SUPREME COURT OF QUEENSLAND

CITATION:	*Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269
PARTIES:	**NICHOLAS GORDON BYRNE** (plaintiff) **v** **PEOPLE RESOURCING (QLD) PTY LTD** **(ABN 78 131 732 888)** (first defendant) and **THIESS JOHN HOLLAND** **(ABN 17 438 477 568)** (second defendant) **THIESS JOHN HOLLAND** **(ABN 17 438 477 568)** (plaintiff by counterclaim) **v** **PEOPLE RESOURCING (QLD) PTY LTD** **(ABN 78 131 732 888)** (first defendant by counterclaim) and **WORKCOVER QUEENSLAND** (second defendant by counterclaim) and **NICHOLAS GORDON BYRNE** (third defendant by counterclaim)
FILE NO/S:	7001 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	29 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2014
JUDGE:	Carmody CJ
ORDER:	**The parties to exchange and file written submissions as to the terms of the declaration and costs.**
CATCHWORDS:	INSURANCE – workers compensation indemnity insurance – Non-employer joint tortfeasor – Judgment by injured worker against employer (sub-contractor) – Judgment by injured worker against non-employer tortfeasor (head-contractor) – Contractual indemnity between head and sub

contractors – Liability between contractors as joint or concurrent tortfeasors and co-defendants – Whether policy responds to contractual indemnity as well as assessed or agreed contribution to tortious harm

Workers Compensation and Rehabilitation Act 2003 (Qld), s 8, s 10, s 383, s 384

Erdelyi v Santos and Ors (2001) 10 NTLR 195, considered
Gordian Runoff Ltd v Heyday Group Ltd (2005) NSWCA 29, not followed
Jennings Constructions v Workers Rehabilitation and Compensation Corporation (1998) 71 SASR 465, considered
Multiplex Constructions Pty Limited v Irving and Ors [2004] NSWCA 346, distinguished
Nigel Watts Fashion Agencies Pty Ltd v GIO General Insurance Ltd (1995) 8 ANZ Ins Cases ¶61-235, distinguished
Rheem Australia Ltd v Manufacturers' Mutual Insurance Ltd [1984] 2 NSWLR 370, considered
State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd (1969) 123 CLR 228, applied

COUNSEL:	R M Treston QC with G O'Driscoll for the first defendant, first defendant by counterclaim. R J Douglas QC with D J Schneidewin for the second defendant, plaintiff by counterclaim. W Sofronoff QC with K Holyoak for the second defendant by counterclaim.
SOLICITORS:	MacDonnells Lawyers for the first defendant, first defendant by counterclaim Barry Nilsson for the second defendant, plaintiff by counterclaim Kaden Borris for the second defendant by counterclaim.

[1] This is a contested workers compensation proceeding. The parties to the dispute are People Resourcing (Qld) Pty Ltd ("**PRQ**"), the insured employer; Thiess John Holland ("**TJH**"), a contractually indemnified co-tortfeasor; and WorkCover.

[2] The injured PRQ worker's claim was settled prior to the hearing. TJH and WorkCover each paid 50 per cent of $450,000 in agreed common law damages in interim satisfaction of the terms of a consent judgment against PRQ and TJH.

[3] At issue is the extent of WorkCover's indemnity obligation. Under the *Workers Compensation and Rehabilitation Act 2003* (Qld) ("**WCRA**") WorkCover must indemnify PRQ for all damages it becomes legally liable to pay a worker for injury independently of the WCRA scheme.[2] Indemnity, in the context of insurance, is a

[2] *Workers Compensation and Rehabilitation Act 2003* (Qld) ss 8, 10, 383(1) and 384.

promise by the insurer to keep the insured "harmless against loss" or to "make good a loss suffered".[3]

[4] PRQ and TJH admit liability and agree that they were equally negligent. This means that at common law each of them became liable to the plaintiff worker for the whole of the damage when his cause of action accrued, that is, at the time of injury.[4] They are regarded as jointly and severally liable to the plaintiff for the damage *in toto*.[5] That is to say, the entire amount of any judgement is recoverable by the plaintiff against either one but not against each or both of them irrespective of how fault is apportioned as between themselves.[6]

The rival contentions

[5] PRQ says WorkCover should indemnify it for the $225,000 it has to repay to TJH in keeping with its agreement to do so because its common law liability to its worker as a co-tortfeasor is for the "full measure" of the damages.[7]

[6] WorkCover denies liability to indemnify PRQ beyond its agreed degree of contributory negligence on the basis that the balance represents an outstanding liability to TJH (as a contract debtor) rather than the plaintiff.[8] The insurer concedes that PRQ has become liable to pay damages in solidum to a worker but contends that the only recoverable loss within the WRCA is PRQ's 50% contribution to the injury as a co-tortfeasor and does not include the self-imposed commitment to indemnify TJH. This is said to be because PRQ's common law liability to pay damages to the worker was extinguished when the judgment was paid out (albeit on an interim basis) by WorkCover and TJH. Apart from its proportionate liability for tortious fault, PRQ's only remaining loss is the contract-based indemnity to TJH. Neither that liability nor the related loss are covered by the policy.[9]

[7] Alternatively, WorkCover submits that even if PRQ was still technically liable to both the worker and indemnified non-employer for the full amount of damages its legal liability as insurer would (and should) be no greater than the extent of PRQ's loss arising out of the worker's claim. That loss is to be calculated as PRQ's common law liability less what TJH would have been required to contribute to the judgment sum as a co-tortfeasor if there was no collateral indemnity.

[8] How workers compensation insurance is affected by a collateral agreement to refund a third party co-tortfeasor raises an important question of legal principle. Equally tenable but conflicting, even opposite, conclusions have been reached in Australia depending on whether the determinant chosen is the employer's legal liability vis-à-vis the injured worker, the nature of that liability (tortious or contractual), or the employer's loss qua employer (the agreed or assessed contribution).

Nigel Watts

---

3 *Yeoman Credit Limited v Latter* (1961) 1 WLR 828, 831.
4 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346, [59]-[60].
5 *Oroz v Hansen Yuncken Pty Ltd and Anor* [2006] NSWSC 737 per Simpson J at [29].
6 See *Oxley County Council v MacDonald and Ors* [1999] NSWCA 126 at [51-[54]; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* (2013) 247 CLR 613, 624 [10].
7 Transcript, 1-29 [1]-[5].
8 Transcript, 1-28 [25]-[30].
9 Cf. *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 per Ipp JA at 69-70.

[9] In *Nigel Watts Fashion Agencies Pty Ltd v GIO General Insurance Ltd* ("***Nigel Watts***")[10] the New South Wales Court of Appeal upheld the compensation insurer's refusal to indemnify an employer's contractual liability to protect a non-employer co-tortfeasor against negligence claims. The injured worker claimed against the non-employer but not the employer. The policy of insurance relevantly covered the employer for "any…amount in respect of…liability independently of the [workers compensation legislation] for…injury [to a worker]".[11]

[10] Kirby P (Mahoney and Handley JJA agreeing) held that the statutory indemnity extended to an employer's common law culpability to a "worker qua worker" but did not cover loss to a third party under contract. Although the employer's liability arose because of injury to a worker, it was really a liability to discharge a debt and not to pay damages for injury. The practical effect of this is that the amount an employer "becomes liable to pay" a worker for injury is no more than the dollar value of its apportioned tortious responsibility under contribution legislation. This in turn limits the indemnity cover required of the workers compensation insurer to the apportioned amount.

[11] If correctly decided, *Nigel Watts* is persuasive authority to the effect that similarly worded policies (such as WCRA's) do not cover an employer for voluntary indemnity obligations, at least, where the employer has not been found liable in tort. Despite criticism,[12] the ratio in *Nigel Watts* was followed in *Multiplex Constructions Pty Limited v Irving and Ors* ("***Multiplex***")[13] and is supported by more recent New South Wales Court of Appeal decisions.

Multiplex

[12] The non-employer defendant in *Multiplex* cross-claimed against the employer as both joint co-tortfeasor under contribution legislation and an indemnifier under a contract for a full refund of damages it had previously paid to the plaintiff worker.

[13] Santow and Ipp JJA agreed that workers compensation fund payouts should not (and do not) depend on "the adventitious fact of whether the worker elects to sue the employer, or some other joint or several tortfeasor."[14]

[14] Ipp JA accepted the principle that judgment against co-tortfeasors creates unitary liability and gives a worker enforcement rights beyond the employer's proportionate responsibility.[15] However, his Honour held that the unique nature of indemnity insurance meant that the employer's monetary loss arising from its tortious liability was the final determinant of the limits of statutory insurance cover and the ratio of *Nigel Watts* precluded the employer from recovering the loss arising under the contract claim from the insurer.[16] Consequently, the only common law component of that loss left after the non-employer defendant had paid out the plaintiff worker

---

10 (1995) 8 ANZ Ins Cases ¶61-235.

11 *Nigel Watts Fashion Agencies Pty Ltd v GIO General Insurance Ltd* (1995) 8 ANZ Ins Cases ¶61-235 at 75-640.

12 P Telford, "Nigel Watts is still in fashion" (2006) 21(4) ILB 57.

13 [2004] NSWCA 346.

14 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 per Santow JA at [23].

15 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 at [46], [66] and [67].

16 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 at [69] to [70], [75].

was the employer's 50 percent assessed contribution which the insurer had already paid.[17]

[15] Santow JA considered that only the employer's 50 percent contribution responsibility retained sufficient "employment character" to allow it to be paid out of the compulsory workers compensation scheme. The other 50 percent was "essentially contractual" and not something which the policy, properly construed, responded to.[18] His Honour regarded the employer's liability for the whole of the judgement sum as merely "contingent" until the non-employer co-tortfeasor paid its common law share of the judgement amount. Where the worker had been paid in full by the non-employer defendant, it would be "wholly artificial" to treat the employer as having a 100 percent common law liability, particularly "in the context of a policy of indemnity". Further, the indemnity cover was for liability qua employer only and consequently was not required to answer any more than the employer's "true loss" – in that case, 50 percent of the damages awarded.[19]

[16] In the High Court sequel, the indemnified co-tortfeasor was refused leave to appeal despite the employer's intervening bankruptcy depriving it of the practical benefit of the contractual indemnity,[20] with the result that the injured worker's "more or less arbitrary decision" to sue the non-employer instead of the employer imposed the whole burden of the judgement on it to the "exoneration" of the workers compensation insurer.[21]

Gordian Runoff

[17] The type of liability covered by the workers compensation insurer under the 1987 New South Wales workers compensation statute was next considered by the New South Wales Court of Appeal in *Gordian Runoff Ltd v Heyday Group Ltd* ("***Gordian Runoff***").[22] In contrast to *Nigel Watts* and *Multiplex*, the employer in *Gordian Runoff* was joined as a defendant but was insolvent at trial. There was no question that its 35 percent fault-based assessment was covered by a workers compensation policy. However, its claim for reimbursement of the amount payable to the non-employer for its 65 percent contribution was rejected.

[18] The appeal focused on whether, for indemnity purposes, the employer's liability to pay was equivalent to the worker's right to enforce 100 percent of the judgment against it or limited to its 35 percent tortious contribution. The insurer submitted that the answer should not depend on procedural differences so that, in the converse of *Multiplex*, it is worse off where the worker sues the employer to verdict than if he or she only sues a non-employer tortfeasor who then seeks contribution from the employer.[23]

---

17 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 at [72].

18 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 at [20].

19 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 at [21].

20 *Multiplex Constructions Pty Ltd v Royal & Sun Alliance Insurance Aust Ltd & Ors* [2006] HCATrans 19 (3 February 2006); High Court Bulletin Number 1 (2006).

21 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 per Ipp JA at [67].

22 [2005] NSWCA 29.

23 *Gordian Runoff Ltd v Heyday Group Ltd* [2005] NSWCA 29 per Tobias JA at [35] citing *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 per Ipp JA at [67] and Santow JA at [23].

[19] Tobias JA (Beazley and Santow JJA agreeing) applied the ratio in *Nigel Watts* and reasoning of Santow and Ipp JJA in *Multiplex*.[24] His Honour concluded that, notwithstanding the plaintiff worker's formal enforcement rights against all co-defendants, the employer's contractual obligation to indemnify the non-employer co-tortfeasor was a form of liability and loss outside the scope of the policy.[25] The indemnity could not be extended by private arrangement to include a non-employer's liability for its own negligence "unconnected with the worker's employment".[26]

[20] Tobias JA considered that there was no reason why *Multiplex* reasoning did not apply despite the employer's inclusion as a defendant.[27] His Honour went on to say:

> "54. The foregoing analysis does not depend on the whim of the worker as to whom he or she sues. It matters not that the worker sues both tortfeasors as in the present case or only the non-employer tortfeasor as in Multiplex. It matters not that the worker obtains a judgment for the full amount of his damages against whomever he sues or even that he enforces that judgment against only one of joint defendants. Where there is an employer as well as a non-employer tortfeasor, the only common law liability of the former to the worker is the share of the worker's modified common law damages for which the employer has been found to be responsible. That is the only loss which it has sustained and for which it has ultimately, in an employment context, "become liable" to pay for any injury to the worker within the meaning of clause 3(b) of the GIO policy. It has not "become liable" to pay the share of the non-employer tortfeasor: that is the responsibility of that party.
>
> 55. Although at one point I was concerned with the prospect of a worker suing a non-employer joint tortfeasor, obtaining judgment but then being unable to recover it due to that tortfeasor being either insolvent or uninsured, on reflection I can see no reason in principle why the employer's insurer, even absent any contractual indemnity between the tortfeasors, should be required to cover the liability to the worker of a non-employer tortfeasor merely because that tortfeasor is unable to pay its share of the judgment debt entered against it. The mere fact that the worker is entitled to enforce the judgment in the full amount against each of the employer and non-employer tortfeasors (where both are sued) cannot be allowed to extend the insurer's liability beyond that which, on its true construction, the policy is intended to cover, namely, the common law liability of the employer qua employer only." (underlining added)

---

24 *Gordian Runoff Ltd v Heyday Group Ltd* [2005] NSWCA 29 per Tobias JA at [49].

25 Ibid.

26 *Gordian Runoff Ltd v Heyday Group Ltd* [2005] NSWCA 29 per Tobias JA at [56].

27 *Gordian Runoff Ltd v Heyday Group Ltd* [2005] NSWCA 29 per Tobias JA at [53].

[21] In *Glynn v Challenge Recruitment Australia Pty Ltd* Giles JA did not comment adversely on the correctness of this opinion despite making critical remarks about other parts of Tobias JA's reasons.[28]

[22] According to Derrington in "Indemnities Outside the Policy", the "continuing thread of logic" found in the *Nigel Watts*, *Multiplex*, and *Gordian Runoff* trilogy, "provides a sound reference point for the resolution of" complications that arise from the intrusion of a contractual indemnity and "eliminates any error of distraction by the technical factors that may follow the [worker's] adventitious choice of remedy".[29]

[23] However, PRQ and TJH submit that whatever its "legal efficacy" in the NSW context,[30] *Gordian Runoff*:

(a) illegitimately introduces a form of de facto proportionate liability into the field of workers compensation claims in Queensland; and

(b) is contrary to strong High Court obiter dicta in *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* ("***Brisbane Stevedoring***") despite them otherwise being "on all fours".[31]

Brisbane Stevedoring

[24] *Brisbane Stevedoring* was neither cited nor considered in *Nigel Watts*. It was distinguished in *Multiplex* and unsuccessfully relied on in *Gordian Runoff*. A policy of work accident insurance issued under the 1916 statutory workers compensation scheme in Queensland protected the employer against "…all sums for which, *in respect of* injury to any worker … [the employer] may became legally liable by way of … damages arising under circumstances creating also, independently of this Act, a legal liability in the employer in respect of that injury".[32] The defendant employer had agreed to fully indemnify a negligent co-defendant for any loss and paid the full amount of judgement directly to the injured worker. It contended that its liability to the plaintiff worker for the whole judgment was a legal liability to pay by way of damages and thus its workers compensation policy indemnity was unaffected by the contractual indemnity.

[25] The trial judge in *Brisbane Stevedoring* apportioned tortious responsibility evenly between the employer and non-employer co-defendants and ordered the employer to indemnify the non-employer co-tortfeasor for the assessed damages and that the workers compensation insurer completely indemnify the employer against "…all sums payable…under the judgment" including the sum payable by the employer to the non-employer by way of indemnity for damages or contribution.

[26] The insurer appealed, first to the Full Court of the Supreme Court of Queensland and then to the High Court, arguing that the employer had become liable to the non-

---

28 *Glynn v Challenge Recruitment Australia Pty Ltd* [2006] NSWCA 203 at [25]-[33], at [68].

29 NSW AILA Paper "Indemnities Outside the Policy" (29 August 2006) by D K Derrington QC; cf *Gordian Runoff Ltd v Heyday Group Ltd* [2005] NSWCA 29 per Tobias JA at [35]; *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 per Ipp and Santow JJA at [23] and [67].

30 Outline of Argument of the Plaintiff by Counterclaim (Thiess John Holland) dated 27 August 2014; Transcript, 1-48 [19]-[21].

31 (1969) 123 CLR 228.

32 *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 per Barwick CJ at 233 (emphasis added).

employer via debt rather than damages and was therefore not covered for more than its 50 percent assessed contribution to the damages awarded to the injured worker.

[27] Barwick CJ (Windeyer J agreeing) considered that the defendant employer's payment of the whole judgement amount directly to the worker meant the issue of the contractual indemnity did not arise on the facts. Nonetheless, his Honour made it clear that, in his opinion, in a case such as that, and regardless of who paid the judgment or when, the non-employer co-tortfeasor's right to recover the full amount of a verdict for common law damages against an insured employer and the obligation to pay it constituted damages arising under circumstances creating a legal liability in the employer to pay damages in respect of the worker's injury and was therefore, covered by the Queensland scheme.[33]

[28] The employer's inability to reduce its own loss by calling on the co-tortfeasor for contribution (because of its contractual indemnity obligation) did not change the legal character of its liability or loss.[34] At no point did the employer, and thus the insurer, have a positive right to contribution.[35] The Chief Justice noted but did not examine the possibility of a different result if the employer was not sued by the worker to verdict (as, for example, in *Nigel Watts* and *Multiplex*).[36]

The legal liability to pay damages under WCRA

[29] The employer's legal liability in *Brisbane Stevedoring* was to pay damages "in respect of" the worker's injury. It is plain from a combined reading of s 8 and s 10 of the WCRA that PRQ's policy covers damages for which it became liable to pay *"to"* a worker *"for"*, not *"in respect of"*, injury. WorkCover argues that the term "in respect of" has a "larger" connotation and is of "wider import" in the context of injury insurance, having the effect of extending "…the ambit of liabilities ... for which the insurer must give indemnity"[37] to include a contingent liability derived from a contract (as well as the common law) whereas the narrower expression "for" does not.[38]

[30] PRQ contends that, consistently with *Brisbane Stevedoring*, its legal liability to pay damages under the consent judgment, including any indemnity due to TJH, is a liability for which it had become liable in damages to the worker for injury and, therefore, within the WorkCover policy. WorkCover, on the other hand, relies on the approach of Ipp and Santow JJA in *Multiplex* and Tobias JA in *Gordian Runoff* that the High Court decision was irrelevant in the New South Wales context and the

---

33 *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 per Barwick CJ at 240 (Windeyer J agreeing).

34 *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 per Barwick CJ at 239-240 (Windeyer J agreeing); per Kitto J at 245-246; per Owen J at 250-251; per Walsh J at 253-255.

35 *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 per Barwick CJ at 243 (Windeyer J agreeing); per Kitto J at 247; per Owen J at 251.

36 *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 per Barwick CJ at 240 (Windeyer J agreeing).

37 Cf. *Royston v McCallum* [2006] QSC 193 at [90], [98].

38 Outline of Argument of WorkCover Queensland filed 29 August 2014 at 9-11.

party invoking it "gain[s] no comfort" from it due to materially different policy provisions.[39]

[31] The phrase "liability…for any injury to" a worker was construed by Glass J in *Rheem Australia Ltd v Manufacturers' Mutual Insurance Ltd* to mean "liability to any person consequent upon or in respect of injury to" a worker and that the indemnity thus extended to a third party.[40] Applied to WCRA this construction would support a conclusion that *Nigel Watts* was wrongly decided but Ipp and Santow JJA in *Multiplex*[41] distinguished it on the facts.

[32] However, in *Jennings Constructions v Workers Rehabilitation and Compensation Corporation*[42] Doyle CJ expressed the view that exposing the 1986 South Australian compulsory worker's compensation fund to additional voluntary unfunded risks or indemnity liabilities incurred by employers for the benefit of non-employer third parties was unlikely to have been envisaged by Parliament.[43]

[33] Likewise, William J noted that workers compensation legislation:[44]

> "…is not concerned with obligations which are contractual in origin. The general words of the Act must be read in light of the nature, purpose and scope of the legislation. As a matter of construction a limitation must be placed upon the generality of the language…[if] WorkCover's risk is to be manageable."

[34] Although accepting, as in *Rheem*, that the phrase "liability…for any injury to" a worker meant *any* liability "consequent upon or in respect of" that injury Angel J rejected the employer's submission in *Erdelyi v Santos and Ors*[45] that the workers compensation insurer's indemnity liability extended beyond direct liability to the worker to include a contractual liability to a third party, whether a co-tortfeasor or not.[46] Preferring to follow *Jennings Constructions* reasoning, his Honour held:[47]

> "…the legislature…intended that the indemnity should be confined to the insurance of risk in respect of obligations compulsorily imposed by law upon the employer and not in respect of liabilities voluntarily assumed in contract."

[35] In *Brisbane Stevedoring*, by contrast, Barwick CJ said that the statutory nature of the workers compensation indemnity "…and the further fact that the provisions with respect to the policy form part of a statutory scheme of protection for [workers] against the possibility of an employer being unable to pay for the consequences of injury received in employment, would make it impossible … for the insurer to refuse to perform the promise to indemnity in full because of some action on the part of the

---

39 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 per Ipp JA at [41] and per Santow JA at [11]-[13]; *Gordian Runoff Ltd v Heyday Group Ltd* [2005] NSWCA 29 per Tobias JA at [31].

40 *Rheem Australia Ltd v Manufacturers' Mutual Insurance Ltd* [1984] 2 NSWLR 370 at 375.

41 *Multiplex Constructions Pty Limited v Irving and Ors* [2004] NSWCA 346 per Santow JA at [8]-[10] and per Ipp JA at [38]-[40]

42 (1998) 71 SASR 465.

43 *Jennings Constructions v Workers Rehabilitation and Compensation Corporation* (1998) 71 SASR 465 at 471.

44 *Jennings Constructions v Workers Rehabilitation and Compensation Corporation* at 490.

45 (2001) 10 NTLR 195.

46 *Erdelyi v Santos and Ors* (2001) 10 NTLR 195; cf Ipp JA in *Multiplex* [38]-[40].

47 *Erdelyi v Santos and Ors* (2001) 10 NTLR 195 at 202.

insured [employer] which reduced the benefit to the insurer of the right of subrogation" such as, for example, contracting away its contribution rights.[48] Clearly, the Chief Justice thought that in a worst case scenario it is better for the loss of subrogation rights to fall on the insurer rather than the worker.[49]

[36] The obvious disadvantage of this interpretation is that the extent of WorkCover's liability varies depending on whether an employer is joined as a co-defendant, added as a third party co-tortfeasor, or sued by another party solely in reliance on a contractual indemnity. Where, for instance, co-defendants are insolvent and the non-employer co-tortfeasor is uninsured the plaintiff worker would only be able to recover the value of the employer's proportionate responsibility for the injury.[50]

[37] However, the scope of a contract of insurance is determined by what a reasonable person, knowing the full context, would find the language used in the text of the document was intended to mean read in light of its purpose and objects. The ultimate goal is to give that intention practical effect.[51]

[38] Like its 1916 predecessor, WCRA establishes a statutory scheme of compulsory insurance for the benefit of workers injured in their employment. As Thomas JA noted in *Hawthorne v Thiess Contractors Pty Ltd*,[52] the scheme was intended, with few exceptions,[53] to be the sole avenue of claim against employers in respect of workers' injuries.[54] It is compulsory for every employer to insure against its legal liability for damages that WorkCover is authorised to indemnity, that is, be covered under the scheme by a statutory policy of insurance against injury sustained by the worker.[55]

[39] The main objects of the WCRA scheme which expressly aid the resolution of interpretation issues are stated in Part 2 and relevantly include in section 5:

- sub-section (2)(d) – that the employer's obligation to workers for employment injuries "…be covered against liability…*for damages* under a WorkCover insurance policy…"

- sub-section (4)(c) – the protection of employers by the scheme in relation to claims *for damages for worker's injuries*; and

- sub-section (5) – ensuring that the compulsory insurance against injury in employment not impose too heavy a burden on employers and the community to promote the State's interest in the continuing competitiveness of the industry.

[40] Sections 383(1) and 384 WCRA limit WorkCover's authority to the business of "accident insurance". Accident insurance is described in s 8 WCRA as "insurance by which an employer is indemnified against all amounts for which the employer

---

48 *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 at 242.

49 Cf. *Workers Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 652.

50 As in *Gordian Runoff Ltd v Heyday Group Ltd* [2005] NSWCA 29 at [32]-[33].

51 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 per Gleeson CJ at [22]; *Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40].

52 [2002] 2 Qd R 157.

53 For example, gratuitous services and punitive damages.

54 *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157 at [16].

55 *Workers Compensation and Rehabilitation Act 2003*, s 48.

may become legally liable, for injury sustained by a worker…for (b) damages. Damages is in turn defined in s 10(b) WCRA as **"**damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the…employer to pay damages to the worker." The only way of ensuring that the legislative intent is met is to determine the coverage of the statutory policy in line with *Brisbane Stevedoring*, that is, by reference to the worker's enforcement rights vis-à-vis co-tortfeasors, at least where, as here, the employer is joined as a defendant.

[41] There is no textual or contextual support for the narrower WorkCover construction or any reason for supposing that WCRA imposes a deliberate limitation on the scope of the statutory policy to bypass *Brisbane Stevedoring*.

[42] Whether *Nigel Watts* was decided per incuriam or not, and despite divergent terminology, *Brisbane Stevedoring* should have been followed in *Multiplex* and applied in *Gordian Runoff*, not only because the policy goals justify a broad construction to fulfil the beneficial purpose of the legislation – to indemnify injured workers – but also because, on a proper analysis, there is nothing to indicate that *Brisbane Stevedoring* turned on any disparity in meaning between "in respect of" and "for" or that the conflict in wording explains or justifies the different outcomes in *Gordian Runoff* and *Brisbane Stevedoring*. The real controversy in the High Court centred on whether an employer's contractual obligation to pay or reimburse a co-tortfeasor was a "legal liability" to pay "by way of damages" and, consequently, an insured loss in a case where judgement had been entered against the employer as a defendant co-tortfeasor in the action. It was, because, as Walsh J pointed out the statutory indemnity is against the liability to pay – not the payment of – damages.[56] Thus, the NSW Court of Appeal series of cases do not depart from *Brisbane Stevedoring* about a mere matter of statutory interpretation but on a point of principle.

Conclusion

[43] *Brisbane Stevedoring* is binding on me and must be applied to the facts of this case. It is authority for the proposition that a negligent employer in PRQ's position incurs liability for the full amount of a judgement either by direct payment to the plaintiff or indirectly via reimbursement of an indemnified co-tortfeasor. PRQ has, therefore, "become legally liable" to pay damages of $450,000 for the PRQ worker's injury. Or, put another way, TJH's right to recoup $225,000 and PRQ's duty to repay it is a legal liability to pay damages that WorkCover must meet.

[44] The parties to exchange and file written submissions as to the terms of the declaration and costs.

---

[56] *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 at 253.