# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Watkin v GRM International P/L* [2006] QCA 382 |
| PARTIES: | **ANTHONY VAUGHN WATKIN**<br>(applicant/respondent)<br>**v**<br>**GRM INTERNATIONAL PTY LTD** ACN 010 020 201<br>(respondent/appellant) |
| FILE NO/S: | Appeal No 3815 of 2006<br>SC No 1341 of 2006 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 29 September 2006 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8 September 2006 |
| JUDGES: | McMurdo P, Keane JA and Cullinane J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal allowed**<br>**2. Orders below are set aside and the respondent's application is dismissed with costs** |
| CATCHWORDS: | WORKERS' COMPENSATION - ALTERNATIVE RIGHTS AGAINST EMPLOYER AND THIRD PARTIES - respondent was resident of Queensland employed by appellant - contract of employment governed by laws of Queensland - respondent's services were provided by the appellant to prison in the Solomon Islands - respondent suffered personal injuries in the course of employment - application for compensation rejected - respondent sought to claim for damages pursuant to *Personal Injuries Proceedings Act 2002* (Qld) - whether the respondent's substantive rights against the appellant, if any, have survived the operation of the *Workers' Compensation and Rehabilitation Act 2003* (Qld)<br><br>*Personal Injuries Proceedings Act 2002* (Qld), s 6(2)<br>*Workers' Compensation and Rehabilitation Act 2003* (Qld), s 10, s 115, s 237<br><br>*Glenco Manufacturing P/L v Ferrari & Anor* [2005] QSC 005; [2005] 2 Qd R 129, cited<br>*Hawthorne v Thiess Contractors P/L & Anor* [2001] QCA 223; [2002] 2 Qd R 157, considered |

*Newberry v Suncorp Metway Insurance Ltd* [2006] QCA 48; Appeal No 7137 of 2005, 3 March 2006, cited
*Roberts v Australia and New Zealand Banking Group Ltd* [2005] QCA 470; Appeal No 5639 of 2005, 16 December 2005, cited

COUNSEL: D O J North SC, with S S Monks, for the appellant
R J Lynch for the respondent

SOLICITORS: Minter Ellison - Gold Coast for the appellant
Gouldson Legal for the respondent

[1] **McMURDO P:** I agree with Keane JA.

[2] **KEANE JA:** The respondent was a resident of Queensland who was employed by the appellant as a prison officer. The respondent's contract of employment with the appellant was governed by the laws of Queensland. The respondent's services were provided by the appellant to the Rove Central Prison in the Solomon Islands. In the course of this employment, the respondent suffered personal injuries.

[3] The respondent made an application for workers' compensation benefits ("compensation") under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("the WCRA"). That claim was rejected by his employer's insurer on the ground that the respondent was not entitled to be paid compensation because his injury was suffered in another country and Queensland was not his principal place of employment. The rejection was upheld by Q-Comp (the Workers' Compensation Regulatory Authority).

[4] The respondent then sought to claim for damages for breach of duty against the appellant in respect of his injuries. The respondent asserted this claim pursuant to the *Personal Injuries Proceedings Act 2002* (Qld) ("PIPA"). The appellant challenged the respondent's entitlement to bring a claim pursuant to the PIPA. In response, the respondent applied for a declaration that the PIPA applied to his claim. The learned primary judge granted the respondent's application. It is that decision which the appellant challenges in this Court.

[5] The form of relief which the respondent sought tends to mask the real issue at the heart of the dispute between the parties. That dispute is not about which procedural regime, that of the WCRA or that of the PIPA, applies to regulate the pursuit of the respondent's claim. The real issue between the parties is whether the respondent's substantive rights against the appellant, if any, have survived the operation of the WCRA. In this regard, it is important to bear in mind that the appellant's substantive liability to the respondent for his injuries is not the creature of either the WCRA or the PIPA but, rather, is a creature of the common law.

**The legislative context**

[6] While it has since been amended, at the relevant time s 6(2) of the PIPA was relevantly in the following terms:

> "… [T]his Act does not apply to -
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> …
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> (b) injury as defined under the *Workers' Compensation and Rehabilitation Act 2003*, but only to the extent that an entitlement to

> seek damages, as defined under that Act, for the injury is regulated by chapter 5 of that Act."

[7] Also relevant to the argument below was s 115 of the WCRA. This section provided:

> "(1) If -
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> (a) an injury is sustained by a worker in another country in circumstances that, had the injury been sustained in Queensland, compensation would have been payable; and
>
> (b) at the time of the injury, the worker's principal place of employment was in Queensland;
>
> compensation is payable as if the injury were sustained in Queensland."

[8] In this statutory context, "compensation" refers, of course, to the compensation which the WCRA provides for injury, as distinct from "damages", the right to which arises independently of the WCRA.[1] The WCRA imposes on employers an obligation to insure against their liability to employees for both compensation and damages for injury.[2] In this way, the WCRA ensures that the liability of employers to pay compensation or damages is covered by a right of indemnity established under the legislative scheme. It is important to recognise that the WCRA makes a clear distinction between the compensation regime and the damages regime, but that the two regimes also interact for certain purposes.

[9] Section 237(1) of the WCRA identifies the classes of person "entitled to seek damages for an injury sustained by a worker". One such class is identified by s 237(1)(d) of the WCRA which permits a worker to seek damages "if the worker has not lodged an application for compensation for the injury". I shall return to this provision. The appellant does not presently satisfy the requirements of any of the qualifying provisions of s 237(1). Section 237(2) provides that "[t]he entitlement of a worker … to seek damages is subject to the provisions of this chapter" (s 237 is contained in chapter 5 of the WCRA). Section 237(5) declares that s 237(1) "abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker".

**The decision below**

[10] It was common ground between the parties below that, because the respondent's principal place of employment was not in Queensland, s 115 of the WCRA did not afford the respondent a right to compensation under the WCRA for the injury sustained by the respondent in the Solomon Islands.[3] It was not suggested by either party that any other provision of the WCRA conferred an entitlement to compensation on the respondent in respect of the injuries the subject of his claim.

[11] As was stated above, the respondent sought to make his claim pursuant to the PIPA. The appellant contended that the injury in respect of which the respondent claims damages from the appellant was one to which the PIPA does not apply because, assuming that the respondent had a right to recover damages from the appellant, that right was "an entitlement to seek damages" which was "regulated by chapter 5 of"

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1 See *Newberry v Suncorp Metway Insurance Ltd* [2006] QCA 48 at [19]; [2006] 1 Qd R 519, 527.

2 See s 48 of the WCRA.

3 See s 115(1)(b) of the WCRA.

the WCRA. Accordingly, it was said that, in terms of s 6(2)(b) of the PIPA, the PIPA did not apply to the respondent's injury because the respondent's entitlement to seek damages was regulated by chapter 5 of the WCRA.

[12] Central to the argument as presented by the appellant to the learned primary judge is the proposition that the respondent had an "entitlement to seek damages" which is "regulated by chapter 5" of the WCRA. The appellant advanced this proposition even though it is, and has always been, legally impossible for the respondent to recover damages for his injuries by reason of the provisions of the combined operation of s 115 and s 237 of the WCRA. This is a distinctly unattractive argument insofar as it suggests that the PIPA does not apply for the reason that the respondent has an "entitlement" to **seek** damages even though he can never **recover** those damages. It is not surprising that the appellant's argument, as presented, was rejected by the learned primary judge.

[13] The learned primary judge rejected the appellant's contention on the basis that:

> "The legislative assumption was that the [WCRA] should apply in that it accorded a right to compensation and opened the gateway provided by chapter 5 for the recovery of damages but only in particular situations. In this unusual case, the Act should not be seen as applying because of the exclusion it wrought by [s 115 …]."

[14] His Honour's approach draws support from the very terms of s 6(2)(b) of the PIPA which assume the possibility of an extant right to recover damages by an employee against an employer notwithstanding that the employee may not be entitled to seek damages against the employer under chapter 5 of the WCRA. Section 6(2)(b) of the PIPA expressly states that the application of the PIPA to an injury is displaced only **to the extent** that an entitlement to seek damages as defined under the WCRA is regulated by chapter 5 of the WCRA. It would, therefore, render s 6(2)(b) of the PIPA a dead letter if it were held to contemplate a right to damages which can only be pursued by the exercise of an entitlement to **seek** damages which is so "regulated" by chapter 5 of the WCRA that the employee's right to recover damages from his or her employer is annihilated by the terms of that "regulation".

[15] Less compelling, however, is the suggestion in the reasons of the learned primary judge that the WCRA does not regulate an employee's attempts to enforce a claim to recover damages in a case where s 237 of the WCRA had no application at all because the injured worker in question never had an entitlement to compensation. His Honour was evidently of the view that, when the various paragraphs of s 237(1) describe the "only persons [who are] entitled to seek damages for an injury sustained by a worker", they describe a worker for whom the WCRA creates a right to the payment of compensation for the injury in respect of which the injured worker seeks damages rather than describing workers in general. The contrary view is that the only workers who are entitled to seek damages from an employer are those described in s 237(1). That view draws powerful support from authority to which I shall return.[4]

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[4] *Hawthorne v Thiess Contractors Pty Ltd* [2001] QCA 223 at [6], [16] and [37] - [39]; [2002] 2 Qd R 157 at 159, 162 and 166-167; *Glenco Manufacturing Pty Ltd v Ferrari* [2005] QSC 5 at [3], [6]; [2005] 2 Qd R 129 at 130-131; *Roberts v Australia and New Zealand Banking Group Ltd* [2005] QCA 470 at [19]; [2006] 1 Qd R 482 at 489.

**The appellant's argument in this Court**

[16] As I have observed, the view of the learned primary judge was obscured by the terms of the application made to his Honour. The focus of that application, and the argument which ensued, was upon the competing claims of the WCRA and the PIPA as the procedural regime under which the respondent's claim might be pursued. Underlying this question of form and procedure, however, was the question whether the respondent had any entitlement to seek damages at all.

[17] In this Court, the appellant argued that the respondent had no entitlement to seek damages because of the operation of s 237(1) and (5) of the WCRA. The learned primary judge failed to appreciate, so it was argued, that the exclusion of a person as a candidate for compensation does not render the provisions of chapter 5 of the WCRA relating to the pursuit of damages inapplicable to a person who would assert an entitlement to seek damages. The thrust of the appellant's argument is that the respondent is unable to enforce an entitlement to damages under chapter 5 of the WCRA, and, moreover, that the respondent has no entitlement at all to seek damages from the appellant. If the appellant's contention is correct, the respondent is not entitled to enforce his right to damages, either under the PIPA, or at all.

[18] It may be said immediately that there is an apparent legislative recognition in s 6(2)(b) of the PIPA that an injured employee has a common law right to recover damages from an employer which he may seek to enforce otherwise than via chapter 5 of the WCRA. The terms of s 6(2)(b) of the PIPA proceed on the assumption that an employee may have an enforceable cause of action against his or her employer for damages for an injury in some circumstances, and that chapter 5 of the WCRA is not concerned with the regulation of an employee's entitlement to **seek** damages in all circumstances (as noted above, this assumption may be said to rely on the phrase "only to the extent that …" in s 6(2)(b)).

[19] Nevertheless, the terms of s 237 of the WCRA are clearly concerned to limit the "entitlement to **seek** damages" only to those workers listed and described in s 237(1). The respondent does not meet any of those descriptions. The decision of the learned primary judge can only be correct if s 237 of the WCRA contemplates a residual category of common law claims for damages (as that term is defined in the WCRA) which is not subject to the limitations imposed by s 237. The course of authority and legislative history combine to deny that view of s 237.

[20] It is securely established that the provisions of s 237(1) of the WCRA exhaustively describe those persons who may seek damages, and s 237(5) denies a person who is not within any of those descriptions any entitlement to seek damages from the appellant for the injury in question. That this reflects the scope of s 237 of the WCRA was affirmed by each member of this Court in *Hawthorne v Thiess Contractors Pty Ltd*.[5] In that regard, speaking of the precursor of s 237, McMurdo P said:[6] "The appellant, not having complied with the provisions of the Act, was unable to seek damages for injury either under the Act or at common law."

[21] Thomas JA said:[7]

> "In my view the [precursor to the WCRA] limits the right of employees to obtain damages for personal injuries against their

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5 [2001] QCA 223; [2002] 2 Qd R 157.

6 [2001] QCA 223 at [6]; [2002] 2 Qd R 157 at 159.

7 [2001] QCA 223 at [16]; [2002] 2 Qd R 157 at 162.

> employers to those who have suffered an 'injury' as defined. I agree with the reasons which Byrne J has written in reaching the view that there is no residual category of common law claim for damages for personal injury in favour of employee claimants who fail to obtain a certificate of the kind required by the Act … It is quite clear that the workers compensation scheme and associated common law damages scheme covered by compulsory insurance was intended to be the sole avenue of claim against employers in respect of injuries sustained by workers in their employment …"

[22] Byrne J said:[8]

> "The notion the [precursor to the WCRA] was intended to extend to all instances in which a PAYE employee seeks damages from an employer for work-related symptoms accords with the Minister's second reading speech, (*Hansard,* 27 November 1996, p 4459, 2nd col) …
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> Sir Owen Dixon wrote that: (*Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397, cited approvingly in *Project Blue Sky* at 381)
>
> > 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.'
>
> So it is here."

[23] Parliament re-enacted the statutory language the subject of these observations in the WCRA. It is impossible to suppose that this language was not intended to have the same effect as the same language expounded by this Court in *Hawthorne*. It is the explanation of the effect of chapter 5 of the WCRA which has been accepted as correct by later decisions.[9]

[24] Finally, I return to the concern that the view of chapter 5, contrary to that taken by the learned primary judge, leaves s 6(2)(b) of the PIPA a dead letter. The provisions of s 10(2) of the WCRA afford an answer to this concern, in that claims for damages against employers in the circumstances contemplated by those provisions are outside the purview of chapter 5 of the WCRA. In this regard, s 10 provides relevantly as follows:

> "(1) ***Damages*** is damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay damages to -
>
> (a) the worker; or
>
> (b) if the injury results in the worker's death - a dependant of the deceased worker.
>
> (2) A reference in subsection (1) to the liability of an employer does not include a liability against which the employer is required to provide under -
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> (a) another Act; or

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8 [2001] QCA 223 at [38] - [41]; [2002] 2 Qd R 157 at 167 (citations footnoted in original).

9 See also *Glenco Manufacturing Pty Ltd v Ferrari* [2005] 2 Qd R 129 at 130 - 131 [3] - [6]; *Roberts v Australia and New Zealand Banking Group Ltd* [2005] QCA 470 at [19]; [2006] 1 Qd R 482 at 489.

(b) a law of another State, the Commonwealth or of another country.

… "

[25] The provisions of s 10(2) contemplate a claim for damages against an employer by a worker for an injury which will not be regulated at all by chapter 5 of the WCRA. Such a claim would fall to be regulated by PIPA pursuant to s 6(2)(b). The exclusion from the concept of damages effected by s 10(2) of the WCRA means that liabilities of the kind contemplated by s 10(2) are not liabilities of the kind against which employers are obliged to insure by the WCRA.[10] It is, therefore, understandable that the WCRA has no interest in regulating claims by workers for damages for such injuries.

[26] Before this Court, there was also some discussion of the effect of s 237(1)(d). That provision, to which I adverted above, permits a worker to seek damages for an injury "if the worker has not lodged an application for compensation for the injury". The respondent in this case, of course, lodged an application for compensation. That application was unsuccessful. Counsel for the respondent argued vigorously that the legislation could not have intended that a person who, like the respondent, makes an application for compensation which cannot succeed because of the statutory limitations on the availability of compensation, should be prevented from seeking damages. There is, however, no provision of the WCRA which offers a claimant the prospect of relief from such a mistake. In this respect, the absence of any such provision may be contrasted with other provisions of the WCRA which enable the court to relieve claimants from the consequences of non-compliance with the requirements of the legislation.[11] One is driven to the unhappy conclusion that the legislation has proceeded on the assumption that claims will be made in conformity with s 237. If a claimant is so ill-advised as to make an erroneous application for compensation (and thereby to put himself or herself outside the scope of workers referred to in s 237(1)(d) of the WCRA) and is not able to bring himself or herself within any of the other gateways of s 237(1), then the claimant's only remedy for the loss of a viable cause of action may be against those responsible for that poor advice.

[27] Senior Counsel for the appellant, perhaps seeking to soften the harshness to the respondent of success for his client on this appeal, was disposed to suggest in the course of argument that the respondent may yet bring himself within s 237(1)(a). Counsel for the respondent cast doubt on that suggestion. Whether or not the suggestion of Senior Counsel for the appellant is correct, it cannot resolve the issue which falls to be determined on this appeal, and this Court should not be beguiled by it. Significantly, Senior Counsel for the appellant was not in a position to concede that the appellant would accept that the respondent could now bring himself within the s 237(1)(a) gateway.

[28] For these reasons, I respectfully disagree with the decision of the learned primary judge to declare that the PIPA applied to the respondent's claim. The declaration should have been refused on the footing that, by virtue of s 237(1) and (5) of the WCRA, the respondent may not seek damages against the appellant for the injury in question.

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10 See s 48(1) of the WCRA.

11 Cf s 276, s 297, s 298 and s 302 of the WCRA.

**Conclusion and orders**

[29] In my respectful opinion, the appeal should be allowed, the orders below should be set aside and the respondent's application should be dismissed with costs.

[30] **CULLINANE J:** I have read the reasons of Keane JA in this matter and agree with those reasons and the orders proposed.