SUPREME COURT OF QUEENSLAND

CITATION:	*Goodsir v Al-Ko International Pty Ltd* [2002] QSC 191
PARTIES:	**PATRICIA MARGARET GOODSIR** **(plaintiff/respondent)** **v** **AL-KO INTERNATIONAL PTY LIMITED** **(ACN 003 066 813)** **(first defendant/respondent)** **and** **SUNCORP METWAY INSURANCE LIMITED** **(ACN 075 695 966)** **(first defendant/applicant)** **and** **AL-KO INTERNATIONAL PTY LIMITED** **(ACN 003 066 813)** **(second defendant/respondent)** **RICHARD SCOTT GOODSIR** **(plaintiff/respondent)** **v** **AL-KO INTERNATIONAL PTY LIMITED** **(ACN 003 066 813)** **(first defendant/respondent)** **and** **SUNCORP METWAY INSURANCE LIMITED** **(ACN 075 695 966)** **(first defendant/applicant)** **and** **AL-KO INTERNATIONAL PTY LIMITED** **(ACN 003 066 813)** **(second defendant/respondent)**
FILE NO/S:	S5550 of 2001 S5551 of 2001
DIVISION:	Trial Division
DELIVERED ON:	28 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2002
JUDGE:	Mullins J
ORDER:	**In proceeding S5550 of 2001:** **1. The first joint defendants have leave to withdraw the admissions of paragraphs 1(f), 1(g) and 10 of the plaintiff's statement of claim.** **2. The application is otherwise dismissed.** **3. The first joint defendants file and serve any amended**

defence on or before 15 July 2002.
4. The first defendant Suncorp Metway Insurance Limited pay the costs of the plaintiff of the application and resulting from any amendment to the defence of the first joint defendants as a result of these orders to be assessed.
In proceeding S5551 of 2001:
1. The first joint defendants have leave to withdraw the admissions of paragraphs 1(f), 1(g) and 10 of the plaintiff's statement of claim.
2. The application is otherwise dismissed.
3. The first joint defendants file and serve any amended defence on or before 15 July 2002.
4. The first defendant Suncorp Metway Insurance Limited pay the costs of the plaintiff of the application and resulting from any amendment to the defence of the first joint defendants as a result of these orders to be assessed.

CATCHWORDS: MOTOR VEHICLES - COMPULSORY INSURANCE - plaintiff's motor vehicle and trailer insured under *Motor Accident Insurance Act* 1994 (Qld) - plaintiff injured by pipe rolling off trailer when trailer moved away from motor vehicle and tilted when trailer coupling failed - plaintiff claiming manufacturer of trailer coupling was negligent - whether CTP insurance covered liability for injury - whether movement of trailer constituted a "motor vehicle running out of control" for the purpose of s 5(1)(a)(iii) of *Motor Accident Insurance Act* 1994 (Qld)

PRACTICE - PLEADING - striking out - insurer seeking to prove that movement of trailer was not a motor vehicle running out of control - question of fact which the circumstances require to be determined on basis of all evidence and not on a summary basis

PRACTICE - WITHDRAWAL OF ADMISSION - r 188 *UCPR* - insurer's solicitors mistakenly believed the plaintiff was entitled to indemnity under *Motor Accident Insurance Act* 1994 (Qld) - particulars of plaintiff's claim raised whether claim was within s 5(1)(a) of *Motor Accident Insurance Act* 1994 (Qld) - plaintiff not opposed to withdrawal of admission

Motor Accident Insurance Act 1994
UCPR r 188

Jewell v Tyre Marketers (Aust) Ltd [2000] QSC 55
Mayne Nickless Ltd v D Symen [2001] NSWCA 292
Ridolfi v Rigato Farms Pty Ltd [2001] 2 QdR 455
Suncorp General Insurance Ltd v Loweke (1998) 28 MVR 111

Townsville Trade Waste Pty Ltd v Commercial Union Assurance Company of Australia Limited [2000] 2 QdR 682

COUNSEL: SC Williams QC for the applicant Suncorp Metway Insurance Limited
DR Cooper SC for the respondent Al-Ko International Pty Limited
RW Trotter for the respondent plaintiffs

SOLICITORS: Jensen McConaghy for the applicant Suncorp Metway Insurance Limited
McCabe Terrill for the respondent Al-Ko International Pty Limited
Shine Roche McGowan for the respondent plaintiffs

[1] **MULLINS J:** Mr Goodsir (who is the plaintiff in proceeding S5551 of 2001 and to whom I shall refer as "the plaintiff") alleges that he was injured on 16 July 1999 while he was unloading a concrete pipe from a single axle 7x4 box trailer registered number AU1804 which was attached to his Ford Falcon panel van registered number 511 BFN ("the Ford") by a coupling which was bolted to the trailer and attached to a 50 mm towball on the tow bar of the Ford. Al-Ko International Pty Limited ("Al-Ko") which is one of the first joint defendants and the second defendant in each proceeding has admitted that it was the manufacturer of the coupling. The plaintiff alleges that Al-Ko sold the coupling to him. The plaintiff claims that he was rolling the pipe which weighed approximately 150 kilograms towards the rear of the trailer, the coupling became detached from the towball on the Ford, the trailer ran out of control and moved away from the Ford, the front of the trailer tilted upwards, the pipe rolled off the back of the trailer, the pipe struck the plaintiff on his lower limbs and the plaintiff suffered personal injuries.

[2] The plaintiff claims damages for negligence and/or breach of contract against Al-Ko and Suncorp Metway Insurance Limited ("the applicant") on the basis that the *Motor Accident Insurance Act* 1994 ("the Act") applies to the claim and against Al-Ko in its capacity as the manufacturer and retail seller of the trailer coupling. Mrs Goodsir's claim in proceeding S5550 of 2001 is based on like allegations and is for damages for loss of consortium arising out of the plaintiff's injury. As in all relevant respects the pleadings in each proceeding are identical, it is convenient to refer to the pleadings in the plaintiff's proceeding.

[3] By application filed on 3 April 2002 in each proceeding, the applicant applies for the following orders:

> "1. That paragraphs 1(d), 1(e), 1(f), 1(g), 1(h) and 10 of the Plaintiff's Statement of Claim be struck out pursuant to Rule 171 as disclosing no reasonable cause of action;
> 2. That judgment be entered for Suncorp Metway Insurance Limited pursuant to Rule 293 on the grounds that the Statement of Claim discloses no reasonable cause of action against Suncorp Metway Insurance Limited;
> 3. Alternatively, that the First Joint Defendants have leave to withdraw the admissions of paragraphs 1(f), 1(g) and 10 of the Plaintiff's Statement of Claim."

[4] Sub-paragraphs (d) to (h) of para 1 of the statement of claim state:

> "(d) the Ford was an insured motor vehicle within the meaning of Section 4 of the ***Motor Accident Insurance Act 1994***;
>
> (e) there was in force a CTP Insurance Policy in respect of the Ford pursuant to and within the meaning of the ***Motor Accident Insurance Act 1994;***
>
> (f) the CTP Insurance Policy in respect of the Ford pursuant to the ***Motor Accident Insurance Act 1994*** in respect of the Ford extended insurance cover to liability for personal injury caused by, through or in connection with the trailer that resulted from the trailer running out of control after becoming accidentally detached from the Ford;
>
> (g) the manufacturer was an 'insured person' within the meaning of Section 4 of the ***Motor Accident Insurance Act 1994***;
>
> (h) the second named of the first joint defendants, SUNCORP METWAY INSURANCE LIMITED A.C.N. 075 695 966 was the insurer of the Ford and the trailer pursuant to and within the meaning of the ***Motor Accident Insurance Act 1994***."

[5] The plaintiff alleges in para 10 of the statement of claim that he has complied with all the requirements of the Act with respect to commencing the proceeding.

History of the plaintiff's claim

[6] On 13 March 2000 solicitors for the plaintiff delivered to the applicant a notice pursuant to s 34 of the Act. The accident was described by the plaintiff in that notice as follows:

> "The accident occurred at the drive way of my residence at Amiens Road, Stanthorpe, Queensland.
>
> At about 2:15 pm on the 16th of July, 1999 while unloading a 4 foot long 15 inch round concrete pipe which weighed approximately 140 kilograms from the back of my box trailer the coupling on the drawbar of the trailer became detached from the two ball on the tow bar of the car while I was attempting to roll the pipe out the back of the trailer and into a ditch that I had previously prepared for it, for the purposes of drainage across the driveway of my residence at Amiens Road, Stanthorpe.
>
> When the box trailer became detached the trailer moved away from the car and tipped up and the pipe rolled onto my legs and feet.
>
> At a later time an inspection of the coupling established that when the locking trigger was released and the released handle pulled up the trigger jammed in on top of the trigger lock and stopped the release handle automatically locking the coupling onto the tow bar so that when I rolled the pipe to the rear of the trailer and the weight went onto the rear, there was nothing to stop the coupling disconnecting from the tow bar thus allowing the trailer to move away from the vehicle and the trailer then to tip and the pipe to roll out."

[7] Notice pursuant to s 37 of the Act was delivered on behalf of the plaintiff by his solicitors to the applicant on 4 April 2000. The cause of the accident was described in that notice as "… the coupling becoming detached from the tow ball and thus allowing the trailer to move up and back".

[8] By letter dated 19 April 2000 the applicant advised the plaintiff's solicitors that it was not prepared to consider the plaintiff's claim further on the basis that the circumstances of the accident did not fall within the ambit of the Act.

[9] The plaintiff's proceeding in this Court was commenced on 21 June 2001.

[10] Mr JR O'Brien who is a solicitor employed by the solicitors for the first joint defendants which take instructions from the applicant has sworn an affidavit which was filed on 3 April 2002 dealing with the defence of the proceeding by the applicant. Mr O'Brien states in para 3 of his affidavit that when he drew the defence to the statement of claim:

> "(a) It was my understanding that AL-KO International Pty Limited was a manufacturer of trailer couplings and manufactured the coupling involved in the Plaintiff's accident. That understanding was reached on the basis of the Plaintiff's allegations and the absence of any evidence to the contrary;
>
> (b) That when the incident occurred the trailer moved a substantial distance from the motor vehicle. My understanding in that regard was gleaned from, in particular, the Plaintiff's Section 34 Notice."

[11] The defence of the first joint defendants was filed on 27 August 2001. The first joint defendants neither deny nor admit para 10 of the statement of claim, but admit the allegations made in sub-paras (d) to (h) of para 1 of the statement of claim.

[12] Particulars were requested on behalf of the first joint defendants on 23 January 2002 in respect of para 4(c)(ii) of the statement of claim in relation to the allegation that the trailer ran out of control. The particulars that were provided by the plaintiff on 11 February 2002 in respect of para 4(c)(ii) of the statement of claim were as follows:

> "(a) The trailer ran out of control as the coupling on the trailer became detached from the towball on the car, causing the trailer to move away from the Ford and tilt upwards.
>
> (b) The trailer moved backwards away from the Ford.
>
> (c) The trailer moved a horizontal distance of about three to four inches away from the Ford.
>
> (d) The trailer moved almost immediately."

[13] Mr O'Brien states, in para 7 of his affidavit, that the admissions made in the defence with respect to the allegations in paras 1(f), 1(g) and 10 of the statement of claim "were made upon erroneous factual assumptions and in the mistaken belief" that Al-Ko was entitled to indemnity from the applicant pursuant to the Act. The reference in para 7 of Mr O'Brien's affidavit to an admission made with respect to para 10 of the statement of claim appears to be incorrect.

[14] There is no affidavit filed on behalf of the applicant which explains the change in attitude of the applicant between its letter of 19 April 2000 to the plaintiff's

solicitors and the admissions in the defence of sub-paras (f) and (g) of para 1 of the statement of claim.

[15] By letter dated 12 March 2002 the plaintiff's solicitors advised the applicant's solicitors in response to their inquiry that the plaintiff had installed the two safety chains that were on the trailer to the vehicle prior to the accident occurring and that both of those chains were engaged at the time when the coupling failed.

[16] There is no evidence on this application as to the length of these safety chains. The inference can be drawn, however, that the horizontal movement of the trailer away from the Ford at the time of the accident was constrained by the length of the safety chains and supports the particulars provided by the plaintiff to the effect that the trailer moved a horizontal direction of about 3 to 4 inches away from the Ford.

[17] The defence of Al-Ko was filed on 20 August 2001. Al-Ko has not admitted the allegations in sub-paras (d) to (h) of para 1 or para 10 of the statement of claim.

Issues on the application

[18] By letter dated 21 February 2002 the plaintiff's solicitors advised the applicant's solicitors that the plaintiff neither consented to nor opposed the applicant's application to withdraw its admissions to the statement of claim. That is the alternative relief that is sought by the applicant in the application. The primary relief sought by the applicant is the striking out of the allegations in the statement of claim that give rise to the allegation that the Act applied to the injury sustained by the plaintiff in the accident and, as a consequence, that judgment be entered for the applicant on the basis that the statement of claim would then disclose no reasonable cause of action against the applicant. Mr Trotter of counsel who appeared for the plaintiff on the hearing of the application indicated that the plaintiff neither opposed nor agreed to the application and was prepared to abide the order of the court, apart from the issue of costs.

[19] The applicant's application was opposed by Al-Ko.

[20] The issues which arose during the hearing of the application were:

(a) whether it is appropriate in the circumstances of this matter on an application of this nature to determine whether the Act applied to the accident;

(b) if so, whether the Act applied to the accident;

(c) alternatively, whether the applicant should be given leave to withdraw the admissions made on behalf of the first joint defendants in respect of paras 1(f), 1(g) and 10 of the statement of claim.

Relevant provisions of the Act

[21] Section 5(1) of the Act provides:

> "**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."

[22] The definition of "motor vehicle" in s 4 of the Act includes a trailer. The definition of trailer in s 4 of the Act is:

> "**'trailer'** means a vehicle without motive power designed to be hauled by a motor vehicle."

[23] If the Act applies, the trailer is therefore included as part of the motor vehicle.

[24] For the Act to apply to the plaintiff's injury, it is necessary for the conditions in each of sub-paras (a) and (b) of s 5(1) of the Act to be fulfilled. Counsel for the applicant and Al-Ko agreed that the plaintiff's claim could conceivably fall only within s 5(1)(a)(iii) of the Act.

[25] There has been no direct judicial consideration of what is meant by "the motor vehicle running out of control" as set out in s 5(1)(a)(iii) of the Act.

[26] The construction of s 5(1) was considered by the Court of Appeal in *Townsville Trade Waste Pty Ltd v Commercial Union Assurance Company of Australia Limited* [2000] 2 QdR 682 where an apprentice mechanic who was repairing a garbage collection truck by standing on the chassis under the elevated rear body was crushed and killed by the rear body of the truck falling, due to the failure of the hydraulics in the truck. By majority, the Court of Appeal held that the deceased's injury and death were not the result of a "collision with" a motor vehicle within the meaning of s 5(1)(a)(ii) of the Act.

[27] Davies JA and White J comprised the majority in that case. Davies JA stated at 687:

> "**[22]** Of the four subparagraphs of s 5(1)(a), three of them, subparas (i), (iii) and (iv) appear to be limited in their operation, not only to an injury which results form the functioning of a motor vehicle as a motor vehicle but to one which results from the movement of a motor vehicle as a motor vehicle. The critical subparagraph, subpara (ii), is not restricted in its operation to an injury resulting from a collision with a moving vehicle; but the question is whether it is, like the other subparagraphs, restricted to an injury resulting from a collision with a vehicle (whether moving or stationary) in its capacity or function as a motor vehicle. The learned primary judge held, in effect, that it was; as his Honour put it, 'qua a vehicle'.
>
> **[23]** There are at least two reasons, already referred to in passing, why, in my view, that conclusion is correct. The first is that it excludes from the operation of subpara (ii) an event which would not, in ordinary language, be thought of as a collision with a motor vehicle. The second is that it restricts the operation of subpara (ii) to a category consistent with the restricted operation of the other subparagraphs. The subparagraphs as a whole then provide a consistent and coherent basis for application of the section."

[28] White J referred to the second reading speech of the 1988 amendment to the *Motor Vehicles Insurance Act* 1936 which was the forerunner of s 5(1) of the Act in which it was stated of the amending legislation that it was necessary to:

> "- ensure that cover of "by, through or in connection with" a motor vehicle relates to the more direct use of a motor vehicle;
> - ensure CTP liability is restricted just to that – and is not extended to matters which are rightly workers' compensation and public liability claims."

[29] White J then stated at 690:

> "**[37]** However, neither the 1988 amendments nor s 5 of the present Act limit the insurance obligation to 'the use of' a motor vehicle and it is impermissible to seek to include those words when construing s 5, *McEwan v Gold Coast City Council* [1987] 1 QdR 337; 3 MVR 225. There is a danger in seeking to confine the meaning of 'collision' to a collision 'with a vehicle qua a vehicle' that such an interpretation ventures in this direction, but in the end I am satisfied that it does not."

and concluded at 691:

> "While the legislation is beneficial in its scope and there is no basis for reading down the meaning, nonetheless I agree with the learned judge below that to characterise what occurred as 'a collision with' a motor vehicle is a significant departure from the natural meaning and use of the expression so as to conclude that these circumstances do not lie within its meaning."

[30] The approach of Davies JA in *Townsville Trade Waste* was applied in *Jewell v Tyre Marketers (Aust) Ltd* [2000] QSC 55 which was another decision on s 5(1)(a)(ii) of the Act. A tyre fitter had put a motor vehicle on a hoist which he then raised in order to perform a wheel alignment. The motor vehicle moved forward on the hoist and injured the tyre fitter. Ambrose J stated at para [13]:

> "The use of ordinary language would not describe what happened to the unfortunate plaintiff when the motor vehicle rolled off the hoist onto him as a "collision" of that motor vehicle with him. Prima facie a CTP liability for injury resulting from a collision with a motor vehicle relates to a liability resulting from use of that motor vehicle qua motor vehicle and not a liability for injury sustained in the course of the mere repair or servicing of that vehicle which does not involve using it as such."

Application of the Act

[31] As presently pleaded, the plaintiff does not discern which movement of the trailer caused the pipe to roll off the back of the trailer: whether it was the movement of the trailer away from the Ford in combination with the tilting of the front of the trailer upwards or whether it was the upward movement of the trailer alone. Paragraphs 4(c) and (d) of the statement of claim allege:

> "(c) while the plaintiff was rolling the pipe towards the rear of the trailer as aforesaid;
>
> (i) the coupling accidentally became detached from the towball on the Ford;
> (ii) the trailer ran out of control and moved away from the Ford;
> (iii) the front of the trailer tiled upwards;
>
> (d) the pipe rolled off the back of the trailer and struck the plaintiff on his lower limbs and the plaintiff suffered personal injuries: …"

[32] When requested to particularise para 4(d) by stating whether the trailer was moving or stationary when the pipe rolled off the back of it, the plaintiff responded:

> "The trailer was moving upwards at one end as the pipe commenced rolling off the trailer."

[33] Paragraph 5(c) of the written submissions of the applicant (Exhibit 1) states:

> "(c) Any movement of the trailer away from the vehicle was both insignificant (limited by safety chains) and causally irrelevant – it was the tipping of the trailer which is alleged to have caused the pipe to roll onto the Plaintiff."

This submission is based on a conclusion which cannot necessarily be made on the basis of the allegations in the statement of claim and the evidence that was available on this application.

[34] It was submitted on behalf of the applicant that the trailer was not "running out of control" within the ordinary and natural meaning of those words. It was submitted that a trailer which was essentially stationary and securely attached by chains to its towing vehicle which was also stationary could not be said to be "running out of control".

[35] In addition it was argued by the applicant that, relying on *Townsville Trade Waste*, s 5(1)(a)(iii) of the Act requires that at the material time the vehicle should be used for its intended purpose as a vehicle. On the basis that the definition of "trailer" in s 4 of the Act identified the function of the trailer for the purpose of the Act as being hauled by a motor vehicle, it was submitted that the trailer was not being used as a vehicle, if it was not being hauled when the injury occurred. That appears to be an extremely restrictive approach to the application of s 5(1)(a)(iii) of the Act to a motor vehicle which is a trailer and it is difficult to conclude that the statements set out above from *Townsville Trade Waste* can be authority for that approach in relation to a motor vehicle of the nature of a trailer.

[36] It was submitted on behalf of Al-Ko that the question of whether the trailer was "running out of control" was a question of fact and not a question of degree. It was submitted that the vehicle was either running out of control or it was not. It was also put on behalf of Al-Ko that "running out of control" simply connotes that the trailer moved independently of the motor vehicle in an uncontrolled or uncontrollable manner, albeit transiently, and that such movement occurred in

connection with the motor vehicle. It was pointed out that the movement does not need to be in relation to, or an aspect of, the driving of the vehicle, because otherwise s 5(1)(a)(i) and (iv) of the Act would be tautologous in expressly referring to the driving of the motor vehicle.

[37] Al-Ko relied on *Mayne Nickless Ltd v D Symen* [2001] NSWCA 292 to submit that the trailer was being used *qua* a motor vehicle when it was being unloaded.

[38] Little assistance is gained from *Mayne Nickless.* The definition of injury in the relevant New South Wales legislation that was under consideration was:

> "[P]ersonal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use of operation of the vehicle if, and only if, the injury is a result of and is caused during:
> (i) the driving of the vehicle, or
> (ii) a collision, or action taken to avoid a collision, with the vehicle, or
> (iii) the vehicle's running out of control, or
> (iv) such use or operation by a defect in the vehicle … ."

[39] At para [24] of the judgment of Ipp AJA relied on the statement made in an earlier decision that "use" in (iv) has the wide meaning of the word "use" in the phrase "in the use or operation of the vehicle" and not a use limited by the activities set out in (i), (ii), and (iii) of the relevant New South Wales definition. Ipp AJA therefore concluded that the New South Wales legislation "is capable of being of application where a vehicle is used in loading and offloading operations and is not restricted to use of a vehicle as a means of transport". That conclusion was as a result of the construction of the word "use" in relevant statutory definition which has no equivalence in s 5(1)(a) of the Act and the conclusion that (iv) of the NSW definition applies where the vehicle is being unloaded cannot necessarily be applied to construing s 5(i)(a)(iii) of the Act.

[40] Al-Ko also relied on the approach taken by the Court of Appeal in *Suncorp General Insurance Ltd v Loweke* (1998) 28 MVR 111. In that case a bus driver sued her employer for damages for personal injuries on the basis that the seats fitted within the driving compartments of the buses were defective requiring a posture to be adopted which accommodated the tilt of the seats and alleged that she sustained injuries to her neck and back as a result. In an application for leave to appeal against the joinder of the compulsory third party insurer as a defendant to the personal injuries action, it was held that the issue of whether or not the Act covered the claim would be best determined at the trial. The proceeding was at the stage where there had not been precise particularisation of the circumstances in which the plaintiff's injuries were alleged to have occurred and it was held that the findings of fact made at the trial may ultimately assist in determining whether the case was covered by the Act.

[41] It must follow from the fact that s 5(1)(a)(iii) of the Act does not expressly require the motor vehicle to be running out of control while being driven, when that is an express requirement of s 5(1)(a)(i) and (iv), that s 5(1)(a)(iii) can apply when the motor vehicle is not being driven. A simple example of a motor vehicle running out of control, but not operating under motive power, is a motor vehicle parked on the downward slope of a hill, where the handbrake has not been properly applied, and the motor vehicle runs out of control down the hill.

[42] It must be a question of fact whether the motor vehicle is running out of control or not. In this particular case, as it is the trailer which is the relevant motor vehicle for the purpose of considering the application of s 5(1)(a) of the Act, the issue is whether the trailer was running out of control at the time of the plaintiff's accident.

[43] As was apparent from the submissions made on the hearing of this application, it is the relatively little amount of movement of the trailer in both the horizontal direction and the upward tilting which makes it a moot question whether the trailer can be said to have been running out of control at the time of the accident. As the outcome of the strike out application requires the determination of a question of fact when there is no consensus of the parties on the detail of the critical facts, it is far preferable for that question of fact to be determined against the background of relevant evidence, rather than being determined merely by reference to the pleadings and incomplete evidence. As in *Loweke*, it is not appropriate to dispose of the critical issue in this proceeding of whether the condition in s 5(1)(a)(iii) of the Act has been fulfilled on a summary basis, in the absence of all relevant evidence.

Withdrawal of admissions

[44] It is therefore necessary to consider the applicant's claim for alternative relief.

[45] Pursuant to r 188 of the *UCPR* a party may withdraw an admission made in a pleading only with the leave of the court. It requires the court to exercise its discretion, having regard to all matters relevant to whether or not that leave should be given, and leave is not given merely "for the asking": *Ridolfi v Rigato Farms Pty Ltd* [2001] 2 QdR 455, 459, 461.

[46] Unlike *Ridolfi* where the leave to withdraw admissions was sought on the first day of trial, this application was made in a relatively timely way after particulars were provided by the plaintiff of the relevant allegations in his statement of claim and these particulars are now the basis on which the applicant wishes to dispute the application of the Act. A trial of the proceeding is not imminent. The plaintiff's attitude to the withdrawal of the admissions also favours the granting of the leave.

[47] Although Al-Ko points to the failure of the applicant to explain its change in attitude to the claim between its letter of 19 April 2000 and the defence, the defence was filed in response to the allegations in the statement of claim. There is evidence from the solicitor who drew the defence of why he made the admissions on behalf of the applicant. Although it is submitted by Al-Ko that para 7 of Mr O'Brien's affidavit is inadequate, it is the unchallenged explanation of the solicitor who made the admissions now sought to be withdrawn.

[48] It is apparent from the submissions put forward on behalf of the applicant in support of its case that the Act does not apply to the plaintiff's injury that there is a genuine dispute between the plaintiff and the applicant as to the application of the Act for which a proper basis has been shown: *Ridolfi* at 460, 461.

[49] Al-Ko also opposed the withdrawal of the admissions. It was foreshadowed by Al-Ko that it would be amending its defence to allege that the incident fell within the applicant's policy of insurance and to adopt the admissions made in the defence filed on behalf of the first joint defendants. The solicitor who acts for the insurer of Al-Ko, Mr PJ Cantwell, deposed in his affidavit filed by leave on 6 June 2002 to the prejudice that Al-Ko would suffer, if leave were granted to withdraw the

admissions, as Al-Ko believes it may be entitled to indemnity under the Act. The withdrawal of the admissions does not preclude Al-Ko from pursuing any claim for indemnity from the applicant to which it considers it is entitled, although there would then be the complication of the potential application adverse to Al-Ko of s 58(4) of the Act.

Orders

[50] It will be necessary to make orders granting the leave to withdraw the relevant admissions and providing for the consequential amendment of the defence of the first joint defendants. In order to avoid the need for the plaintiff to appear to receive this judgment, at the time of hearing the application I heard the argument between the applicant and the plaintiff as to what orders for costs should be made between those parties.

[51] The applicant submitted that an appearance by the plaintiff was unnecessary on the hearing of the application in the light of the plaintiff's solicitors' letter of 21 February 2002. The application that was pursued by the applicant was significantly different to seeking merely to withdraw admissions. It was submitted on behalf of the plaintiff that prudence required the plaintiff to be represented at the hearing of the application. It was constructive for Mr Trotter to seek costs for the plaintiff thrown away as a result of any amended defence. Having regard to the actual terms of the application, prudence did justify the plaintiff being represented at the hearing. As the admissions relating to the application of the Act to the plaintiff's accident were made as a result of the applicant's solicitors' mistaken belief or understanding as to the distance which the trailer moved away from the Ford, it is appropriate that the applicant pay the costs of the plaintiff of the application and the costs of the plaintiff resulting from any amendment to the defence of the first joint defendants. I will hear submissions on the issue of costs, as between the applicant and Al-Ko.

[52] It follows that the orders which should otherwise be made are:

In proceeding S5550 of 2001:

1. The first joint defendants have leave to withdraw the admissions of paragraphs 1(f), 1(g) and 10 of the plaintiff's statement of claim.
2. The application is otherwise dismissed.
3. The first joint defendants file and serve any amended defence on or before 15 July 2002.
4. The first defendant Suncorp Metway Insurance Limited pay the costs of the plaintiff of the application and resulting from any amendment to the defence of the first joint defendants as a result of these orders to be assessed.

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