SUPREME COURT OF QUEENSLAND

CITATION:	*Coley v Nominal Defendant* [2003] QCA 181
PARTIES:	**KEVIN WAYNE COLEY** (plaintiff/appellant/applicant) **v** **NOMINAL DEFENDANT** (defendant/respondent)
FILE NO/S:	Appeal No 9391 of 2002 DC No 2161 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2003
JUDGES:	McMurdo P, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, McMurdo P and Jerrard JA concurring as to the orders made, Mackenzie J dissenting
ORDERS:	**1. Leave to appeal granted** **2. Appeal allowed** **3. Order of 20 September 2002 set aside and instead order that the defendant's application to strike out be dismissed with costs** **4. The respondent pay the applicant's costs of and incidental to this application and appeal to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where appellant suffered personal injury in motor accident – where learned primary judge held that the *Motor Accident Insurance Act* 1994 (Qld) had no application to the facts of the case - where learned primary judge struck out parts of the Amended Statement of Claim - whether the injuries sustained by the appellant were caused wholly or partly by the unidentified motor vehicle - whether the learned primary judge erred in law and in fact *Dickinson v The Motor Vehicle Insurance Trust* (1987) 163 CLR 500, distinguished *Evans v Transit Australia Pty Ltd* [2002] 2 Qd R 30,

considered
Mani v Nominal Defendant [2003] 1 Qd R 248, considered
March v Stramare Pty Ltd (1990-1991) 171 CLR 506, applied
State Government Insurance Commission v Stevens Bros Pty Ltd (1984) 154 CLR 552, distinguished
Wardley Australia Ltd v State of Western Australia (1992) 175 CLR 514, considered
Westpac Banking Corporation v Klef Pty Ltd [1998] QCA 311; Appeal No 8204 of 1998, 16 August 1998, applied
Wiley v The ANI Corporation Limited [2000] QCA 314, Appeal No 4092 of 1999, 5 April 2000, applied

COUNSEL: N E Ulrick for the appellant/applicant
S C Williams QC, with P D Lane, for the respondent

SOLICITORS: Bartels for the appellant/applicant
O'Shea Corser & Wadley for the respondent

[1] **McMURDO P:** At about 8 pm on 30 May 1998, the applicant was driving his Ford Fairmont sedan west along Milne Street, Beenleigh when an unidentified white motor vehicle, also travelling west, commenced to overtake him. The unknown driver or a passenger of the second vehicle threw an object akin to a Molotov cocktail into the applicant's vehicle setting fire to the interior. The second vehicle sped off and was never identified. The applicant suffered burns, smoke inhalation and shock.

[2] The applicant commenced proceedings in the District Court against the respondent claiming damages for personal injuries caused by the negligence and/or wrongful act of the driver of the second vehicle and/or his passenger under the *Motor Accident Insurance Act* 1994 (Qld) ("the Act").[1]

[3] The respondent applied to a District Court judge under UCPR r 171 to strike out those parts of the applicant's pleadings relating to the throwing of the Molotov cocktail and the injuries resulting from the fire. The applicant relied on his second amended statement of claim and his affidavit filed in that application.

[4] The learned primary judge determined that s 5(1)(a) of the Act had no application to the facts of the case and those parts of the pleadings which relied upon it must be struck out. The result is that the applicant's remaining claim is, unless this application is successful, limited to damages for shock suffered as a result of the manner of driving the unidentified vehicle.

[5] The applicant applies for leave to appeal under s 118(3) *District Court Act* 1967 (Qld) from that decision. During the hearing, the merits of the appeal have been fully argued and, if the application for leave to appeal is granted, both parties are content to have the appeal dealt with on their presented arguments.

[6] The applicant deposed that he was travelling at about 60 kph along Milne Street to return some videos when an unidentified white vehicle sped up to overtake his car,

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[1] See ss 31(1)(d) and 33(1) the Act; the Act, s 4 definition of "compulsory third-party insurance policy"; s 23(1); Schedule to the Act, Policy of Insurance cll (1), (3)(a) and s 5 the Act.

crossed the centre line and then veered towards and travelled close to his vehicle. He heard a noise like a gun going off. He was shocked and felt he might be killed. The manner of driving the white car so close to his was terrifying. The unidentified vehicle then accelerated away. The applicant turned and saw black smoke and then flames in his vehicle. He slowed and pulled over to the side of the road. He had difficulty getting out of his car, was shocked, had burns and was suffering from smoke inhalation. There was a hole in the rear passenger's window on the driver's side which was not there when he commenced his trip. Police investigations suggest that a bottle filled with petrol and a lighted wick, commonly known as a Molotov cocktail, was thrown from the white vehicle into the driver's side rear passenger window just after the white vehicle accelerated and drove towards his car. The applicant further deposed that he believed the driving of the unidentified vehicle provided a substantial part of the velocity and the direction of the bottle as it broke his rear passenger window; without the driving of the unidentified vehicle in this manner, the bottle could not have entered his vehicle.

[7] The struck out portions of the applicant's most recent claim are as italicised below.

> "4. At the said time a motor vehicle (Unit 1) was travelling in a westerly direction on Milne Road and commenced to overtake Unit 2 *whereupon the driver or a passenger of Unit 1 threw an object into Unit 2 setting fire to the inside (sic) Unit 2* (the incident), and Unit 1 sped off.
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> …
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> 7. The personal injuries, loss and damage suffered by the Plaintiff were caused by the negligence or wrongful act of the driver *and/or passenger* of Unit 1, particulars of which are:-
>
> …
>
> (c) Driving Unit 1 in the manner set out in subparagraphs (e), (f), and (g) herein alongside Unit 2 to enable the ~~*and*~~ *throwing an object at Unit 2* when it was unsafe to do so;
>
> (d) Deliberately inflicting injury upon the plaintiff;
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> (e) Driving Unit 1 at about 60 kpm (sic) alongside Unit 2 when it was unsafe to do so;
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> (f) Driving Unit 1 so that it veered towards Unit 2 when it was unsafe to do so;
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> (g) Driving Unit 1 close to Unit 2 when it was unsafe to do so;
>
> (h) Driving Unit 1 ahead of Unit 2 when it was unsafe to do so;
>
> (i) *Driving Unit 1 in the manner set out in subparagraphs (e), (f) and (g) herein to enable the driver and/or passenger to force an object containing flammable liquid and a lighted wick, through the right back passenger's side window, when it was dangerous to do so.*
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> …
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> 11. At all material times, the Defendant was and is the insurer of Unit 1, its liability for personal injury was and is the same as if it had been the insurer under a CTP insurance policy under the *Act*, and the driver *and passenger* of the Unit 1 were and are insured persons within the meaning of the *Act*.
>
> …"

***Motor Accident Insurance Act* 1994 (Qld)**

[8] Section 5 of the Act at the relevant time provided:

"**Application of this Act.**
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 whilst 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.
…"

[9] To bring himself within the Act, the applicant must establish that the personal injury he claims to have received was:

- caused by through or in connection with the unidentified motor vehicle;[2] and
- was a result of the driving of the unidentified motor vehicle;[3] and
- was caused wholly or partly by a wrongful act or omission in respect of the unidentified motor vehicle by a person other than the applicant.[4]

[10] It is common ground that the applicant suffered "personal injury caused by, through or in connection with a motor vehicle" and only s 5(1)(a)(i) can have application here. The main issue in this application is whether s 5(1)(a)(i) of the Act applies to the struck out portions of the pleadings.

[11] Although there is no assistance given in the Act, there seems little doubt that the phrase "a result of" in context means "caused by": see *Evans v Transit Australia Pty Ltd*.[5]

[12] The plain meaning of the phrases and their juxtaposition in the sub-section also make clear that the words "caused by, through or in connection with a motor vehicle" at the commencement of s 5(1) are much wider and more inclusive than the words "as a result of – (i) the driving of the motor vehicle" in s 5(1)(a). The former is wider and although it involves a causal or consequential relationship, it does not require as direct or proximate a relationship to the injuries caused by the use of the vehicle: cf *State Government Insurance Commission v Stevens Bros Pty Ltd*[6] and *Dickinson v The Motor Vehicle Insurance Trust*.[7]

[13] Mr Ulrick, for the applicant, contends the most appropriate test of causation to apply to s 5(1)(a) is that used in negligence; it does not matter that the throwing of

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2 Section 5(1).
3 Section 5(1)(a)(i).
4 Section 5(1)(b).
5 [2002] 2 Qd R 30; Pincus JA and Cullinane J at [26]. See also *Mani v Nominal Defendant* [2003] 1 Qd R 248 and *Re FAI Insurance Company Limited* [1996] 2 QdR 230, 233 (Moynihan J).
6 (1984) 154 CLR 552, 555.
7 (1987) 163 CLR 500, 505. See also *Green and Lloyd Pty Ltd v GIO(NSW)* (1996) 114 CLR 437.

the Molotov cocktail was a cause of the applicant's injuries if the manner of the driving of the motor vehicle was also a material contributing cause.

[14] The law relating to causation in negligence recognises that there may be more than one effective cause of injury: *March v Stramare (E&MI) Pty Ltd*.[8] Whether something is a cause of injury is a question of fact which must determined by applying common sense to the facts of the case.[9]

[15] Mr Williams QC for the respondent, however, contends that only the throwing of the Molotov cocktail caused the injuries, not the driving; the causative effect of "as a result of" in s 5(1)(a) should be given its commercial contractual meaning.

[16] In reality, causation in a commercial contractual context seems no different to causation in negligence: *Wiley v The ANI Corporation Limited.*[10] It is sufficient if a defendant's breach is *a* cause of the loss even if there are other concurrent causes: *Simonius Vischer & Co v Holt and Thompson*;[11] *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co. Ltd*;[12] *Alexander v Cambridge Credit Corporation Limited*[13] and *Wiley v The ANI Corporation Limited.*[14]

[17] In *Wardley Australia Ltd v State of Western Australia*[15] the High Court considered the meaning of the word "by" in s 82(1) *Trade Practices Act* 1974 (Cth), likening it to other causative phrases including "as a result of". In a joint judgment, Mason CJ and Dawson, Gaudron and McHugh JJ noted the word clearly expressed the notion of causation without defining or elucidating it and should be understood to take up the common law practical or common sense concept of causation discussed in *March v Stramare*.[16] It is difficult to comprehend why the words "a result of" in s 5(1)(a) the Act should not have a similar meaning.

[18] Even in the criminal law the question of cause is a matter for the jury applying their common sense to the facts and is akin to the test applied in negligence cases as set out in *March v Stramare*: see *Royall v The Queen*.[17]

[19] The words "*a* result of" (my emphasis) themselves support the *March v Stramare* concept of causation. Had the legislature intended to further restrict the meaning, it could have used phrases such as "the immediate result of", "the most proximate result of" or "the sole result of". Such a conclusion is consistent with the objects of the Act;[18] the Second Reading Speech[19] and the subsequent amendments to s 5 of

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8 (1990-1991) 171 CLR 506, Mason CJ with whom Toohey J generally agreed, and Gaudron J agreed at 509 and Deane J, with whom Gaudron J agreed at 521-522.

9 Ibid, at 515 and 524.

10 [2000] QCA 314, Appeal No 4092 of 1999, 5 April 2000; McMurdo P, [28], Thomas JA, [46], Ambrose J, [84].

11 (1979) 2 NSWLR 322, 346.

12 [1940] AC 997 at 1007.

13 (1987) 9 NSWLR 310, where Glass and McHugh JJA held that the test was whether, as a matter of common sense, the relevant act or omission was a cause of the damage.

14 Ibid.

15 (1992) 175 CLR 514, 525.

16 At 525.

17 (1990) 172 CLR 378, 387.

18 Section 3.

19 16 February 1994, 6900 to 6902, which emphasises the rehabilitation opportunities offered by the Act; that the Nominal Defendant will continue its role to provide redress for injured persons where

the Act;[20] nor is there anything in the Act or in the decided cases to suggest to the contrary.

[20] The words "a result of" in s 5(1)(a) of the Act invoke the notion of causation as explained in *March v Stramare*. To come within that sub-section the applicant must establish at trial the fact that the driving of the unidentified motor vehicle was, in a common sense way, a cause of the applicant's injuries on the facts of the case. That the throwing of the Molotov cocktail was also a cause of the injuries will not necessarily preclude a finding at trial that the manner of driving was an additional cause, in a common sense way, of the injuries, bringing the action within s 5(1)(a).

[21] The respondent also contends that the struck out portions of the applicant's pleadings do not satisfy s 5(1)(b) of the Act because the person who injured the applicant (the thrower of the Molotov cocktail), did not do a wrongful act in respect of the unidentified motor vehicle. But that is not the applicant's pleaded case. The applicant contends that his injury was caused wholly or partly by the unidentified driver's wrongful manner of driving the car and that this satisfies s 5(1)(b) of the Act. The causative element of s 5(1)(b) is certainly no higher than in s 5(1)(a). The use of the words "wholly or partly" makes it even clearer that it is not necessary to prove that the applicant's injuries were caused solely by the manner of driving the unidentified motor vehicle; it does not matter for the purposes of s 5(1)(b) if the throwing of the Molotov cocktail was a cause of the injuries if the wrongful driving by the unidentified driver was also, in a common sense way, the whole or partial cause of his injuries.

[22] UCPR r 171(2) relevantly provides:

> "(1) This rule applies if a pleading or part of a pleading –
> (a) discloses no reasonable cause of action
> …
> (2) The court, at any stage of the proceeding, may strike out all or part of the proceeding and order the costs of the application to be paid by a party calculated on the indemnity basis.
> (3) On the hearing of an application under sub-rule (2), the court is not limited to receiving evidence about the pleading."

[23] The rule covers both applications to strike out pleadings under the rule's predecessor O 22 r 28 *Supreme Court Rules* and those made under the inherent jurisdiction of the court,[21] it otherwise closely follows the wording of its predecessor, O 22 r 28; the power to strike out is sparingly exercised because judges recognise that "great care must be exercised to ensure that under the guise of achieving expeditious finality a [claimant] is not improperly deprived of [the] opportunity for the trial of [the] case by the appointed tribunal".[22]

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the "at fault vehicle" cannot be identified (6901) and that the Bill retains the philosophy of the existing legislation on the basic principles of compulsory third party insurance (6902).

20 Assented to 3 December 2001, adding sub-paragraphs (4), (5) and (6) which excludes the use of the motor vehicle for acts of terrorism on or after 1 January 2002.

21 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 602, 609; Civil Procedure Queensland Uniform Civil Procedure Rules, Butterworths, 2000, 8191.

22 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130 (Barwick CJ); *Noble & McBride v State of Vic and State of Qld* [1999] QCA 110; Appeal No 9023 of 1997, 13 April 1999, 17.

[24] Mr Williams emphasises the decision in *Mani v Nominal Defendant*.[23] There the pleadings claimed that Mani was driving his vehicle when the driver or the passenger in another vehicle travelling in the opposite direction threw a rock, breaking the windscreen on Mani's car and hitting and injuring him. Unlike this applicant who carefully pleaded that the unsafe manner of driving enabled the Molotov cocktail to be thrown into the applicant's car, Mani's pleaded case was that the throwing of or causing the rock to be thrown gave rise to a foreseeable risk of injury. In those circumstances, Helman J had no option but to conclude that, at its highest, Mani's case could not succeed as it did not claim that the *driving* caused the injury but instead claimed that the *throwing* caused the injury; as a result s 5(1)(a) of the Act could not apply. *Mani* is not determinative of this case which is pleaded quite differently.

[25] Whilst the applicant may have evidentiary difficulties in establishing the pleaded case, it is not fair to say at this early stage of the proceedings that it will be impossible for him to establish the facts pleaded to make out his claim. The learned primary judge was wrong to so conclude and to deny the applicant the opportunity of proving the necessary facts at trial to establish that the pleaded case comes within s 5 of the Act. If, as pleaded, the applicant is able to prove at trial that the unsafe manner of driving the unidentified motor vehicle enabled the Molotov cocktail to be thrown at the applicant's vehicle and that this driving was a common sense cause of the applicant's injuries, then his claim would come within s 5(1)(a)(i) and (b) of the Act. On the present material before the Court, proving these matters may be challenging, but it may be possible to infer from the applicant's evidence, tested at trial, that the driver of the unidentified vehicle unsafely drove in a manner to assist and facilitate the successful throwing of the Molotov cocktail into the applicant's car; that this was a common sense cause of the applicant's injuries[24] and that those injuries were caused wholly or partly by the unidentified driver's wrongful act in driving in that manner.[25]

[26] Leave to appeal should be granted consistent with the principles set out in *Westpac Banking Corporation v Klef Pty Ltd*.[26] I would allow the appeal, set aside the order below and instead order that the defendant's application to strike out be dismissed with costs. The respondent should pay the successful applicant's costs of and incidental to this application and appeal to be assessed.

Orders:

1. *Leave to appeal granted.*

2. *Appeal allowed.*

3. *Order of 20 September 2002 set aside and instead order that the defendant's application to strike out be dismissed with costs.*

4. *The respondent pay the applicant's costs of and incidental to this application and appeal to be assessed.*

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23 [2002] QCS 152, SC No 7 of 1998, 30 May 2002.

24 Section 5(1)(a).

25 Section 5(1)(b).

26 [1998] QCA 311; Appeal No 8204 of 1998, 16 August 1998, [10]-[11].

[27] **JERRARD JA:** I have read the judgments in draft of the President and Mackenzie J, and respectfully agree with the reasons for judgment of the President. I am not confident that the remarks by the High Court when construing "arising out of"[27] (the use of a motor vehicle) in past, largely uniform, versions of motor vehicle legislation can necessarily be applied to the construction of "caused by, through or in connection with a motor vehicle" in the instant legislation. I add the following comments.

[28] During submissions Mr Williams QC sought to distinguish *Evans v Transit Australia Pty Ltd*[28] on the basis that the evidence in that case established what he submitted was the existence of two proximate causes. These were the respondent's driving, and the defective condition of the bus seat. That submission necessarily concedes that an injury which "is a result" of the driving of a motor vehicle occurs when that driving is one of two proximate causes of the injury. Although Mr Williams appeared unenthusiastic about the result in *Evans v Transit Australia,* he did not submit that the decision was wrong or should be reconsidered.

[29] The judgments in the High court in *Technical Products Pty Ltd v State Government Insurance Office* (Qld)[29] have the consequence that to satisfy the requirement in s 5(1)(b) that the injury the applicant suffered be caused, wholly or partly, by a wrongful act or omission "in respect of" the motor vehicle by a person other than the applicant, the applicant must establish a discernable and rational link between that particular unidentified motor vehicle and a wrongful act or omission by another person. Not only that, but the applicant must also establish that that wrongful act or omission in respect of the unidentified motor vehicle "caused", wholly or partly, his injuries in the sense that that wrongful act or omission "materially contributed" to his sustaining injury (*Batiste v State of Queensland* [2002] 2 Qd R 119 at [10], [25], [27], [31] – [32] and [37].

[30] The applicant may succeed in satisfying those matters by evidence called in support of his pleaded case. That pleaded case raises for consideration material facts akin to ones in a case in which, for example the rider of a motor cycle very skilfully weaved it through traffic, across lanes, and "jumped" a median strip in breach of traffic regulations, to enable a pillion passenger to fire a pistol into another motor vehicle with the intent to assassinate a particular passenger. In such a case, the Queensland *Criminal Code* (s 7) would make the rider equally criminally responsible (as an "aider") with the pillion passenger for any offence constituted by causing a serious injury from a gun shot wound to the passenger fired at. In those circumstances, it would seem appropriate to hold in a civil claim that the same injury was a result of the driving which was done to enable at least that result to occur; it is not that there are really two discrete acts, one the driving and the other the shooting, but rather two acts each committed in the furtherance of the one common purpose.

[31] That would satisfy s 5(1)(a)(i); and (5)(1)(b) is satisfied in this case at the pleading level by the contention that the driver of the unidentified vehicle deliberately veered it towards the applicant's vehicle when it was unsafe to do so, **and** to enable the driver and/or passenger to throw the Molotov cocktail into the applicant's car. The deliberate veering alleged pleads a wrongful act in respect of the motor vehicle;

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27 In *State Government Insurance Commission v Stevens Bros Pty Ltd* at 154 CLR 552 at 555, and *Dickinson v The Motor Vehicle Insurance Trust* at 163 CLR 500 at 505.

28 [2002] 2 Qd R 30.

29 (1988-1989) 167 CLR 45 at 47, 48.

which wrongful act may be shown by evidence to have materially contributed to the applicant's sustaining his injury. It follows that on this point I respectfully disagree with the suggestion of Mackenzie J that it is unnecessary to plead that the veering occurred "when it was unsafe to do so"; to my mind, this is needed to satisfy s 5(1)(b).

[32] I agree with the orders proposed by the President.

[33] **MACKENZIE J:** This is an application for leave to appeal from an order of the District Court striking out parts of a Second Amended Statement of Claim in an action for personal injuries. According to the Second Amended Statement of Claim the applicant was driving a motor vehicle in Beenleigh when another vehicle travelling in the same direction commenced to overtake his vehicle. As it was doing so the driver or a passenger threw an object in the nature of a Molotov cocktail into his vehicle causing him injuries which included burns, smoke inhalation and shock.

[34] The pleading in the form finally considered by the learned District Court judge contained the following allegations of negligence or a wrongful act of the driver and/or the passenger of the other vehicle:

- Driving the vehicle;
    - at about 60 kilometres per hour alongside the applicant's vehicle when it was unsafe to do so; and
        - so that it veered towards the applicant's vehicle when it was unsafe to do so; and
        - close to the plaintiff's vehicle when it was unsafe to do so.
- Driving the vehicle in the manner described:
        - alongside the plaintiff's vehicle to enable the throwing of an object at it when it was unsafe to do so;
        - to enable the driver and/or passenger to force an object containing flammable liquid and a lighted wick through the right back passenger's side window when it was dangerous to do so.
- Deliberately inflicting injury upon the plaintiff.

There was also an allegation that the other vehicle had driven ahead of the applicant's vehicle when it was unsafe to do so, but that appears to be of no significance for present purposes.

[35] The defence put liability in issue in the following way:

(a) The injury is not a result of any of the circumstances set out in s 5(1)(a) of the *Motor Accident Insurance Act* 1994 (Qld);

(b) The injury was not caused wholly or partly by a wrongful act or omission in respect of the alleged vehicle by a person other than the injured person.

It was also alleged that for those reasons the cause of action was not maintainable.

[36] The applicant replied, by way of denial of those paragraphs, to the effect that the driving of the other vehicle materially contributed to the applicant's loss and damage by materially contributing to the velocity and the direction of the object and enabling the throwing or forcing of the object from the other vehicle into his vehicle. There is nothing to suggest that the vehicles themselves came into contact at any time.

[37] It can be seen from this recitation of the facts that the applicant was not pleading a case of random negligent infliction of injury or injury caused by something merely being thrown at another vehicle from a passing vehicle. The case mounted is that the vehicle was driven in a particular way by the driver, if acting alone, or by him in concert with a passenger, if there was one, so as to produce the optimum conditions to ensure that an object likely to cause injury would enter the other vehicle. It alleges a purposive use of the motor vehicle, in that it was driven in the manner alleged to enable a deliberate infliction of injury on the applicant.

[38] While I have some reservations about some of the physics implied in the first proposition in the amended reply, the point seems to be, according to the proposition that the driving materially contributed to the velocity and direction of the object and enabled it to be thrown from the other vehicle into the applicant's vehicle, that the vehicle was driven in that manner for the purpose of achieving the objective of throwing the Molotov cocktail into the applicant's vehicle.

[39] For the purposes of this case the respondent's liability derives from the fact that it is put in the same position as the insurer of a motor vehicle which can be identified. The policy of insurance under which a person suffering personal injuries may recover damages is one that insures against liability for personal injuries caused by, through or in connection with an insured motor vehicle, subject to meeting the other criteria in s 5. In the case of the Nominal Defendant, the reference to an insured motor vehicle is a reference to the vehicle which cannot be identified.

[40] For the purpose of discussion, ss 5(1), (4) and (5) are reproduced, although ss 5(4) and (5) were not in operation at the time of the incident. Section 5 of the *Motor Accident Insurance Act* 1994 provides as follows:

"(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 a motor vehicle; or
  (ii) a collision, or action taken to avoid 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

…

(4) For subsection (1)(b), the reference to a wrongful act or omission in respect of the motor vehicle does not include the use of the motor vehicle at the particular time it is being used for the actual doing of an act or making of a threat that is an act or terrorism

(5) The following is an example of a particular time when a motor vehicle is not being used for the actual doing of an act that is an act of terrorism –

> A is the driver of a motor vehicle from which a bomb is thrown at a government building. It is established that at that time the bomb is thrown the motor vehicle is being used for an act of terrorism. In driving away from the building after the bomb is thrown, A runs into a motor vehicle being driven by B. At the time A's motor vehicle runs into B's motor vehicle A's motor vehicle is not being used for the actual doing of an act of terrorism."

[41] The respondent conceded for the purposes of the striking out application that:

(a) the plaintiff suffered personal injury; and

(b) that such injury was caused by, through or in connection with the unidentified motor vehicle.

The argument focussed on s 5(1)(a)(i), since the other paragraphs of s 5(1)(a) had no application to the case. Section 5(1)(b) was also in contention.

[42] Section 5(1)(a)(i) limits the application of the Act to personal injury caused by, through or in connection with a motor vehicle if, and only if, the injury is a result of the driving of the motor vehicle. There must be a relationship of cause and effect between the driving and the injury. The pleadings describe driving at about 60 kph alongside the applicant's vehicle, veering towards it and driving close to it, in each case with the addition of the allegation "when it was unsafe to do so". The purpose of that addition is unclear since if the point of the pleading is that the vehicle was positioned in such a way as to facilitate the throwing of the object, that allegation seems unnecessary.

[43] There is a further pleading of driving the other vehicle alongside the applicant's vehicle and throwing an object at it when it was unsafe to do so. There is also a pleading that the injury was deliberately inflicted upon the applicant. Finally, and this is probably an encapsulation of all that has gone before, there is a pleading of driving the other vehicle to enable the driver and/or passenger to force an object containing flammable liquid and a lighted wick through the right back passenger's side window when it was dangerous to do so. It is in this context that the question whether an action based on the proposition that the injury was a result of the driving of the vehicle falls to be answered.

[44] In *Mani v Nominal Defendant* (2003) 1 Qd R 248; (2002) QSC 152 Helman J considered a pleading in which the allegation was that the driver or passenger of a vehicle travelling in the opposite direction to the plaintiff threw a large rock which smashed the windscreen and hit the plaintiff. The action was based on an allegation of negligence of the driver or passenger of the other vehicle in throwing or causing the rock to be thrown when the plaintiff's vehicle was passing in circumstances which gave rise to a foreseeable risk of injury to the plaintiff. Helman J reached the following conclusion:

> "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."

[45] The conclusion reached by Helman J invites attention to the proposition that throwing an object from a vehicle which is being driven in proximity to the injured person's vehicle will almost inevitably lead to an inference that the throwing was done with the intention to cause the object to strike the injured person's vehicle or was at the very least done negligently. In those circumstances, it would be reasonably foreseeable that injury to someone in that vehicle may occur. The consequence is that, on the applicant's argument, unless Helman J's conclusion is incorrect, the viability of any such case depends on the ability or inability to plead facts that raise a case the injury was a result of the driving, rather than that being in the vehicle merely provided the opportunity for the object to be thrown.

[46] There is an issue of interpreting the legislative policy underlying the resolution of this question. It is unlikely that the outcome of a case was intended to depend on the ingenuity of the pleader. It would be an arbitrary result if there was a distinction between a case where an object is thrown from a vehicle negligently when the vehicle happens to be within sufficient proximity of another vehicle to strike it and the case where the driver of the other vehicle has deliberately positioned his vehicle to enable something to be thrown from it. The answer whether the distinction is valid then depends on the view one takes of the intention of the legislation. I am unpersuaded, firstly that Helman J's analysis is incorrect, and secondly, that the present case may be distinguished from *Mani v Nominal Defendant.*

[47] The statutory policy of insurance in the Schedule to the Act, relevantly for the present purposes, contains the following:

> "**1 Extent of insurance cover**
>
> (1) This policy insures against liability for personal injury caused by, through or in connection with the insured motor vehicle anywhere in Australia
>
> …
>
> (3) The liability mentioned in subsection (1)…
>
> (a) is a liability for personal injury to which the *Motor Accident Insurance Act 1994* applies;
>
> …
>
> (4) This policy does not insure a person (the **"injured person"**) against injury, damage of loss

(a) that arises independently or any wrongful act or omission

…

2 Insured Person

The person insured by this policy is the owner, driver, passenger or other person whose wrongful act or omission in respect of the insured motor vehicle causes the injury to someone else and any person who is vicariously liable for the wrongful act or omission."

[48] Clause 2 refers to a person, who may be the owner, driver, passenger or other person, whose wrongful act or omission causes the injury to someone else. The wrongful act or omission must be in respect of the insured motor vehicle. In my view, throwing the object is not an act in respect of the vehicle. Nor is doing an act in respect of the vehicle, such as driving it in a manner that is not of itself wrongful in the relevant sense. The fact that it may be driven with knowledge that a passenger was intending to commit an offence is irrelevant in this context. The fact that the driver may also be criminally responsible for an offence arising from the throwing of the object does not convert a manner of driving which was not in itself a wrongful act or omission into a wrongful act or omission in respect of the motor vehicle for the purposes of the Act.

[49] Nor can any assistance can be gained from the recent amendment (which was not in force at the relevant time) which excludes from the scope of wrongful acts or omissions referred to in s 5(1)(b) the actual doing of an act or making of a threat that is an act of terrorism. (s 5(4)). Firstly, the amendment is concerned with defining the scope of wrongful acts or omissions in respect of a motor vehicle that are covered by the statutory policy. Using the throwing of a bomb as an example of an act of terrorism (s 5(5)) begs the question whether an injury caused by the throwing of the bomb is a result of driving of the motor vehicle. Section 5(5) is concerned not with that issue but with limiting the period of operation of the vehicle to which the terrorism exclusion applies to a period which is, in practical terms, contemporaneous with carrying out the actual act of terrorism. According to the example given, something which happens in the period, after the terrorist has done the act of throwing the bomb, when he is fleeing from the scene is not sufficiently contemporaneous to be within the exclusion.

[50] It would probably be regarded by the general public as a socially desirable outcome that innocent road users injured as a result of projectiles being thrown at their motor vehicles have meaningful access to compensation. However, once the statutory scheme is made to depend on the occurrence of one of the events referred to in s 5(1)(a) and (b) in respect of the indemnified person's vehicle, it can be seen that events such as dropping a rock from an overpass or the throwing of an object from the roadside by a pedestrian would not be compensable under the Act. Once that is made the underlying principle of the scheme, there is no incongruity in saying that the mere fact that an object is thrown from another vehicle and causes injury, even if maliciously done, is not within the scheme since it is not a result of the driving of

a motor vehicle. Nor is there merit in allowing the outcome to depend on the ingenuity of the pleading.

[51] In my view the plaintiff's action insofar as it is based on the proposition that the injury was a result of driving of the motor vehicle must fail. The learned District Court judge was correct in striking out the paragraphs of the Statement of Claim insofar as they related to the throwing of the object from the vehicle. I would refuse leave to appeal.