IN THE COURT OF APPEAL [1998] QCA 431

SUPREME COURT OF QUEENSLAND

Appeal No. 2427 of 1998

Brisbane

[Far North Queensland Electricity Board v. Masterwood P/L]

BETWEEN:

FAR NORTH QUEENSLAND ELECTRICITY BOARD
(Defendant) Appellant

AND:

MASTERWOOD PTY LTD (ACN 054 890 550)
(Plaintiff) Respondent

McPherson J.A.
Ambrose J.
Cullinane J.

Judgment delivered 18 December 1998.

Separate reasons for judgment of each member of the Court; Cullinane J. dissenting.

APPEAL ALLOWED WITH COSTS. JUDGMENT SET ASIDE. IN LIEU THEREOF, JUDGMENT BE ENTERED FOR THE DEFENDANT IN THE ACTION, TOGETHER WITH THE COSTS OF AND INCIDENTAL TO THE ACTION TO BE TAXED, AND INCLUDING THE COSTS OF THE TRIAL BEFORE DALY DCJ IN APRIL 1996. RESPONDENT IS GRANTED AN INDEMNITY CERTIFICATE UNDER S. 15 OF *APPEAL COSTS FUND ACT* 1973.

CATCHWORDS: **CIVIL - statutory construction of s. 122(1) *Electricity Act* 1976-1980 - whether s. 122(1) provided the appellant a statutory exemption from liability for negligence involving the suspension of power lines over a river without visible warning signs.**

***Electricity Act* 1976-1980 (Qld)**
***Harbours Act* 1955 (Qld)**

Masterwood Pty Ltd v. Far North Queensland Electricity Board
(C.A. No. 4049 of 1996, 29 August 1997)

***Australian National Airlines Commission v. Newman* (1987) 162 C.L.R. 466**
***Board of Fire Commissioners of New South Wales v. Ardouin* (1961) 109 C.L.R. 105**
***Hudson v. Venderheld* (1968) 118 C.L.R. 171**
***Larkin v. Capricornia Electricity Board* [1995] 1 Qd.R 268**
***Jolliffe v. Wallasey Local Board* (1873) Law Rep. 9 C.P. 62**
***Gorris v. Scott* (1874) L.R. 9 Exch. 125**
***Henwood v. Municipal Tramways Trust C.S.A.)* (1988) 60 C.L.R. 438**
***Newton v. Ellis* (1855) 5 El. & Bl. 115**

Counsel: Mr J. Clifford Q.C. for the appellant
Ms J. Dalton for the respondent

Solicitors: Gadens Lawyers for the appellant
Corrs Chambers Westgarth for the respondent

Hearing date: 25 September 1998

IN THE COURT OF APPEAL

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Brisbane

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Ambrose J.
Cullinane J.

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BETWEEN:

FAR NORTH QUEENSLAND ELECTRICITY BOARD
(Defendant) Appellant

AND:

MASTERWOOD PTY LTD
ACN 054 890 550
(Plaintiff) Respondent

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 18 December 1998

1 In 1992 the plaintiff, which is the respondent to this appeal, conducted a business of flying tourists on trips from the confluence of the Russell and Mulgrave Rivers in north Queensland. For this purpose it used an aircraft equipped with floats capable of landing on water. At about 8.00 or 9.00 am on 29 November 1992, the aircraft piloted by a Mr W.H. Morgan took off from the Russell River and flew around Frankland Island near Russell Heads. The conditions there were rough and, instead of landing on the water at the Island as had been intended, the float plane returned and prepared to land on the Russell River. In doing so, and while still airborne, the aircraft struck an electric power line or cable, as a result of which it hit the water and sank. In this action, tried in

the District Court at Cairns, the plaintiff sued for and recovered judgment against the defendant for the loss sustained. The quantum of damages was agreed at $120,000.

2 The cable was installed by the defendant Electricity Board in 1984. Its function was and is to carry electric power across the river to the community at Russell Heads. It was suspended over the water at a height of some 20 m or more from two poles or pylons erected on the river bank on either side. With the exception of the sign to be mentioned, there was no warning of the presence of the cable across the river.

3 The plaintiff's claim was based on the negligence of the defendant, of which various particulars were given in the plaint in its original form. In that form, judgment in the action was given in favour of the defendant on a preliminary point of law determined at an earlier first trial in the District Court at Cairns. From that decision an appeal was brought to this Court, which by a majority allowed the appeal (Masterwood Pty Ltd v Far North Queensland Electricity Board [1999] 1 Qd.R. 345), ordering that the plaintiff have leave to amend its plaint in the action. When the action again came on for trial in the District Court at Cairns, the plaint as amended then pleaded:

> "6. The collision by the plaintiff's float plane with the cable was caused by the negligence of the defendant."

The particulars of negligence relied on at the second trial were confined to the following:

> "(j) failing to ensure that any warning signs were free of obscuring undergrowth;
>
> (k) failing to ensure that any warning signs were readily visible to aircraft."

In response, the defendant relied on the statutory exemption afforded by s.122(1) of the *Electricity Act 1976*, which is in the following terms:

> "**122. Indemnities**. (1) No liability shall be incurred by an Electricity Board, the General Manager, any member of the Board, the secretary to or

> any other employee of the Board or any other person whomsoever acting under the direction of the Board on account of anything done for the purposes of this Act or done in good faith and purporting to be for the purposes of this Act."

The question for consideration on this occasion is whether the provisions of s.122(1) are sufficient to exempt the defendant Board from liability for the damages sustained by the plaintiff in consequence of the defendant's negligence, as the primary judge found it to be, in failing, in terms of the particular pleaded in para.6(j), to ensure that any warning signs were free of obscuring undergrowth.

4 There is in evidence a photograph of the river bank from which it is possible, although with difficulty, to discern among the mass of surrounding vegetation a sign which is said to warn of the existence of the electricity cable overhead. The circumstances in which that sign came to be erected were explained in evidence at the trial by the defendant's witness Mr P.E. Hanley. Section 86(2)(a) of the *Harbours Act 1955*[1] provides:

> "... no person ... shall ... construct any ... works of any kind, or place any ... structure in, on, over, through, or across ... any land ... lying under any harbour (including any navigable river) ... without the sanction of the Governor in Council ..."

The procedure for obtaining such authority is specified in s.86(3). Before commencing work, the constructing authority is required to deposit a plan of the whole of the proposed work: s.86(3)(i). Then, if it appears to the Governor in Council that the proposed work "will not impede or restrict navigation", he may approve the plan subject to any restrictions or conditions "necessary ... for the preservation of any public right or otherwise": s.86(3)(ii). Section 86(3) concludes with the following sub-paragraph:

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1. The *Harbours Act 1955* was repealed by the *Transport Infrastructure Act 1994*, which, however, by s.236 continues in force the provisions of s.86 of the *Harbours Act 1955*.

> "(v) Subject to this Act, no constructing authority who, with and in accordance with such approval as aforesaid, commences, constructs, places, or alters or extends any harbour works or other works or any such pile or other structure shall be liable to action or indictment or process of law for nuisance, encroachment, or obstruction, or other like cause on account thereof."

5 In contemplation of the installation of the cable across the Russell River (which presumably constitutes a "harbour" within the meaning of ss.8 and 86(1) of the *Harbours Act* as being either an "estuary" or a "navigable river'), the defendant by letter dated 13 June 1984 (ex.14) applied for permission to erect a power line or cable across the Russell River at a point shown on an accompanying plan. The response received by letter dated 26 July 1984 was that approval had been given for the construction of a single wire overhead power line across the Russell River at its confluence with the Mulgrave River subject to conditions, of which only the first two are relevant here:

> "1. The applicant must position two (2) warning signs on the eastern bank of the Russell River, angled so as to be read from both upstream and downstream, and floodlit at night.
>
> 2. 'As constructed' clearances for the power line must be submitted to the Harbour Master, Innisfail, and to the Marine Board of Queensland."

Subsequently, by letter dated 11 April 1985, the approval was varied by substituting for condition 1 another condition, which departed from the original only to the extent that it required the two warning signs to be "reflective" and omitted the requirement that they be floodlit at night. The conditions in question do not expressly require the defendant to keep the sign clear of vegetation.

6 I have dwelt at some length on these statutory provisions, and the authority or permission given to the defendant under them, in order to expose the particular purpose for which they exist. Section 86(3)(v) was not relied on by the defendant in the action;

but, taken in conjunction with s.86(3) and in particular s.86(3)(ii), it is plain that those provisions are concerned with obstructions to navigation. A navigable river is a public highway: see *Mayor of Colchester v. Brooke* (1845) 7 Q.B. 339, 373; 115 E.R. 518, 531; *Fergusson v. Union Steamship Co*. (1884) 10 V.L.R. (L.) 279. It follows that any obstruction to its use for navigation constitutes a public nuisance and a misdemeanour at common law, which, if private damage ensues, confers on the person so affected by it a right to recover damages. Apart from s.86(3)(v), it is no doubt true to say that if, in using the Russell River as water along which to taxi or "navigate" its aircraft, the plaintiff's float plane had come into collision with an obstruction that was not authorised under the *Harbours Act*, the person responsible for the obstruction would on this common law principle have been liable for the resulting damage. It seems to me, however, that it is another question whether the same consequence would in law ensue if the collision took place when, as happened here, the aircraft was not navigating or travelling on the water but in the air. It is a matter open to some doubt, on which I have not succeeded in locating any authority, whether the air space at a sufficient height above navigable waters to be beyond the level at which a marine vessel or its masts or superstructure might be expected to intrude, also constitutes a public highway for the purpose of the common law principle. If it does, then it would logically apply with equal force to the air space above roads or public highways on land, through which it is a matter of notoriety that power lines and other such obstructions commonly intrude. A conclusion to that effect does not seem tenable.

7 The justification for this digression is to address, at least in part, the principal reason advanced by the plaintiff for holding the defendant liable in this action. It is that, if the sign erected by the defendant in response to the requirements of s.86 of the

Harbours Act had been kept clear of vegetation, it would have been visible to and in fact seen by the pilot Mr Morgan. He had at some time before the flight in question taxied the float plane along the river looking for obstructions that might be prejudicial to the safety of the aircraft while it was on the water or in the air. Because of the vegetation surrounding the sign, he did not see it. He also made inquiries of various people familiar with the locality (including two of his passengers) whether there were any power lines or obstructions in the area. The answer he received was in the negative. Curiously, he does not appear to have thought to ask the defendant about it.

8 The critical point is, however, that the sign was not erected for the protection of low-flying aircraft, but of vessels travelling on the surface of the water. So much is clear from the provisions of the *Harbours Act* to which I have referred. Indeed, at the time of enacting the earlier statutory provision, which was *Harbour Boards Act 1892*, ss.65-66, on which s.86 of that Act was modelled, there was no such thing as an aircraft. The requirement that the defendant erect the sign cannot, therefore, have been imposed for the protection of aircraft in flight. To that extent, the claim here resembles that of the plaintiff in the well known case of *Gorris v. Scott* (1874) L.R. 9 Exch. 125, where the plaintiff's sheep were washed overboard while being carried on the defendant's ship from Hamburg to Newcastle. The loss would not have taken place if the defendant had complied with a statutory regulation requiring animals on board a seagoing vessel to be placed in pens of specified dimension. The purpose of the regulation was, however, not to protect animals from perils of the sea but to prevent the spread among them of contagious diseases. An action by the plaintiff based on the defendant's omission to comply with the regulation therefore failed. The loss sustained was not within the scope of the risk contemplated or provided for by the statute.

9 In the present instance, however, the plaintiff does not rely directly on the provisions of the *Harbours Act* as conferring a right of action, but rather as evidence of a precaution that might have been adopted. "When negligence as a cause of action is in question, breach of a legislative provision requiring a specific precaution amounts to evidence of want of reasonable care": *Henwood v. Municipal Tramways Trust* (S.A.) (1938) 60 C.L.R. 438, 461. Here, however, the defendant was not, either under the provisions of the *Harbours Act* or the conditions attaching to the approval for installing the cable, required to ensure that the sign was there and that it remained visible for the benefit of low flying aircraft. Relying as a particular of negligence upon the defendant's failure to ensure that the sign was free of obscuring undergrowth thus appears to be an indirect means of ascribing to the defendant a duty at common law to do something that is imposed by statute for a different purpose. Permitting the sign to become obscured was not in terms a breach of any legislative provision; and, even if it had been, that breach would not have amounted to evidence of a want of reasonable care on the part of the defendant to the owners of low flying aircraft.

10 That is a matter that on this appeal is relevant to the proper interpretation of s.122(1) of the *Electricity Act* on which the defendant claims immunity as regards the damage sustained by the plaintiff. The effect of s.122(1) is to exclude liability on the part of the defendant Board "on account of anything done for the purposes of this Act, or done in good faith and purporting to be for the purposes of this Act". With respect, it is difficult to accept that the liability of the defendant in this instance falls outside the terms of that statutory exemption. To reach such a conclusion it would be necessary to say that the defendant's liability for the damage is attributable solely or substantially to its failure to maintain the sign free from undergrowth and in a visible or legible condition. That was

plainly not the case here, and no artifice of pleading can make it so. What was involved here was a composite act, or, as Coleridge J. described it in *Newton v. Ellis* (1855) 5 El. & Bl. 115, 119 E.R. 424, a "complex" act on the part of the defendant. The plaintiff's aircraft collided with the cable and not with the sign. If the cable had not been there, the aircraft would not have collided with it. There would then have been no loss or liability; and that is so whether or not the sign was obscured by vegetation. The cable was in that place at that time because it had been installed and was maintained there by the defendant "for the purposes of this Act", meaning the *Electricity Act*, and its installation and maintenance was "anything done" for those purposes. The purposes of the Act include the supply of electricity to the community of Russell Heads, which it was and is the function, if not the duty, of the defendant to carry out in terms of s.129 of the *Electricity Act*.

11 On this aspect, I accept what is said by Ambrose J. in his reasons for judgment, which I have had the benefit of reading. Carrying out that function or duty was unquestionably "anything done" for those statutory purposes; and it is "on account of" doing it that the Board is, within the meaning of s.122(1), exempted from any liability that it would otherwise incur. The matter under appeal cannot be equated with *Board of Fire Commissioners New South Wales v. Ardouin* (1961) 109 C.L.R. 105, where driving a vehicle along a public highway was, as Kitto J. said there, not something that the Board required any statutory authority to do. It would be tedious to repeat here what was said about that and other decisions on the subject in my reasons for judgment on the last occasion when this action was before this Court. It may be accepted that the later decision of the High Court in *Australian National Airlines Commission v. Newman* (1987) 162 C.L.R. 466 affords rather more general support for the plaintiff's limited interpretation of

the exemption in s.122(1). However, in that case the relevant exclusion was confined to liability for an "act" that was "done under" the relevant statute, which was not readily descriptive of the action (or inaction) of the defendant in failing to provide safe access to the kitchen work place, or in failing to maintain its floor in a safe condition. No statutory authority is required for a corporation or anyone else to conduct a kitchen, whereas it is plain that statutory authority is needed in order to lawfully supply electricity to consumers, and to install and maintain power lines for that purpose over land or water. It was in the discharge of that function that the defendant installed and maintained the cable with which the plaintiff's aircraft collided. In my opinion, s.122(1) affords a complete defence to the plaintiff's claim in this action.

12 I am, of course, conscious of the need to adopt a narrow approach in interpreting provisions like s.122(1), which aim to confer on particular persons or bodies special privileges or immunities from ordinary legal liability. Events show that the earlier attempt by the Law Reform Commission, which is mentioned in my reasons for judgment in the earlier appeal, has failed to achieve its purpose. Statutory authorities with direct access to those who exercise or control legislative power continue to exert extensive influence when it comes to devising and incorporating new, or even old, forms of exemption from legal liability to which other ordinary members of the community are bound to submit. No doubt such provisions are incorporated largely as a matter of rote from earlier legislation on the topic that is intended to be repealed by the new enactment. Depriving the plaintiff in this case of its right of action for property damage is itself a serious step. It would be a great deal more serious, not to say tragic, if the collision in this instance had resulted in personal injury, to which the exemption in s.122(1) appears indiscriminately to extend. I entirely agree with the remarks of Ambrose J. on the undesirability as a matter

of policy of continuing to maintain such exemptions in cases like the present. The solution to the problem of persistence of such provisions lies, however, in the adoption of a legislative policy of refusing to enact them. It does not rest with the judiciary to adopt increasingly artificial interpretations of such provisions in an effort to escape the injustice which they inflict. The responsibility for the kind of grave injustice which at some time in the future is bound to ensue or be repeated if s.122(1) is not repealed rests squarely with the legislature and not the judiciary.

13 I agree with the orders proposed by Ambrose J. I would add only that in my opinion this appeal is one that justifies the grant of an indemnity under s.15 of the *Appeal Costs Fund Act 1973.*

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(Defendant) Appellant

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(Plaintiff) Respondent

REASONS FOR JUDGMENT - B.W. AMBROSE J.

Judgment delivered 18 December 1998

1 In November 1992 the respondent's float plane collided with a cable erected and maintained by the appellant above and across the Russell River to supply electricity to a community at Russell Heads.

2 It is unnecessary to examine in detail the evidence upon which the learned trial Judge concluded that the collision was caused by the negligence of the appellant. There is no appeal against that finding. It suffices to say that the appellant was found negligent in failing to keep visible to the pilot of the respondent's float plane a sign erected on one of the banks of the river drawing attention to the fact that an electric cable was suspended between poles erected on either side of the river in the vicinity of that sign.

3 The learned trial Judge rejected the contention of the appellant that it was

exempted from liability upon his finding of negligence by the terms of s. 122(1) of the *Electricity Act 1976* which provides:

> "**122**. **Indemnities** (1) No liability shall be incurred by an Electricity Board, the General Manager or any member of the Board, the secretary to or any other employee of the board or any other person whomsoever acting under the direction of the Board on account of anything done for the purposes of this Act or done in good faith and purporting to be for the purposes of this Act.

4 Section 129 of the Act specifies the "powers, functions and duties of an electricity board". It is from this section that one deduces the purposes of the Act under s. 122(1).

5 It is to that section that one must turn to determine whether upon the finding of negligence made by the trial Judge, the appellant's acts/omissions upon the basis of which it was held liable were on account of anything done for "the purposes of" the *Electricity Act* or "purporting to be for the purposes of" that Act.

6 Under s.129(a) the appellant was obliged to supply electricity to Russell Heads.

7 Under s. 129(d) the appellant was required to:

> "subject to s.36 (i.e. compliance with the requirements of the State Electricity Commission) plan, design, construct, expand, extend, protect, maintain, control and manage works for the supply of electricity pursuant to this Act."

8 Under s. 6 of the Act "works" are defined to mean:

> "electric lines and any buildings, machinery, engines, metres, lamps, transformers, fittings, apparatus, control cables and any matters or things of whatever description required to generate, transmit or distribute electricity or to carry into effect the object of any electricity authority pursuant to this Act."

9 The learned trial Judge summarized his findings on negligence in the following terms:

> "I am of the view that the defendant, being aware of the potential danger of its cable, owed a duty to the plaintiff to keep the sign visible by ensuring that at all times it was not obscured by tree growth. This duty arises by reason of the danger posed by the cable, not by any statutory obligation to keep the sign clear. I find that the defendant was negligent in failing to keep the sign clear of vegetation growth."

In dealing with the contention of the appellant that it was exempted from liability under s. 122(1) the learned trial Judge observed with respect to that section:

> "It was submitted that somehow this prevents a finding of negligence against the defendant in the way alleged. I do not accept this submission. The section has no relevance. In my view it has no application at all unless and until so far as this case is concerned a finding of negligence is made. It is then a question of construction as to whether or not the liability which would normally arise out of such negligence comes within that class of liability exempted by the Act."

10 I must confess I have difficulty with this analysis.

11 The cause of the collision was the suspension of the cable across the river without any adequate warning.

12 As the learned trial Judge held, the duty to warn arose by reason of the danger posed by the cable.

13 The observation that there was no "statutory obligation to keep the signs clear" in my view is unhelpful at the least. To the extent that it assumes that only those things done pursuant to a mandatory duty may be characterized as things done "for the purposes of the Act", it is plainly insupportable. Section 129 refers to "powers" as well as "duties".

14 In any event to the extent that the appellant was under a "duty" to supply electricity to Russell Heads it was indeed under a duty to erect and maintain the "works" necessary to effect that supply. Those works upon the evidence included both the power line suspended between the poles on either side of the river and the warning sign underneath the line in the absence of which the appellant would not have been permitted

to suspend that line over the river.

15 In the course of a long judgment, the learned trial Judge had regard to consideration given by this Court to the very point which was argued before him, in *Masterwood Pty Ltd v. Far North Queensland Electricity Board* (Appeal No. 4049 of 1996) in which judgment was delivered on 29 August 1997. It is unreported but of course was placed before him.

16 In my view, two of the three Judges (Fitzgerald P. and McPherson J.A.) clearly took the view that the negligent act found against the appellant fell within the statutory exemption of s. 122 of the *Electricity Act*. Although the learned trial Judge concluded that the President was "mistaken" in material respects on my view a reading of his judgment lends no support to this conclusion. He would have struck out the particular of negligence upon which judgment for the respondent was based.

17 McPherson J.A. was clearly of the view that s.122 would exempt the appellant from any liability on the negligence found against it. At page 10 of his unreported decision, McPherson J.A. observed:

> "The problem for the plaintiff is however that in conferring the exemption from liability s.122(1) of the *Electricity Act* does not use the expression 'anything done under this Act' or its equivalent. The exemption conferred by s.122(1) is 'on account of anything done for the purposes of this Act'. The statutory protection is much wider and more comprehensive than that considered in the High Court decision (*ANA Commission v. Newman* and the other cases referred to in it). It is available whenever anything is done with a purpose and that purpose is among the purposes of the Act; or even as s.122(1) goes on to add 'if it is done in good faith and purports to be for the purposes of the Act'.
>
> There can be no doubt that the erection and maintenance of the cable through the airspace above Russell River was 'anything done for the purposes of' the *Electricity Act 1976* whether or not it was something that could be or was done only by virtue of a power conferred by that Act. Counsel's concession that it was within the scope of the Act to put the cable across the river is probably sufficient to establish the point. But in

> any event it is impossible to doubt that the erection and maintenance of the cable at or in the place in question was within the meaning of s.129 a thing done 'for the purposes of' supplying electricity to consumers in accordance with that section."

18 Fryberg J. when analyzing s. 122 observed (at p. 9 of his unreported judgment):

> "Plainly 'anything' cannot refer to the whole of a cause of action but there is no reason why it cannot refer to the whole of the conduct of the potential defendant which is necessary to the cause of action and which brings about the liability. That in my judgment is how the words should be read. It is the complex of facts which constitutes the conduct to be tested for compliance with the section."

At p. 11 he continued:

> "In my judgment the section requires that the conduct in question ("anything done") be an essential or inherent part of carrying out the identified purpose of the Act will be necessarily incidental to that identified purpose."

Interestingly at p.12 Fryberg J. distinguished the High Court cases to which I have referred

observing:

> "Much of the focus in those cases is necessarily upon whether the act in question was done in the execution of a statutory power or duty. That is not an appropriate test in the present case."

19 Ultimately Fryberg J. (and Fitzgerald P.) took the view that the appeal should be allowed and the matter remitted back to the District Court to permit amendment of the pleadings. McPherson J.A. concurred.

20 Paragraph 6 of the plaint which led to the first appeal to this Court read inter alia:

> "6. The collision by the plaintiff's float plane with the cable was caused by the negligence of the defendant.
>
> Particulars
>
> ---
>
> (j) failing to ensure that any warning signs were free of obscuring undergrowth

(k) failing to ensure that any warning signs were readily visible to aircraft pilots when it ought to have done so."

21 There were many other particulars of negligence but when pursuant to the order of this Court the plaint was amended on 18 September 1997 those two particulars together with another particular not pursued were the only ones relied upon.

22 On my reading of the judgment of this Court it is clear that it was the view of both Fitzgerald P. and McPherson J.A. that the liability of the appellant for the act of negligence upon which the respondent succeeded was excluded by the terms of s. 122 of the *Electricity Act*.

23 In my view the learned trial Judge fell into error in his construction and application of s. 122 of the Act as to its effect on the finding of negligence he made; it was contrary to the express views of two members of this Court; although he did not directly address the point in my view the observations of Fryberg J. to which I have referred do not lead to the conclusion that his conclusion would have differed from those of the other members of the Court on this point.

24 In the course of considering the observations of the members of this Court in August 1997, his Honour observed:

> "I have no difficulty with the proposition that the erection of the warning signs was carried out as a valid requirement under the *Harbours Act 1955*. I also accept that the erection of the signs was something which the defendant had to do in order to get the required approval to construct the power line.
>
> However in my view that does not make the erection of the sign something done for the purpose of constructing the works.
>
> --
>
> I point out of course that the 'thing done' under consideration is not the erection of the sign. If anything the erection of the sign was carried out for the purpose of the *Harbours Act*. Clearing the vegetation obscuring the

> sign is one step further removed from the purposes of the Act than the construction of the sign.
>
> No purpose of the Act has been identified to me in respect of which it can be said that the periodic clearing of vegetation was "for". In my view the purpose of clearing the vegetation away from the sign was to notify people in the vicinity of the presence of the overhead cable. My attention has not been directed to any such purpose in the *Electricity Act*.
>
> I am not satisfied that the liability in respect of which I have found against the defendant is on account of anything done for the purposes of the *Electricity Act*."

I am in fundamental disagreement with this analysis and conclusion. In my view the only purpose of erecting and maintaining the power line and the warning sign was the supply of electricity to Russell Heads. If contrary to the requirements of the Harbour Authority or if that authority had no such requirement, no warning sign had ever been erected, it would render ineffective s. 122 to hold the appellant liable in negligence for suspending its power line across the river without a warning sign.

25 One might find it surprising that a statutory exception in terms of s.122 of the *Electricity Act* is still to be found in current legislation.

26 The learned trial Judge sought to confine its effect by construing it very narrowly. This is understandable; a similar approach was adopted by the High Court in *Australian National Airlines Commission v. Newman* (1987) 162 C.L.R. 466 and *Board of Fire Commissioners of New South Wales v. Ardouin* (1961) 109 C.L.R. 105.

27 I find little assistance in construing s. 122 in the observations in *Board of Fire Commissioners of New South Wales v. Ardouin* (1961) 109 C.L.R. 105; *Hudson v. Venderheld* (1968) 118 C.L.R. 171 and *Australian National Airlines Commission v. Newman* (1987) 162 C.L.R. 466.

28 Two of those cases related to the failure of a plaintiff injured by the negligence of

a person for whom a statutory corporation was responsible to give a notice of action which the statute incorporating the corporation required when a servant or agent of that corporation was engaged in an activity "done or intended to be done or omitted to be done under this Act" (*Hudson v. Venderheld*) or "arising out of anything done or purporting to have been done under this Act" (*ANA v. Newman*).

29 Of those cases, *Ardouin's* case seems to be the most comparable to the present case. The other cases related to the necessity to give a notice. However, in *Ardouin's* case there was a statutory exemption from liability of the Fire Board for "damage caused in the bona fide exercise of any powers conferred" by the *Fire Brigade's Act* or the By-laws made under that Act.

30 In all three cases a plaintiff sued for damages for negligence of the corporation or an officer for whose negligence the corporation was responsible.

31 In *Ardouin's* case a fire officer drove a fire engine to the scene of a fire negligently. In *Hudson v. Venderheld* the plaintiff was injured when a council truck returning to its depot after it had been used to repair high tension wires collided with a car in which he was a passenger. In *Australian National Airlines Commission v. Newman* an employee of the Airlines Commission who was a catering assistant in the staff canteen provided by the Commission slipped on a patch of grease on the floor of the flight services kitchen. She sued her employer for negligence in failing to provide her with a safe place of work.

32 The Court in that case considered the other two cases to which I have referred and it will suffice I think to refer briefly to observations in that case consistent with decisions in the other cases to distinguish the nature of the statutory exemptions in those cases from the statutory exemption under the *Electricity Act*.

33 In that case the Commission contended that in carrying on the flight services kitchen the Commission was doing something "under the Act".

34 In the majority decision of the Court, it was observed at 471:

> "The flaw in this argument is that s.63(1) lends no support to the view that for the purpose of determining whether the sub-section applies, we should look to the general statutory function or power pursuant to which the Commission carried on its relevant undertaking rather than to the particular act of which the respondent complained. The expression at the end of the sub-section 'the act complained of' refers back to the earlier words 'anything done or purporting to have been done under this Act.' These words refer to the particular act that causes the injury complained of rather than to the general function or power pursuant to which the Commission engages in the undertaking in the course of which the injury occurs. What the respondent complained of was not the carrying on of a flight service kitchen but the failure to maintain a safe means of access to a place of work the failure to maintain the floor in good order and condition and the failure to properly maintain it.
> ---
>
> The starting point of the application of s. 63(1) in a particular case must necessarily be the identification of the thing 'for or arising out of' which the action is brought which, as we have indicated will correspond with what the section describes as the 'act complained of'."

At 477 Brennan J. observed:

> "The conduct of the kitchen was something which the Commission had capacity to undertake but without the grant of statutory power to undertake it. It follows that an act committed in the course of conducting the kitchen is not an act arising out of something done or purportedly done under the Act for the purpose of s.63(1)."

In *Ardouin's* case Kitto J. had observed at 118:

> "There is no difficulty in finding in the creation of a duty an implied grant of power. But the implication arising as it does from necessity must be limited by the extent of the need. There can be no implication of a grant of power to do in the performance of the duty what is in any case lawful. To drive a vehicle on a public street for the purpose of dealing with a fire or for any other purpose needs no grant of power. For that reason neither s.19 nor s.28 (the sections prescribing the Board's duties) can be said to confer a power to drive on a public street; and accordingly damage caused by an officer of the Board in driving on a public street is not damage caused in the exercise of a power conferred by either of those sections. It is caused in

> the exercise of the right of way which anyone may exercise in virtue of the public character of the highway."

35 Section 122 of the Act is in quite different terms from the sections considered in the three cases to which I have referred. Those cases talked of something done or purportedly done "**under** the Act". Section 122 on the other hand exempts the Board from liability on account of anything done **for the purposes** of this Act or done in good faith and purporting to be **for the purposes** of this Act.

36 I gain little assistance in determining whether the erection of the warning sign and its maintenance at the site of the suspended cable across the Russell River was something done for the purposes of the Act or purporting to be for the purposes of the Act by considering authorities dealing with whether an act complained of was done "under the Act". In my view it would make nonsense of the section to so construe it as to put outside the statutory exemption from liability an act or omission directly connected with the maintenance of the supply of electricity to the Russell Heads community. In my view this conclusion follows almost inevitably from the plain wording of the section as it has been construed by this Court in both *Larkin v. Capricornia Electricity Board* [1995] 1 Qd.R. 268 and indeed in the earlier decision of this Court in this case (unreported) delivered 29 August 1997.

37 In *Larkin* an electrical subcontractor negligently installed a sub-main on a residential block of land. The electricity board failed to "inspect the installation in its entirety" and was found guilty of negligence.

38 The trial Judge had observed that:

> "A provision such as s. 122 should be strictly construed"

He referred to *Ardouin's* case and the *Australian National Airlines Commission v. Newman*

and continued:

> ---
>
> As was the situation with the particular section of the Act in *Newman's* case, s. 122 says nothing about omissions or the failure to perform a duty. Section 156 of the Act is an example of the provision of the Act concerned with the Board's failure to do something not due to negligence or default on its part. In the circumstances in my view s.122 provides no immunity to the defendant from the plaintiff's action".

39 In allowing an appeal against this ruling this Court pointed out that *ANA v. Newman*:

> "emphasizes the need to identify the specific cause of the plaintiff's injury to see whether it attracts a statutory protection but leaves open the question whether omissions as well as acts of commission may be said to be 'done' within the meaning of a statutory provision such as s. 122 of the *Electricity Act*".

40 The Court then applied *Jolliffe v. Wallasey Local Board* (1873) L.R. 9 C.P. 62. Upon the facts of this case it is clear that *Larkin* establishes that the appellant's failure to keep the warning sign visible while its power line was suspended across the Russell River was "an act done **for the purposes** of the *Electricity Act*". It was not the failure to keep the warning sign visible which alone was the cause of the collision; it was the suspension of the cable without an effective warning of its location which was the cause. In *Larkin* at 273 it was observed:

> "The respondent somewhat faintly advanced an alternative argument that s.122 of the *Electricity Act* should be read down so as to apply only in relation to powers or duties given or imposed by Part III Division II of the Act. Two reasons were given for this. One was that s. 122 is contained in that part of the Act. The other was that, otherwise, s. 156 of the Act would be otiose. Neither of these submissions has any substance."

41 Counsel for the respondent contended that the warning sign in question was not "part of the works" which the appellant used and maintained to supply electricity to

people at Russell Heads. She contended that even if it were essential to have the sign erected and kept visible to allow the electric line to be lawfully suspended across the river the sign could still not be treated as part of the works as for example the poles between which the line was suspended over the river would obviously be treated.

42 Finally it was contended on behalf of the respondent that the warning sign was only erected near the suspended wire "because of the demand of the Harbours and Marine Board"; and its connection with the supply of electricity is too indirect for the erection and maintenance of the sign to be covered by the exception. It was contended that while acts done or omitted with respect to the maintenance of the poles and the wires suspended between them would come within the statutory exception, the maintenance of the sign to warn people of the existence of the electric cable was so "indirectly" connected with the supply of electricity to Russell Heads that as a matter of statutory construction it could not be said that the erection and maintenance of the sign involved "anything done for the purposes of or purporting to be for the purposes" of the Act within s. 122 of the *Electricity Act.*

43 Undoubtedly given an ordinary construction, one would think that s. 122 might exempt an electricity board from liability for the most negligent of activities causing very great damage to persons coming within the ambit of the Board's operations in supplying electricity. For example, persons for whose actions a Board is responsible, cutting the limbs off trees to protect electric lines might be exempted from liability for damage resulting from those activities caused to pedestrians or property unfortunate enough to be at or near the scene of those operations by the most negligent conduct of those persons.

44 Again, a Board would seem to be given a statutory exception from liability for its

failure to ensure that electric light poles are erected carefully; and once erected not allowed to deteriorate to such an extent that they collapse; with the result that they fall across roads or on to houses causing great injury and damage.

45 As the century draws to a close one can but wonder at the maintenance of a legislative exemption, in the terms of s. 122(1), from liability for damage caused to members of the community by the negligence of persons for whom a Board is responsible in performing it s function in supplying electricity to the community generally when it is usual for other corporations generally to insure against liability for negligence. Upon the facts of this case the effect of s. 122(1) as far as the respondent is concerned is to equate the legal consequence of its float plane colliding with the appellant's power line suspended over the Russell River without adequate (and the required) warning with that of its colliding with a tree or a mountain. One might think the charges levied for the supply of electricity would permit some boards disinclined to insure against legal liability for negligence to become self insurers for damage negligently inflicted on persons and property by persons retained by them for the distribution of electricity and the maintenance of works necessary for that purpose.

46 In my view this Court ought not be astute to so read down the clear statutory exemption conferred on electricity boards by s.122(1) of the Act as to deprive it of the effect to be given to it by a natural and sensible reading of the terms of that section. In my view it is a matter for the Legislature to address the justice and wisdom of having such a wide and all encompassing legislative exemption from liability in this day and age and not for this Court by a strained and artificial construction to attempt to achieve a result consistent with what it perceives to be a desirable social policy in the circumstances of this case.

47 There are obviously other circumstances where serious injury and damage may be caused to members of the community by negligence for which Electricity Boards are responsible - such as employees, householders, road-users etc - which might be kept in mind by the Legislature should it consider whether s. 122(1) should remain in force in its present terms. In my view, it is clear upon the evidence that the erection of the warning sign and its maintenance was required of the appellant before it could lawfully suspend the electric cable across the Russell River for the purpose of supplying Russell Heads with electricity. Such was the undisputed evidence and indeed was the finding of the learned trial Judge.

48 The erection of the sign at the insistence of the Harbour Board was obviously designed to bring to the attention of people using the Russell River the presence of the power line suspended across that river. Such persons one would think, would include those sailing boats with high masts on the river and also those persons landing on and taking off from the river in float planes.

49 The whole object of the Harbour Board requiring the erection and, I infer, maintenance of the sign as a condition precedent to permitting the electric line to be suspended across the river from poles on either side of it, was to procure as far as reasonably practicable, the safety of persons who might be using the river from injury or damage they might suffer should they or their conveyance come into contact with it.

50 It was contended on behalf of the appellant that another object of the erection and maintenance of the sign was to protect the power line from damage. Undoubtedly this was a result which the erection and maintenance of the sign might achieve. However, on the material as I read it, it was not established that it was erected for that purpose by the appellant. The reason the appellant erected the sign was that the Harbour Board would

only permit it to suspend the power line over the river if such a sign was erected.

51 It is clear on the evidence and upon the findings of the learned trial Judge that over the years that passed after the power line was first suspended across the river, employees of the appellant from time to time, attended to the maintenance of the sign in such a way that it would achieve the purposes for which it had been erected; which was to warn persons who were able to see it of the existence of the power line by drawing its location to their attention. Obviously it was for this purpose that from time to time the appellant's workmen took the trouble to sufficiently clear brush and undergrowth from around the sign to enable people on or above the river to see it.

52 In my view the purpose of the erection and maintenance of the sign was inextricably bound up with the supply of electricity to Russell Heads by means of the electric power line with which the respondent's aeroplane collided.

53 I find it impossible to regard the erection and maintenance of the sign as being for any purpose other than the supply of electricity to Russell Heads in a manner as safe as reasonably practicable which involves drawing the attention of persons who might be affected by the location of the power line to its existence in that location. In my view the negligence found against the appellant clearly comes within the exemption provided by s. 122(1) of the Act.

54 I would allow the appeal and set aside the judgment for the respondent and direct that judgment be entered for the appellant with costs. I would further order that the respondent pay the appellant's costs of and incidental to the action to be taxed including pursuant to the order of the Court of Appeal the costs of the trial of the claim held before Judge Daly in April 1996.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No 2427 of 1998

Brisbane

Before McPherson J.A.
Ambrose J.
Cullinane J.

[Far North Queensland Electricity Board v. Masterwood P/L.]

BETWEEN:

FAR NORTH QUEENSLAND ELECTRICITY BOARD
(Defendant) Appellant

AND:

MASTERWOOD PTY LTD
ACN 054 890 550
(Plaintiff) Respondent

REASONS FOR JUDGMENT - CULLINANE J.

Judgment delivered 18 December 1998

1 The relevant factual matters are set out in the judgment of Ambrose J and I adopt these.

2 This appeal concerns the ambit of the immunity provided to electricity authorities by s. 122 of the *Electricity Act 1976* as amended.

3 The learned trial Judge found that the appellant was guilty of negligence which caused damage to the respondent in that it failed to keep visible a sign intended to provide notice of the presence of cables which the appellant had constructed together with other structures for the purposes of supplying electricity.

4 His Honour found that the erection of the warning sign which the appellant, as His Honour found, failed to keep clear of vegetation so as to maintain its visibility, was required pursuant to the *Harbours Act 1955,* and its erection was something which the appellant was obliged to carry out in order to obtain the necessary approval to establish the electricity supply.

5 Section 122 provides (so far as is relevant) as follows:

> "**Indemnities**. (1) No liability shall be incurred by an Electricity Board, the General Manager, any member of the Board, the secretary to or any other employee of the Board or any other person whomsoever acting under the direction of the Board on account of anything done for the purposes of this Act or done in good faith and purporting to be for the purposes of this Act.

6 The statutory powers, functions and duties of an electricity board are contained in s.129 of the Act and are widely expressed. In any consideration of s.122 I would take the relevant purpose of the Act in the circumstances of this case as the supply of electricity to consumers at Russell Heads pursuant to the statutory obligation imposed on the appellant by s.129(a).

7 Section 122 has been considered in *Larkin v. Capricornia Electricity Board* [1995] 1 Qd R 268 and in this matter when it came before the Court of Appeal on an earlier occasion. That judgment is now reported in [1999] 1 Qd.R. 345.

8 Whilst His Honour's finding is of a negligent omission there is a substantial body of authority that in such a case the cause of action is in fact a composite of act and omission. As McPherson JA said at page 349 of the report of this matter when it first came before the Court of Appeal:

> "What the defendant was sued for here was erecting and maintaining cables across the river without giving low flying aircraft adequate warning of its presence."

See also *Jolliffe v. Wallasey Local Board* (1873) L.R. 9 C.P. 62. In *R.. v Williams* (1884) 9 App.Cas. 418 the Privy Council approved. In *Larkin v. Capricornia Electricity Board* the Court of Appeal adopted a similar approach. As I have already said, s.122 was under consideration in that case. I will return to this aspect of the matter a little later.

9 Assuming this approach to be correct, it can, I think be readily accepted that if s.122 is to be afforded its literal meaning and is not to be read down in some way, the activity, the subject of the finding by the learned Trial Judge, would come within the terms of the immunity. The immunity would, it seems to me, also include activity peripheral or incidental to the supply of electricity which might include the negligent driving of a vehicle by an employee on his way to inspect an installation, or injury sustained by a member of the public by an inadequately guarded construction site at premises where electricity bills are paid. These activities would satisfy the description "anything done for the purposes of this Act" and fall within s.122. Unless the section is read down in some way, there is no reason why the immunity does not extend to activities of this kind with consequences which most people would regard as so far reaching as to be unjust.

10 Support for a construction of clauses of this kind which confines their operation is found in, amongst other cases, a series of judgments of the High Court of Australia. See *Board of Fire Commissioners of New South Wales v. Ardouin* (1961) 109 CLR 105, *Hudson v. Venderheld* (1968) 118 CLR 171 and *Australian National Airlines Commission v. Newman* (1987) 162 CLR 466. The provisions under consideration in those cases were in different terms to that under consideration here.

11 In *Ardouin's* case, the relevant provision protected certain officers "exercising any powers conferred by this Act or the by-laws" from liability for any damage caused by a bona fide exercise of such powers.

12 In *Hudson's* case, no proceedings could be instituted against a local authority or any member thereof or any member or servant thereof "for anything done or intended to be done or omitted to be done under this Act" until the expiration of one month after notice in writing had been served on the person concerned and such action had to be commenced within a period of 12 months after the cause of action arose.

13 In *Newman's* case, any action against the Australian National Airlines Commission or against any person "for or arising out of anything done or purporting to have been done under this Act" was required to be commenced within two years after the act complained of was committed.

14 The expression "on account of anything done for the purposes of this Act" is of wider import than the expression "for anything done under this Act." Furthermore, as is apparent from the judgments just referred to, an immunity of the latter kind gives rise to somewhat different considerations to those which arise under s.122.

15 Nonetheless, it seems to me to be clear that the principles to be found in the judgments of the High Court and in particular, *Ardouin's* case are of general application and cannot be limited to provisions expressed in the terms under consideration in those cases.

16 In *Ardouin's* case, Kitto J said at page 116:

> "...The protective nature of the provision made in s.46 ... is such that a most strict interpretation of its words is plainly demanded. The consequences for the property, the health, the lives, of individuals affected by a negligent exercise of power under the Act may be of the most serious; yet the section takes away all remedy, if only good faith exist.

> And the Act, be it noted, makes no provision of its own for compensation. As already mentioned it does, in s.32, enable damage caused to property by an officer in the circumstances there mentioned to be deemed damage by fire for the purposes of a fire policy; but that provision covers only a limited class of cases, and even where it applies, all it does is to transfer the burden of the loss from the owner of the property to the insurer. Section 46 operates, then, to derogate, in a manner potentially most serious from the rights of individuals; and a presumption therefore arises that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such an immunity granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow."

And at 117:

> "What, then, is the strict meaning that should be given to the description of the damage which may be caused with immunity from liability? It is limited to damage caused 'in' the bona fide exercise of powers. In my opinion, the meaning is that the immunity attaches in respect only of damages resulting from an act which, if it had not been negligent, would have been the very thing, or an integral part of or step in the very thing, which the provisions of the Act other than s.46 or the bylaws gave power in the circumstances to do, as distinguished from an act which was merely incidental to, or done by the way in the course of, the exercise of a power."

17 Although in the second of the two passages set out above, Kitto J was referring to the particular provision with which that case was concerned, his remarks are not to be regarded as limited to such a case, a point which His Honour made a little later at p. 117 when referring to another case which involved a differently expressed immunity:

> "A construction similarly restricted was placed upon a differently worded provision in the case of *Marriage v. East Norfolk Rivers Catchment Board*. That case is no authority on the meaning of s.46, but I mention it for an illustration which was taken by Jenkins L.J. (as he then was) in order to make clear the distinction I am drawing. The Act under consideration in that case gave a drainage board a power which extended to heightening the banks of watercourses. A section of the Act made its own provision for

> compensation, and consequently excluded resort to the courts, in cases of injury sustained 'by reason of the exercise of a drainage board of any of its powers under this section.' His Lordship construed the description as applying only to an injury 'the product of an exercise of the board's powers as such, as opposed to the product of some negligent act occurring in the course of some exercise of the board's powers, but not in itself an act which the board are authorised to do.' 'For example,' His Lordship said, 'an injury caused by flooding on one side of the river due to heightening by the board of the bank on the other side would be a proper subject of compensation, as opposed to action in the courts; but an injury caused by the negligent driving of one of the board's lorries bringing materials to the site would be actionable in the ordinary way'. "

18 These principles were approved and applied in *Hudson's* case and *Newman's* case.

19 I would hold that the statutory immunity for which s.122 provides is limited to the very activities by which the relevant purpose is achieved and does not extend to anything incidental or ancillary to this. In the present case I would regard the erection and maintenance of the cables and structures by which the supply of electricity is provided as within the immunity but the provision of a sign warning of the presence of the cables and the keeping of vegetation away from the sign so as to maintain its visibility as outside the immunity.

20 In my view, the learned trial Judge reached the correct conclusion. The appeal should be dismissed for this reason.

21 The respondent sought to support the judgment on an alternative ground and relied upon *Australian National Airlines Commission v. Newman (supra)* in support thereof.

22 I have already referred to those authorities dealing with what is said to be the composite nature of a cause of action where a negligent omission is alleged.

23 It is however difficult to reconcile this approach with the judgment of the High Court in *Newman's* case. In that case, the respondent/plaintiff alleged that she had been injured by the Commission's failure as her employer to provide a safe means of access to her place of work or to maintain the floor in good order and condition.

24 At pp. 471-472, in the joint judgment of the majority, it was said,

> "The starting point of the application s.63(1) in a particular case must necessarily be the identification of the thing 'for or arising out of' which the action is brought, which, as we have indicated, will correspond with what the section describes as the 'act complained of.' In the present case, there is no difficulty in identifying the 'act complained of' or the thing 'for or arising out of' which the particular action was brought. It was the failure to provide a safe means of access to a place of work or to maintain the floor in good order and condition or to maintain it properly. As a matter of ordinary language, it seems to us that the Commission's failure in any of those regards could not, in the context of the disentitling provision of the kind contained in s.63(1) of the Act, properly be seen as coming within the description of something 'done or purporting to be done' under an Act which contains nothing at all about either the failure to provide or the provision of safe means of access or about the neglect or the proper maintenance of floors in premises owned and occupied by the Commission. We are confirmed in that view by a consideration of the authorities to which we were referred in the course of argument. For present purposes, the most important of those authorities are the decisions of this Court in *Ardouin and Hudson v. Vanderheld*."

25 This approach requires a strict focus upon the very thing alleged to give rise to the cause of action rather than the general statutory function of the relevant authority.

26 Just as in that case the Act made no provision for a failure to provide a safe means of access or a failure to properly maintain floors in premises owned by the commission, the *Electricity Act* (perhaps unsurprisingly) makes no provision for the failure to keep visible signs warning of the presence of electrical installations.

27 The approach of the High Court is undoubtedly highly restrictive and would greatly reduce the effect of statutory immunities such as s.122. However, it is difficult to see why the same process of reasoning, carrying the weight of such high authority, should not lead to the conclusion that the appellant's negligent failure to keep the sign free of vegetation so as to maintain its visibility to persons in the vicinity cannot be something done "for the purposes of this Act" under s.122.

28 For this reason also I think the appeal should be dismissed.

29 I would dismiss the appeal and order the appellant to pay the respondent's costs of the appeal.