SUPREME COURT OF QUEENSLAND

CITATION:	*Devlin v South Molle Island Resort* [2003] QSC 020
PARTIES:	**CRAIG DEVLIN** (applicant) v **SOUTH MOLLE ISLAND RESORT** (respondent)
FILE NO/S:	S10988 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	13 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 January 2003
JUDGE:	Philippides J
ORDER:	**Declaration that, in respect of the injury suffered by the applicant on 12 October 1999 and alleged to have been caused by the respondent's negligence, the *Personal Injuries Proceeding Act* 2002 applies.**
CATCHWORDS:	STATUTES – INTERPRETATION – whether the applicant who had suffered an "injury" as defined in the *WorkCover Queensland Act* 1996 could in addition to pursuing a claim against his employer proceed against an alleged concurrent tortfeasor under the *Personal Injuries Proceedings Act* 2002 – whether s 6(2)(b) of the *Personal Injuries Proceedings Act* 2002 operates to exclude an employee's claim against an alleged concurrent tortfeasor – whether s 253(3) of the *WorkCover Queensland Act* 1996 abolishes a worker's entitlement to sue a concurrent tortfeasor. *Acts Interpretation Act* 1954, s 14A, s 15AB *Motor Accident Insurance Act* 1994, s 4, s 5 *Personal Injuries Proceedings Act* 2002, s 6(1), s 6(2) , s 4(1), s 4(2) *WorkCover Queensland Act* 1996, s 34(1), s 253 *Bosner v Melnacis & Ors* [2002] 1 Qd R 1 referred to *Campbell v CSR Limited & CSR Plane Creek Pty Ltd* [2002] QSC 266 followed *Karanfilov v Inghams Enterprises Pty Ltd* [2001] 2 Qd R 273 considered *Hawthorn v Theiss Contractors Pty Ltd* [2002] 2 Qd R 157

referred to

COUNSEL: D Kent for the applicant
K Holyoak for the respondent

SOLICITORS: Hall Payne for the applicant
Carter Newell for the respondent

[1] **PHILIPPIDES J:**

The Issue

[2] The applicant seeks a declaration that, in respect of an injury suffered by him on 12 October 1999, alleged to have been caused by the respondent's negligence, the *Personal Injuries Proceedings Act* 2002 ("the PIPA") applies.

[3] The applicant seeks to pursue a claim against his employer under the *WorkCover Queensland Act* 1996 ("the 1996 Act") and to that end has delivered a pre-court notice of claim to the applicant's employer under the 1996 Act. He also seeks to pursue a claim against the respondent under the PIPA and has accordingly delivered a pre-court notice to the respondent under that Act. However, the respondent contends that the PIPA has no application to that claim, because of s 6(2)(b) of the PIPA, which excludes from the ambit of that Act "injury as defined under [the 1996 Act]" and that furthermore, any right to bring a concurrent action against the respondent is abolished by the 1996 Act.

[4] The issue which the application raises is whether, pursuant to the PIPA, the applicant may pursue a concurrent claim which he contends he has against the respondent in respect of injuries which he sustained whilst acting in the course of his employment. An additional issue addressed in submissions is whether the 1996 Act abolished the applicant's right to proceed against the respondent.

[5] The brief facts as they appear from the material and which are not contentious for the purposes of the application are that, on 12 October 1999, the vessel "Enterprise" travelled to South Molle Island, with the applicant acting as its skipper/engineer for the purposes of loading baggage. While the vessel was docked there, an employee of the respondent threw a soft bag weighing approximately 25 kilograms onto the deck of the vessel striking the applicant and thereby causing him injury.

[6] The application proceeded on the basis that it was not in contention that the applicant was a "worker" within the meaning of the 1996 Act, as it stood on 12 October 1999 and that the applicant had suffered an "injury" within the meaning of the 1996 Act. Indeed, a notice of assessment was issued, in respect of the incident of 12 October 1999, to the applicant under the 1996 Act and he has received statutory benefits hereunder.

The PIPA

[7] Section 6 of the PIPA deals with the application of that Act. Relevantly, it provides:

> "(1) This Act applies in relation to all personal injury arising out of an incident whether happening before, on or after 18 June 2002.
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> (2) However this Act does not apply to:
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> (a) personal injury as defined under the *Motor Accident Insurance Act* 1994 and in relation to which that Act applies; or
> (b) injury[1] as defined under the *WorkCover Queensland Act* 1996 …".

[8] The PIPA is described in its heading as "an Act to regulate claims for and awards of damages based on a liability for personal injuries, and for other purposes". Its main purpose as stated in s 4(1) of the PIPA "is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury". Pursuant to s 4(2), this purpose is to be generally achieved, by:

> (a) providing a procedure for the speedy resolution of claims for damages for personal injury to which the Act applies; and
> (b) promoting settlement of claims at an early stage wherever possible; and
> (c) ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial; and
> (d) putting reasonable limits on awards of damages based on claims; and
> (e) minimising the costs of claims; and
> (f) regulating inappropriate advertising and touting.

The respondent's submissions

[9] The respondent submits that, on the true construction of s 6, with the exception of the matters expressly excluded from its ambit by s 6 of the PIPA, claims for damages for personal injuries sustained in Queensland are now regulated by one of three different statutory regimes as follows:

> (a) a "personal injury within the meaning of the *Motor Accident Insurance Act* 1994 ("MAIA"), and to which that Act applies" is governed by the MAIA;
> (b) an injury within the meaning of the 1996 Act is governed by that Act;
> (c) all other personal injury, whether occurring before or after 18 June 2002 is governed by the PIPA.

[10] The respondent's submission is that on a proper reading of s 6, in the context of the other two schemes to which it refers, a person faced with concurrent choices must bring his or her claim under the scheme in respect of which it primarily relates.

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1 See s 34 of the 1996 Act.

[11] Support for this submission, the respondent contends, may be found in the purpose and objects of the PIPA. It was said that the primary purpose of the legislation was to facilitate the ongoing affordability of insurance in the previously unregulated non-compulsory insurance areas of personal injury claims through appropriate and sustainable awards of damages for personal injury. It was submitted that, a purposive construction of s 6, which squares with the purpose and object of the Act, and which alleviates pressure in the non-compulsory insurance area, is one which ensures "that the claim is channelled or corralled into the correct statutory regime in the first instance". Such a result it was argued would allow the claim, in the first instance, to be regulated and met where primarily it ought to fall; be it under the MAIA, if it be primarily a motor vehicle accident claim within the meaning of that Act, or under the 1996 Act, if it be primarily an employment related action and, otherwise, under the PIPA. It was thus contended that the object of s 6(2)(b) of the PIPA is to ensure that, so far as injuries within the meaning of the 1996 Act are concerned, the 1996 Act is the sole avenue for personal injury claims. That is, the PIPA sought by s 6(2)(b) to ensure that such claims were channelled against the employer at first instance and not against any other person who may be alleged to be concurrently liable with the employer.

[12] It was contended that the wording of s 6(2) of the PIPA supported the respondent's submission. The omission in s 6(2)(b) of the PIPA of the words "and to which the Act applies" was said to be of particular importance given their presence in s 6(2)(a) of that Act. It was said that the qualification in s 6(2)(a) of the PIPA, of the reference to the definition of "personal injury" in the MAIA, by the words "and in relation to which the Act applies" arose, in part, because of the restricted application of that Act in s 5 thereof. This was contrasted with the definition of "injury" in the 1996 Act, which was said to be self limiting in a number of respects.[2]

[13] However, it was submitted by the respondent that there was another important distinguishing feature between the MAIA and the 1996 Act, which necessitated the qualifying words in s 6(2)(a). That feature was said to be that the MAIA insures any person whose wrongful act or omission, in respect of the insured vehicle, causes injury to somebody else,[3] whereas the only persons afforded coverage under the 1996 Act are employers. It was thus said that, whereas the MAIA applies to any person who falls within its restricted coverage, and all claims against such persons are excluded from the ambit of the PIPA through the use of qualifying words "and in relation to which the Act applies" in s 6(2)(a), the use of the same words in s 6(2)(b) would only exclude, from the ambit of the PIPA, claims made against an employer. The respondent thus submitted that the omission of such qualifying words in s 6(2)(b) of the PIPA evinced an intention on the part of the legislature not to so restrict the scope of s 6(2)(b). It was submitted that that omission was deliberate and that its object was to facilitate the tripartite division of "insurance schemes".

[14] The respondent conceded that the construction urged by it might result in an abolition of the applicant's rights of recovery against a concurrently liable entity, something which s 6 of the PIPA does not itself expressly provide. However, it was the respondent's submission that that abolition is not effected by the PIPA, but by

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2 Principally through the phrase "arising out of or in the course of employment" and at the time of the injury, but the further phrase "if the employment is a significant contributing factor to the injury".

3 See clause 2 of the schedule policy of insurance to the MAIA.

the 1996 Act, specifically by s 253 of that Act. The respondent thus contended that not only was the 1996 Act a code and the sole avenue of claim against employers for injuries suffered by a worker, a proposition now well established,[4] but that the 1996 Act also abolished an employee's right to sue concurrent tortfeasors in respect of an injury arising out of or in the course of employment.

[15] In so submitting the respondent relied on certain statements by McPherson JA in *Karanfilov v Inghams Enterprises Pty Ltd*[5] ("*Karanfilov*"). The issue in *Karanfilov*, was whether a claim by a spouse of an injured worker for loss of consortium was abolished by the 1996 Act. The Court of Appeal held that the claim was abolished. The Chief Justice agreed with the reasons of McPherson JA in holding that the abolition was effected by s 253(3) of the 1996 Act.[6] Their Honours held that, when applying the definition of damages in s 11 of the 1996 Act to s 253(3), the definition should be read by omitting the word "the" where it appears before the word "damages" in the definition.

[16] McPherson JA, in the course of his judgment, dealt with a submission made on behalf of the respondent that, "if s 253 is interpreted like this, it has the consequence of abolishing the right of action of a worker who is injured in some way not creating a common law liability on the part of the employer, but on the part of someone else, such as an independent contractor or an occupier of premises, or a supplier of machinery, equipment or material that is defective." McPherson JA dealt with the submission as follows:

> "…I do not consider that s 253 has such an effect. If, for example, a tradesman is sent by his employer to work at premises of an occupier, where he sustains injury because of a defect in those premises, he is, it may be assumed, a "worker" who is mentioned in s 253(1) and hence a person entitled to seek damages for his injury. It is true that, as against the occupier of the premises where he was injured, he will presumably not satisfy the requirements of paras (a), (b) or (c) of s 253(1). But that would not deprive him of his claim for damages against the occupier unless the circumstances are such as to create, independently of the Act of 1996, a common law liability on the part of his employer to pay damages to him as the worker for the injury sustained. And if there were such a liability on the part of his employer, there would be no occasion for the injured worker to sue the occupier for damages for that injury. He would be able to recover damages from his employer for the injury he had sustained at the occupier's premises. If he had no right of action against his employer because of the defective state of the occupier's premises, he would still be able to sue the occupier because he would not then be claiming "damages" as defined in s 11(1) against the occupier. On that hypothesis, there would not be a common law liability on the worker's employer to pay damages to the worker. Section 253 would then not abolish his claim against the occupier."

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4 See *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157.

5 [2001] 2 Qd R 273.

6 The other member of the court, Mullins J, rejected this construction, but nevertheless held that the claim was abolished by s 316 of the 1996 Act.

[17] It is these statements of McPherson JA, which it is conceded are dicta only, that are relied upon by the respondent in its contention that the 1996 Act abolished a worker's concurrent rights.

The applicant's submissions

[18] The applicant submitted that the purpose of the PIPA was the regulation of otherwise unregulated personal injuries claims and it was not the intention of the legislature to abolish rights against concurrent tortfeasors, because of the existence of a claim arising out of the same incident against an employer. The applicant further submitted that as against the respondent, the injury is not one 'arising out of, or in the course of, employment' and was therefore not, as against it, an injury within s 34(1) of the 1996 Act. It is said that the respondent's argument failed to recognise the separate nature of the applicant's causes of action against each prospective defendant.

[19] Moreover, the applicant disputes the contention that the 1996 Act abolishes an employee's right of action against concurrent tortfeasors where the injury arises out of or in the course of employment. The applicant submitted that the dicta of McPherson JA in *Karanfilov* do not provide support for the proposition contended for by the respondent. In this regard, the applicant referred to the remarks of Dutney J in *Campbell v CSR Limited & CSR Plane Creek Pty Ltd*.[7] In that case, which was heard before the PIPA came into force, Dutney J considered the question of whether the 1996 Act excluded a claim against a concurrent tortfeasor, where an employer was concurrently liable at common law. Dutney J considered that question in the light of McPherson JA's statements in *Karanfilov* in the following passages:

> "[28] During the course of the argument I raised a query as to whether the provisions of s 253 of the *WorkCover Queensland Act* 1996 ("the Act") operated to exclude a claim against an occupier where the employer was concurrently liable at common law. That appeared superficially to be the conclusion reached by McPherson JA in *Karanfilov v Inghams Enterprises Pty Ltd* at 282. Having considered the matter I do not think that is the case. At 282, his Honour was excluding the claim against the occupier on the assumption that the worker had not met the requirements of s 253(1)(a) and (b) of the Act. These related to the need to obtain a notice of assessment from Workcover. The example being given was one where a "worker" was seeking to avoid the obligations under the Act by suing a concurrent tortfeasor. There is no suggestion here that Ms Campbell has not obtained a notice of assessment or otherwise complied with the requirements of the Act. She must have done so in order to bring the claim against the employer. If it were alleged she had not it would be a matter that would have had to have been pleaded. It is thus unnecessary for the purposes of determining liability to consider whether there is any inconsistency between he position discussed by McPherson JA in *Karanfilov* and the implied assumption underlying *Bonser v Melnacis.* In the latter case the Court was concerned with whether a

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7 [2002] QSC 266.

> third Party sued by an employee who had not satisfied the requirements of the Act could claim contribution against an employer.
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> …
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> [58] In order to determine this claim against the second defendant it is necessary to decide whether "damages" in s 315 of the Act means damages only against the employer or also includes damages against a third party where there is concurrent liability.
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> [59] This question is not resolved by the Court of Appeal's decision in *Bonser v Melancis* nor by the decision of the Court of Appeal in *Karanfilov*. The former case assumed the co-existence of the causes of action without argument on or discussion of the point. The Court was not asked to determine the validity of the action against the third party. The latter case was concerned with whether the definition of damages in s 11 covered the position of someone not mentioned in s 253(1) who sought to make a claim against the employer for injury to a worker.
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> [60] In my view s 315 of the Act does not apply to a claim against a third party even where the employer is jointly liable. The *WorkCover Queensland Act* is intended to regulate claims against employers who are insured under the statutory fund. That it is to be read to restrict only claims against employees required to insure under the statutory fund is consistent with the exclusion from the definition of damages in s 11 of the Act of claims for which the employer is separately insured under another Act. Restricting the operation of the limitations contained in the Act to the placing of limitations on claims against employers enables the decisions in *Bonser, Karanfilov* and *Hawthorne v Theiss Contractors Pty Ltd* to be reconciled and to meet the objectives of the legislation as expressed in s 5(4)(a)." (footnotes omitted)

Does the PIPA apply to the applicant's claim against the respondent?

[20] Although the PIPA must be afforded a purposive construction,[8] there is nothing in the stated purpose of the PIPA, the Explanatory Notes, nor the second reading speech, which supports the respondent's contention, "that the object of s 6 (2)(b) of the PIPA is to ensure that so far as injuries within the meaning of the 1996 Act are concerned, the 1996 Act is the sole avenue for personal injuries claims, i.e. that they be channelled against the employer in the first instance and not against another person who may be concurrently liable with the employer". No intention on the part of the legislature that the PIPA effect such an important modification of the rights of an employee can be said to emerge, whether by express words or necessary implication.[9]

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[8] See s 14A *Acts Interpretation Act* 1954.

[9] See *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609 at 617 per Mason ACJ, Wilson and Dawson JJ, Pearce and Geddes, *Statutory Interpretation in Australia, 5th ed,* p 150.

[21] Nor do I accept that the omission in s 6(2)(b) of the PIPA of the words "and to which that Act applies", which are present in s 6(2)(a) of the PIPA, supports the construction of s 6(2)(b) contended for by the respondent. The inclusion of those qualifying words in s 6(2)(a) arises because of the very broad terms in which "personal injury" is defined in s 4 of the MAIA and the fact that the MAIA, in s 5, circumscribes the "personal injury" to which the MAIA applies.

[22] There was no similar need in s 6(2)(b) of the PIPA to qualify the reference to "injury as defined under the [1996 Act]" because the 1996 Act in defining "injury", incorporates limiting concepts circumscribing the application of the 1996 Act. At the relevant time, s 34(1) of the 1996 Act defined "injury" as "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury". Thus, the definition of injury itself circumscribed the personal injury to which the 1996 Act applies. It did this, as the respondent acknowledged in its submissions, principally through the phrase "arising out of or in the course of employment" and the further phrase "if the employment is a significant contributing factor to the injury". Those phrases clearly envisage a context of a claim by an injured worker against an employer.[10] To include in s 6(a)(b) of the PIPA, the additional words present in s 6(2)(a) would have been superfluous. Given that definition of injury, and its context in the 1996 Act, which is concerned with claims against employers, s 6 (2)(b) of the PIPA can only be construed as excluding, from the ambit of the PIPA, injury claims under the 1996 Act against employers, that is injury claims to which the 1996 Act applies.

[23] This construction is supported by the Explanatory Notes concerning the *Personal Injuries Proceedings Bill* 2002,[11] to which consideration may be given in interpreting s 6 of the PIPA.[12] The Explanatory Notes indicate that it was intended that s 6(2) of the PIPA have the result that injuries to which either the MAIA or the 1996 Act applied were excluded from the ambit of the PIPA. The Explanatory Notes concerning what ultimately became s 6 of the PIPA make this clear by stating[13] "excluded from the application of the Act are injuries to which the [MAIA] applies or injuries to which the [1996 Act] applies". The Explanatory Notes are therefore against the interpretation contended for by the respondent as following from the omission of the words "and to which the Act applies" in s 6(b) of the PIPA.

[24] Furthermore, I do not accept the respondent's submission that the 1996 Act abolishes the applicant's concurrent rights against the respondent. In *Hawthorne v Theiss Contractors Pty Ltd*,[14] McMurdo P observed that legislation such as the 1996 Act which significantly cuts down the rights of access of injured workers to the courts must be construed strictly. As Dutney J noted in *Campbell v CSR Limited*, the decision in *Bonser v Melcancis* proceeded on the basis that an injured worker's concurrent rights continued under the 1996 Act, and the matter was not the subject of argument in that case. Nor was that question the issue for determination in *Karanfilov*. I reject the respondent's submissions that the dicta of McPherson JA in *Karanfilov* lend support for the view that an abolition of an employee's concurrent

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10 See also Subdivision 3 of Division 5 of Part 4.

11 See *Personal Injuries Proceedings Bill* 2002, Explanatory Notes.

12 See s 15AB of the *Acts Interpretation Act* 1954.

13 See *Personal Injuries Proceedings Bill* 2002, Explanatory Notes, page 5.

14 [2002] 2 Qd R 157 at 158.

rights has been effected by s 253 of the 1996 Act. In this regard, I respectfully agree with the observations of Dutney J in *Campbell v CSR Limited.*

[25] Section 253(3) of the 1996 Act abolishes any entitlement of a person not mentioned in s 253(1) to seek damages for an injury sustained by a worker. The present applicant is a person mentioned in s 253(1) of the 1996 Act. It is accepted that he is a "worker" within the meaning of that term as defined in the 1996 Act. He has been issued with the relevant notice of assessment. Section 253(3) does not concern such a person's rights and does not abolish such a person's concurrent rights.

[26] Further, to accept the respondent's contentions would result in injustices which it cannot be accepted the legislature intended.[15] It would mean that an employee would only have recourse against concurrent tortfeasors where it had been determined that there was no civil liability in an employer. However, it is not difficult to envisage that in many cases an employee could well be placed in a situation where, by the time of the determination of the employer's liability, any action against a concurrent tortfeasor had become time barred. Consequently, if the respondent's submissions were accepted, an employee might well be left with no ability to pursue another tortfeasor. Furthermore, the respondent's contentions have the illogical consequence, as pointed out by the applicant, that while an applicant could not pursue concurrent tortfeasors, such persons could still be indirectly involved through contribution proceedings at the instigation of the respondent.

[27] Accordingly, s 6(2)(b) of the PIPA does not have the effect of excluding the applicant's claim against the respondent from the ambit of the PIPA. The applicant is entitled to the declaration he seeks.

[28] I make a declaration that in respect of the injury suffered by the applicant on 12 October 1999 and alleged to have been caused by the respondent's negligence, the PIPA applies.

[29] I shall hear submissions as to costs.

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15 See *Hawthorne* [2002] 2 Qd R 157 per McMurdo P at 159, per Byrne J at 167.