SUPREME COURT OF QUEENSLAND

CITATION:	*WorkCover Queensland v Suncorp Metway Insurance Ltd* [2004] QSC 216
PARTIES:	**WORKCOVER QUEENSLAND** (plaintiff) **v** **SUNCORP METWAY INSURANCE LIMITED** **(ACN 075 695 966)** (defendant)
FILE NO:	5735 of 2000
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2004
JUDGE:	White J
ORDER:	**Judgment for the plaintiff against the defendant in the sum of $336,091.83 together with interest thereon from 4 July 2000 at the rate of 7 per cent per annum.**
CATCHWORDS:	INSURANCE – DOUBLE INSURANCE – WORKERS' COMPENSATION LIABILITY – employee of a partnership injured whilst driving motor vehicle – partnership indemnified pursuant to policy of accident insurance under *Workers' Compensation Act* 1990 – motor vehicle registered in only one of the partner's names – whether plaintiff entitled to equitable contribution from defendant in respect of employee's claim – construction of s 3(1) of *Motor Vehicle Insurance Act* 1936 – whether there was a coincidence between the 'owner' who is legally liable by way of damages and the 'employer' who is also liable to pay damages – whether there was a sufficient identity of the insured to give rise to double insurance – where the insured pursuant to policy issued under the 1936 Act was the registered owner of the motor vehicle and the insured pursuant to policy under 1990 Act was the partnership – whether there was an obligation to contribute for less than half the amount paid in settlement – policy issued under 1990 Act indemnified individual members of partnership jointly and severally such that each partner was insured in his/her own right

Acts Interpretation Act 1954, s14H(1)(b)
Motor Vehicles Insurance Act 1936, s3(1), s3(2)
Partnership Act 1891, s13, s15
Workers Compensation Act 1990, s2.1(1), s4.9(2)

Albion Insurance Co Ltd v Government Insurance Office (NSW) (1969) 121 CLR 342, applied
AMP Workers' Compensation Services (NSW) Ltd v QBE Insurance Ltd (2001) 53 NSWLR 35, cited
Commercial and General Insurance Co Ltd v Government Insurance Office (NSW) (1973) 129 CLR 374, considered
Glover v Politanski [1990] 2 Qd R 41, applied
Lorimer v Thatcher [1993] 2 Qd R 25, followed
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, cited
Schleimer v Brisbane Stevedoring Pty Ltd [1969] Qd R 46, considered

COUNSEL: R J Douglas SC, with G W Diehm, for the plaintiff
A M Daubney SC, with K Greenwood, for the defendant

SOLICITORS: O'Mara's Lawyers for the plaintiff
Quinlan Miller & Treston for the defendant

[1] The plaintiff ('WorkCover') seeks equitable compensation from the defendant ('Suncorp Metway') in the sum of $336,091.83 by virtue of its claim that WorkCover and Suncorp Metway were co-insurers.

[2] WorkCover settled a claim for damages brought by Mark Carter in respect of personal injury suffered by him on 13 December 1993 when the prime mover and trailer which he was driving on a highway in the course of his employment rolled over. The registered owner of the prime mover was Keith White. Mr Carter was employed by a partnership consisting of Mr White and his wife, Rosemary. There are two issues for resolution. The first is whether, on the proper construction of s 3(1) of the *Motor Vehicles Insurance Act* 1936, the third paragraph thereof operates so as to exclude the liability of Suncorp Metway, that is, whether there is a co-incidence between the "owner" who is legally liable by way of damages and the "employer" who is also liable to pay damages. The second issue is if there is an obligation to contribute should it be for less than half the amount paid in settlement because of the partnership between the Whites.

[3] The parties tendered a statement of agreed facts at the trial, exhibit 2, and Mr White gave brief oral evidence. The agreed facts are as follows:

1. Keith White and Rosemary White (individually "Keith White" and "Rosemary White" respectively and together "the Whites") carried on a transport business.

2. The Whites carried on their business in partnership ("the Partnership").

3. As at 13 December 1993, Mark Anthony Carter ("Carter") was employed by the Partnership as a truck driver.

4. Keith White was the registered owner, pursuant to the *Motor Vehicles Insurance Act* 1936, of a Kenworth prime mover Queensland Registration No. QXO-1XF ("the prime mover") and a Barker trailer Queensland Registration No. QT-00JC ("the trailer").

5. There existed a policy of insurance under the 1936 Act, with the defendant ("Suncorp") as compulsory third party insurer, in respect of each of the prime mover and the trailer.

6. The prime mover and the trailer were used in the course of the Partnership business.

7. On or about 13th December 1993:-

   (a) the trailer was hitched to the prime mover;
   (b) Carter was driving the prime mover;
   (c) Carter was so driving in the course of his employment;
   (d) the trailer was loaded with paper bales three high;
   (e) on top of the paper bales some roll cores had been further loaded;
   (f) the load was secured by webbing straps;
   (g) on a bend on Boonah Road, Boonah in the State of Queensland, approximately 30 metres east of the Allen Creek Bridge, the load shifted on the trailer ("the load shift");
   (h) the load shift caused the trailer, and in turn the prime mover connected to it, to overturn ("the incident");
   (i) Carter was injured as a result of the prime mover and trailer overturning;

8. The Whites, as employers of Carter, were obliged by implied terms of his contract of employment, and or in the alternative by a tortious duty of care at all material times, to exercise reasonable care in and about Carter's employment;

9. By Queensland Supreme Court proceedings, issued in the Brisbane Registry, being by Writ No. 6492 of 1996, ("Carter's proceedings") Carter sued the Whites in respect of his injury alleging the said contractual and tortious duties and a breach of duty under the *Workplace Health & Safety Act* 1999.

10. In Carter's proceedings, Carter alleged that the injuries sustained by Carter were caused by a breach of the said implied terms and the said duty in:

(a) failing to take any or any reasonable steps to devise and provide a safe system of work for Carter and/or failing to properly instruct Carter in the observance of that system;
(b) failing to take any or any reasonable steps to provide Carter with a safe place of work;
(c) failing to provide and maintain adequate and suitable plant and appliances to enable Carter to carry out his work in safety;
(d) failing to take any or any reasonable care for Carter's safety whilst he was working;
(e) exposing Carter to a risk of injury of which they knew or ought to have known;
(f) causing or permitting the load on the trailer to be secured by webbing straps only;
(g) failing to provide or install rigid sides on the trailer which would have prevented the load shift;
(h) causing the paper bales to be stacked three rather than two rows high, the additional height amplifying the tendency towards a load shift;
(i) causing or permitting the roll cores to be stacked on top of the paper bales, such stacking amplifying the tendency towards a load shift;
(j) failing to warn Carter of the risk of injury to which he was exposed by reason of the matters aforesaid.

11. Liability on the part of the Whites in respect of the claims made in the Carter proceedings was a joint and several liability of each of them, to Carter, as partners in the partnership.

12. The plaintiff (WorkCover):-

(a) assumed carriage of the defence of Carter's proceedings;
(b) subsequently, on 30th November 1999, compromised Carter's cause of action and the proceedings by agreeing to pay and paying, to or in respect of Carter the sum of $632,183.67, being a sum inclusive of no fault compensation benefits previously paid by WorkCover to Carter in the sum of $82,183.67, together with costs on a standard basis to be assessed, but subsequently agreed in the sum of $40,000 ("the compromise").

13. The compromise was a reasonable one.

14. At all material times:

(a) there existed a policy of accident insurance, pursuant to the *WorkCover Act* 1990, between WorkCover and the Whites;
(b) the liability of the Whites to Carter in consequence of the incident and his consequent injury was a liability in

respect of which the Whites were entitled to indemnity under the 1990 Act policy.

15. The injury suffered by Carter in consequence of the incident was a consequence of:

    (a) the driving of the prime mover;
    (b) alternatively, the prime mover running out of control.

16. The injury suffered by Carter was caused by through or in connection with the prime mover.

17. The liability of the partnership, of which Keith White was a member, to Carter for his injuries, was in respect of the prime mover.

18. The prime mover and trailer were:

    (a) purchased by the Partnership;
    (b) Financed by the Partnership by commercial loans obtained by it;
    (c) Solely used in the business of the Partnership;
    (d) Fully maintained, repaired, insured, etc. from the resources of the Partnership;
    (e) Incorporated fully into the financial records and tax returns of the Partnership;
    (f) Registered in the name of Keith White only as a matter of convenience.

19. There is no excess or relevant limitation on the amount of indemnity under either the 1990 Act policy or the 1936 Act policy.

[4] Mr White has operated a transport business in equal partnership with his wife for about 35 years. The prime mover was purchased in about 1990 from a dealer in Shepparton in Victoria by the partnership with finance provided to the partnership. The vehicle was insured in the name of the partnership prior to leaving Victoria. The prime mover was then registered in Victoria. Mr White drove the vehicle to Queensland. In due course the Victorian registration expired and Mr White went into the town of Beaudesert to register the prime mover in Queensland. Mrs White did not accompany him. Since it was necessary for both of them to sign the papers for joint registration the prime mover was registered in Mr White's name alone.

[5] Section 3(1) of the *Motor Vehicles Insurance Act* 1936 ("the 1936 Act") provides

> "3(1) Subject to this Act, the owner of any motor vehicle shall at all times during the registration, or as the case may be, any renewal of the registration of such motor vehicle indemnify and keep indemnified the owner and every authorised agent of the owner by a contract of insurance with the State Government Insurance Office (Queensland) or with some licensed insurer against all sums for which the owner or his estate or any such authorised agent or his

> estate shall become legally liable by way of damages in respect of such motor vehicle for accidental bodily injury (fatal or non-fatal) to any person (including, in respect of such injury caused by any such other person, the owner himself) in any State or Territory of the Commonwealth of Australia where such injury is caused by, through, or in connection with such motor vehicle.
>
> Liability by way of damages referred to in the first paragraph of this subsection includes the liability (either joint or several) of an insured person –
>
> *(a)* to pay or to contribute to the payment of such damages;
> *(b)* to make contribution to any other tortfeasor under the provisions of *The Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act of* 1952;
> *(c)* to pay damages for breach of his contract of employment evidenced by his causing such injury.
>
> Liability by way of damages referred to in the first paragraph of this subsection does not include the liability of an employer incurred on or after 22 September 1988 to pay damages on account of accidental bodily injury (fatal or non-fatal) caused by, through or in connection with a motor vehicle to his employee (being a worker within the meaning of the *Workers Compensation Act 1916-1988*) in circumstances such as would give rise to an entitlement to the payment of compensation under that Act."

The reference to the *Workers' Compensation Act* 1916-1988 should be read as a reference to the *Workers' Compensation Act* 1990, s 14H(1)(b) *Acts Interpretation Act* 1954.

[6] Mr Daubney SC who with Ms K Greenwood appeared for Suncorp Metway and Mr Douglas SC who with Mr G Diehm appeared for WorkCover agreed that the proper approach to construction of this provision is to give effect to its purpose, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382. That purpose is, self-evidently, to exclude the liability of a compulsory third party insurer of a motor vehicle where there is workers' compensation insurance cover by an employer who is the registered owner of the vehicle. The extent of co-incidence between the motor vehicle insured and the employment insured is the concern of these proceedings.

[7] Section 4.9(2) of the *Worker*s' *Compensation Act* 1990 provides

> "Subject to subsection (3), every employer is to insure and remain insured with the Board under a policy in respect of –
>
> (a) the employer's legal liability to pay compensation under this Act; and
> (b) the employer's legal liability existing independently of this Act to pay damages in respect of injury to a worker employed by the employer, being a liability within the cover of accident insurance as defined in section 2.1."

[8] "Accident insurance" is defined relevantly in s 2.1(1) as

> "... insurance by which an employer is indemnified against all sums for which the employer may become legally liable, in respect of injury to a worker employed by the employer, in respect of –
>
> (a) ...
>
> (b) damages arising under circumstances creating also, independently of this Act, a legal liability in the employer to pay such damages, other than a liability against which the employer is required to provide under some other Act of Queensland or a law of another State or Territory, or of the Commonwealth or of another country."

[9] Suncorp Metway accepts that there was policy of accident insurance in place pursuant to the *Workers' Compensation Act* 1990 covering Keith White and Rosemary White and they were entitled to indemnity under that policy in respect of the claim by Carter. They did not fall within the exception in (b) because Keith White was the registered owner of the prime mover and required by the 1936 Act to be insured in respect of it. The employer, the partnership was not. This was the conclusion of the Full Court in *Glover v Politanski* [1990] 2 Qd R 41 at 46-47 per Macrossan CJ and at 51 per Ryan J. Mr Daubney submitted that *Glover v Politanski* was distinguishable because the facts were different but any differences do not exclude the proposition to which I have referred.

[10] Suncorp Metway contends that its obligation to indemnify Keith White under the compulsory third party insurance policy taken out by him in accordance with the requirements of the 1936 Act was excluded by the last paragraph of s 3(1) because a partnership has no separate legal identity from its members each of whom is jointly and separately liable for wrongs committed by the partnership, ss 13 and 15 of the *Partnership Act* 1891.

[11] WorkCover argues that by virtue of the incorporation of the definition of "worker" and the necessary inclusion of "employer" from the *Workers' Compensation Act* 1990 into s 3(1) of the 1936 Act a different meaning from that understood at common law and in the *Partnership Act* is to be accorded to a partnership for the purposes of s 3(1). A "worker" means

> "... a person who works under a contract of service or apprenticeship or otherwise with an employer in work of any description, whether the contract is oral or written, express or implied ..."

An "employer" means

> "... a person (whether an individual or a corporation), or any association or group of persons, or a partnership that employs a worker or workers ..."

[12] In *Lorimer v Thatcher* [1993] 2 Qd R 25 the Court of Appeal held at 28 that

> "The phrase 'liability by way of damages referred to in the first paragraph of this subsection' in the third paragraph of s. 3(1) is a reference to the legal liability by way of damages of the owner or any authorised agent of the owner ... referred to in that first

> paragraph; that is, it is the legal liability by way of damages of the owner or his authorised agent which in the third paragraph is expressed not to include the liability of an employer to pay damages in circumstances which would give rise to an entitlement to the payment of compensation under the *Workers' Compensation Act* 1916. The only legal liability of the first kind which would otherwise include liability of the second kind is liability of the owner or authorised agent *as* an employer, which requires that the owner or authorised agent also be the employer. It must be this that is referred to in the third paragraph of s. 3(1)."

[13] Mr Daubney sought to distinguish *Lorimer v Thatcher*. The employer was not the registered owner of the vehicle driven by an employee in the course of his employment in which he negligently and fatally injured a co-employee. Notwithstanding, *Lorimer v Thatcher* is authority, for these purposes, for the proposition that for the legal liability referred to in the first paragraph of s 3(1) to be excluded the owner must also be the employer. The application of the definition of "employer" in the *Workers' Compensation Act* in s 3(1) of the 1936 Act gives legal life to the answer to the question, who employed Carter? Clearly the partnership of Keith White and Rosemary White. The employer is thus not the registered owner of the prime mover who was Keith White alone. The exclusion of liability brought about by s 3(1) of the 1936 Act does not apply.

[14] Mr Daubney argued in the alternative that the partnership of Keith White and Rosemary White was the "authorised agent" of the registered owner of the prime mover and thereby gave a commonality between the registered owner and the employer so as to exclude Suncorp Metway's liability to contribute. As Mr Douglas submitted, the scheme of the 1936 Act gives a pivotal role to the registered owner of a motor vehicle, *Schleimer v Brisbane Stevedoring Pty Ltd* [1969] Qd R 46 FC at 71 per Hanger J. Section 3(2) of the 1936 Act emphasises this primacy by characterising every person, other than the owner, who at any time is in charge of a registered motor vehicle with or without the owner's authority, the authorised agent of the owner and acting within the scope of his authority as agent. Clearly that deeming provision cannot apply to the partnership. Was the partnership the owner's agent in fact? Mr Daubney submitted that the partnership of Keith White and Rosemary White was Keith White's authorised agent. The evidence cannot support that contention. What the evidence of Mr White revealed was the reverse. Keith White registered the prime mover on behalf of himself and his wife as partners in the transport partnership. The injured employer, Carter was driving the prime mover as an employee of the partnership but as a deemed agent of Keith White, the registered owner.

[15] Whilst there is no sufficient co-incidence between the registered owner and the employer to cause the operation of the exclusion provisions of s 3(1) of the 1936 Act there is the further question as to whether, for the application of the equitable doctrine of contribution, there needs to be an identity of the insureds under each policy of insurance.

[16] The principles relating to contribution between insurers are to be found in *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 and recently summarised by Handley JA in *AMP Workers' Compensation Services (NSW) Ltd v QBE Insurance Ltd* (2001) 53 NSWLR 35. On the issue of what

commonality needs to be established the majority (Barwick CJ, McTiernan and Menzies JJ) in *Albion Insurance* said at 345

> "The doctrine, however, only applies when each insurer insures against the same risk, although it is not necessary that the insurances should be identical."

And at 345-346:

> "Thus one insurer may insure properties A and B against fire and the other insurer may only insure property A against fire. Again, one policy may be for a limited amount and the other may be for an unlimited amount. One policy may cover the risk of a whole voyage and the other may cover only part of the voyage. Differences of this sort may affect the amount of contribution recoverable but they do not bear upon the question whether or not each insurer has insured against the same risk so as to give rise to some contribution. The element essential for contribution is that, whatever else may be covered by either of the policies, each must cover the risk which has given rise to the claim. There is no double insurance unless each insurer is liable under his policy to indemnify the insured in whole or in part against the happening which has given rise to the insured's loss or liability."

[17] Here the risk insured against by both insurers was the same, that is, the liability for damages suffered by Carter driving the prime mover and trailer in the course of his employment. The damage in each case would have been identical. It remains to consider then whether there is sufficient identity of the insured so as to give rise to a situation of double insurance. Kitto J, in *Albion Insurance*, with whose reasons Windeyer J agreed, appeared to require an exact identity of insureds at 352

> "What attracts the right of contribution between insurers, then, is not any similarity between the relevant insurance contracts as regards their general nature or purpose or the extent of the rights and obligations they create, but is simply the fact that each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained; for that is the situation in which "the insured is to receive but one satisfaction" (to use Lord Mansfield's expression) and accordingly all the insurances are "regarded as truly one insurance": *Sickness and Accident Assurance Association Ltd v General Accident Assurance Corporation Ltd*."

[18] A partnership has no separate legal identity, Lindley & Banks *On Partnership* 16th ed. (1999) 27 and the cases there cited. The provisions of the *Partnership Act* make every partner jointly and severally liable for the wrongful acts or omissions of any partner acting in the ordinary course of business of the firm, ss 13 and 15. The incorporation of the *Workers' Compensation Act* 1990 definition of employer to include a partnership in s 3(1) of the 1936 Act is for the purposes of that Act only. The partnership of Keith White and Rosemary White was the employer and named as the insured in the workers' compensation policy. But in the litigation each member of the partnership had to be sued individually and each was liable jointly and severally. The policy of insurance issued to the partnership indemnified the

members jointly and severally so that Keith White was himself insured pursuant to the policy of accident insurance taken out under the *Workers' Compensation Act* 1990. He was also the insured as the registered owner of the prime mover under the policy of insurance issued pursuant to the 1936 Act. It was sufficient that he was insured himself whether or not with another member of the partnership.

[19] Accordingly there is an identity of insured as between the policy of insurance provided by WorkCover and the policy of insurance provided by Suncorp Metway.

[20] It follows therefore, that there is a situation of double insurance and WorkCover, having indemnified the insured for the amount of the settlement, is entitled to call on the co-insurer for contribution.

[21] Finally, Mr Daubney submitted that should the Court find in favour of contribution Suncorp Metway ought to be required to make only a 25% contribution because WorkCover was the insurer of the partnership and Suncorp Metway was the insurer of one of them only – Keith White. In cases where complete indemnity has been sought by one insurer from another in double insurance cases on the ground of potential liability in a third party such an approach as contended for here has been rejected. For example in *Commercial and General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 CLR 374 the Court held at 380

> "Accordingly, any claim that the appellant has against the respondent must depend upon the right to contribution arising from the double insurance of the one risk, i.e. the risk of the employer's liability in damages for the negligence of his servant for which he must bear the responsibility. Such a claim is, by its very nature, one to rateable relief and it is not immediately obvious how, when there is a double insurance, one of the insurers should be able, in proceedings for rateable relief, to throw the whole burden on the indemnity upon the other. Indeed, the purpose of the doctrine is to avoid this very thing. The doctrine is not concerned with working out the rights of insurers and third parties. It is concerned with distributing the indemnity to which the insured is entitled under policies of insurance with two insurers. If the rights of insurers and third parties are involved, a further element is introduced, namely, what is, or could be, the result of the exercise by an insurer of his right of subrogation to the position of the person who has been indemnified."

It follows, in my view, that Keith White was indemnified by his compulsory third party insurer. It is not relevant to a claim for contribution that he could seek indemnity from his co-partner.

[22] Suncorp Metway is accordingly obliged to contribute to the damages paid by WorkCover to Carter in half of the amount which it paid in damages being $336,091.83.

[23] There is no dispute that interest may be awarded from the date of the initiation of the proceedings on 4 July 2000 at a rate of 7 per cent pursuant to s 47 of the *Supreme Court Act* 1995.

[24] The orders are there be judgment for the plaintiff against the defendant in the sum of $336,091.83 together with interest thereon from 4 July 2000 at the rate of 7 per cent per annum.