IN THE COURT OF APPEAL [1993] QCA 136

SUPREME COURT OF QUEENSLAND

Appeal No. 265 of 1992

Brisbane

[Curtain Bros. v. FAI General Insurance Company Ltd.]

BETWEEN:

PET DOLLY LEDERHOSE
(Plaintiff)

- and -

CURTAIN BROS. (QLD) PTY. LTD.
Appellant

- and -

FAI GENERAL INSURANCE COMPANY LIMITED
(Third Party)
Respondent

The President
Mr Justice McPherson
Mr Justice Shepherdson

Judgment delivered 19/04/93

Judgment of the Court

APPEAL ALLOWED WITH COSTS TO BE TAXED. JUDGMENT ENTERED FOR THE APPELLANT AGAINST THE RESPONDENT FOR $19,288.00 PLUS THE TAXED COSTS OF THE THIRD PARTY PROCEEDINGS AND HALF OF THE PLAINTIFF'S TAXED COSTS OF THE ACTION.

CATCHWORDS: INSURANCE - Motor Vehicles - Risks insured - Applt. co. excavated part of road at minesite without erecting barricades or giving warnings - Pl. employee injured when vehicle drove off end of road - Whether applt co's liability to pl. "in respect of" motor vehicle - Motor Vehicles Insurance Act 1936, s.3(1).

NEGLIGENCE - Personal Injuries - Applt co. excavated part of road at minesite without

erecting barricades or giving warnings - Whether applt co's liability to pl. "in respect of" motor vehicle - Motor Vehicles Insurance Act 1936, s.3(1)

Counsel: Mr J.A. Griffin Q.C. for the appellant
Mr R. Morton for the respondent

Solicitors: Messrs. O'Shea Corser and Wadley as town agents for Messrs. Roberts Leu and North for the appellant
Messrs. McInnes, Wilson and Jensen for the respondent

Hearing Date(s): 30/03/93

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REASONS FOR JUDGMENT - THE COURT

Judgment delivered 19/04/93

On 15 August, 1988, the plaintiff, Pet Dolly Lederhose, was injured. She sued her employer, the appellant, in the District Court at Townsville, and on 20 November 1992 judgment was entered in her favour against the appellant for an amount of damages and the taxed costs of the action. On the same day, the appellant's claim against the respondent to be indemnified to the extent of one-half of the plaintiff's judgment, including

costs, was dismissed and the appellant was ordered to pay the costs of the third party proceeding. By this appeal, the appellant seeks orders that there be judgment for it against the respondent in a sum agreed at $19,288.00 and that the respondent pay one-half of the plaintiff's taxed costs of the action and the appellant's taxed costs of the third party proceeding and of the appeal.

As part of her duties for the appellant, the plaintiff was required to drive to a building on its minesite where some of its other employees had morning and afternoon tea. It was the plaintiff's job to clean the room for the other employees. She was provided with a motor vehicle by the appellant to drive to the building which she was required to clean. The respondent was the licensed insurer of the vehicle which the plaintiff was driving on the day when she was injured.

On that day, she drove along her usual route unaware that, during the previous night, it had been excavated as part of the appellant's mining operations. The plaintiff was injured when she drove off the end of the road which ended abruptly and precipitously. There were no barricades or warning signs and the plaintiff was given no warning by the appellant before she set out.

It was common ground that the plaintiff's injuries were "caused by, through or in connection with" the motor vehicle which she was driving: Motor Vehicles Insurance Act 1936, as amended, subsection 3(1). However, the trial judge found that the appellant's legal liability to the plaintiff for damages was not "in respect of" the motor vehicle as required by that subsection. The sole issue for decision on the appeal is whether or not that finding was correct.

A similar issue has come before courts on many occasions, and in the course of argument we were referred to a number of decisions, both reported and unreported. Sometimes seemingly small factual differences have produced opposite results. It is instructive in the present context to contrast Boath v. Central

Queensland Meat Export Co. Pty. Ltd. (1986) 1 Qd.R.139 with Suncorp Insurance and Finance v. Workers' Compensation Board of Queensland (1990) 1 Qd.R. 185.

In the former case, the plaintiff, Boath, was driving his truck across a bridge situated on the property of the defendant, The Central Queensland Meat Export Company Pty. Ltd.. He was injured when the bridge collapsed. It was held by the Full Court that the defendant's liability was not a liability "in respect of" the plaintiff's truck and that the third party, State Government Insurance Office (Queensland), was not liable to indemnify the defendant. W.B. Campbell CJ said at pp. 142-143:

> "The negligence alleged and proved against C.Q.M.E. was that it was negligent in respect of, or in relation to, the bridge. There was no negligence alleged or proved against C.Q.M.E. in respect of the plaintiff's truck; the statement of claim (para.5) alleges negligence in that C.Q.M.E., its servants or agents, allowed persons and vehicular traffic to use an unsafe bridge, failed to take adequate steps to safeguard persons using the bridge. The learned trial Judge's findings of negligence were as follows:
>
> > `The defendant had the duty to use reasonable care to prevent damage from unusual danger which it knew about or ought to have known about. The danger lay in the very structure of the bridge which was obvious to anyone who inspected the bridge from below ... . The defendant was thus exposing motor vehicles to the likelihood of damage and their occupants to injury by taking no steps to close the bridge or to give warning that the edges were unsupported.'
>
> The case was a straight-forward example of a breach of duty on the part of an occupier."

In the second case, the plaintiff was driving a Toyota vehicle, the property of the defendant in the action, Mary Kathleen Uranium Limited, at the company's minesite. Also on the site was a heavy vehicle known as an Euclid dump truck which was operated by one Machen who was also employed by the defendant. When the Euclid was loaded with ore, Machen, who was unaware of the presence of the Toyota, moved off, without sounding his vehicle's horn, and drove over the Toyota, injuring the

plaintiff. The plaintiff successfully brought an action against the defendant for damages for its negligence, the trial judge finding that the defendant was vicariously liable for the negligent operation of the Euclid by Machen and also directly liable for failure adequately to warn the plaintiff against parking in a position of risk from the movement of an Euclid. Connolly J., with whom Kelly SPJ and Moynihan J. agreed, said at p.193:

> "That the defendant's liability to the plaintiff was a liability in respect of the insured Toyota is, to my mind, clear, at least insofaras the liability was founded upon the defendant's breach of duty adequately to warn the plaintiff in relation to his management of that vehicle in the vicinity of Euclid trucks."

There is little purpose to be served in multiplying references to previous cases. The question now in issue was considered by the High Court in Technical Products Pty. Ltd. v. State Government Insurance Office (Queensland) (1989) 167 CLR 45, which establishes the correct approach to be followed.

In that case, a workman was injured when he fell from a pallet supported by the tines of a forklift while loading goods into a container on the back of a motor vehicle which was the subject of a policy of insurance under sub-section 3(1) of the Act. The workman's employee was held liable in negligence due to the unsafe condition of the forklift, which was not insured. It was held that the employee was not entitled to an indemnity from the insurer of the motor vehicle. In the their joint judgment, Brennan, Deane and Gaudron JJ. said at p.47 that the nexus between liability and motor vehicle which the words "in respect of" introduce in subsection 3(1) "... is a broad one which is not susceptible of precise definition" but does not exist "unless there be some discernible and rational link between the basis of legal liability and the particular motor vehicle."

On pp.47-48, their Honours continued:

> "The point is well made in the judgment of Connolly J. (with whom Andrews C.J. and Thomas J. concurred) in the

Full Court of the Supreme Court in the present case (11):

> `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 S.G.I.O. (Qld) v. Workers' Compensation Board (Qld.) (12), Stevens v. Nudd (13) and Boath v. Central Queensland Meat Export Co. Pty. Ltd. (14) 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", but 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.'

Thus, the requisite relationship between liability and he particular motor vehicle will ordinarily not exist where the liability is that of a person who is unconnected with that vehicle."

Then on p.48 they said:

> "In most cases where the injury itself was "caused by, through, or in connection with" the relevant vehicle that further requirement will, no doubt, be satisfied. There will, however, be cases in which the superimposed requirement will be critical in the sense that, notwithstanding that the injury was "caused by, through, or in connection with" the insured motor vehicle, there is no discernible rational relationship between the relevant legal liability for the injury and that vehicle. There remains for consideration the question whether the present is such a case.

Finally, at p.49, it was said:

> "Even accepting that the trailer and the container are properly to be regarded as one receptacle, the employer's liability was a liability "in respect of" any vehicle, it was a liability with respect the unregistered fork-lift. There is nothing in the present case which would justify a conclusion that the trailer and container had any involvement in the employee's accident beyond their passive presence as the receptacle into which the bags were being loaded."

Campbell v. International Rigging (Aust) Pty. Ltd. (Appeal 51/1990; Full Court, 20 February, 1991 unreported) was another example of a case in which the relevant motor vehicle played no material role. In the course of unloading a load carried by a mobile crane in respect of which the insurance cover existed, the plaintiff moved backwards and fell over a pallet lying on the ground in the working place. The trial judge held that there was no breach of duty involved in the use of the crane and that the only basis on which the employer was liable was that the work-area was cluttered and dangerous. McPherson SPJ said:

> "The mere fact that the liability arises in the course of an operation in which a vehicle plays a part is not enough to constitute it as a liability in respect of the motor vehicle ... . It is necessary to go further and ask what was the very act or omission that gave rise to the failure and, therefore, to the consequential legal liability that arose in this case ... . [Here] there is no finding that the system of using or unloading the crane that was adopted by the defendant in the present case was the source of the defendant's liability."

In the present case, there is no dispute as to the facts and no contention is advanced that the pleadings did not adequately raise the appropriate issue of legal liability between the plaintiff and the appellant to enliven the appellant's reliance upon subsection 3(1) of the Act.

Shortly stated, the appellant supplied the plaintiff with a vehicle and employed her to drive it along the relevant route without warning her of a danger in the road of which the appellant was aware and she was unaware. If the road was not a private road occupied by the appellant or it had not itself created the danger by its operations, it could scarcely be doubted that the appellant's legal liability to the plaintiff was "in respect of" the vehicle with which it had supplied her for use in the course of her employment.

It is fallacious to seek to subsume this specific basis of legal liability into some wider or different basis merely because the presence of additional factors makes the other basis

of liability also available. Thus, for example, it does not exclude the particular basis of the appellant's liability to the plaintiff in respect of the vehicle if it is also liable to her as an occupier in respect of the dangerous excavation or as an employer in respect of the unsafe place of work. The trial judge drew a false dichotomy when he said that "the negligence of the appellant was in respect of the roadway and not in respect of the [vehicle]". One basis of liability is not exclusive of the other and the correct view is that the appellant was negligent, and liable, in respect of both.

The appeal should be allowed with costs to be taxed and judgment entered for the appellant against the respondent for $19,288.00 plus the taxed costs of the third party proceedings and half of the plaintiff's taxed costs of the action.