IN THE COURT OF APPEAL [1994] QCA 218

SUPREME COURT OF QUEENSLAND

Appeal No. 226 of 1993

Before Fitzgerald P.
Davies JA.
Pincus JA.

[Grays Sawmills Pty. Ltd. v. Suncorp]

BETWEEN:

WARREN THOMAS PATULLO
Plaintiff

AND:

GRAYS SAWMILLS PTY. LTD.
First Defendant/First Respondent

AND:

FREDERICK JOHN REINKE
Second Defendant/Second Respondent

AND:

THE NOMINAL DEFENDANT (QUEENSLAND)
Third Defendant/Third Respondent

AND:

SUNCORP INSURANCE AND FINANCE
Third Party/Appellant

REASONS FOR JUDGMENT - THE PRESIDENT

Judgment delivered 17/06/94

The circumstances giving rise to this appeal are set out in the judgment of Davies J.A.

The facts appear complicated and the judgment from which the appeal is brought has surprising consequences. The appellant was the insurer of a registered motor-vehicle, the semi-trailer, which was owned and controlled by the injured plaintiff who was not in any way negligent. The appellant had no connection with the other, unregistered, vehicle, the forklift, or with the negligent parties, the first and second defendants. Yet it is required to indemnify them in respect of their liability to the plaintiff and the Nominal Defendant (Queensland), consequent upon their and its liability to the

plaintiff. Such a curious result requires careful consideration.

Yet I am satisfied that it is correct, subject to one possible qualification. As Davies JA. points out, although it has since been amended, at the material time subsection 3(1) of the *Motor Vehicles Insurance Act, 1936 as amended*, effectively provided for the licensed insurer of a motor vehicle to indemnify not only the owner but "all other persons" against all sums for which any such person should become legally liable by way of damages in respect of the insured vehicle. I agree with Davies J.A. that the liability of the defendants to the plaintiff or the Nominal Defendant is "by way of damages" within the meaning of the Act. The question is whether the defendants' liability is "in respect of" the plaintiff's semi-trailer.

As the cases demonstrate, that is a question upon which conflicting views may be, and often are, rationally held: see, e.g.. *Technical Products Pty. Ltd. v. State Government Insurance Office (Queensland) (1989) 167 CLR 44.* I have found it helpful on this occasion to consider a somewhat simplified version of the facts.

Suppose that there were no forklift involved, and the second defendant, an employee of the first defendant, was involved in manually loading the plaintiff's semi-trailer by placing timber upon it. Suppose further that the second defendant was negligent in performing that activity and the plaintiff was thereby injured. In my opinion, there would be a sufficient link between the negligence and the semi-trailer to satisfy the test prescribed in *Technical Products*.

On the other issues, I agree with Davies JA. and have nothing to add. I also agree with the orders which his Honour proposes.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 226 of 1993.

Brisbane

[Patullo v. Grays Sawmills Pty Ltd]

Before Fitzgerald P.
Pincus J.A.
Davies J.A.

BETWEEN:
WARREN THOMAS PATULLO
(Plaintiff)

AND:
GRAYS SAWMILLS PTY LTD.
(First Defendant) First Respondent

AND:
FREDERICK JOHN REINKE
(Second Defendant) Second Respondent

AND:
THE NOMINAL DEFENDANT (QUEENSLAND)
(Third Defendant) Third Respondent

AND:
SUNCORP INSURANCE AND FINANCE
(Third Party) Appellant

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 17/06/1994

I have read the reasons for judgment of Davies JA in which the facts of the case and the issues for decision are set out. One of the issues was whether there was legal liability to the injured plaintiff by way of damages in respect of the trailer from which he jumped, in the circumstances set out in the

reasons of Davies JA The leading case is Technical Products Pty Ltd v. State Government Insurance Office (Queensland) (1989) 167 C.L.R. 45. It was there held that to satisfy the test of being a liability by way of damages in respect of a particular motor vehicle there must be a link between the basis of liability and the vehicle or - a test that may be slightly more onerous - between the vehicle and "the very act or omission which gives rise to that liability". The Court held that the relevant vehicle had no sufficient connection with the accident; I agree with the view of Davies JA that Technical Products is distinguishable from the present circumstances. Inevitably, the application of the principle of Technical Products will, at the margins, involve the making of some fine distinctions.

I have found some difficulty with reconciling the decision in Fraser v. The South East Queensland Electricity Board [1992] 1 Qd.R. 508 with that of the primary judge in the present case. There, as here, the plaintiff was injured jumping to the ground to avoid injury. In each case the jump was from an insured vehicle. In Fraser's case the vehicle was a truck to which was attached a cherry-picker which was treated by the court as part of the vehicle. The cause of the plaintiff's injury in Fraser's case was that a pole was negligently let fall towards the plaintiff, causing him to jump from the cherry-picker. There was held to be no sufficient relationship between the negligent act and the motor vehicle. The connection between the vehicle -

or rather that part of it which constituted the cherry-picker - and the negligent act was that it was the fall of the pole towards the cherry-picker which obliged the plaintiff to get out of it, which he could only do by jumping to the ground. Treating the cherry-picker as part of the vehicle, one could say that there the cause of the accident was an object being let move towards the plaintiff, being then in or on the insured vehicle, which caused him to leap from the vehicle and sustain injury. The same may be said of the present case.

The only substantial difference which I can see between the proper characterisation of the facts in this case and those in Fraser's case is that here the plaintiff's leap was caused by an object which got loose in the course of an attempt to load it on the insured vehicle; thus the vehicle had two connections with the accident, rather than one. One could account for both decisions by postulating that an injury caused to an occupant of a stationary vehicle in getting out of the vehicle to avoid an object moving towards him (and towards the vehicle) is not covered by the compulsory insurance on the vehicle except where the cause of the object's motion is some use of the vehicle - e.g. loading it. But the tests accepted in Technical Products do not square well with this explanation; there may well be a link between the basis of liability and the vehicle, as well as a relationship between the vehicle and the act giving rise to liability, even where the cause of the object's motion is not any use of the vehicle. The necessary link and relationship exist where the motion of the object towards the vehicle, then in use by the plaintiff, causes the plaintiff to jump out of the vehicle. I am therefore, with respect, doubtful of the correctness of the result of Fraser's case; I agree with Davies JA that the first ground of appeal should be rejected.

As to the second ground of appeal, I express my agreement with the reasons of Davies JA.

I agree that the appeal should be dismissed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND Appeal No. 226 of 1993

Brisbane

Before Fitzgerald P.
Davies J.A.
Pincus J.A.

[Patullo v. Grays Sawmills & ors.]

BETWEEN:

WARREN THOMAS PATULLO
(Plaintiff)

AND:

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(First Defendant) First Respondent

AND:

FREDERICK JOHN REINKE
(Second Defendant) Second Respondent

AND:

THE NOMINAL DEFENDANT (QUEENSLAND)
(Third Defendant) Third Respondent

AND:

SUNCORP INSURANCE AND FINANCE
(Third Party) Appellant

REASONS FOR JUDGMENT - DAVIES J.A.

Judgment delivered 17/06/1994

The appellant was on 20 September 1982 the licensed insurer, under the Motor Vehicles Insurance Act of a semi-trailer motor

vehicle owned by Warren Thomas John Patullo, the plaintiff in the action ("the plaintiff"). On that day, the plaintiff was injured during an operation of loading timber onto the tray of that trailer at the railway station at Proserpine. The plaintiff, who had been engaged by Grays Sawmills Pty Ltd ("the first defendant") as an independent contractor, was then to carry the timber upon his semi-trailer from the railway station to the first defendant's sawmill. The loading operation was being carried out by means of an uninsured forklift owned by the first defendant and driven by Frederick John Reinke ("the second defendant"), an employee of the first defendant.

The learned trial judge held that the plaintiff's injuries were caused by the negligent mismanagement of the forklift by the second defendant. Accordingly he gave judgment for the plaintiff against the first and second defendants and also against the Nominal Defendant (Queensland) who was sued in respect of the forklift pursuant to s. 4F of the Motor Vehicles Insurance Act 1936 ("the Act"). He then declared that the first and second defendants were entitled to be indemnified by the appellant, whom they joined as a third party, in respect of their liability to the plaintiff; ordered that the Nominal Defendant, if it satisfied the judgment, be entitled to be indemnified by the first and second defendants; and ordered that the first and second defendants be entitled to be indemnified against their liability by the appellant.

The appellant appeals against the declaration and order requiring the appellant to indemnify the first and second defendants on two grounds. They are:

1. That his Honour was wrong in finding that the liability of the first and second defendants was a liability in respect of the semi-trailer; and
2. That even if the appellant was liable to indemnify the first and second defendants in respect of the semi-trailer, his Honour should have apportioned liability between the appellant and the Nominal Defendant.

The first of these grounds involves the all too familiar question of whether the plaintiff's damages were in respect of the semi-trailer motor vehicle within the meaning of s. 3(1) of the Act. In order for those damages to be in respect of the trailer there must be a discernible and rational link between the basis of legal liability of the first and second defendants for the plaintiff's injury and the trailer: Technical Products Pty Ltd v. State Government Insurance office (Q) (1989) 167 C.L.R. 45 at 47. In order to determine whether that rational link exists it is necessary to state the facts giving rise to the plaintiff's injury in some detail.

The timber to be loaded onto the trailer was in tied bundles of varying lengths, even at one end, uneven at the other. The

second defendant was required to carry the bundles, one at a time, upon the tines of the forklift from a railway truck to the tray of the trailer and to place each bundle length-ways on the trailer with the even end towards the front. Once the second defendant had placed sufficient bundles on the trailer to cover the whole of the tray, it was the plaintiff's task to place dunnage over those bundles before a second layer of timber was placed over the first. The dunnage was to enable the second defendant, when the time came to unload the timber, to place the tines of the forklift under the bundles of timber to remove them without damaging the timber.

Prior to the plaintiff's accident, the first defendant had placed a number of bundles of timber on the tray of the trailer but not sufficient to cover the whole of it. According to the plaintiff, whose evidence his Honour accepted, there remained space on the driver's side to place at least one further bundle. Nevertheless the plaintiff observed the second defendant manoeuvring his forklift, with a bundle of timber on it, towards the passenger side of the semi-trailer apparently preparatory to placing that bundle on top of the bundles already placed there. The plaintiff then jumped up onto the tray of the trailer in order to place dunnage on top of the bundles already there before the second defendant placed that bundle on the trailer.

The plaintiff had placed the first piece of dunnage on the

timber already there and was in the process of placing the second piece when the incident which gave rise to his injury occurred. His attention was attracted to the forklift and he saw the bundle of timber then on the forklift rolling off the tines towards him. At the same time he heard the second defendant call out to him to jump. He immediately jumped backwards off the semi-trailer and sustained the injuries for which he sued and recovered.

There are undoubted similarities between Technical Products and this case. The appellant submitted that they are relevantly indistinguishable. There, the plaintiff was injured in the course of his employment when he fell from a pallet, which was supported by the tines of a forklift, onto a concrete floor about seven feet below. At the time he fell, he was assisting in the unloading of bags of salt from the forklift into a large container which was mounted on a trailer, the relevant motor vehicle. There were bags of salt stacked on the pallet upon which the plaintiff was standing and he was engaged in passing these to a fellow employee who was inside the container. But plainly the negligent omission which caused his fall was allowing him to stand upon the pallet on the forklift without any restraint. No aspect of the trailer played any part in his fall. Similarly in Fraser v. The South East Queensland Electricity Board [1992] 1 Qd.R. 508 the negligent act which caused the plaintiff's injury was unrelated to the cherry picker

motor vehicle.

Here the negligent act which was the basis of the first and second defendants' liability was the act of mismanagement of the forklift which caused the bundle of timber to fall towards the plaintiff. The rational links between that negligent act and the trailer are:

1. that the negligent act was the very act of loading the trailer (compare Glover v. Politanski [1990] 2 Qd.R. 41; contrast Stradbroke Sandblasting Company Pty Ltd & anor v. Suncorp Insurance and Finance CA No. 48 of 1993, 5 August 1993, unreported); and
2. that the manner of loading, involving as it did the placing of a bundle of timber on top of others, and the safe carriage and unloading of the timber, required the plaintiff to be on the trailer in the path of the bundle of timber which fell from the forklift.

The plaintiff's damages were therefore in respect of the trailer. It is irrelevant that they can also be characterised as being in respect of the forklift: Lederhose & anor. v. FAI General Insurance Company Limited CA No. 265 of 1992, unreported, 19 April 1993. The appellant's first ground of appeal fails.

It was conceded by the appellant, in effect, that if the damages were in respect of the trailer, the appellant was liable to

indemnify the first and second defendants. This might seem a curious result given that neither of the defendants was the owner of that motor vehicle or presumably in charge of it. But I should mention that, at the relevant time, s. 3(1) of the Act required the owner to indemnify "himself and all other persons" against all sums for which any such person should become legally liable by way of damages in respect of the motor vehicle. In 1988 that provision was relevantly amended so as to require the owner to indemnify only "the owner and every authorised agent of the owner"; so that, after that amendment, an insurer in the appellant's position would probably not be obliged to indemnify the first or second defendant.

Although the appellant submitted that the learned trial judge should have apportioned liability between it and the Nominal Defendant, no basis for this apportionment was ever articulated. Of course they are not tortfeasors so that the statutory regime for apportionment between tortfeasors can have no application to them. The only rational argument for apportionment, it seems to me, could be that their liabilities are coordinate and that therefore a right to contribution exists between them. See Albion Insurance Co. Ltd v.Government Insurance Office (NSW) (1969) 121 C.L.R. 342 at 351-2. But I do not think that there were coordinate liabilities here.

It is true that, at least indirectly, each of the Nominal

Defendant and the appellant was liable to make good the same loss, the amount of the plaintiff's damages. But they were liable to different persons and their liabilities were of a different kind. The Nominal Defendant's liability was a direct one to the plaintiff, whereas the appellant's was a liability to indemnify the first and second defendants, they being in turn liable to the plaintiff. More importantly, the Nominal Defendant was entitled, at least indirectly, to be indemnified by the appellant in respect of its liability to the plaintiff. That right arose in the following way.

The Nominal Defendant, upon paying the plaintiff, was entitled pursuant to s. 4G(1)(b) of the Act to recover that amount from the first and second defendants. If it recovered from either of those defendants that defendant would be entitled to recover that amount from the appellant because, in my view, that amount was a sum for which the first and second defendants were liable by way of damages within the meaning of s. 3(1) of the Act. I agree with the conclusion in this respect of Yeldham J. in Nominal Defendant v. Butler (1976) 1 N.S.W.L.R. 546 at 551-2. See also Newland v. The Nominal Defendant (Queensland) (1983) 1 Qd.R. 514 at 522-4. The liability of the Nominal Defendant cannot be coordinate with that of Suncorp when the former, if it pays its liability first, is entitled by statute to be indemnified indirectly by the appellant; whereas if the appellant pays its liability first, it has no statutory right,

directly or indirectly, against the Nominal Defendant. Accordingly, the appellant's second ground of appeal must also fail.

The appeal should therefore be dismissed with costs.

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Brisbane

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BETWEEN:

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SUNCORP INSURANCE AND FINANCE
(Third Party) Appellant

FITZGERALD P.
DAVIES J.A.
PINCUS J.A.

Judgment delivered 17/06/1994

SEPARATE REASONS FOR JUDGMENT OF FITZGERALD P., DAVIES, AND PINCUS JJ.A., ALL CONCURRING AS TO THE ORDERS MADE.

APPEAL DISMISSED WITH COSTS.

CATCHWORDS: **MOTOR VEHICLES - COMPULSORY INSURANCE - plaintiff engaged by first defendant to carry timber on his semi-trailer to its sawmill - loading operation conducted with uninsured forklift owned by first defendant - forklift driven by first defendant's employee, the second defendant - forklift negligently mismanaged by second defendant while loading bundle of timber onto plaintiff's semi-trailer - plaintiff injured after jumping from trailer to avoid bundle rolling from tines - liability of appellant insurer - whether plaintiff's damages were in respect of the semi-trailer motor vehicle - s. 3(1) Motor Vehicles Insurance Act**

NEGLIGENCE - CONTRIBUTION AND INDEMNITY - whether appellant's liability to indemnify first and second defendants should have been apportioned between itself and the Nominal Defendant - whether coordinate liability and right to contribution - s. 4G(1)(b) Motor Vehicles Insurance Act

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J.J. Clifford Q.C. with him J.P. Barbeler for the Third Respondent

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Kinsey Bennett & Gill for the Third Respondent

Date(s) of Hearing: 2 June 1994