IN THE COURT OF APPEAL [1997] QCA 172

SUPREME COURT OF QUEENSLAND

Appeal No. 4050 of 1996

Brisbane

[WCBQ v. Suncorp Insurance & Finance]

BETWEEN:

WORKERS COMPENSATION BOARD OF QUEENSLAND
(Defendant by Election) Appellant

AND:

SUNCORP INSURANCE AND FINANCE
(Second Defendant) Respondent

Fitzgerald P
McPherson JA
Thomas J

Judgment delivered 17 June 1997

Separate reasons for judgment of each member of the Court each concurring as to the orders made.

APPEAL DISMISSED WITH COSTS

CATCHWORDS: **INSURANCE - Motor vehicles - licensed insurer - transitional provisions of *Motor Accident Insurance Act* 1994 - Contract of insurance provided for by *Motor Vehicles Insurance Act* 1935-1988 - Whether terms of contract governed by *Motor Vehicles Insurance Act* 1936-1988 or *Motor Accident Insurance Act* 1994 - Whether processing of claims governed by old Act or new Act - Meaning of "mobile machinery" in s.2(3) of *Motor Vehicles Insurance Act* 1936-1988**

WORDS & PHRASES - "mobile machinery"

***Motor Vehicles Insurance Act* 1936-1988, ss 2(3), 3(1)**

***Motor Accident Insurance Act* 1994-, ss 23, 31-61, 102, 104**

Counsel: Mr J. Griffin QC for the appellant
Mr P. Ambrose for the respondent

Solicitors: R. Bradley & Co for the appellant
John Taylor & Co for the respondent

Hearing Date: 2 May 1997

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REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 17 June 1997

This is an appeal from a judgment delivered in the Trial Division on 19 April 1996. The judgment determined a preliminary issue between the appellant and respondent in an action in which the respondent was named as second defendant and the appellant joined as a defendant by election. The issue between the appellant and respondent was decided on the basis of agreed facts and at least implicit assumptions concerning some legal consequences.

The plaintiff in the action, Mervyn Harold Reeves, alleges that he was injured on 23 October 1994 while driving a tractor which was involved in a collision with another tractor driven by one Ian Raymond Shepherd ("the driver"). Although that tractor was used on dedicated roads

from time to time, the collision occurred on private property. The tractor driven by the driver was owned by the firm of R.W. Shepherd & Son ("the owner"), the members of which were Raymond William Shepherd, his wife Muriel, and Ross Alexander Shepherd. That tractor was insured under insurance class 6 until 7 May 1995 by a policy issued under the Motor Vehicles Insurance Act 1936. The respondent was the licensed insurer of both tractors, although for present purposes it is material that it was the licensed insurer of the tractor driven by the driver.

Raymond William Shepherd, Ross Alexander Shepherd, John William Shepherd and the driver were the plaintiff's employers ("the employers"), and the collision occurred in the course of his employment. The appellant was the employers' insurer in respect of any liability to the plaintiff arising out of the driver's negligence.

The proceeding was conducted on the basis that the parties' respective rights and obligations fell to be considered by reference to the position as at the date of the collision.[1] Further, subject to one matter which is referred to later, it was accepted that the respondent was not liable to indemnify the driver or the owner if the policy of insurance it issued under the Motor Vehicles Insurance Act was applicable in respect of the collision and the plaintiff's injuries. The appellant submitted that that policy was inapplicable by reason of the Motor Accident Insurance Act 1994, which had come into force on 1 September 1994, shortly before the collision. Both parties approached the matter on the footing that that question was to be answered prematurely by reference to sub-ss. 104(1) to (3) of that Act.

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[1] See sub-s. 104(4) of the Motor Accident Insurance Act 1994 and ss. 20 and 20A of the Acts Interpretation Act 1954.

Section 102 of that Act repealed the Motor Vehicles Insurance Act, and s. 104 of the Motor Accident Insurance Act was clearly intended to make temporary provision with respect to the operation of policies of insurance issued under the Motor Vehicles Insurance Act during the initial period after the Motor Accident Insurance Act came into force. Sub-sections 104(1)(a) and (3) of the Motor Accident Insurance Act provide that the policy issued to the owner under the Motor Vehicles Insurance Act was to continue and remain in force. However, the appellant seized upon that part of sub-s. 104(3) which provided that "... a claim for the personal injury must be dealt with under" the Motor Accident Insurance Act notwithstanding that a policy issued under the Motor Vehicles Insurance Act was in force. Although s. 104 of the Motor Accident Insurance Act is badly drafted, there seems to me to be no particular difficulty in giving effect to sub-s. 104(1)(a) and both aspects of sub-s. 104(3) provided that it is recognised that the requirement that a claim for the personal injury be dealt with under the Motor Accident Insurance Act is intended to indicate that Part 4 of that Act, headed "Claims", is to apply. Although Part 4 would not otherwise apply in respect of personal injuries arising out of motor vehicle accidents which occurred while the Motor Vehicles Insurance Act, or a policy of insurance under that Act, was in force, s. 104 extends the operation of Part 4 in the way which I have stated. While defined terms in the Motor Accident Insurance Act cannot be comfortably fitted into this combination of Part 4 and s. 104 of that Act, that is of little consequence since, as is usual, the meanings assigned to the defined terms apply only to the extent that the context does not indicate otherwise. Further, it seems to me of little significance that it might be possible to point to some anomalous outcomes in various circumstances on the construction of the Motor Accident Insurance Act which I consider correct. Any other approach would probably produce similar results in some circumstances because of the inadequate drafting.

What I have said on this aspect of the case is consistent with the reasons for judgment of

Thomas J., which I have read. It is unnecessary for me to discuss any other point. I agree with what has been written by Thomas J.

I also agree with his conclusion that the appeal should be dismissed, with costs to be taxed.

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REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 17 June 1997

I agree that the appeal should be dismissed with costs.

The sequence of events and the relevant provisions of the *Motor Accident Insurance Act 1994* are set out in the reasons for judgment of Thomas J. Section 102(1) of the new Act, as his Honour describes it, repealed the old Act, which was the *Motor Vehicles Insurance Act 1936*. The new Act came into force on 1 September 1994, which was some time before the motor vehicle accident on 23 October 1994 giving rise to the claim for damages for personal injuries indorsed on writ no. 46 of 1995 issued by the plaintiff on 29 March 1995. The defendant to the action was in fact a partnership or firm; but it is

convenient to speak of them in the singular, which is the way in which they are described in the writ.

Before 1 September 1994 the defendant's vehicle was the subject of a policy of compulsory third party insurance issued under the old Act. The policy had previously been issued or renewed on 7 May 1994 and, in the ordinary course of events, would remain in force until 7 May 1995 or thereabouts, when registration of the vehicle was due to be renewed. By the terms of the policy the insured person was indemnified against all sums for which he should be legally liable by way of damages in respect of the vehicle for accidental bodily injury to any person. In respect of the plaintiff's claim, the defendant was therefore entitled to the benefit of the indemnity afforded by the policy unless the new Act deprived the defendant of it.

In the case of a standard consensual policy of insurance, the right to indemnity under the policy attaches once the event insured against takes place provided the policy is then in force. Policies under the old Act were, notionally at least, issued in the form prescribed in Schedule III of the Regulations made under the old Act. Although the form itself and much of the framework were statutory, the legislation nevertheless set out to preserve the substance of a standard consensual insurance contract or policy. For example, in speaking of the proposer's application for insurance under the old Act, the statutory form refers to it as an "application for a contract of insurance", and it describes the policy as being issued on the faith of the application "which shall be the basis of the contract ...".

That is one reason for supposing that the new Act was not intended to disturb the indemnity afforded by the existing policy issued under the old Act. In the case of a purely consensual policy, one would be slow to infer such an intention. Another reason is to be found in the transitional provisions in s.104 of Part 7 of the new Act. Section 104(1)

provides in effect that a contract of insurance, in force under the old Act immediately before the commencement of the new Act on 1 September 1994, "continues in force" until : (a) the contract is replaced by a policy under the new Act; or (b) 30 days after the end of the registration period to which it related, whichever happens first. As I have said, the registration period did not expire until at least 7 May 1995, and on 23 October 1994, when the accident giving rise to the claim for damages took place, the subsisting contract of insurance had not been replaced by a policy under the new Act or otherwise brought to an end. The insurance policy under the old Act was therefore continued in force by s.104(1). The aim of the new Act evidently was to progressively replace policies issued under the old Act by policies under the new Act at the time when registration of a vehicle was renewed or within 30 days thereafter: see s.23. This no doubt explains why s.104(4) provided that s.104 expired on 31 December 1995, by which date it was expected that all registrations of vehicles registered before 1 September 1994 would have been renewed.

If the Act had stopped at s.104(1), no question could have arisen about the defendant's right to indemnity under the continuing policy issued under the old Act. However, that conclusion is said to be displaced by s.104(2) and s.104(3). They provide:

> "(2) If personal injury arises out of a motor vehicle accident happening before the commencement of this Act, a claim for the personal injury must be dealt with as if this Act had not been enacted.
>
> (3) If personal injury arises out of a motor vehicle accident happening on or after the commencement of this Act, a claim for the personal injury must be dealt with under this Act (even though the accident may have happened while a policy of insurance issued under the former Act remains in force)."

In the present case the motor vehicle accident happened after the commencement of the new Act, and the plaintiff's claim for personal injury must under s.104(3) therefore be "dealt with" under the new Act. But in the proceedings before us, the question in issue is

not the plaintiff's claim, but the right of the defendant to be indemnified by the licensed insurer in respect of that claim. The plaintiff's claim can sufficiently be "dealt with" under the provisions of Part 4 of the Act without affecting the defendant's right to be indemnified under the policy continued under the old Act. Part 4, comprising ss.31 to 61, introduced a new regime for notifying, making and dealing with personal injuries arising from motor vehicle accidents and claims for damages for such injuries; but those provisions are not, directly or immediately, concerned, if at all, with the right of the insured under a policy to indemnity according to its terms. Indeed, the words in brackets at the end of s.104 (3) clearly assume that a policy issued under the old Act "remains in force". There would have been no point in including those words unless such a policy continued to afford indemnity according to the terms and conditions of the policy issued under the old Act but continued under the new Act.

It follows, in my opinion, that the policy of insurance issued on 7 May 1994 continued and remained in force on 23 October 1994. However, for the reasons given by Thomas J. in answering question 2 considered in those reasons, it is the appellant Board that is bound to indemnify the first defendant in these proceedings.

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REASONS FOR JUDGMENT - THOMAS J

Judgment delivered 17 June 1997

This is an appeal against the determination of an issue between the Workers' Compensation Board of Queensland ("the Board") and Suncorp Insurance & Finance ("Suncorp"). The question concerns which party is liable to indemnify the first defendant in the action brought against it by the plaintiff, Mr Reeves.

The first defendant is a partnership consisting of four persons (Raymond William Shepherd, John William Shepherd, Ross Alexander Shepherd and Ian Raymond Shepherd) which was the employer of the plaintiff at the time of the plaintiff's accident, namely 23 October 1994.

The agreed facts upon which the hearing proceeded are as follows:

"1. The four persons named as First Defendants were the employers of the Plaintiff.

2. The subject collision occurred on private property and not a dedicated road.

3. The Chamberlain Tractor L-7103 was used on dedicated roads from time to time.

4. In respect of the Chamberlain Tractor L-7103:

(a) The registered owner was R.W. Shepherd & Son;
(b) The due date for renewal of registration was 7th May 1994;
(c) Registration and insurance were paid on the 19th May 1994;
(d) The due date for the next renewal was 7th May 1995;
(d) The tractor was insured under insurance class 6.

5. The proprietors of R.W. Shepherd & Son were Muriel Shepherd (wife of Raymond William Shepherd), Ross Alexander Shepherd who is the third named First Defendant and Raymond William Shepherd who is the first named First Defendant.

6. As at the 23rd October 1994 the Chamberlain Tractor L-7103 was owned by the partnership R.W. Shepherd & Son and had been so owned since the 13th February 1987 and was hired to the cane farm partnership which consisted of the four named First Defendants."

In addition the learned Trial Judge found that the tractor in question was not used principally for the transport of goods or substances on roads.

To resolve the issue, two basic questions need to be answered:

1. Were the terms of the relevant motor vehicle insurance policy those provided by the *Motor Vehicles Insurance Act* 1936-1988, or by the *Motor Accident Insurance Act* 1994?
2. Is Suncorp or the Board liable to indemnify the first defendant in respect of the plaintiff's claim?

1. Old Act or New Act?

On 1 September 1994, only a few months before the accident in question, the *Motor Accident Insurance Act* came into force. Section 102 of that Act repealed the *Motor Vehicle Insurance Act*.

It will be convenient to refer to the *Motor Vehicle Insurance Acts* as the old Act and to the

Motor Accident Insurance Act as the new Act. Unfortunately the transitional provisions in the new Act are not as clear as they might be. The following sections are relevant:

> "**104.** **(1)** A contract of insurance in force under the former Act immediately before the commencement of this Act continues in force until -
>
> (a) the contract is replaced by a CTP policy under this Act; or
>
> (b) 30 days after the end of the registration period to which it related;
>
> whichever happens first.
>
> **(2)** If personal injury arises out of a motor vehicle accident happening before the commencement of this Act, a claim for the personal injury must be dealt with as if this Act had not been enacted.
>
> **(3)** If personal injury arises out of a motor vehicle accident happening on or after the commencement of this Act, a claim for the personal injury must be dealt with under this Act (even though the accident may have happened while a policy of insurance issued under the former Act remains in force).
>
> **(4)** This section expires on 31 December 1995."

> "**23.** **(1)** When transport administration registers or renews the registration of a motor vehicle -
>
> (a) a policy of insurance in terms of the Schedule comes into force for the motor vehicle when the registration or renewal of registration takes effect; and
>
> (b) the licensed insurer selected under this Part in or in relation to the relevant application is the insurer under the policy.
>
> **(2)** The policy remains in force for the period of registration and for a further period of grace ending -
>
> (a) on the renewal of the registration or the grant of a permit allowing the vehicle to be driven on roads while unregistered; or
>
> (b) on the expiry of 30 days from the end of the period of registration;
>
> whichever happens first, but the period of grace does not include a period over which the vehicle has attached to it plates that allow it to be driven on roads while unregistered.
>
> **(3)** However, if the registration is cancelled before the end of the period for which it was granted or renewed, the policy ceases to be in force when the cancellation takes effect.
>
> . . ."

The extent of insurance cover provided under each Act has basic similarities, but there are

distinctions which no doubt contribute to the present litigation. The cover under the old Act may be ascertained by reference to the Act as a whole, and essentially by reference to s.3(1) and to Schedule III to the Regulations made under that Act. The cover under the new Act may be ascertained from that Act as a whole, and essentially from s.5 and the Schedule referred to in s.23 of that Act.

The facts reveal that subject to any contrary effect under the new Act, the old Act policy was paid up and prima facie in force until 7 May 1995. When, under s.104(1) of the new Act, was that policy "replaced" by a new policy? To answer that question one goes back to s.23 to ascertain when new policies take effect. By the relevant date (23 October 1994) no new registration or renewal or registration had taken effect (sub-s.(1)); the period 30 days after the end of the registration period had not been reached (sub-s.(2)); and there had been no premature cancellation of registration (sub-s.(3)). Prima facie then, s.104(1) recognises the continuation in force of the old policy.

Section 104(3) requires that "a claim" for personal injury in respect of an accident happening after the commencement of the Act must be dealt with under the new Act. The words in parenthesis, however, recognise the continued existence and force of the old policy with respect to accidents occurring after the commencement of the new Act. These parts of s.104(3) are not necessarily in conflict. There are special provisions in the Act dealing with the making of a claim, namely Part 4 (ss.31-61). This part brings into effect a system designed to give effect to the objects stated in s.3 of the Act. Those objects include the encouragement of speedy resolution of claims, and the promotion of rehabilitation of claimants. A new regime is introduced with respect to notification of accidents, notice of claim, response to notice of claim, duties of cooperation between claimant and insurer, expert reports, rehabilitation, mitigation of damages and other matters. It may be noted in passing that the parties appear to have acted in accordance with those provisions in the conduct of the present litigation. There would appear to

be no good practical reason why a claim where the defendant happens to remain insured under the old Act cannot proceed in accordance with the new procedures introduced by Part 4 of the new Act.

Once this is appreciated, there is little difficulty in construing s.104(3) as applying the new Act claim procedures to all accidents after 1 September 1994, including those where cover still exists in the terms of the old Act. As earlier noted, the extent of cover provided under the two Acts is different. Numerous insurers were licensed under the old Act, and transitional provisions exist so that they may continue to operate under the new Act. It is not to be expected that the legislature has varied the rights of parties under existing statutory contracts of insurance unless clear words have been used.

Counsel for the appellant (the Board) submitted that one could not deal with a claim under the new Act unless on the footing of an insurance policy under that Act. He submitted that s.31(1) does not lie comfortably with the notion of some other insurance. Whilst there is some force in that submission, it is to be noted that the purpose of that section is to differentiate between the motor vehicle insurer, a "self-insurer" (viz. the State or Commonwealth), and the Nominal Defendant. This inconsistency in drafting, however, is not of sufficient moment to require a different meaning to be given to s.104(3). The submissions of counsel for the Board would require the words in parenthesis in s.104(3) to be treated as meaningless surplusage. Apart from the point made with respect to s.31, there are no indications in the remainder of Part 4 (ss.31-61) that are inconsistent with the immediate introduction of a new procedural system applicable both with respect to claims under new policies and claims under old policies which are preserved until they are replaced by a new policy.

In short, on the proper construction of the new Act, continuing effect is recognised for policies under the old Act until such time as a new policy comes into force under s.23 of the new Act; and a new system is introduced for the making and pursuing of claims which immediately

binds both the injured person and the licensed insurer irrespective of the kind of policy in force. The policy issued by Suncorp in favour of R.W. Shepherd and Son with respect to the tractor was therefore in terms that are to be drawn from the old Act and Regulations.

2. Which insurer, Suncorp or the Board, is liable to indemnify the first defendant in respect of the plaintiff's claim?

Two principal arguments were addressed on this question, but it will be necessary to deal only with the first of these.

The present claim is in respect of an incident that has been described as an "off-road tractor accident". The question is whether such an accident is covered under the policy under the old Act.

Under that Act "motor vehicle" is defined as follows:

> "Motor vehicle" - Any vehicle propelled by gas, motor spirit, oil, electricity, steam or any other motive power: the term includes a tractor, trailer, motor bicycle or motor cycle, but does not include a railway or tramway locomotive, tram motor, tram car, trolley bus, air cushion vehicle, fire engine, fire reel, or any machinery especially designed for road-making;"

By an amending Act in 1988, a number of qualifications were introduced with the effect of reducing the ambit of cover of compulsory third party policies. In particular the following sub-section was inserted as s.2(3) of the Act:

> "(3) Accidental bodily injury (fatal or non-fatal) caused by a motor vehicle that is a back-hoe, bulldozer, end-loader, fork-lift, mobile crane or hoist, or other mobile machinery on or after 22 September 1988 is not injury to which any provision of this Act applies unless the injury is caused on land dedicated as road according to law."

Some difficulty is created by the words "other mobile machinery". Does it include a tractor?

The term "mobile machinery" is defined in the amending Act as follows:

> "Mobile machinery" - does not include a vehicle used principally for the transport of goods or substances on roads"

That is of course a negative definition, in the style of an exemption from what might otherwise be thought to be included in the term. When one imports into that exemption the definition of "vehicle" (which expressly includes a tractor), the legislative intent seems to be that "mobile machinery" does not include a tractor used principally for the transport of goods or substances on roads. In my view that tends to support the inference that the term does include a tractor that is not used principally for transport of goods on roads.

The natural meaning of "mobile machinery" would seem to include tractors. They are certainly mobile, and may fairly be described as "machinery". Inter alia they are designed not only for moving themselves, but for driving and operating other forms of machinery.

The learned Trial Judge found that the tractor in question was not used principally for the transport of goods or substances on roads and that it was "mobile machinery" within the meaning of s.2(3) of the old Act. His Honour, inter alia, drew attention to the phrase "other mobile machinery" following references to "back-hoe, bulldozer, end-loader, fork-lift, mobile crane or hoist", noting that such items were also regarded as mobile machinery, and of course the list is not exhaustive. If those items are so regarded, it is difficult to think that a tractor is not also mobile machinery notwithstanding that it was not specifically listed. It is perhaps surprising that the word "tractor" was not mentioned along with the other types of plant and equipment that were specifically mentioned in s.2(3), and that indeed was the principal submission on behalf of the Board on this point. However it does not outweigh the force of the natural meaning of "mobile machinery" and the apparent effect of the definitions.

The consequence of s.2(3) is that under the old Act (after 1988) a tractor that is not used principally for the transport of goods or substances on roads is covered with respect to personal injury claims only when the injury is caused on a road. It follows that the Board's policy in favour of the relevant employer under the *Workers' Compensation Acts* is the policy which should

indemnify the first defendant in this action.

It is unnecessary to consider the further question whether s.3(1) of the old Act (as amended by the 1988 Amending Act) would in any event deny cover to the first defendant partnership.

The appeal should be dismissed with costs.