# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Mani v. Nominal Defendant* [2002] QSC 152 |
| PARTIES: | **ENJENDRA MANI**<br>(plaintiff)<br>**v**<br>**NOMINAL DEFENDANT**<br>(defendant) |
| FILE NO: | 7 of 1998 |
| DIVISION: | Trial |
| DELIVERED ON: | 30 May 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 11 March 2002 |
| JUDGE: | Helman J. |
| CATCHWORDS: | MOTOR VEHICLES – NOMINAL DEFENDANT – LIABILITY OF – occupant of unidentified motor vehicle threw rock through windscreen of plaintiff's vehicle injuring the plaintiff – whether the *Motor Accident Insurance Act* 1994 applies<br><br>INSURANCE – MOTOR VEHICLES – LIABILITY – pre-litigation admission of liability by insurer – whether plaintiff relied on admission – proceeding commenced within limitation period |
| | *Motor Accident Insurance Act* 1994, s 4, s 5, s 23(1), s 31(1)(d), s 33(1), s 34, s 37, s 41, s 52, s 104(3)<br>*Motor Accident Insurance Amendment Act* 2000, s 18, s 19, s 21<br>*Motor Accident Insurance Legislation Amendment Act* 1996, s 2(1)<br>*Motor Vehicles Insurance Act* 1936<br>*Uniform Civil Procedure Rules* 1999, r 482, r 483 |
| | *Brewer v. Incorporated Nominal Defendant* [1980] V.R. 469<br>*Evans v. Transit Australia Pty Ltd & Anor* (2000) 33 M.V.R. 99<br>*Heath v. Corporation of City of Tea Tree Gully & Anor* (1996) 66 S.A.S.R. 548<br>*Lindsay v. Smith & Anor.* [2001] Q.C.A. 229<br>*Morris v. FAI General Insurance Company Limited* [1996] 1 Qd. R. 495<br>*Newton, Bellamy and Wolfe v. S.G.I.O.* [1986] 1 Qd. R. 431<br>*Rous v. Government Insurance Office of New South Wales* |

[1994] Aust. Torts Reports 81-289
*State Government Insurance Commission v Wagner* (1993) 62 S.A.S.R. 175
*Till v. Nominal Defendant* [2000] 2 Qd. R. 676

COUNSEL: Mr S. J. English for the plaintiff
Mr K. N. Wilson for the defendant

SOLICITORS: Paul Pattison for the plaintiff
O'Shea Corser & Wadley for the defendant

[1] **HELMAN J:** In this proceeding the plaintiff claims damages for negligence. He alleges that on 8 January 1995 he was driving a van along Leitches Road, Brendale, Queensland when the driver of, or a passenger in, another motor vehicle travelling in the opposite direction threw a rock approximately the size of a tennis ball at the van. He alleges the van's windscreen was smashed and the rock hit and injured him. Proper enquiry and search have failed to establish the identity of the other vehicle, he alleges.

[2] In this application, which is made under rule 483 of the *Uniform Civil Procedure Rules* 1999, the defendant seeks an order that the question whether the *Motor Accident Insurance Act* 1994 applies to the plaintiff's claim be determined separately from other questions which may arise at the trial of the proceeding, and before the trial. Rule 483 is in Part 5 (Separate decision on questions) of Chapter 13 (Trials and other hearings). Rule 483(1) provides that the court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial, or continuation of the trial, of the proceeding. Rule 482 provides that in Part 5 'question' includes 'a question or issue in a proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings, agreement of parties or otherwise'. The question the defendant seeks to have determined is one of law which has been raised on the pleadings.

[3] At the hearing of the application I heard full argument on the question the defendant seeks to have determined, and it was agreed by the parties that should I grant the application I should then proceed to determine the question.

[4] In bringing his claim the plaintiff relies on the statutory insurance scheme established by the *Motor Accident Insurance Act*, which came fully into force on 1 September 1994: see s. 104(3). Section 31(1)(d) of the Act, so far as it is relevant, provides that if personal injury is caused by, through, or in connexion with a motor vehicle that cannot be identified the defendant is the insurer for the statutory insurance scheme. Section 33(1) provides that the defendant's liability for personal injury caused by, through, or in connexion with a motor vehicle is the same as if the defendant had been, when the motor vehicle accident happened, the insurer under a compulsory third-party insurance policy under the Act for the vehicle. Section 4, the definitions section, so far as it is relevant, defines 'compulsory third-party insurance policy' as a policy of insurance under the Act for a motor vehicle insuring against liability for personal injury caused by, through, or in connexion with the motor vehicle. Section 23(1) provides for a policy of insurance in terms set out in the schedule to the Act.

[5] Clause 1(1) of the statutory policy of insurance provides that the policy 'insures against liability for personal injury caused by, through or in connection with the

insured motor vehicle anywhere in Australia'. Clause 1(3)(a) provides that the liability mentioned in sub-clause (1) is 'a liability for personal injury to which the *Motor Accident Insurance Act* 1994 applies'. That takes one to s. 5 of the Act which, so far as it is relevant, is as follows:

> **5.(1)** 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.

I should mention here that s. 5(1)(b) is not as it was at the time of the incident, but the provision as it was then was omitted and the provision as I have set it out inserted by the *Motor Accident Insurance Legislation Amendment Act* 1996, which provides in s. 2(1) that s. 5(1), the section bringing about that amendment to the principal Act, was to be taken to have commenced on 1 September 1994 when, as I have mentioned, the principal Act came fully into force. The scope of subsection (1)(b) has been modified – but in a way not relevant to this application - since 3 December 2001 by the insertion of a new subsection (4) which applies to the use of a motor vehicle for the actual doing of an act or making of a threat that is an act of terrorism happening, as a new subsection (6) provides, on or after 1 January 2002.

[6] It is now necessary that I recount what has passed between the plaintiff, through his solicitors, and the defendant and its solicitors, to the present time.

[7] By a letter dated 21 February 1995 the plaintiff's present solicitor gave notice to the defendant pursuant to s. 34 of the *Motor Accident Insurance Act*, and a second such notice was given by a letter dated 10 March 1995 from another solicitor. Section 34 - as it was at the relevant time, a new s. 34 having been substituted from 1 October 2000 by s. 18 of the *Motor Accident Insurance Amendment Act* 2000 - required a person who proposed to claim damages for personal injury arising from a motor vehicle accident to give written notice containing specified information to the insurer, or one of the insurers, against 'whom' the claim might be made within one month after the person first consulted a lawyer about the possibility of making a claim. (Section 52 requires that insurers be parties to court proceedings for damages for personal injury arising out of a motor vehicle accident.) The plaintiff's notice of claim dated 4 April 1995, given pursuant to s. 37 of the Act which is in Division 3 (Claims procedures) of Part 4 (Claims), was delivered to the defendant on 6 April 1995. Section 37, so far as it was relevant, provided that before bringing

an action in a court for damages for personal injury arising out of a motor vehicle accident, a claimant was required to give written notice of the claim to the insurer, or one of the insurers, against 'which' the action was to be brought. The notice was required to contain certain specified information and to be accompanied by specified documents and had to be given to the defendant within three months after the motor vehicle accident if the motor vehicle could not be identified. A new s. 37 was substituted from 1 October 2000 by s. 19 of the *Motor Accident Insurance Amendment Act* 2000, but the requirements I have referred to have remained in essence the same as they were in the original provision.

[8] By a letter dated 5 July 1995 from the defendant to the plaintiff's solicitor, the defendant notified the solicitor that it accepted that the plaintiff had given the notice required of him by the Act. Then, by a letter dated 19 September 1995 to the plaintiff's solicitor, a claim manager employed by the defendant wrote:

> **"MOTOR ACCIDENT INSURANCE ACT 1994"**
> **CLAIMANT: Ejendra MANI**
>
> I refer to my letter of 11th September, 1995 and to a telephone conversation on 18th September, 1995 with your Mr Craig Livermore, when it was confirmed that you act for the abovenamed in this matter.
>
> The Nominal Defendant admits total liability for the injuries sustained by the abovenamed on 8th January, 1995. Please forward copies of any Hospital and/or medical reports held, together with your clients offer to settle.

That letter was written to comply with s. 41 of the Act - as it was at the relevant time, its having been amended from 1 October 2000 by s. 21 of the *Motor Accident Insurance Amendment Act* 2000 – which provided that within six months after an insurer received notice of a motor vehicle accident claim under Division 3 of Part 4 of the Act it was required to give the claimant written notice stating whether liability was admitted or denied, and, if it was admitted, whether it was admitted in full or in part: s. 41(b)(i) and (ii). There is no evidence before me that the plaintiff forwarded copies of any hospital or medical reports or an offer to settle.

[9] The plaintiff began this proceeding within the three-year limitation period, on 2 January 1998. His statement of claim was delivered on 6 April 1999. It was, formal parts omitted, as follows:

> 1. At all material times:-
>
> (a) the plaintiff was the driver of a Toyota Tarago Van, registered number 495-ORY;
>
> (b) the defendant was the licensed insurer on the policy of insurance created by virtue of s. 20 Motor Accident Insurance Act 1994 as amended pursuant to s. 31(b) of the said Act;
>
> (c) the defendant is a body corporate capable of being sued.

2. At or about 7.50 pm on 8th January, 1995 the plaintiff was travelling in a northerly direction along Leitches Road, Brendale in the State of Queensland.

3. Whilst travelling along Leitches Road, a motor vehicle (the "other vehicle") while travelling in the opposite direction of the Toyota Tarago driven by the plaintiff, the driver or passenger of the other vehicle threw a large rock approximately the size of a tennis ball at the said Toyota Tarago Van smashing the windscreen and hitting the plaintiff.

4. Proper enquiry and search have been made of the identity of the other vehicle and have failed to establish the identity of that vehicle.

5. The said incident and the consequences flowing therefrom were caused by the negligence of the driver or passenger of the other vehicle.

**PARTICULARS**

(a) throwing or causing to be thrown a rock at the other vehicle at a time when the said Toyota Tarago Van was passing the other vehicle in circumstances which gave rise to a foreseeable risk of injury to the plaintiff.

6. As a consequence of the matters aforesaid, the plaintiff has suffered personal injuries and other loss.

**PARTICULARS**

(a) Fractured Larynx.

7. As a consequence of his injury, the plaintiff has been left with a permanent disability. The plaintiff has been required to undergo medical treatment. The plaintiff has endured considerable pain, suffering and discomfort and will continue to do so in the future. The plaintiff has lost many of the amenities of life. The plaintiff has suffered a significant diminution in his earning capacity which is productive of financial loss and which will continue into the future.

8. The plaintiff has also suffered special damages, full particulars of which will be delivered to the defendant prior to trial.

> AND the plaintiff claims damages for negligence against the defendant together with interest pursuant to s. 47 Supreme Court Act 1995.

[10] The defendant's defence was delivered on 6 May 1999. It was, formal parts omitted, as follows:

> 1. The Defendant admits the matters alleged in paragraphs 1(a), 1(c) and 2 of the Statement of Claim.
>
> 2. The Defendant denies:-
>
> (a) That the Plaintiff suffered any injury as a result of the negligent driving of any unidentified motor vehicle;
>
> (b) The matters alleged in paragraphs 1(b), 3, 4 and 5 of the Statement of Claim.
>
> 3. If the Plaintiff did sustain personal injury in the circumstances set out in paragraph 3 of the Statement of Claim (which is denied), the Defendant says:-
>
> (a) The injury is not a result of any of the circumstances set out in section 5(1)(a) of the Motor Vehicle Insurance Act 1994 ("the Act");
>
> (b) Further, or in the alternative, the injury was not caused, wholly or partly, by a wrongful act or omission in respect of the alleged unidentified vehicle by a person other than the injured person;
>
> (c) In the premises the Defendant denies that the Plaintiff's cause of action is maintainable against the Defendant under the provisions of the Act having regard to sections 5(1)(a) and 5(1)(b).
>
> 4. Save as aforesaid the Defendant denies each and every allegation set forth in the Statement of Claim.

Although the allegations in paras. 3, 4, and 5 of the statement of claim were denied in para. 2(b) of the defence, at the hearing of this application, Mr Wilson, for the defendant, told me that for the purposes of the application the defendant accepted that those facts had been established.

[11] A statement of loss and damage was delivered on behalf of the plaintiff on 29 July 1999. On 5 March 2001 the plaintiff's solicitor gave notice to the defendant's solicitors of the plaintiff's intention to proceed:

> I refer to the above matter and to our telephone conversation with regard to same.
>
> I have spoken at length with Mr. Mani concerning the action. I have received his instructions to proceed. I note your comnents (*sic*) in regard to the attitude of the Nominal Defendant as to the application of the Motor Vehicle Insurance Act to the present circumstances.
>
> I enclose herewith Notice of Intention to Proceed.

On 8 March 2001 the defendant's solicitors responded to the plaintiff's solicitor's letter:

> We acknowledge receipt of your letter dated 5 March 2001.
>
> We look forward to receiving your client's Supplementary Statement of Loss and Damage in order to address those matters we raised in our letter to you of 30 July 1999, as well as a List of Documents.
>
> We wish to confirm our client's position in relation to your client's claim. Our client wrote to your office on 19 September 1995 advising that it "admits total liability for the injuries sustained by [your client] on 8 January 1995." As discussed with you on 30 November 2000, our client's instructions are to proceed to Trial in this matter in accordance with our client's pleading; namely, that your client's injury is not one which falls within the scope of the Motor Accident Insurance Act 1994.
>
> We look forward to receiving your client's List of Documents and Supplementary Statement of Loss and Damage.

On 2 July 2001 the plaintiff's list of documents was delivered, and on the following day a supplementary statement of loss and damage. The defendant's list of documents and statement of expert and economic evidence were delivered on 5 July 2001. This application was filed on 22 January 2002.

[12] My account of what has passed between the plaintiff through his solicitors and the defendant and its solicitors is derived from the only evidence before me on that subject, an affidavit of Mr Richard Barnes, solicitor and member of the firm of solicitors acting for the defendant, filed on the day the application was filed. There is nothing in that evidence showing any assertion, in pleading or letter, of the making of a contract between the plaintiff and the defendant arising from the defendant's admission of liability in its letter of 19 September 1995 or of an estoppel upon which the plaintiff seeks to rely arising from the contents of the same letter.

[13] On behalf of the plaintiff, Mr English referred to the defendant's admission in its letter of 19 September 1995, and submitted that the defendant could not now change its stance and deny liability. If that submission is correct this application must of course fail at the threshold. Mr English relied in particular upon the decision of the Court of Appeal in *Lindsay v. Smith & Anor.* [2001] Q.C.A. 229. Before discussing that decision, I shall refer to three reported decisions dealt with in some detail in the reasons of Chesterman J., with whom McMurdo P. and McPherson J.A. agreed, in *Lindsay v. Smith & Anor*: *Newton, Bellamy and Wolfe v. S.G.I.O.* [1986] 1 Qd. R. 431; *Morris v. FAI General Insurance Company Limited* [1996] 1 Qd. R. 495; and *Till v. Nominal Defendant* [2000] 2 Qd. R. 676.

[14] *Newton, Bellamy and Wolfe v. S.G.I.O.* was a proceeding in which the final relief sought was a declaration. Solicitors acting for the executors of the estates of a husband and wife killed in a motor vehicle collision and their son gave the insurer of the driver of a motor vehicle under the *Motor Vehicles Insurance Act* 1936 notice of their clients' intention to institute proceedings for damages on behalf of the estates of the deceased and on behalf of the son, then a minor. Before proceedings

were begun the insurer wrote asking for details of the claim adding that it was confirmed that liability was not in issue. Further correspondence followed in which the solicitors gave particulars of the sums claimed. A writ was eventually issued, but after the expiration of the relevant limitation period of three years. A statement of claim was delivered and a defence was delivered in which liability was denied and it was pleaded that the proceeding was statute-barred. A second writ was issued claiming a declaration that the correspondence between the solicitors for the claimants and the insurer constituted an agreement for the admission of liability and not to plead or set up any limitation period. Declarations in those terms were made on a motion before the chamber judge. The insurer appealed, but the appeal was dismissed. Andrews A.C.J. and Derrington J. observed that estoppel might be available to prevent reliance on the statutory limitation of three years: p. 436. Their Honours also concluded that the matter might be resolved on the basis that an agreement was reached between the parties. The arrangement was supported by consideration:

> The insurer by accepting liability offers the other party an inducement and impliedly requests him to forebear from taking action with avoidance of costs of formal proceedings at the expense of the insured. Once the negotiations are thus commenced the potential for saving is created and the insurer is bound to pay something, however ultimately it is to be assessed, to that other party.
>
> Here negotiations continued for some time to determine whether the appellant would pay the respondent his damages without the need for the latter to commence an action. In our view an agreement is implicit in the facts constituting the history of the matter, following upon the confirmation that liability was not an issue. (p. 437)

McPherson J. concluded that the statement in the letter confirming that liability was not in issue constituted a contract, or at least a firm offer capable of being accepted so as to create a contract. If the latter, it was accepted, his Honour observed, by the solicitors' letter providing particulars of the claims that had been sought by the insurer's letter: p. 441. Further, his Honour's view was that liability in damages for the loss resulting from the negligence of the insured was once and for all accepted by the insurer so as to preclude its putting forward any defence whatever 'which would impeach that liability': p. 443.

[15] *Morris v. FAI General Insurance Company Limited* concerned a claim that arose from injuries sustained in a motor vehicle collision. The incident occurred on 20 January 1985, and so, as for the incident the subject of *Newton, Bellamy and Wolfe v. S.G.I.O.*, before the *Motor Accident Insurance Act* commenced, but this decision too is relevant to the issues in this case. On 1 September 1987, the claimant's solicitor wrote to the licensed insurer of a car involved in the collision enquiring whether it intended to offer to settle the claim and saying that if there were no response within twenty-eight days proceedings would issue. The insurer replied on 11 September 1987 saying it was prepared to accept the 'claim for personal injuries' and requesting copies of the relevant medical reports, to enable it to give consideration to 'an offer for quantum'. The claimant did not begin proceedings in relation to her injuries before the expiration of the three-year limitation period. On 1 June 1989, her solicitor provided the insurer with further information relating to her damages. By a solicitors' letter dated 4 July 1989 the

insurer denied all liability in the matter. The Court of Appeal did not interfere with a finding that there was an assumption adopted by the claimant and induced by the letter of 11 September 1987 that the insurer admitted liability and would not rely on the limitation period. The claimant's solicitor, the primary judge had found, believed the insurer had admitted liability to save the cost of litigation. Her Honour also found that the solicitor read the letter accepting the claim to the claimant and advised her it was not necessary to bring proceedings within the three-year limitation period. It was held that her Honour had been correct in concluding that the insurer was estopped from relying on the expiration of the limitation period. Pincus and Davies JJ.A. explained that result in this way:

> In our opinion, once one accepts that the assumption mentioned by the primary judge was adopted by the respondent as a result of the letter of 11 September 1987, the question becomes whether it would be unjust and oppressive on the part of the appellant to depart from it. It was not necessary for the respondent to show that every recipient of such a letter would treat it as making the institution of proceedings unnecessary; it is enough that the respondent did so. Then the appellant's difficulty is that its letter of 11 September 1987 is well capable of conveying to a prospective plaintiff that liability will not be disputed and that it is unnecessary to institute the proceedings threatened by the letter to which the appellant's letter was an answer. Further, it must have been evident to the appellant that its letter could give rise to the very assumption which the respondent adopted; Mr Williams Q.C. stressed that people involved with litigation of this sort would be familiar with the *Giblin* case, in which a similar letter led to the identical assumption. Subject, then, to the question of detriment, it must follow that a departure from the assumption thus induced would be unconscionable and cannot be permitted.
>
> It is our view that a detriment is sufficiently shown here. It is true that the conduct of the respondent's solicitor, in failing to pursue the matter further with the appellant for such a long period after receipt of the letter of 11 September 1987, is difficult to defend, but the only part of that delay which is material is the period between receipt of the letter of 11 September 1987 and expiration of the limitation period, on 20 January 1988. That the respondent failed to institute proceedings during that period is properly treated as a consequence of the appellant's conduct in sending the letter of 11 September 1987. (p. 501)

[16] There were two appeals before the Court of Appeal in *Till v. Nominal Defendant*. Admissions of liability made by insurers under s. 41(1)(b) of the *Motor Accident Insurance Act* were considered. In the defences in proceedings begun by the claimants liability was denied. The principal question that arose was whether the Act precluded such a denial. It was held that it did not, that the legislature had not intended to alter the general law in relation to admissions of liability, i.e., that such an admission will be binding only where the party to whom the admission was made had acted or omitted to act in reliance on it in circumstances where it would be unconscionable to permit departure from it: pp. 679-680. A second question was whether the insurers were, in any event, precluded by their admissions from making

such a denial. In neither case was it proved or even asserted that the claimant suffered any detriment in consequence of any act or omission in reliance on the admissions. Nor was any other evidence adduced or reason advanced which would make it unconscionable for the insurer in either case to deny liability. It was held therefore that in neither case under the general law could an estoppel arise: p. 681.

[17] *Lindsay v. Smith & Anor* also concerned a claim subject to the provisions of the *Motor Accident Insurance Act*. The incident that gave rise to the claim occurred on 15 July 1995. On 3 November 1995, a Mr Rutherford of the firm of solicitors acting for the claimant wrote to the insurer of a car driver the claimant alleged was liable to him for damages for personal injuries. In a letter dated 4 January 1996 the insurer admitted it was liable to the claimant. Mr Rutherford deposed that he relied on the insurer's admission of liability and 'assumed that the . . . claim would proceed as an assessment of damages only'. Mr Rutherford informed the claimant of the admission and of his belief that all that needed to be done was to collect evidence so that an offer of settlement could be made to the insurer. There were further discussions between Mr Rutherford and an employee of the insurer. The limitation period expired. The claimant began his proceeding on 27 May 1999. A defence filed on 16 July 1999 pleaded that the claimant's proceeding was statute-barred. A finding that the insurer was estopped from denying liability because the insurer's admission was a representation on which Mr Rutherford and the claimant relied in not beginning proceedings before the expiration of the limitation period was not disturbed on appeal, nor was a finding that the admission constituted a contract between the insurer and the claimant, or at least an offer to pay reasonable damages which had been accepted by the claimant. The consideration for the admission of liability was the claimant's forbearing to sue and not incurring the expense of proving liability which the insurer would ultimately have otherwise had to bear. The claimant, by his solicitors, accepted the offer when the insurer was informed that medical reports would be obtained and sent when the claimant's injuries had stabilized: see para. 25 per Chesterman J., with whom McMurdo P. and McPherson J.A. agreed.

[18] The agreed facts of this case are different from the facts of *Newton, Bellamy and Wolfe v. S.G.I.O.*, *Morris v. FAI General Insurance Company Limited*, and *Lindsay v. Smith & Anor* in two material respects. There is no evidence before me that there was any response whatever from the plaintiff to the letter of 19 September 1995 from the defendant. There is no evidence of any reliance on the admission in that letter by the plaintiff, who began his proceeding against the defendant within the three-year limitation period. Accordingly this case falls into the same category as *Till v Nominal Defendant* does, and I am not persuaded by Mr English's submission to the effect that the application must fail at the threshold. It will clearly be convenient to determine the question raised on the application now.

[19] The issue raised by para. 3 of the defence depends for its resolution on the construction that should be put upon s. 5(1) of the *Motor Accident Insurance Act*. On behalf of the defendant it was conceded that the plaintiff's injury was caused by, through, or in connexion with a motor vehicle, the unidentified motor vehicle referred to in the statement of claim. There is no scope for the application of sub-paras. (ii), (iii), or (iv) of subsection (1)(a), so that the question comes down to whether sub-para. (i) could apply to the plaintiff's claim. If it could not, then the claim cannot proceed in reliance on the statutory insurance scheme established by the Act and so the plaintiff's claim against the defendant must fail.

[20] The requirement that the injury be *a result* of the driving of a motor vehicle means that it must be established that the injury was *caused* by the driving of the motor vehicle, because for an injury to be one to which the statutory policy of insurance applies the injury must be caused in one of the ways specified in s. 5(1)(a). That construction was put upon the provision in question in *Evans v. Transit Australia Pty Ltd & Anor* (2000) 33 M.V.R. 99. Pincus J.A. and Cullinane J., referring to the requirements of s. 5, said:

> In our view the appellant is correct in its argument that for a personal injury to be one to which the statutory policy applies it is both sufficient and necessary that the injury be:
>
> (a) caused by, through or in connection with the relevant motor vehicle;
>
> (b) caused as a result of one or more of the occurrences (or in the case of s 5(1)(a)(iii) the condition and occurrence therein provided for) specified in s 5(1)(a); and
>
> (c) caused by some wrongful act or omission on the part of someone other than the injured person in respect of the motor vehicle. (para. 26, pp. 104-105).

I see no distinction between the concept of A's being caused as a result of B and that of A's being caused by B; and it is relevant to note that at para. 39 (p. 107) their Honours observed, 'What s. 5 requires is a causal relationship between the driving of the motor vehicle concerned and the personal injury'. On the question whether the injuries referred to in that case were the 'result' of 'driving' Byrne J., who agreed generally with the interpretation placed on s. 5(1) by Pincus J.A. and Cullinane J., referred to 'the necessary causal link between the driving and the injury': paras. 49 and 51, p. 108.

[21] I was referred to a number of other cases in which the provisions of statutes concerning other insurance schemes were considered. Those decisions are of some limited assistance in construing the provision in question on this application, even though they concern different forms of words. The decision in *Brewer v. Incorporated Nominal Defendant* [1980] V.R. 469, another rock-throwing case, turned upon the meaning of the words 'arising out of the use of a motor car'. It was held by Southwell J., with whom Starke J. agreed, that while the expression 'arising out of the use' has a wider connotation than the words 'caused by . . . the use' there must be 'some cause or link between the use and the injury' (p. 476) - which was present in that case. While the width of the words 'arising out of the use' reduced the requirement for the connexion between use and injury to 'some cause or link' the narrower expression requires a direct causal connexion.

[22] *Rous v. Government Insurance Office of New South Wales* [1994] Aust. Torts Reports 81-289, in which the claimant had been injured after an object was thrown from a car and hit a horse she was riding, also concerned the question whether the injury arose 'out of' the use of a motor vehicle. Sheller J.A., with whom Priestly and Meagher JJ.A. agreed, contrasted the expressions 'arises out of' and 'caused by':

> The legislature intended it to mean something more than "caused by". In a joint judgment in *Dickinson v Motor Vehicle Insurance Trust* (1987) Aust Torts Reports ¶80-125 at 68,966; 163 CLR 500 at

505 the High Court said of similar expressions in an analogous context in Western Australian legislation:

> The test posited by the words 'arising out of' is wider than that posited by the words 'caused by' and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle.

Their Honours referred to *State Government Insurance Commission v Stevens Bros Pty Ltd* (1984) 154 CLR 552 at 555 where four members of the Court had said that the expression "arising out of" must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words "caused by". (61,529 - 61,530)

[23] *State Government Insurance Commission v. Wagner* (1993) 62 S.A.S.R. 175 and *Heath v. Corporation of City of Tea Tree Gully & Anor* (1996) 66 S.A.S.R. 548 concerned the expression 'a consequence of' the driving of a vehicle. In each case the claimant suffered injury when working at or near a stationary front-end loader. In the earlier case King C.J. observed there was a 'distinct separation' between the activity of driving, which had been completed, and the activity in progress when the injury occurred: p. 176. Millhouse J.'s reasons were to the same effect: pp. 176-177. Olsson J. observed that 'two quite separate, albeit successive, discrete activities' were involved: p. 182. In the later case the majority, Cox and Debelle JJ. reached a similar conclusion. Cox J. observed that 'a mere temporal connection between driving and a non-driving use' of a vehicle would not bring the latter within the relevant provision: p. 550; see also Debelle J's. reasons at pp. 555-556.

[24] At its highest the plaintiff's case is not that the *driving* of the unidentified motor vehicle caused his injury, but rather that the motor vehicle, which was then being driven, carried the person – driver or passenger - who threw the rock; or, if one puts it another way, the moving motor vehicle provided the opportunity for the malefactor to throw the rock. The throwing of the rock was not a result of the driving of the unidentified motor vehicle, the driving of the unidentified motor vehicle was merely the occasion for the throwing of the rock. The two activities were discrete, though contemporaneous, whether or not done by the same person.

[25] In view of the conclusion I have reached concerning s. 5(1)(a), it is unnecessary for me to consider s. 5(1)b).

[26] It follows that the plaintiff cannot rely on the statutory insurance scheme established by the *Motor Accident Insurance Act* in making his claim. His claim against the defendant cannot succeed. I shall invite further submissions on the orders that should be made to give effect to that conclusion, and costs.