SUPREME COURT OF QUEENSLAND

CITATION:	*QBE Ins Ltd v Nominal Defendant* [1999] QCA 493
PARTIES:	**BORIS TRENEVSKI** (plaintiff) v **ANTHONY GARY TURIANO** (first defendant) **QBE INSURANCE LIMITED** **(ACN 000 157 899)** (second defendant/applicant/appellant) **THE NOMINAL DEFENDANT (QUEENSLAND)** (third party/respondent)
FILE NO/S:	Appeal No 8469 of 1999 DC No 3594 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 November 1999
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 1999
JUDGES:	Davies and Pincus JJA, Williams J
ORDER:	**Appeal allowed with costs. Order below set aside and in lieu the application made to the learned primary judge dismissed with costs.**
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – RIGHTS AND LIABILITIES OF INSURER IN RESPECT OF DEFENCE AND COMPROMISE – QUEENSLAND – third party notice claiming contribution from Nominal Defendant issued by defendant insurer – notice struck out – application of s 52A *Motor Accident Insurance Act* 1994 to claim for contribution – accident occurred before s 52A came into effect - whether right to contribution accrued before s 52A came into effect - application of s 40(2) *Limitation of Actions Act* 1974 – whether permissible for defendant insurer to make anticipatory claim for contribution in the absence of judgment or compromise *Hordern-Richmond Ltd v Duncan* [1947] KB 545, applied

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589, applied

Limitation of Actions Act 1974, s 40(2)
Motor Accident Insurance Act 1994, s 52A

INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – RIGHTS AND LIABILITIES OF INSURER IN RESPECT OF DEFENCE AND COMPROMISE – QUEENSLAND – REQUIREMENT OF NOTICE BEFORE ACTION – third party notice claiming contribution from Nominal Defendant issued by defendant insurer – whether notice requirements of s 37(5) *Motor Accident Insurance Act* 1994 satisfied – whether s 37(5) applicable to a claim for contribution

Young v Keong [1999] 2 QdR 335; [1998] QCA 100, distinguished

Motor Accident Insurance Act 1994, s 37(5)

COUNSEL: Mr K F Boulton for the applicant
Mr A P Goodman (not of counsel) for the respondent

SOLICITORS: Delaney & Delaney (town agents for Windeyer Dibbs, Sydney) for the applicant
Gadens Lawyers for the respondent

[1] **THE COURT:** This is an appeal from the District Court concerning a claim for contribution made by the appellant QBE Insurance Limited. A plaintiff, Mr Boris Trenevski, caused a plaint to be issued claiming damages for personal injuries arising out of a collision between two motor vehicles, one driven by Mr Trenevski and the other driven by a Mr Turiano. The plaintiff claimed damages for injuries said to have been suffered in the collision. He sued both Mr Turiano and the latter's insurer QBE; that was done because of the requirements of s 52(1) of the *Motor Accident Insurance Act* 1994 ("the 1994 Act"). A defence was delivered denying negligence and the defendants Mr Turiano and QBE issued a third party notice claiming indemnity or contribution from the Nominal Defendant (Queensland) on the ground that the plaintiff's injuries were contributed to by the negligence of the driver of an unidentified motor vehicle.

[2] The Nominal Defendant applied for and obtained an order striking out the third party notice on the ground that QBE had no cause of action against the Nominal Defendant. The learned primary judge held that s 52A of the 1994 Act which deals with the question of contribution by or from the Nominal Defendant under the *Law Reform Act* 1995, Part 3 Division 2, did not apply to this claim for contribution. His Honour pointed out that s 52A came into effect on 16 October 1997, whereas the plaintiff's injury was sustained on 4 August 1997. He held that

s 52A had no retrospective operation and therefore did not assist QBE. Section 52A reads as follows:

> "(1) This section applies if –
> (a) the Nominal Defendant is 1 of 2 or more insurers liable on a motor vehicle accident claim; and
> (b) the claim is not a claim in relation to which the insurers are, under the industry deed and within the time stated in the deed, required to resolve questions about-
> (i) which insurer is to be the claim manager; and
> (ii) the basis on which claim costs are to be shared between the insurers.
> (2) For the recovery of contribution by or from the Nominal Defendant, the *Law Reform Act* 1995, part 3, division 2 applies as if the Nominal Defendant were a tortfeasor".

[3] In our opinion s 52A on its natural construction applies, and applies only, to rights of contribution which accrue after the date upon which it came into effect; it refers to "*recovery* of contribution". The date of accrual of actions for contribution of this sort is defined by s 40(2) of the *Limitation of Actions Act* 1974. That deals with two circumstances, that in which the party claiming contribution has been held liable by judgment and that in which that party has settled with the plaintiff. At the time the contribution claim was made here, neither of these circumstances had arisen; i.e. there was then no accrual of the cause of action for contribution. There was no judgment in favour of the plaintiff nor any compromise of the suit. But it was permissible for QBE to make its claim for contribution when it did, in an anticipatory way, although there was neither judgment nor compromise: *Hordern-Richmond Ltd v Duncan* [1947] KB 545, *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 595. In *Anshun* it is explained that an indemnity may be claimed, under the statute providing for contribution between tortfeasors, before the liability to indemnify arises because "one of the peculiarities of third party procedure is that it enables litigation on the indemnity to take place before there is any liability". The same applies to contribution claims: *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200 at 210. In our view, these doctrines apply to the District Court, despite the limited nature of its jurisdiction in equity.

[4] As between holding that the amendment catches only instances in which the cause of action for contribution with which it deals accrues after commencement of the amendment, and fixing the commencement of its operation by reference to the accrual of a cause of action (the injured plaintiff's) other than that with which it deals, the former is the appropriate course. It should be added that substantial arguments may be able to be advanced in favour of the view that, even apart from s 52A, the claim for contribution was good*: Mathieson v Workers' Compensation Board of Queensland* [1990] 2 QdR 57, *Suncorp Insurance and Finance v Nominal Defendant* (1990) 6 ANZ Ins Cas ¶60-959, *Dunning v Altmann* [1991] 2 VR 667. But it does not appear necessary to discuss this aspect of the matter, for s 52A applies.

[5] In the court below attention was focused on the expression in s 52A(1) "liable on a motor vehicle accident claim" and it was held that the provisions of s 52A came

into effect when that liability arose. That was, in our respectful opinion, incorrect. The cause of action which is created by, or whose existence is made clear by, s 52A(2) is not that dealt with in s 52A(1), but the claim for contribution, a cause of action which does not accrue until judgment or compromise.

[6] A further point which was argued is that QBE had failed to give the appropriate notice under s 37(5) of the 1994 Act. The learned primary judge read this section as destroying the claim for contribution. In our opinion that is not so. Section 37(5) has nothing directly to do with any claim for contribution.

[7] It is true that it has been held that failure by a person claiming damages for personal injuries to give notice of claim to the insurer under s 37(1) causes an action brought of the kind mentioned in that subsection to be a nullity: *Young v Keong* [1999] 2 QdR 335; [1998] QCA 100, but that authority has no bearing upon s 37(5). *Young v Keong* would be a useful analogy only if s 37(5) in some way tied the giving of the notice to the bringing of a claim for contribution; it does not do so, either expressly or implicitly.

[8] Another reason for holding, as we do, that s 37(5) does not affect any claim for contribution is that, if it did, then it would prevent a claim for contribution in instances in which the insurer given the notice of claim had at first no knowledge that any other motor vehicle was involved in the accident. For example, an injured pedestrian might ascribe his injury to vehicle A which struck him and it might turn out that it did so partly because it was caused to swerve by vehicle B. If the plaintiff's claim blamed the driver of a certain vehicle, the insurer of that vehicle may not be able within seven days, or indeed a longer time, to ascertain that another motor vehicle was involved.

[9] The appeal must be allowed with costs, the order made below set aside and in lieu the application made to the learned primary judge dismissed with costs.

[10] There is another appeal raising the same point, relating to plaint no 3593 of 1998. It would not appear to be necessary to make a formal order relating to that appeal, which must share the fate of this one. However, such an order will be made if desired.