more serious injuries. They included multiple rib fractures and a soft tissue injury to the cervicothoracic spine, leading to a permanent disability. There was also an aggravation of a depression illness, lasting 12 month. The claimant suffered bad headaches for six to eight months, and five years later needed to use a neck brace to drive. As a result the $45,000 awarded for general damages is of limited assistance.

[35] Mr Ballandis' injuries and aftermath are not in the same league as any of the cases above. Nonetheless he suffered discomfort for eight months and has been left with a minor nasal displacement which will require surgery and a period of 10 days off work. In my view the appropriate award for general damages is $15,000. That award will attract interest, at two per cent per annum, on one half of that sum, from 18 May 2010. To 25 April 2015 that sum is $741.34.

Gratuitous care.

[36] The learned primary judge accepted the evidence of Ms Garson, Mr Ballandis' then de-facto, in relation to the care given after the accident. This follows from: the rejection of Mr Ballandis' evidence on a number of points; the only rejection of Ms Garson's evidence was as to whether the rib injury was caused, as opposed to exacerbated, in the accident;[46] and his Honour's finding that the assistance "amounts to nowhere near six hours per day for six months".[47]

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37 Reasons at [118], [119](d).
38 Reasons at [126].
39 Reasons at [27], [124]-[125].
40 Reasons at [75].
41 Reasons at [121].
42 [2010] QDC 332.
43 [2010] QDC 501.
44 [2006] QSC 146.
45 Outline paragraph 18.
46 Reasons [112].
47 Reasons [145].

[37] Ms Garson's evidence was that because of the injuries to Mr Ballandis, she assisted in domestic tasks normally done by him, such as cleaning, washing and cooking.[48] She estimated that she spent an extra hour per day for the first month, then 30 to 45 minutes per day for the next two months, after which things went back to normal.[49]

[38] Based on those estimates, and taking 45 minutes for the second period, the total is 76.5 hours. No evidence was led, it seems, as to an appropriate rate to apply for gratuitous care. I would consider $20 per hour to be appropriate in the circumstances.[50] That results in a total of $1,530 for this head of the damages. That sum should attract interest at five per cent from 1 July 2010 (the midpoint of the three months that care was provided). To 25 April 2015 that sum is $368.46.

Disposition

[39] For the reasons expressed above I would propose the following orders:

1. The appeal is dismissed.

2. The appellant pay the respondents' costs of and incidental to the appeal, to be assessed on the standard basis.

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48 AB 120, 121, 128-129, 130, 131.

49 AB 122

50 In *Affleck* the rate applied was $18 per hour, but that was five years ago: [35].