SUPREME COURT OF QUEENSLAND

CITATION:	*Rigney v Littlehales & Ors* [2005] QCA 252
PARTIES:	**IRENE FLORENCE RIGNEY** (plaintiff/applicant/appellant) **v** **BRIAN LITTLEHALES** (first defendant) **DARREN JOHN THOMAS** (second defendant) **NRMA INSURANCE LIMITED** ACN 000 016 722 (third defendant/respondent)
FILE NO/S:	Appeal No 11267 of 2004 DC No 1417 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2005
JUDGES:	McMurdo P, Jerrard JA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted** **2. Appeal allowed** **3. The applicant is to pay the respondent's costs of the appeal to be assessed** **4. The order made in the District Court on 8 December 2004 is set aside and instead it is ordered that the application be dismissed with costs to be assessed for the reasons given by this Court**
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – RISKS INSURED – LIABILITY "IN RESPECT OF" MOTOR VEHICLES – applicant injured when Brisbane City Council bus in which she was travelling collided with a pedestrian – respondent compulsory third party insurer of bus under *Motor Accident Insurance Act* 1994 (Qld) – applicant applied for a declaration the pedestrian was an insured person under s 5(1)(b) of the Act claiming the collision was contributed to or

caused by the pedestrian's negligence – respondent opposed application contending it was premature and could not be summarily decided in the absence of findings on all relevant facts at trial – no appearance entered by pedestrian – primary judge heard application on its merits – application refused on the basis there was no rational and discernible link between the pedestrian and the bus – whether in the circumstances primary judge correct to summarily determine application – whether issue should have been determined after all relevant findings of fact had been made at trial

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – INTERLOCUTORY ORDERS AND JUDGMENTS – primary judge's order appropriate – reasoning supporting primary judge's order wrong – whether substantial justice would result if leave to appeal refused

Motor Accident Insurance Act 1994 (Qld), s 5(1)(b)

Boath v Central Queensland Meat Export Co Pty Ltd [1986] 1 Qd R 139, cited
Curtain Bros (Qld) Pty Ltd v FAI General Insurance Co Ltd [1995] 1 Qd R 142, considered
Megaw v Suncorp Metway Insurance Ltd [2002] 1 Qd R 499, considered
Rich v CGU Insurance Ltd (2005) 79 ALJR 856, applied
Suncorp Insurance and Finance v Workers' Compensation Board of Queensland [1990] 1 Qd R 185, cited
Technical Products Pty Ltd v State Government Insurance Office (Q) (1989) 167 CLR 45, applied
Westpac Banking Corporation v Klef Pty Ltd [1998] QCA 311; Appeal No 8204 of 1998, 16 October 1998, applied

COUNSEL: R J Lynch for the applicant/appellant
S C Williams QC for the respondent

SOLICITORS: McInnes Wilson for the applicant/appellant
Sparke Helmore for the respondent

[1] **McMURDO P:** Ms Rigney (the applicant plaintiff) was injured when the Brisbane City Council bus in which she was travelling, driven by Mr Littlehales (the first defendant) collided with a pedestrian, Mr Thomas (the second defendant) in Melbourne Street, South Brisbane, near the Cultural Centre. NRMA Insurance Ltd ("NRMA") (the third defendant and respondent to this application) is the compulsory third party insurer of the bus under the *Motor Accident Insurance Act* 1994 (Qld) ("the Act").

[2] Ms Rigney commenced an action against Mr Littlehales, Mr Thomas and NRMA in the District Court for damages in negligence. She applied on 7 July 2004 to a District Court judge for a declaration that Mr Thomas was an insured person under the Act. Her application was adjourned so that Mr Thomas, who has not entered an

appearance in the action, could be served with the material relating to the application. Ms Rigney's application was heard on 8 December 2004. Mr Thomas did not appear but Ms Rigney has not applied for judgment by default against him. NRMA and Mr Littlehales (who had common legal representation) opposed the application on the basis that it was premature and could not be summarily decided in the absence of findings on all relevant facts at trial. His Honour rejected that contention and heard Ms Rigney's application for a declaration on its merits but then refused it with costs. Ms Rigney now applies for leave to appeal from that decision under s 118(3) *District Court of Queensland Act* 1967 (Qld).

The relevant provisions of the Act

[3] The objects of the Act relevantly include establishing a basis for assessing the affordability of insurance under the statutory insurance scheme and keeping the costs of insurance at a level the average motorist can afford;[1] encouraging the speedy resolution of personal injury claims resulting from motor vehicle accidents;[2] and promoting measures directed at eliminating or reducing causes of motor vehicle accidents and mitigating their results.[3]

[4] The term "insured person" is defined relevantly under s 4 of the Act as: "a person who is insured under a CTP[4] insurance policy … ."

[5] Part 3 of the Act[5] provides for compulsory insurance of motor vehicles used on a road or in a public place. Section 23(1) in Pt 3, Div 2 of the Act provides that a policy of insurance in terms of the schedule comes into force when a motor vehicle is registered or the registration is renewed. Section 2 of the schedule states that:

> "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."

[6] Section 5 of the Act relevantly provides:

> "(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 –
>
> …
>
> (ii) a collision, or action taken to avoid a collision, with the motor vehicle; or
>
> … 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.
>
> …"

The issue

[7] It is common ground that Ms Rigney's injury was within s 5(1)(a) of the Act and that if, under s 5(1)(b) of the Act, her injury was caused wholly or partly by Mr

---

1 The Act, s 3(aa).
2 Above, s 3(c).
3 Above, s 3(f).
4 "CTP" is an abbreviation of "compulsory third-party": see s 4 of the Act.
5 Section 20-s 30.

Thomas' wrongful act or omission in respect of the bus driven by Mr Littlehales, then Mr Thomas was an insured person under the Act.

[8] The words "in respect of" are wide in meaning but they require a nexus between the wrongful act or omission causing injury and the motor vehicle. This connection will only exist if there is a discernible and rational link between Mr Thomas' wrongful act or omission and the bus driven by Mr Littlehales. It is not enough that there is connection or relation in time or sequence between the motor vehicle and the events giving rise to legal liability; there must be a relationship between the motor vehicle and the very act or omission which gives rise to that liability. In most cases where the injury is "caused by, through or in connection with" the relevant vehicle this requirement will be satisfied but in some cases the critical question will be whether there is a discernible rational relationship between the relevant legal liability for the injury and that vehicle: *Technical Products Pty Ltd v State Government Insurance Office (Q)*.[6] This case raises that critical question.

The primary judge's reasons

[9] Ms Rigney claimed in her amended statement of claim that Mr Thomas was an insured person under the Act and that the collision with the bus was contributed to or caused by his negligence, particulars of which included his attempting to cross the roadway when it was unsafe to do so and failing to exercise proper care when attempting to cross the roadway, inferentially because of the imminent approach of the bus driven by Mr Littlehales. Mr Littlehales and NRMA in their joint defence denied that Mr Thomas was an insured person under the Act and claimed that Ms Rigney was injured solely as a result of Mr Thomas' actions, particulars of which included stepping out in front of the bus driven by Mr Littlehales when it was unsafe to do so.

[10] On the material before his Honour, it was not certain that the facts relevant to determining the critical question were undisputed. Understandably, his Honour did not attempt to resolve such factual issues in an interlocutory application. Despite NRMA's opposition, his Honour considered that on the evidence before him he could determine the application because it was unlikely there would be any variation to the facts even if the matter went to trial. In reaching this conclusion, his Honour seems to have relied on Mr Thomas' non-appearance and on Mr Littlehales' statement taken by an NRMA investigator to the following effect. Mr Littlehales was driving his bus near the Cultural Centre, South Brisbane; he had been watching Mr Thomas leaning against a pole on the median strip of Melbourne Street; the traffic light facing Mr Littlehales' bus changed to green; he drove across the intersection and into the bus lane at no more than 10 kilometres per hour; Mr Thomas stepped off the median strip straight in front of the bus without looking; Mr Littlehales swerved in an attempt to avoid him but Mr Thomas' head or shoulder hit and broke the bottom left hand corner of the bus windscreen; Mr Littlehales immediately stopped the bus less than a metre past the point where Mr Thomas had been standing on the median strip; there were no skid marks on the road; Ms Rigney, an elderly female passenger in the bus, was thrown forward when Mr Littlehales braked; she suffered a head injury and was taken to hospital by ambulance. Mr Littlehales stated that the incident was filmed on video cameras situated in the area where the accident occurred but no videotape evidence was placed before his Honour. NRMA's investigator also took statements from other

---

6 (1989) 167 CLR 45, Brennan J (as he then was), Deane, Gaudron JJ, 47.

witnesses whose accounts were not inconsistent with that of Mr Littlehales, including a statement from Ms Suffren, a nurse who had been attending a conference at the Convention Centre shortly before the accident. She did not see the collision but assisted Mr Thomas immediately after he was injured. She noted that he had been hit badly in the head; she described the back of his head as "pulp"; he was displaying symptoms consistent with a head injury. Ms Rigney, in her Notice of Accident Claim Form under the Act, stated that she did not see the collision between Mr Thomas and the bus which resulted in her injury.

[11] His Honour determined, apparently on those facts, that there was no rational and discernible link between Mr Thomas' wrongful act and the bus; whilst Mr Thomas owed a duty of care to the bus driver, Mr Littlehales, and to the passenger, Ms Rigney, he had no duty of care in respect of the bus; it followed that Mr Thomas' negligence as a pedestrian was not in respect of the bus. For these reasons, his Honour dismissed Ms Rigney's application.

Was the primary judge correct in refusing the application?

[12] It may sometimes be possible to summarily determine whether a defendant is an insured person under s 5(1)(b) of the Act, for example, where the pleadings do not allege a nexus between the wrongful act or omission and the motor vehicle as, for example, in *Megaw v Suncorp Metway Insurance Ltd*.[7]

[13] Although we have not been referred to any other relevant decisions as to the interesting question of the meaning of the words "in respect of" in s 5(1)(b) of the Act, there have been decisions as to the meaning of those words in the sub-section's similarly worded predecessor, s 3(1) *Motor Vehicles Insurance Act* 1936 (Qld) (repealed). In considering the meaning of "in respect of" in the repealed s 3(1), this Court noted in *Curtain Bros (Qld) Pty Ltd v FAI General Insurance Co Ltd*[8] that sometimes seemingly small factual differences have produced opposite results, for example, compare *Boath v Central Queensland Meat Export Co Pty Ltd*[9] and *Suncorp Insurance and Finance v Workers' Compensation Board of Queensland*.[10] For that reason, unless the relevant facts are agreed by all affected parties or are very clear, ordinarily the issue as to whether a plaintiff's injury is caused wholly or partly by a wrongful act or omission in respect of the relevant motor vehicle under s 5(1)(b) of the Act should not be determined summarily: *Rich v CGU Insurance Ltd*.[11]

[14] If and when Ms Rigney's claim against Mr Littlehales, Mr Thomas and NRMA proceeds to trial, the trial judge may not accept all of Mr Littlehales' evidence. Mr Thomas may decide to defend the claim and give or call evidence contrary to that of Mr Littlehales. The video tapes if tendered may record a different sequence to that described by Mr Littlehales. The judge may find facts different from those accepted by the learned primary judge in this application; this could affect whether Mr Thomas is found to have committed a wrongful act or omission and, if so, whether there is a discernible, rational relationship between that act or omission, the bus and Ms Rigney's injuries. NRMA correctly identified this concern to his Honour and opposed the application. Unfortunately, his Honour did not accede to that

---

7 [2002] 1 Qd R 499, 500-501.
8 [1995] 1 Qd R 142, 144.
9 [1986] 1 Qd R 139.
10 [1990] 1 Qd R 185.
11 (2005) 79 ALJR 856, 859, [18].

submission and refused the application for a declaration, not because it should have been decided at trial but because he considered that under s 5(1)(b) of the Act there was no rational and discernible link between Mr Thomas' wrongful negligence as a pedestrian and the bus. His Honour should not have reached that conclusion summarily in this case. Whilst that order stands, Ms Rigney cannot pursue her contention that Mr Thomas is an insured person under s 5(1)(b) of the Act, an issue which here should only be determined after all relevant findings of fact have been made at a trial.

[15] An application for leave to appeal from an interlocutory judgment will usually be refused unless the decision from which it is sought to appeal is attended with sufficient doubt to warrant its being reconsidered and also that, accepting it is wrong, substantial injustice would result if leave were refused.[12] Although his Honour's order refusing the application was appropriate, it should have been made because Ms Rigney's application was premature and should be determined at trial after all relevant facts have been determined. If the order based on his Honour's reasons stands, Ms Rigney may be estopped from pursuing that issue at trial, with the risk of substantial injustice to her.

[16] The application for leave to appeal should be granted and the appeal allowed. As the applicant was successful only on a ground supported by the respondent at first instance and mistakenly rejected by the primary judge, the applicant should pay the respondent's costs of the appeal to be assessed. The order made at first instance should be set aside because the reasoning supporting that order was wrong. The application to the primary judge should nevertheless be refused with costs to be assessed but for the reasons I have earlier given.

ORDERS:

1. Application for leave to appeal granted.

2. Appeal allowed.

3. The applicant is to pay the respondent's costs of the appeal to be assessed.

4. The order made in the District Court on 8 December 2004 is set aside and instead it is ordered that the application be dismissed with costs to be assessed for the reasons given by this Court.

[17] **JERRARD JA:** In this proceeding, I have had the advantage of reading the reasons for judgment of the President, and respectfully agree with those reasons, and with the orders proposed by Her Honour. I do so particularly because the respondent maintained the submission that the matter should not have been determined summarily, and that this Court should not continue to deal with the matter on a summary basis.

[18] **MUIR J:** I agree with the reasons of McMurdo P and with the orders proposed by her.

---

12 *Westpac Banking Corporation v Klef Pty Ltd* [1998] QCA 311; Appeal No 8204 of 1998, 16 October 1998.