SUPREME COURT OF QUEENSLAND

CITATION:	*Raschke v Suncorp Metway Insurance Ltd* [2005] QCA 161
PARTIES:	**LYNDON MARC RASCHKE** (plaintiff/respondent) **v** **FH WORKSHOP PTY LTD** ACN 010 727 134 (defendant) **KENNETH JOHN TURNER** (first third party) **FH TRANSPORT PTY LTD** ACN 010 561 092 (second third party) **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (third third party/appellant)
FILE NO/S:	Appeal No 8579 of 2004 SC No 7009 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2005
JUDGES:	McPherson and Keane JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay respondent plaintiff's costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	LIMITATION OF ACTIONS - POSTPONEMENT OF THE BAR - EXTENSION OF PERIOD - CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES - KNOWLEDGE OF MATERIAL FACTS - MATERIAL FACTS OF DECISIVE CHARACTER - where plaintiff employed to unload trailers carrying cotton bales hauled by prime movers - where plaintiff injured by bale falling from trailer during unloading - where action commenced against employer alleging negligent loading, securing and inspection of bales - where employer issued third party notice to compulsory third

party insurer alleging driving of prime mover attached to trailer had made the cotton bales unstable prior to delivery - where plaintiff applied for extension of limitation period to commence action against third party - whether allegation that load had shifted in transit was mere possibility or a material fact

LIMITATION OF ACTIONS - POSTPONEMENT OF THE BAR - EXTENSION OF PERIOD - CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES - KNOWLEDGE OF MATERIAL FACTS - WHETHER REASONABLE STEPS TAKEN TO ASCERTAIN FACTS - whether plaintiff should have considered possibility that cause of injury was cotton bale shifting in transit - whether this possibility should have been considered before allegation was made in defendant's pleadings

INSURANCE - THIRD-PARTY LIABILITY INSURANCE - MOTOR VEHICLES - COMPULSORY INSURANCE LEGISLATION - RISKS INSURED - LIABILITY "IN RESPECT OF" MOTOR VEHICLES - where injury suffered during unloading of a trailer was alleged to result from the driving of the attached prime mover - whether injury caused by a wrongful act or omission "in respect of" the trailer

Limitation of Actions Act 1974 (Qld), s 30, s 31
Motor Accident Insurance Act 1994 (Qld), s 5

Broken Hill Pty Co Ltd v Waugh (1988) 14 NSWLR 360, considered
Healy v Femdale Pty Ltd [1993] QCA 210; Appeal No 37 of 1992, 9 June 1993, cited
Reeves v Thomas Borthwick & Sons (Australia) Pty Ltd [1995] QCA 339; Appeal No 96 of 1995, 11 August 1995, considered
Sloane v Yuruga Nursery Pty Ltd & Ors [2004] QSC 020; SC No 5123 of 2001, 23 February 2004, cited
Technical Products Pty Ltd v State Government Insurance Office (Q) (1989) 167 CLR 45, cited
Tooheys Ltd v Commissioner of Stamp Duties (NSW) (1961) 105 CLR 602, cited
Wood v Glaxo Australia Pty Ltd [1993] QCA 114; [1994] 2 Qd R 431, applied

COUNSEL: M Grant-Taylor SC for the appellant
R A I Myers for the respondent

SOLICITORS: Jensen McConaghy for the appellant
Peter Chappel for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Keane JA, which I have had the advantage of reading.

[2] The appeal must be dismissed with costs.

[3] **KEANE JA:** On 9 September 2004, the learned primary judge granted the plaintiff's application for an extension of time pursuant to s 31(2) of the *Limitation of Actions Act* 1974 (Qld) ("the LAA"). The extension of time was sought in order to deny the benefit of a limitation defence to persons who had been joined as third parties to the plaintiff's action against the defendant but against whom the plaintiff did not seek an order that they be joined as defendants.

[4] The present appeal is brought by the third third party, which is the CTP insurer of the first and second third parties. The third third party contends that neither of the pre-conditions set by s 31(2) for a grant of an extension of time were satisfied in this case. In order to appreciate the contentions of the third third party, it is necessary to refer first to the relevant provisions of the LAA and then, in some greater detail, to the facts.

The LAA

[5] Section 31 of the LAA provides relevantly:

> "**31 Ordinary actions**
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> **(1)** This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.
>
> **(2)** Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court—
>
> (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
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> (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;
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> the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly."

[6] Terms used in s 31 are defined in s 30[1] of the LAA as follows:

> "**30 Interpretation**
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> **(1)** For the purposes of this section and sections 31, 32, 33 and 34—
>
> (a) the material facts relating to a right of action include the following—

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[1] Formerly numbered s 30(a), (b), (c) and (d).

(i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;

(ii) the identity of the person against whom the right of action lies;

(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;

(iv) the nature and extent of the personal injury so caused;

(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing—

(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and

(ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;

(c) a fact is not within the means of knowledge of a person at a particular time if, but only if—

(i) the person does not know the fact at that time; and

(ii) as far as the fact is able to be found out by the person—the person has taken all reasonable steps to find out the fact before that time.

(2) In this section—

"**appropriate advice**", in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts."

Factual background

[7] In April 1999 the plaintiff commenced employment with the defendant as a line haul truck driver. His duties involved him in taking delivery at Rocklea in Brisbane of prime movers and trailers loaded with cotton bales which had been driven from elsewhere, and then driving them to the premises of P & O Storage at Hemmant in Brisbane for unloading.

[8] On Thursday 6 May 1999 a BB Double Taut Liner trailer that had been attached to the rear of a Kenworth prime mover was loaded with cotton bales at Moree and driven to the defendant's holding yard at Rocklea. The driver of the rig from Moree in north-western New South Wales to Rocklea was the first third party. Upon arrival at Rocklea, the loaded trailer in tow behind the Kenworth prime mover was detached and left to stand pending reassignment. The plaintiff was instructed to take a Volvo prime mover to the defendant's Rocklea holding yard and there to

couple it to the trailer which had recently arrived from Moree. The newly configured rig was then to be taken to Hemmant. The plaintiff, acting in accordance with his instructions, arrived at the premises of P & O Storage at Hemmant at about 10.50 am on that morning.

[9] The plaintiff says that he then walked around the back of the trailer and commenced to unload the trailer by undoing the clips of the curtain, or side skirting, which held the load in place while walking towards the front of the trailer. He arrived at the front of the trailer and released the tension on the curtain of the trailer. He then walked back to the rear of the trailer where it was necessary to pull on a bar in order to release the tension there. To remove this bar it was necessary to lift it upwards and twist it around. As the plaintiff pulled the bar out at the rear of the trailer, the top bale dislodged from where it was sitting and slid down from the top of the load in between the trailer and the curtain which the plaintiff was still holding. As the bale tumbled downwards, it pushed the curtain in such a manner that the plaintiff, who was still holding onto the curtain, ended up turned around and facing away from the trailer. The bale struck the plaintiff in the back of his right shoulder, knocking him to the ground, before landing on his right leg. As a result the plaintiff suffered a dislocation of his right ankle.

[10] The plaintiff commenced proceedings against his employer, the defendant, on 1 August 2002. In that action the plaintiff alleges negligence on the part of the defendant in relation to the loading, securing and inspection of the cotton bales which, he says, caused the incident in which he was injured. The plaintiff does not say that this negligence in relation to the securing of the load in the trailer occurred at Rocklea as opposed to Moree.

[11] The defendant issued a third party notice dated 21 January 2003 against the third parties. The first third party was the driver of the Kenworth prime mover which towed the trailer loaded with bales of cotton from Moree to Rocklea. He was an employee of the defendant. It seems to be accepted by the parties to this appeal that the pleaded allegation by the defendant that the first third party was employed by the second third party is erroneous. The second third party was the registered owner of the Kenworth prime mover. The third third party was the CTP insurer in relation to the Kenworth prime mover.

[12] The defendant alleged in its statement of claim in support of its third party proceedings that the cotton bale which injured the plaintiff moved from a stable position on top of other cotton bales to an unstable position against the curtain of the trailer during the course of the bale's journey from Moree to Rocklea. The defendant also alleges that the first third party was negligent in the execution of his duties in failing to ensure that the load was adequately secured, in failing adequately to inspect the load, in failing to warn the plaintiff that the load had not been properly or adequately secured or inspected, and in failing to warn the plaintiff of the risk of injury in those circumstances. These allegations, it may be noted, reflect the plaintiff's allegations against the defendant.

[13] The defendant alleges that the plaintiff's injury was caused by or in connection with the Kenworth prime mover and that it was as a result of the driving of the Kenworth prime mover that the cotton bale moved and became unstable in consequence of which it fell upon the plaintiff when he unloaded the trailer. It is not alleged by the defendant against the third parties that the first third party, in driving the Kenworth

prime mover from Moree to Rocklea, was guilty of any negligent act or omission in relation to the actual driving of the rig. What is alleged is that during the course of the journey the cotton bale moved from a stable position to an unstable position. The negligence alleged by the defendant against the first third party was in relation to the manner in which the rig was loaded and inspected by the first third party who was an insured person under the CTP policy in force in respect of the Kenworth prime mover under the *Motor Accident Insurance Act* 1994 (Qld) ("the MAIA").

[14] On 5 April 2004, the defendant filed an amended defence in which it alleged that the plaintiff had been injured in a motor vehicle accident, as defined in s 4 of the MAIA, and that, by reason of the plaintiff's failure to comply with the requirements of the MAIA in relation to claims against insured persons and their insurer, the proceedings against the defendant were, and are, a nullity.

[15] Confronted by this contention on the part of the defendant, the plaintiff then applied for an extension of the limitation period within which he might proceed against the third parties. In support of that application, the plaintiff deposed that it was only after 6 April 2004, when the defendant's amended defence was served on the plaintiff's solicitors, that he became aware for the first time of an allegation that the first third party's driving of the Kenworth prime mover may have been a cause of his injury.

The judgment at first instance

[16] The learned primary judge seems to have accepted, for the purposes of the proceedings before him, that the bale did shift in the course of the journey from Moree to Rocklea. He also accepted the plaintiff's evidence that he was not aware that his injury may have been the result of the driving of the Kenworth prime mover by the first third party from Moree to Rocklea. His Honour held that the "fact" that the driving of the Kenworth prime mover from Moree to Rocklea was causally related to his injury was not within his means of knowledge until, at the earliest, 6 April 2004. In this regard, his Honour said:

> "It is hard to imagine the load shifting except in the course of the movement of the vehicle. However, whether that is a material fact or not depends upon whether it is seen as a fact which has the degree of carelessness necessary to give rise to liability for negligence. That, of course, is what the plaintiff wants now to allege, mainly as a precautionary measure but the fact would not be material unless it bore that quality.
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> …
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> I do not think that this fact in the circumstances of this case is so obviously material that an ordinary person in the position of the plaintiff would have been put on inquiry. Essentially, the claim is in respect of the failure of the employer to provide a safe place and safe system of work. Indirectly, that may involve the employer having vicarious liability for [the first third party] but that is not how the plaintiff cast his action and, indeed, it is unclear whether he had knowledge of the relationship between [the first third party] and the defendant.
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> In any event, the materiality of the driving is in small compass when it is compared with the conduct which is central to the plaintiff's claim in negligence.

> The proposed defendants submit that this is of no consequence; that it does not matter whether the major causes of injury, perhaps 99 per cent of the fault for injury, lies away from [the MAIA], they submit that if any proportion of conduct capable of founding an action does cause the result described in s 5 of the Act then the consequence that the action must be brought against the insurer of the vehicle necessarily follows.
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> If that is right then it seems to me that it will often be the situation that facts which may be known to plaintiffs will not be known to be material. It is sufficient, in my view, even if a fact is known that it is not known to be material unless of course the error is simply one of law. If it is a fact the materiality of which is not obvious without knowing other intermediate facts then the case is one where the plaintiff makes good his position under the extension legislation.
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> In my view it would not be the position in the circumstances of this case a reasonable plaintiff would have been put on inquiry to seek out the information about the motor vehicle and commence proceedings against the proposed defendants on the basis of the driving. The driving was, in other words, a material fact which was neither within the plaintiff's knowledge nor within his means of knowledge until he was told of the significance of the amended pleadings by his solicitor in May this year. Since then, he has been diligent and has done what he ought to have done to get an extension of time.
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> Therefore, in my view, the application should be allowed and the necessary orders made."

The appeal

[17] At this point it should be noted that the allegation about the driving of the Kenworth prime mover and the consequential moving of the errant bale has, on the face of things, nothing to do with a claim for damages for negligence made by the plaintiff against the first third party. It is said, however, to be material to the plaintiff's right of action against the third third party, the CTP insurer. The appellant conceded that, because the MAIA contemplates proceedings and judgment against a CTP insurer, in respect of "motor vehicle accident claims", it confers a right of action against the CTP insurer and so the facts which make a claim one recognizable as a "motor vehicle accident claim" are facts material to a right of action against the CTP insurer. The appellant's concession relieves this Court of the need to determine whether it is correct to regard the MAIA as creating a right of action against the CTP insurer for the purposes of s 30 and s 31 of the LAA.

[18] The appellant's attack on the learned primary judge's decision is put on two grounds. First, it is said that his Honour was not entitled to find that s 31(2)(a) of the LAA was satisfied because the shifting of the load during the journey from Moree to Rocklea was a mere possibility, not a fact, so that it could not be a "material fact" as the subsection requires. Secondly, the appellant submits that the learned primary judge erred in failing to conclude that, if the shifting of the load on the journey from Moree to Rocklea was a fact, it was a fact within the means of knowledge of the plaintiff long before the plaintiff brought his application for an extension of time under the LAA.

[19] The appellant argues that it was not open to his Honour to infer, as a fact, that the errant cotton bale actually shifted during the course of the driving of the rig by the first third party from Moree to Rocklea. This contention is a matter of "fact and degree" that can only rarely be decided definitively prior to trial.[2] This case is not one of those rare cases. In any event, the respondent does not, in my view, need to establish definitively that the bale shifted during the journey from Moree to Rocklea, either in relation to s 31(2)(a) or s 31(2)(b) of the LAA.

[20] The appellant submits, in relation to its first ground of attack on the judgment below, that the plaintiff is on the horns of a dilemma in that, either the plaintiff has failed to show that there is a material fact of which he has only recently become aware because the shifting of the bale is only a possibility not a fact; or he has failed to satisfy the requirements of s 31(2)(b) to show that there is evidence to establish a right of action. As to the first horn of the dilemma, the appellant's error, it seems to me, is in failing to appreciate that s 30 and s 31 of the LAA are not concerned with facts finally established as such on the balance of probabilities.

[21] It is to be emphasized that s 31(2)(a) does not require an applicant to prove the existence of a material fact to the satisfaction of the court on the balance of probabilities. The "material facts" relating to a right of action, including those previously unknown to an applicant for an extension of time may, and often will be, hotly in issue between the parties when an application for an extension of time is decided. As Davies JA explained in *Wood v Glaxo Australia Pty Ltd*,[3] s 31(2)(a) is concerned with the composite notion of knowledge of a material fact. For the purposes of s 31(2)(a), knowledge of a fact is not concerned with what a court ultimately finds to be the fact, but with the quality of the information about the fact available to an applicant and the applicant's state of belief or understanding generated by that information. In the context of s 31, material facts are facts which may establish a right of action if they themselves are established. It is quite clear from the authorities in relation to s 31(2)(b), to which I shall refer below, that the information available to establish all the facts material to a right of action does not have to satisfy the court on the balance of probabilities as to the existence of that fact. It could not, as a matter of logic, be the case that a material fact on which a cause of action depends needs to be established on the balance of probabilities for the purposes of s 31(2)(a), when proof of that fact to that degree is not required to "establish the right of action" for the purposes of s 31(2)(b) of the LAA.

[22] In my view, the point which is relevant for the purposes of s 31(2)(a) is that the first moment when it could be said that the plaintiff knew of the shifting of the bale on the journey from Moree to Rocklea as a "material fact" in question was when the defendant alleged that it was a fact. That was when the plaintiff first knew of information apt to lead him to believe that, in fact, the bale shifted on the journey and that this fact was causally related to his injury. What is not relevant for the purposes of s 31(2)(a) is that the information on which the defendant's allegation was based may, at trial, be insufficient to establish those facts to the satisfaction of the court.

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2 See *Sloane v Yuruga Nursery Pty Ltd & Ors* [2004] QSC 20; SC No 5123 of 2001, 23 February 2004 at [23].

3 [1993] QCA 114 at [31] - [36]; [1994] 2 Qd R 431 at 440 - 442.

[23] The appellant resists this view of s 31(2)(a) and relies upon the statement by Clarke JA, in relation to the New South Wales analogues of s 30 and s 31[4] of the LAA in *Broken Hill Pty Co Ltd v Waugh*,[5] where his Honour said that "the possibility of a causal nexus is not sufficient of itself to qualify as a material fact relating to a cause of action either as defined or as that phrase would generally be understood".[6]

[24] It seems to me that the appellant's reliance on the dictum of Clarke JA is misplaced. The appellant fails to appreciate that s 31(2)(a) is not concerned with the facts ultimately found at trial but with the composite notion of material facts known to an applicant for an extension. Clarke JA did not hold that an applicant for an extension of time can never meet the requirements of a provision such as s 31(2)(a) of the LAA unless the "material fact" can be proved as such on the balance of probabilities. This observation of Clarke JA was made in the course of his Honour affirming a grant of an extension of time to the respondent in that case on the footing that, until the relevant fact was known to the respondent to be more than a possibility, it had not become a fact known to the respondent or within his means of knowledge. If Clarke JA meant what the appellant seeks to attribute to him, any plaintiff could claim not to "know a material fact" until it was established as such at a trial. On this view, a plaintiff could always wait until trial to seek an extension of time secure in the knowledge that time was not running against him or her for the purposes of s 31(2) however strong the evidence of the fact might be.

[25] The point that was rightly made by Clarke JA, in the passage from *Waugh* relied on by the appellant, is that simple knowledge of what I would call a "bare" possibility, something that could explain an occurrence but which has nothing in particular to recommend it over other possible explanations as being the true cause, is not enough to constitute knowledge of a "material fact". *Waugh* concerned a plaintiff who had been exposed to asbestos during the course of his employment that, it was alleged, had caused damage to the plaintiff's lungs. The plaintiff had experienced problems with his lungs for some time and it had been suggested to him by at least one medical specialist that his problems could be related to his asbestos exposure. The plaintiff was aware that he had been exposed to asbestos and that the measures taken to protect him from inhaling that dangerous substance by his employer had been inadequate. Clarke JA held, however, that it was not until the plaintiff underwent tests that showed a link between his lung problems and asbestos related disease, something that occurred after the limitation period had expired, that he gained decisive knowledge of a material fact relating to his cause of action in negligence against his employer.

[26] Similarly in the present case, it can be accepted that the available information meant that it was open to the plaintiff to think it possible that the bale which fell on him had shifted during the course of its transport from Moree to Rocklea but there was nothing to suggest that this was what had actually occurred. The plaintiff had no reason to consider this scenario any more probable than any other explanation until

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4 *Limitation Act* 1969 (NSW) s 57 and s 58 (s 57 has since been renumbered as s 57B). Certain similarities between the New South Wales and Queensland legislation have previously been recognized by this Court: see *Watters v Queensland Rail* [2000] QCA 51 at [14]; [2001] 1 Qd R 448 at 455; *Stephenson v State of Queensland* [2004] QCA 483; Appeal No 7621 of 2004, 17 December 2004 at [16] - [17].

5 (1988) 14 NSWLR 360.

6 *Broken Hill Pty Co Ltd v Waugh* (1988) 14 NSWLR 360 at 369.

the defendant suggested there was evidence to support such a hypothesis by alleging that the bale had shifted in its defence. It was at this point that what I have called the "bare" possibility became knowledge of a material fact. It was at this point that the plaintiff was confronted by a pleaded case which implied the existence of evidence in the defendant's possession that could be adduced to make the hypothesis a likely one. Whether that evidence will show that the hypothesis is more likely, on the balance of probabilities than other hypotheses, is, as s 31 of the LAA clearly contemplates, a matter for determination at trial.

[27] The appellant also relies on the decision of this Court in *Reeves v Thomas Borthwick & Sons (Australia) Pty Ltd*[7] to support its view of the dicta of Clarke JA in *Broken Hill Pty Co Ltd v Waugh*.[8] A close study of the reasons of this Court in *Reeves* shows that they do not sustain the appellant's argument, and indeed, that the Court was careful not to endorse a contention in the terms now advanced by the appellant. In *Reeves*, the Court said:[9]

> "As can be seen, s 31(2) applies to a person 'claiming to have a right of action'. However, in order to attract a favourable exercise of the discretion conferred by the subsection, it is necessary that both of the matters specified in paras (a) and (b) should appear. In the present case, the effect of the judge's finding was that in Dr White's opinion the 1991 incident had 'possibly' had a lasting effect on the plaintiff's spinal condition; that it was this 'lasting effect' that was 'a material fact of a decisive character relating to the right of action'; and that it was a fact which was not within the plaintiff's knowledge or means of knowledge until he found out about it from Dr White's report. That being so, it was submitted on appeal that the plaintiff's application ought to have failed because, on the judge's finding, the 1991 incident was no more than a possible cause of the plaintiff's back condition, and so was incapable of constituting a 'material fact' for the purpose of s 32(2)(a): cf *Broken Hill Proprietary Company Ltd. v Waugh* (1988) 14 NSWLR 360, 369, where Clarke JA said that:
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> > 'the possibility of the occurrence of negligence, or the possibility of a causal nexus, is not sufficient of itself to qualify as a material fact relating to a cause of action ...'.
>
> The defendant's argument on appeal assumed that a person who applies for an extension is bound under s 32(2)(a) to prove affirmatively both that a material fact existed and that it was outside his means of knowledge at the relevant time; and consequently that the application to extend time must fail unless the material fact is, on the balance of probabilities and not as a mere possibility, proved to have existed. Another and not implausible approach to the subsection is that the present question arises under s 31(2)(b), which requires an applicant for an extension to show that there is 'evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation'. As to that, Macrossan CJ has observed that it is 'probably accurate enough to say that an applicant will meet the requirements imposed by s 31(2)(b) if he can point to

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7 [1995] QCA 339; Appeal No 96 of 1995, 11 August 1995.

8 (1988) 14 NSWLR 360.

9 [1995] QCA 339; Appeal No 96 of 1995, 11 August 1995 at [7] - [11].

> the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to provide his case'. See *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 - 435.
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> If the test propounded by Macrossan CJ is applied, then the plaintiff in this instance has failed to satisfy it. The opinion of Dr White, on which the primary judge acted, was that it was no more than possible that the incident in 1991 had a lasting effect on the condition of the plaintiff's back. His opinion to that effect is related to the issue of causation of the injury and as such is something which the plaintiff would have to establish at trial. Merely proving at trial that the 1991 incident was a possible cause of the plaintiff's prevailing back condition would, even if it were not opposed by any other evidence, not suffice to prove his case. He would need to establish that element of his cause of action on the balance of probabilities. Dr White's opinion would, on the view which the learned judge formed of it below, not satisfy that requirement in para (b) of cl 31(2).
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> It is, however, probably not helpful in a case like this to consider the requirements of paras (a) and (b) of s 31(2) in isolation from each other. Section 31(2)(a) requires that it be shown that 'a material fact of a decisive character relating to the right of action' was not within the means of knowledge of the applicant. Section 30(b) explains that material facts relating to a right of action are of a decisive character only if a reasonable person knowing those facts, and having taken appropriate advice, would regard them as showing:
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> > '(i) that an action on the right of action would ... have a reasonable prospect of success ...'.
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> Knowing that Dr White considered that the present disabled condition of the plaintiff's back was 'possibly' caused by the 1991 incident would not lead a reasonable person to regard it as showing that an action on any right of action which the plaintiff might possess would have a reasonable prospect of success. It would, on the contrary, lead or tend to the conclusion that the plaintiff's prospect of success in an action against the defendant was, on the material presented in support of the application, slender.
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> It is not a function of s 31(2) to enable such an action to be instituted or prosecuted when, quite apart from any defence of limitation that may be raised, it will probably not succeed. In consequence, the plaintiff's application to extend time ought not to have been granted."

The importance of this passage for present purposes is the endorsement of an approach which does not involve the consideration of the "requirements of para (a) and para (b) of s 31(2) in isolation from each other". It is by considering these requirements together that the courts can ensure that s 31(2) is not allowed to facilitate the prosecution of hopeless cases.

[28] As to s 31(2)(b) of the LAA, in *Broken Hill Pty Co Ltd v Waugh*[10] Clarke JA, discussing the equivalent provision in New South Wales, said:

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[10] (1988) 14 NSWLR 360 at 371 - 372.

> "In this respect attention should be directed to the precise words of the subsection. They do not lay down as a condition a requirement that there be evidence to establish conclusively, or even on the probabilities, the cause of action. All the words of the subsection require is that there is evidence available to establish the cause of action.
>
> According to well recognised principles where a plaintiff, who has sued multiple defendants one or more of whom may be liable, shows prima facie that at least one defendant may be responsible, the court is bound to hear the whole of the evidence before entertaining submissions by any other defendant that no case has been established against him. This is so even if the plaintiff has not called any evidence demonstrating the fault of the particular defendant.
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> The rationale of the rule, as explained in *Menzies v Australian Iron & Steel* (1952) 52 SR (NSW) 62; 69 WN (NSW) 68, is that if the rule were otherwise the defendant against whom a prima facie case was shown might escape liability by addressing evidence to the effect that the defendant against whom the case had been dismissed was the party who was actually at fault. Indeed that is what occurred in *Hummerstone v Leary* [1921] 2 KB 664, the case cited in *Menzies*. Obviously that result would be inimical to the interests of justice."

[29] When s 31(2)(b) of the LAA speaks of "evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation", it is, as was explained in *Wood v Glaxo Australia Pty Ltd*[11] by Macrossan CJ, referring to "the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his case".

[30] As to the second horn of the dilemma which the appellant propounded in relation to its first ground of attack on the decision below, there was, in my view, a sufficient case shown by the plaintiff to satisfy s 31(2)(b) of the LAA.

[31] The plaintiff is able to rely on the circumstance that the defendant has pleaded as a fact that the bale shifted during the journey from Moree to Rocklea. As the appellant concedes, the plaintiff is entitled to rely upon these allegations in the defendant's pleading for the purposes of his application under s 31(2)(b) of the LAA.[12] In my opinion, the plaintiff is also entitled to rely upon the pleaded allegations for the purposes of s 31(2)(a) of the LAA. The plaintiff was entitled to take the view that this allegation was made responsibly upon instructions which were reliable. Further, the inference that the load shifted during the course of the journey from Moree to Rocklea, rather than between Rocklea and Hemmant, is reasonably compelling as a matter of common sense having regard to the great distance travelled on open roads as opposed to what was probably more sedate progress over a shorter distance within the built up area around Brisbane.

[32] I turn then to the appellant's second ground of attack on the decision below, viz, that the causal nexus between the driving and the falling of the bale was within the means of knowledge of the plaintiff. The appellant invited us to proceed on the

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11 [1993] QCA 114 at [7]; [1994] 2 Qd R 431 at 434 - 435.

12 See *Dwan v Farquhar* [1988] 1 Qd R 234 at 247; *Horne v Commissioner of Main Roads* [1991] 2 Qd R 38 at 44 - 45.

basis that the respondent should reasonably have ascertained that the load may have shifted on the journey from Moree to Rocklea or must be taken to have done so. In my view, this invitation should be rejected. There is no reason for the plaintiff to have been concerned with that possibility. It is now a matter of interest to the parties only because of the terms of s 5 of the MAIA and the complexities of the relationship between the MAIA and the *WorkCover Queensland Act* 1996 (Qld). The terms of s 5 of the MAIA are apt to give rise to subtle arguments of law, or mixed fact and law.

[33] The MAIA provides relevantly by s 5:

> "**5 Application of this Act**
>
> **(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;
>
> … 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."

[34] Where the MAIA applies to a personal injury, the mandatory requirements of Part 4 of the MAIA, in which s 37 and s 39 are to be found, must be observed if a claim for damages for that injury is to be allowed to proceed. In the present case, the plaintiff was bound to observe those requirements only if the injury which he suffered was a result of the driving of "the trailer hauled by the Kenworth prime mover" and was "caused by a wrongful act or omission in respect of the" trailer by the first third party.

[35] The expression "in respect of" is apt to convey a broad range of connections; but the context in which the expression is used may indicate the level of connection relevant to the particular use of the expression. In *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*[13] Taylor J, speaking of the similar expression "relating to", said:

> "There can be no doubt that the expression 'relating to' is extremely wide but it is also vague and indefinite. Clearly enough it predicates the existence of some kind of relationship but it leaves unspecified the plane upon which the relationship is to be sought and identified. That being so all that a court can do is to endeavour to seek some precision in the context in which the expression is used. With this in mind it may be said with some certainty that an examination of the language of the exempting provision shows that it does not admit of its application to an instrument merely because it makes a reference to the existence of a relationship of master and servant between the parties to it, or still less, because it refers to the existence of a master and servant relationship between persons who are not parties to it. It is, I think, not open to argument that 'relating to', in the context in which it appears, is equivalent to 'referring to' and the 'relationship' must be based upon some more substantial ground."

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[13] (1961) 105 CLR 602 at 620.

[36] In *Technical Products Pty Ltd v State Government Insurance Office (Qld)*[14] Brennan, Deane and Gaudron JJ said:

> "The words 'in respect of' have a very wide meaning. Indeed, they have a chameleon-like quality in that they commonly reflect the context in which they appear. The nexus between legal liability and motor vehicle which their use introduces in s 3(1) is a broad one which is not susceptible of precise definition. That nexus will not, however, exist unless there be some discernible and rational link between the basis of legal liability and the particular motor vehicle. The point is well made in the judgment of Connolly J (with whom Andrews CJ and Thomas J concurred) in the Full Court of the Supreme Court in the present case ((1988) 5 ANZ Insurance Cases 75,436 at p 75,437):
>
> > 'If the liability of the respondent in this case is to be described as being in respect of the trailer, there must, in my opinion, be more than the mere presence of the trailer at the scene. As McPherson J observed in *Tonga v John Holland (Construction) Pty Ltd* (reported as *SGIO (Qld) v Workers' Compensation Board (Qld)* ((1987) 4 ANZ Insurance Cases 74,893, at p 74,895), *Stevens v Nudd* [1978] Qd R 96 and *Boath v Central Queensland Meat Export Co Pty Ltd* [1986] 1 Qd R 139 may be taken as establishing that it is not sufficient, in order to satisfy the requirement that the person entitled to the benefit of the cover be 'legally liable ... in respect of such motor vehicle', that there be no more than a connexion or relation in time or sequence between the motor vehicle and events which in law give rise to the liability. What is required is that there be a relationship between the motor vehicle and the very act or omission which gives rise to that liability.'"

[37] Apart from the appellant's concession referred to above, it might be argued that the shifting of the load in the course of the journey from Moree to Rocklea was not a fact material to the plaintiff's right of action against the third parties. Similarly, it might be argued that, having regard to the history of motor vehicle accident insurance legislation in Queensland and to the context of s 5(1) of the MAIA, the collocation of s 5(1)(b) with s 5(1)(a) has the effect, that when s 5(1)(b) speaks of a wrongful act or omission "in respect of the motor vehicle", it is speaking of a wrongful act or omission in respect of those matters concerning the motor vehicle referred to in s 5(1)(a). In other words, so the argument might go, the wrongful act or omission referred to in s 5(1)(b) must relate directly to one or more of the matters referred to in s 5(1)(a)(i) - (iv) of the MAIA.[15]

[38] If this argument is correct, then the plaintiff's attempt to access the CTP insurance must fail, as would the defence raised by the defendant in reliance upon the plaintiff's failure to observe the requirements of the MAIA. This argument was not

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14 (1989) 167 CLR 45 at 47 - 48.

15 Cf *Purt v State of Queensland* [2003] QCA 503; [2004] 1 Qd R 663; *Brew v WorkCover Queensland* [2003] QCA 504; [2004] 1 Qd R 621; *Palmer v Harker Transport Pty Ltd* [2003] QCA 513; (2003) 40 MVR 166.

advanced for the appellant and so it is unnecessary to say any more about the point save to say that, for present purposes, the requirements of s 5 of the MAIA, whatever in truth they may be, cannot be relied upon to show that the possibility of the shifting of the bale on the journey from Moree to Rocklea was a matter within the plaintiff's means of knowledge prior to the delivery of the defendant's amended defence. The plaintiff had no occasion to turn his mind to the question whether the bale shifted during the journey from Moree to Rocklea.[16] His complaint was one of negligent loading and inspection by the defendant's servants and agents who included the first third party. He did not seek to make any allegation of negligent driving against the first third party. Even now, neither the plaintiff nor the defendant are minded to make such an allegation against the first third party. Further it is to be emphasized that, for the purposes of s 30(c)(ii) of the LAA:

> "There is no requirement to take 'appropriate advice' or to ask appropriate questions if in all the circumstances it would not be reasonable to expect the plaintiff to do so."[17]

[39] In my view, there was no reason to think that the plaintiff, acting reasonably, should have turned his mind to the possibility that the errant bale shifted while in transit, and so came to injure him, before the defendant's amended pleading sought to characterize the incident in which he was injured as a "motor vehicle accident". Further, I reject the appellant's submission that it should be inferred that the plaintiff actually turned his mind to these matters. There is simply no basis in the evidence for such an inference.

[40] Finally, I should note that the appellant also conceded the plaintiff's failure to comply with the mandatory requirements of the MAIA in relation to the pursuit of his motor vehicle accident claim does not mean that the plaintiff could not meet the requirements of s 31(2)(b) of the LAA because his right of action would be denied by a defence other than the expiration of the limitation period.[18]

Conclusion

[41] I would dismiss the appeal and order that the appellant pay the respondent plaintiff's costs of the appeal to be assessed on the standard basis.

[42] **PHILIPPIDES J:** I agree for the reasons outlined by Keane JA that the appeal should be dismissed. Given the applicability of the MAIA was the matter of concession, I make no observations as to the ambit of s 5(1) of the MAIA.

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16 See *Royal North Shore Hospital v Henderson* (1986) 7 NSWLR 283 at 298 - 299.

17 *Healy v Femdale Pty Ltd* [1993] QCA 210; Appeal No 37 of 1992, 9 June 1993 at [6].

18 See *Horinack v Suncorp Metway Insurance Limited* [2000] QCA 441; [2001] 2 Qd R 266.