SUPREME COURT OF QUEENSLAND

CITATION:	*Lawes v Nominal Defendant* [2007] QCA 367
PARTIES:	**RICKY LEE LAWES** (plaintiff/respondent) **v** **NOMINAL DEFENDANT** (defendant/appellant)
FILE NO/S:	Appeal No 4281 of 2007 Appeal No 4623 of 2007 SC No 1930 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2007
JUDGES:	Jerrard and Muir JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – WHERE IDENTITY OF VEHICLE CAN NOT BE ESTABLISHED – QUEENSLAND – GENERALLY – where the respondent's motorcycle collided with a horse laying on road as a result of a collision with an unidentified vehicle – where trial judge held the nominal defendant liable in respect of the injuries sustained by the respondent – whether trial judge erred in his construction and application of s 5(1) of the *Motor Accident Insurance Act 1994* (Qld) APPEAL AND NEW TRIAL – APPEAL- GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – where the respondent's motorcycle collided with a horse laying on road as a result of a collision with an unidentified vehicle – where trial judge held the nominal defendant liable in respect of the injuries sustained by the respondent – whether the trial judge erred in finding that the driver of the unidentified vehicle knew or ought to have known that they had created an obstacle on the road –

whether the trial judge had erred in finding that there was a nexus between the 'wrongful act or omission' and the unidentified vehicle

Motor Accident Insurance Act 1994 (Qld), s 3, s 5(1), 33(1)
Transport Operations (Road Use Management - Road Rules) Regulation 1999 (Qld), s 221

Brew v WorkCover Queensland [2004] 1 Qd R 621; [2003] QCA 504, applied
Coley v Nominal Defendant [2004] 1 Qd R 239; [2003] QCA 181, cited
Coster v Boral Gas (Qld) Pty Ltd [1986] 1 Qd R 393, distinguished
Curtain Bros (Qld) Pty Ltd v FAI General Insurance Company Limited [1995] 1 Qd R 142, cited
Evans v Transit Australia Pty Ltd [2002] 2 Qd R 30; [2000] QCA 512, cited
Fox v Percy (2003) 214 CLR 118, applied
Glover v Politanski (1990) 2 Qd R 41, cited
Lawes v Nominal Defendant [2007] QSC 092, affirmed
Pennington v Norris (1956) 96 CLR 10, cited
Pennington v Wolfe 262 F Supp 2 d 1254, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, applied
Raschke v Suncorp Metway Insurance Limited [2005] 2 Qd R 549; [2005] QCA 161, considered
Sutherland Shire Council v Heyman (1984-1985) 157 CLR 424, cited
Technical Products Pty Ltd v State Government Insurance Office (Qld) (1989) 167 CLR 45, applied
Ticehurst v Skeen (1986) 3 MVR 307, cited

COUNSEL: R J Douglas SC, with P B de Plater, for the respondent
D B Fraser QC, with R B Dickson, for the appellant

SOLICITORS: McNamara Garrahy Lawyers for the respondent
Broadley Rees Lawyers for the appellant

[1] **JERRARD JA:** This appeal is from a judgment in the Trial Division of this Court given on 24 April 2007 in which the learned trial judge ordered that the plaintiff Mr Lawes recover $212,000, 80 per cent of an agreed figure as to damages, from the Nominal Defendant. The appellant Nominal Defendant maintains on this appeal its denial of any liability to compensate the plaintiff under the *Motor Accident Insurance Act 1994* (Qld) ("the MAIA").

[2] That liability assertedly arose under s 33(1) and s 5(1) of that Act. Section 33(1) provides:

> "The Nominal Defendant's liability for personal injury caused by, through, or in connection with a motor vehicle is the same as if the Nominal Defendant had been, when the motor vehicle accident

happened, the insurer under a CTP insurance policy under this Act for the motor vehicle."

Section 5(1) provides:

"This Act applies to personal injury caused by, through, or in connection with a motor vehicle if, and only if, the injury –

(a) Is a result of –
  (i) the driving of the motor vehicle; or
  (ii) a collision, or action taken to avoid a collision, with the motor vehicle; or
  (iii) the motor vehicle running out of control; or
  (iv) a defect in the motor vehicle causing loss of control of the vehicle while it is being driven; and

(b) is caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person."

[3] The respondent plaintiff was injured on Friday 14 March 2003 when the motorcycle he was riding struck a horse, possibly already dead, lying on the bitumen road surface on the Gympie – Tin Can Bay Road. The collision occurred at about 8.40 pm that Friday evening, about 2 km west of the intersection of that road with the Cooloola Coast Road. The road consisted of two lanes separated by a white painted, broken line. Each lane was about 3.5 metres wide, with a sealed shoulder abutting a sloping stretch of grassy verge that led to the Toolara State Forest. There were no residential, rural or commercial properties for several kilometres in either direction, and no artificial lighting. The forest caused the road area to be darkened.

[4] The then 21 year old plaintiff was riding his 500 cc motorcycle east from Gympie, heading to Rainbow Beach, and was overtaking a utility driven by a Mr Moore, when the plaintiff saw a horse lying directly in his path on the road. He looked left to make sure he was clear of the utility, but did not slow down, as he "misjudged the time it would take to reach the animal"[1] on the road. He was still travelling at about 100 kmph when the motorcycle struck the horse, and he was thrown into a grassy depression near the southern side of the road, and lost consciousness. The driver and passenger in the utility saw the brake light of the motorcycle come on, and the utility braked, passing to the left of the horse, and stopping a few meters beyond its body. The passenger heard other horses running in the nearby bush, as that passenger searched for the plaintiff, using the utility headlights. After the plaintiff was located and an ambulance telephoned, the passenger went back to the horse, and identified it as a brumby weighing about 400 kilos, and still warm to the touch.

[5] A police chaplain came upon the scene, who saw the utility parked facing towards him with the headlights on. That police chaplain stopped and spoke with the passenger and driver, who pointed the horse out to the chaplain, who saw it then for the first time. The chaplain moved his car to the northern side of the road, facing inwards to illuminate the horse, and activated his hazard warning lights. He then put on a reflective vest with the words "Police Chaplain". While he was standing in

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1 Reasons for judgment, at [7].

the beam of his own headlights to warn other motorists of the danger, wearing the vest, a vehicle approached, hit the horse, appeared to suffer front end damage, and sped away.

[6] The trial judge found that the plaintiff had often travelled along that road and had previously seen brumbies grazing beside it in the State Forest area. Others too had noticed brumbies in the area. The trial judge found that the horse was lying in or about the middle of the road when struck by the motorcycle, seriously injured or dead, and that more probably than not, it was lying there because of a recent collision with an unidentified motor vehicle. The learned judge also concluded that the collision between the vehicle and the horse could readily have happened without any breach of duty to other road users.

> "The night was dark. The horse was brown. Brumbies are swift. This unfortunate animal could well have rushed in front of a car or truck. The collision might not practicably have been avoided by a driver moving at a suitable speed who also kept a proper lookout. There are accidents that are no one's fault. Hitting the horse could easily have been one of them."[2]

[7] The judge held that the plaintiff had not shown that it was more probable than not that the impact between the horse and the unidentified vehicle had resulted from negligence. The learned judge went on to hold that (although without fault) the driver of that unidentified vehicle had created a danger posed by the presence of the prone horse on the road, and that circumstance attracted a duty to exercise reasonable care to prevent that hazard harming other road users. The learned judge cited authority, including *Ticehurst v Skeen* (1986) 3 MVR 307, at 310-311; Fleming *"The Law or Torts"*, 9th Ed (1998) at pp 164-166, *Clerk & Lindsell on Torts*, 19th Ed (2006), 8-43, pp 411-412; Todd (Gen Ed), *The Law of Torts in New Zealand*, 2nd Ed (1997) p 213, and several decisions in the United States. The judge reasoned:

> "[41] The interval between the initial impact with the horse and the plaintiff's arrival on the scene was, it may be comfortably inferred, long enough for the driver to have positioned his vehicle so that its lights illuminated the carcass and otherwise to warn of the hazard: for example, by turning on the vehicle's warning lights. There is no reason to suppose that the driver fled to find help. In any event, in view of the considerable distance to anyone living or working in the vicinity and the high risk that another road user would collide with the horse before a removalist arrived, in the prevailing circumstances, the exercise of reasonable care required the driver to stay and warn."

[8] The learned judge continued:

> "[42] The plaintiff did not slow down after he saw the horse. But had the steps mentioned been taken by the driver, the earlier, clear warning of the presence of the horse that those precautions would have afforded the plaintiff would, more

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2 At the reasons for judgment, in paragraph [38].

> probably than not, have avoided his collision with the animal.
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> [43] The driver's negligence caused the plaintiff's injuries."

[9] The learned judge went on to apportion liability 80/20 in the plaintiff's favour, holding that by far the greater proportion of responsibility for the injuries must be borne by the driver of the unidentified vehicle. The judge held that that driver had had ample time, as well as no doubt the means at hand, to adopt suitable precautions which had every prospect of obviating the risk that eventuated.

[10] The appellant Nominal Defendant did not challenge the learned judge's conclusion that the circumstances created a duty on the driver of the unidentified vehicle to exercise reasonable care to prevent the hazard posed by the dying or dead horse from harming other road users. Counsel referred this Court to the remarks of Brennan J, as His Honour then was, in *Sutherland Shire Council v Heyman* (1984-1985) 157 CLR 424 at 479. In *Pennington v Wolfe* 262 F Supp 2 d 1254 Lungstrum J wrote (at 1260) that:

> "The rule is extrapolated from the broader principal that an actor who creates a hazardous condition has a duty to use reasonable care to warn others of the condition or to correct it."

Likewise in *Ticehurst v Skeen*, referred to by the learned judge, Wood J expressed the view that a duty existed to take reasonable steps to remove a hazard or give warning of its presence, where a motorist was connected with the creation of the hazard.

[11] The Nominal Defendant submitted that in any event, as a matter of law, the omission found against the driver of the unidentified motor vehicle – failing to warn of an obstacle on the road – was not a wrongful omission "in respect of" the unidentified motor vehicle, within the meaning of s 5(1)(b) of the MAIA. The Nominal Defendant had accepted before the trial judge that, if the horse was lying on the road because it had been struck by an unidentified vehicle, the plaintiff's injuries were "caused by, through or in connection with" that unidentified vehicle. However, the Nominal Defendant contended to the trial judge that that injury was not "a result of...the driving" of that unidentified vehicle, as described in s 5(1)(a)(i) of the MAIA, and that the relevant wrongful omission (the failure to remain at the scene and warn) was not "in respect of the motor vehicle", as required in s 5(1)(b). As to the s 5(1)(a)(i) argument, the learned judge, however, held that the causal link, between the operation of the unidentified vehicle and the injuries sustained through the collision between the motorcycle and the horse, was sufficiently close, or proximate, for those injuries to be appropriately regarded as a result of that driving. That conclusion is not directly challenged on the appeal.

[12] The learned judge then considered the words "in respect of", citing from *Technical Products Pty Ltd v State Government Insurance Office* (Qld) (1989) 167 CLR 45, and from the joint judgment therein of Brennan, Deane and Gaudron JJ at pp 47-48, where Their Honours wrote:

> "The words 'in respect of' have a very wide meaning. Indeed, they have a chameleon-like quality in that they commonly reflect the context in which they appear. The nexus between legal liability and motor vehicle which their use introduces in s 3(1) is a broad one which is not susceptible of precise definition. That nexus will not, however, exist unless there be some discernible and rational link between the basis of legal liability and the particular motor vehicle. The point is well made in the judgment of Connolly J in the present case...
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> > 'If the liability of the respondent in this case is to be described as being in respect of the trailer, there must, in my opinion, be more than the mere presence of the trailer at the scene...it is not sufficient, in order to satisfy the requirement that the person entitled to the benefit of the cover be 'legally liable... in respect of such motor vehicle', that there be no more than a connexion or relation in time or sequence between the motor vehicle and events which in law give rise to the liability. What is required is that there be a relationship between the motor vehicle and the very act or omission which gives rise to that liability.'"

[13] The Nominal Defendant repeated on this appeal the argument made below, that the evidence established no more than a connection or relation in time or sequence between the unidentified motor vehicle and the events giving rise to the liability, namely either the driver's flight, or the consequential failure to employ the vehicle driven away as a beacon; but the learned trial judge held otherwise. The judge concluded that the act of driving away occasioned the critical omission relevant to the unidentified driver's legal liability, namely that the lights of the vehicle driven away were not deployed to warn of the danger presented by the horse. That negligent conduct, the judge held, did involve a relationship with the vehicle, of a sufficiently distinct nature to satisfy the "in respect of" requirement in s 5(1)(b).

[14] The Nominal Defendant submitted on this appeal that driving away the unidentified motor vehicle merely provided the means by which its driver left the scene, and not necessarily the acts which occasioned the omission critical to the driver's legal liability. For example, the driver of an unidentified motor vehicle might leave it at the scene, because it was damaged, and the driver could leave the scene without driving the motor vehicle away. Doing that could not possibly change the character of that driver's wrongful act or omission in leaving the scene without alerting other road users to the obstruction constituted by the dead horse on the highway, assuming that the unidentified motor vehicle was not itself obstructing the highway. The submission continued, that what was necessary to discharge a duty to warn others of an obstruction on the highway depended on the facts and circumstances affecting the obstacle and the driver of any other vehicle.

[15] The Nominal Defendant then argued that the evidence proved no more than that there was a connection or relation in time or sequence between the unidentified motor vehicle and the events which in law gave rise to the liability, citing from *Technical Products v SGIO* (Qld), and that the learned judge was in error in holding

otherwise. As part of that submission, the Nominal Defendant argued that if a passenger in the unidentified vehicle was seriously injured, then no obligation to unknown third parties would operate to prevent the driver of the unidentified vehicle from seeking treatment for those injuries and leaving the scene, in preference to taking steps at the scene to guard against or warn of the obstacle. That submission really only identifies a circumstance in which it would be arguable that failing to warn other drivers of the obstruction was not a breach of the duty described in *Pennington v Norris*,[3] namely that a person who has created a dangerous condition on a highway has a duty to use reasonable care to avoid injury to others, by either removing the hazard or warning others of it. So, for example, if a person walked onto a highway, dropped farm equipment on it, and then walked away, the same duty to warn or remove the equipment would arise.

[16] The Nominal Defendant's basic submission, that any wrongful act or omission by the driver of the unidentified vehicle was in respect of the obstruction on the road and not in respect of the unidentified vehicle, assumed that any such wrongful omission could not be in respect of both. But that position is really contradicted by the judgments of this Court in *Brew v WorkCover Queensland* [2004] 1 Qd R 621 and *Curtain Bros (Qld) Pty Ltd v FAI General Insurance Company Limited* [1995] 1 Qd R 142, that the fact that liability might exist "in respect of" an unsafe place of work did not exclude it being also a liability "in respect of" a vehicle. The conclusions of fact reached by the learned judge, namely that driving away led to the critical omission to use the unidentified vehicle's lights at the scene to warn of the danger presented by the horse, described, on the judge's findings, a wrongful omission which had a discernable and rational link with that particular motor vehicle, and so was "in respect of" it. The Nominal Defendant's arguments included the concession from its senior counsel that the unidentified driver's wrongful omissions could be said to be "in relation to" the unidentified vehicle, but not in "respect of" it.

[17] The Nominal Defendant made an alternative argument, which relied on some observation of this Court in *Raschke v Suncorp Metway Insurance Limited*[4], where the court suggested that an argument could be made that the wrongful act or omission referred to in s 5(1)(b) must relate directly to one or more of the matters referred to in s 5(1)(a)(i)-(iv) of the MAIA. But that argument, with respect, goes a little further than the section does. Section 5 provides that the MAIA applies to personal injury caused by, through, or in connection with a motor vehicle, if, and only if, the injury relevantly satisfies both the descriptions in s 5(1)(a) and in s 5(1)(b). The condition described in s 5(1)(b) is a cumulative requirement to the four described in s 5(1)(a), not a restatement of the conditions described in s 5(1)(a)(i)-(iv). I disagree that the manner in which the learned trial judge approached the issue did not treat the word "and" as if it was present. The section provides two separate requirements for the Act to apply to injury caused by, through, or in connection with a motor vehicle. One is in s 5(1)(a), and a different matter is described in s 5(1)(b). Often enough the same conduct will satisfy both, but that does not mean the s 5(1)(b) requirement is not separate and additional. That

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3 (1956) 96 CLR 10

4 [2005] 2 Qd R 549.

is how the position was summarised in *Evans v Transit Australia Pty Ltd* [2002] 2 Qd R 30 at 39.

[18] Accepting the existence of a duty on a party causing an obstruction on a highway without negligence, both to remove the obstruction and to warn other highway users of its presence before removal, I would not have concluded that in these circumstances the plaintiff has shown that it was more probable than not that a breach of that duty was established, which resulted in the plaintiff's injury. A single female occupant of a motor vehicle on an unlit country highway is not necessarily acting in breach of duty to other road users in choosing self-protection and leaving a collision scene, rather than remaining there with no knowledge of who will next arrive. A driver who was injured and needed medical help, or who lacked a chain or rope or other means of removing the body of a horse from the road, or who had a fixed arrangement to resume care of others (such as children), or who had children in a vehicle, would be required (on the reasoning of the learned trial judge) to remain there until some other driver or drivers arrived, who could remove the obstruction or give adequate warning. Again, the driver who collided with the horse without provable negligence may not have had reason to know that the horse had come to rest on the road surface. Further, even when the police chaplain took all of the steps suggested by the learned trial judge, the driver of another oncoming vehicle still collided with the horse.

[19] However, the learned trial judge was directed to evidence of marks on the road observed by the police chaplain, looking somewhat like drag marks and apparently consisting of bodily fluids coming from the horse. Those were about one meter in length and ended at the body of the horse. There was also evidence of a lack of any record of any person having contacted the police, or any other service or organisation, about the existence of the horse on the road. That evidence means that the conclusions drawn by the learned trial judge were open, although I would have regarded them as too speculative. In those circumstances I agree with Muir JA that that appeal should be dismissed.

[20] **MUIR JA**: The nominal defendant appeals against a judgment of a judge of the trial division of this court holding the nominal defendant liable in respect of injuries sustained by the respondent when his motorcycle collided with a horse laying on the Gympie-Tin Can Bay Road as a result of a collision with an unidentified vehicle. There are three grounds of appeal. The first concerns the construction and application of s 5(1) of the *Motor Accident Insurance Act* 1994. The second challenges the implicit finding that the driver of the unidentified vehicle knew or ought to have known that he or she had created an obstacle on the road. The final ground is that the respondent failed to discharge the onus of showing that there were steps reasonably open to the driver of the unidentified vehicle to reduce the risk of collision posed by the horse which the driver failed to take.

Findings of the learned primary judge

[21] The learned primary judge made findings as follows. The accident occurred at about 8.40 pm on Friday 14 March 2003 on a straight stretch of two lane sealed road marked with a broken white centre line and parallel white lines near the edges

of the bitumen. The scene of the accident was within an uninhabited area of the Toolara State Forest. The traffic was light in both directions and the weather clear. When the accident occurred the respondent had just overtaken a utility travelling at a little under 100 kmph. The respondent was travelling at about 100 kmph. While or just after overtaking, the respondent saw the horse on the roadway, misjudged the time it would take him to reach it, failed to slow down and collided with it.

[22] The horse, a feral brown brumby, was lying in the middle of the road[5] having been struck by an unidentified vehicle. The horse was dead but still warm. The driver of the unidentified vehicle did not stop at the scene or contact police to warn of the danger created by the horse on the road although he would have appreciated that his vehicle had collided with a large animal at a speed calculated to disable it.

[23] The fact of the collision was not proof of negligence on the part of the driver of the unidentified vehicle. The driver, however, "created the danger posed by the presence of the prone horse on the road [attracting] ... a duty to exercise reasonable care to prevent the hazard's harming road users". The exercise of reasonable care required the driver to stay and warn the drivers of other vehicles of the hazard. The warning could have been given by the positioning of the unidentified vehicle "so that its lights illuminated the carcass" or by means of "the vehicle's warning lights". In the absence of such a warning there was a "high risk that another road user would collide with the horse before a removalist arrived…". If the vehicle's headlights and back lights had been rendered inoperable through impact with the horse "reversing lights, in combination with hazard warning lights, no doubt could have been used effectively". Had such steps been taken by the driver of the unidentified vehicle it was probable that the accident would not have occurred.

[24] There was no challenge to the finding that the driver of the unidentified vehicle came under a duty to exercise reasonable care to prevent the hazard causing harm to road users.

The application of s 5(1) of the Act - the appellant's contentions

[25] The requirement in s 5(1) of the Act that the injury be caused by a wrongful act or omission "in respect of the motor vehicle by a person other than the injured person" was not satisfied. The evidence established "no more than a connection or relation in time or sequence between the motor vehicle and the events which in law gave rise to the liability".[6]

[26] Alternatively a wrongful act or omission in respect of the motor vehicle must concern one or more of the particular circumstances listed in s 5(1)(a).

[27] The driving away of the unidentified vehicle merely provided the means by which the driver left the scene. If, for example, the driver had left the scene without

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5 Reasons paragraph [31].

6 *Technical Products Pty Ltd v State Government Insurance Office (Queensland)* (1989) 167 CLR 45 at 47 and 48 per Brennan, Deane and Gaudron JJ; *Mani v Nominal Defendant* [2003] 1 Qd R 248; *Rigney v Littlehales* [2005] QCA 252 per McMurdo P at [8].

driving the motor vehicle that could not change the character of his wrongful act or omission.

[28] Any omission on the part of the driver was "in respect of the obstacle on the highway and was not in respect of the motor vehicle. It would be different if the motor vehicle was obstructing the highway after an accident in which case the failure to use hazard indicator lights (if fitted) could amount to a wrongful omission".

[29] Attention is drawn to "if, and only if," in the introductory words of s 5(1). Those words are an "emphatic and intensive phrase" which "directs attention to notions of predominance and immediacy rather than to more removed circumstances".[7] The driving away of the unidentified vehicle relied on by the primary judge concerned "removed circumstances". The failure to warn was the matter of predominance and immediacy and was not related to any of the matters in s 5(1)(a).

[30] The requirement of a wrongful act or omission in respect of the motor vehicle should be seen as narrowing rather than expanding the circumstances in which the Act will apply. If s 5(1)(b) is not seen as operating only where the injury is caused by one or more of the matters in s 5(1)(a) the requirement that the two subsections together limit the expression "by through or in connection with the motor vehicle" implicit by the linking of the subsections with the conjunction "and" is not given effect to adequately. Section 5(1) requires a step by step approach to the application. The first inquiry is whether the injury was caused "by, through or in connection with a motor vehicle". If that query is answered in the affirmative "if, and only if" the requirements of (a) and also (b) are shown to be present, the subsection will apply. The conjunction "and" is used to demonstrate the link required between the "driving" or "collision".

[31] The primary judge's approach ignores the word "and" and fails to give effect to the words "if, and only if". The appellant's argument is supported by observations of Keane JA, with whose reasons McPherson JA agreed, in *Raschke v Suncorp Metway Insurance Ltd*.[8]

[32] The evidence does not establish that the driver of the unidentified vehicle knew or ought to have known that he or she had created an obstacle on the road. There was no evidence of: the residue of impact; the type of vehicle; the part of the vehicle striking the horse; whether the horse was moved by any such collision or of any tyre or other marks left on the horse by a previous collision. The finding of knowledge amounts to no more than an uninformed choice between competing guesses. The absence of debris suggests a glancing contact. One can only speculate as to what the driver should have made of a noise or sensation consistent with such a contact whilst travelling in the dark through a forest. A check in the rear view mirror would not have revealed the presence of such an obstacle on the road.

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7 *Allianz Australia Insurance Ltd v G S F Australia Pty Ltd* (2005) 221 CLR 568 at 598 per Gummow, Hayne and Heydon JJ.

8 [2005] 2 Qd R 549 at [37].

[33] The respondent had the onus of showing that steps reasonably open to the driver to reduce the risk of collision with the obstacle had not been taken.[9] The positioning of the vehicle to shine its headlights on the horse was impractical for a large vehicle such as a truck. Headlights pointed at the obstruction are unlikely to assist traffic in both directions and it would be foolhardy for the driver to take up a position obstructing the highway. It would be unreasonable also to require a person to hazard his safety simply to illuminate an obstacle. Headlights from a car positioned on the shoulder perpendicular to the road would not illuminate the presence of the horse on the surface in the middle of the road because the rear of a car so placed would be much lower than its front. The use of the horn is unworkable and nor would reversing lights make any difference. The use of hazard lights was not lawful in the circumstances. It is speculative to conclude that had there been a vehicle beside the road shining its lights on the obstacle it would have made a difference to the respondent's actions.

The relevant statutory provisions

[34] Section 5 of the Act relevantly provides:

> "(1) This Act applies to personal injury caused by, through or in connection with a motor vehicle if, and only if, the injury -
>
> (a) is a result of -
>
> (i) the driving of the motor vehicle; or
>
> (ii) a collision, or action taken to avoid a collision, with the motor vehicle; or
>
> (iii) the motor vehicle running out of control; or
>
> (iv) a defect in the motor vehicle causing loss of control of the vehicle while it is being driven;
>
> and
>
> (b) is caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person.
>
> (2) For an uninsured motor vehicle, subsection (1) applies only if the motor vehicle accident out of which the personal injury arises happens on a road or in a public place.
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> …
>
> (4) For subsection (1)(b), the reference to a wrongful act or omission in respect of the motor vehicle does not include the use of the motor vehicle at the particular time it is being used for the actual doing of an act or making of a threat that is an act of terrorism."

The extent of the issues in relation to section 5(1)

[35] Section 5(1) applies where a personal injury is "caused by, through or in connection with a motor vehicle…" and

(a) The injury is a result of one of the matters listed in s 5(1)(a); and

(b) The injury is caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person.

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[9] *Freeleagus v Nominal Defendant* [2007] QCA 116 at [17]; [2007] 47 MVR 491 at 494.

[36] The primary judge's finding that the respondent's injuries were "a result of the driving" of the unidentified motor vehicle and that, in consequence, a requirement of s 5(1)(a) had been satisfied, was not challenged by the appellant. Nor was it contended that the appellant's injuries were not "caused by, through or in connection with a motor vehicle"; that was conceded at first instance. The focus of the argument is thus on s 5(1)(b).

Must the "wrongful act or omission" relate to one or more of the matters in s 5(1)(a)?

[37] The appellant argues, by reference to s 3 of the Act, that the Act "effects a compromise between the interests of those who have suffered personal injury from motor vehicle accidents and the interests of the public in having the cost of compulsory third party insurance at a level which the average motorist can afford". This is said, by inference at least, to support a restrictive interpretation of s 5(1).

[38] It is argued also that paragraphs (a) and (b) should be seen as restrictions on the scope of the expression "by, through or in connection with a motor vehicle". Consequently, unless paragraph (b) is limited in its operation to wrongful acts or omissions which relate directly to a matter or matters in paragraph (a), the legislative intention of narrowing the scope of "by, through or in connection with a motor vehicle" will not be given effect.

[39] The argument that "the wrongful act or omission" in (b) must be in respect of or relate to one or more of the matters listed in s 5(1)(a) is based in part on a possible construction adverted to by Keane JA, with whose reasons McPherson JA agreed, in the following passage from his reasons in *Raschke v Suncorp Metway Insurance Limited*: [10]

> "Apart from the appellant's concession referred to above, it might be argued that the shifting of the load in the course of the journey from Moree to Rocklea was not a fact material to the plaintiff's right of action against the third parties. Similarly, it might be argued that, having regard to the history of motor vehicle accident insurance legislation in Queensland and to the context of s 5(1) of the MAIA, the collocation of s 5(1)(b) with s 5(1)(a) has the effect, that when s 5(1)(b) speaks of a wrongful act or omission "in respect of the motor vehicle", it is speaking of a wrongful act or omission in respect of those matters concerning the motor vehicle referred to in s 5(1)(a). In other words, so the argument might go, the wrongful act or omission referred to in s 5(1)(b) must relate directly to one or more of the matters referred to in s 5(1)(a)(i) - (iv) of the MAIA.[15]
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> [15] Cf *Purt v State of Queensland* [2003] QCA 503; [2004] 1 Qd R 663; *Brew v WorkCover Queensland* [2003] QCA 504; [2004] 1 Qd R 621; *Palmer v Harker Transport Pty Ltd* [2003] QCA 513; (2003) 40 MVR 166."

[40] Counsel for the appellant did not suggest that the above passage went further than merely identifying a possible approach to the construction of s 5(1)(b).

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[10] [2005] 2 Qd R 549 at [37].

[41] It is not a construction which I favour. Paragraph (b) has its own words of qualification or limitation. The "wrongful act or omission" must be "in respect of the motor vehicle" and must be "by a person other than the injured person". Subsection (4) further expressly limits the scope of paragraph (b) and subsection (2) expressly limits the application of the whole of subsection (1). The appellant's construction requires paragraph (b) to be read as if the further words of qualification, "relating directly to one of the matters in paragraph (a)" appear in paragraph (b) after "motor vehicle". The existence of the express limitations on the scope of paragraph (b) makes it most unlikely that a further significant limitation is to be implied.

[42] The structure of subsection (1), in which paragraphs (a) and (b) each relate to "the injury" identified in the subsection's introductory words, does not support such a construction either. Paragraph (a) does not qualify or relate directly to paragraph (b) or vice versa. The two paragraphs are concerned with different matters. Paragraph (a) requires the relevant injury to be the result of one or more specified matters. Paragraph (b) requires the injury to be caused by a wrongful act or omission linked to the subject motor vehicle.

[43] The Legislature in enacting the Act, as the appellant asserts, most probably sought to achieve a balance between the individual's need for compensation on the one hand and the cost to the community of providing a compensation scheme on the other. Considerations of that nature are common enough and are not confined to statutes setting up compensatory schemes. The perception that the wording of a statute is the result of such a balancing exercise though, normally, would not require the statute to be construed restrictively. In the absence of some good reason for a contrary conclusion the statute will stand to be construed on the basis that the language chosen by the Legislature reflects the balance it has decided to strike. But even a restrictive interpretation of s 5(1)(b) would not authorise the substantial departure from the natural meaning of the words of that provision which the appellant's construction requires.

[44] Finally, the appellant's construction is contrary to that approach previously taken by this Court, admittedly in the absence of an argument along the lines of that advanced by appellant.[11]

Was there the necessary nexus between the "wrongful act or omission" and the unidentified vehicle?

[45] The critical findings by the primary judge concerning satisfaction of the requirements of s 5(1)(b) are:

> "The vehicle was driven away after the horse was struck. This act occasioned the omission that is critical to the driver's legal liability: that the lights were not deployed to warn of the danger presented by the horse.

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[11] *Evans v Transit Australia Pty Ltd* [2002] 2 Qd R 30 and *Coley v Nominal Defendant* [2004] 1 Qd R 239.

> That negligent conduct does involve a relationship with the vehicle; and the distinct nature of that link suffices to satisfy the "… in respect of …" requirement of s 5(1)(b), at least unless the Nominal Defendant's alternative contention concerning the meaning and effect of the provision prevails."

[46] His Honour identified the following passage from the reasons of Brennan, Deane and Gaudron JJ in *Technical Products Pty Ltd v State Government Insurance Office (Qld)*[12] as containing the approach taken by him in interpreting s 5(1)(b):

> "… The words 'in respect of' have a very wide meaning. Indeed, they have a chameleon-like quality in that they commonly reflect the context in which they appear. The nexus between legal liability and motor vehicle which their use introduces in s 3(1) is a broad one which is not susceptible of precise definition. That nexus will not, however, exist unless there be some discernible and rational link between the basis of legal liability and the particular motor vehicle. The point is well made in the judgment of Connolly J. … in the present case …:
>
> 'If the liability of the respondent in this case is to be described as being in respect of the trailer, there must, in my opinion, be more than the mere presence of the trailer at the scene. … it is not sufficient, in order to satisfy the requirement that the person entitled to the benefit of the cover be "legally liable ... in respect of such motor vehicle", that there be no more than a connexion or relation in time or sequence between the motor vehicle and events which in law give rise to the liability. What is required is that there be a relationship between the motor vehicle and the very act or omission which gives rise to that liability.' "

There was no suggestion that *Technical Products* does not state, authoritatively, principles to be applied in the construction of s 5(1).

[47] The appellant argues that the connection between any wrongful act or omission by the driver of the unidentified vehicle and the unidentified vehicle itself is essentially coincidental. It is submitted that there would be scope for the application of paragraph (b) if, for example, the unidentified vehicle had itself obstructed the roadway after the incident. In that case failure to use hazard indicator lights could amount to an unlawful omission. But, it is said, departing from the scene of the accident in the motor vehicle cannot change the character of the driver's wrongful act or omission.

[48] In construing paragraph (b) it must be borne in mind that the "wrongful act or omission" must be "in respect of the (unidentified) motor vehicle". As is pointed out in the joint reasons in *Technical Products*, "in respect of" has a very wide meaning. The relevant inquiry concerns the existence of a "discernible and rational link" between the unidentified vehicle and driver's wrongful omission, not whether there was some different, and perhaps stronger, link between the driver's wrongful

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12 (1989) 167 CLR 45.

omission and some other fact or circumstance. The fact that the "wrongful act or omission" may be able to be categorised as being "in respect of" a particular matter does not prevent the "wrongful act or omission" from being "in respect of" the motor vehicle.[13]

[49] The appellant's argument, in my view, tends to equate "in respect of" with words such as "through" or "in connection with". The "wrongful act or omission" relied on by the respondent was the failure to warn [by the deployment of lights or otherwise]. There is a "discernible and rational link" between the unidentified motor vehicle and that basis of legal liability. That link does not fail to exist because the driver of the unidentified vehicle could have warned of the hazard by means other than acts involving the use of the unidentified vehicle. Nor is it necessary for a link to exist that the wrongful act or omission involves the driving or movement of the motor vehicle.[14] Paragraph (b), unlike subparagraphs (i), (iii) and (iv) of paragraph (a), contains no such express or implied requirement.

[50] The primary judge was required to make a determination based on the facts before him and not by reference to hypothetical considerations. On those facts the obvious means of giving warning of the hazard was by use of lights on the unidentified vehicle: a vehicle driven by the person responsible for the wrongful omission found by the primary judge. The fact that the vehicle had been instrumental in causing the hazard of which its driver failed to warn is another circumstance which provides a link between the vehicle and its driver's wrongful omission. The connection between the vehicle and the driver's wrongful omission is thus more than one of "time or sequence".

The reason for the presence on the road of the prone horse

[51] The evidence in support of the primary judge's implicit finding that the driver of the unidentified vehicle knew or ought to have known that he had created an obstacle on the road is meagre but, in my view, sufficient. It is not disputed that the respondent collided with a horse on the road or that the horse was "prone" when struck by the respondent's motorcycle. The possibilities are that: the horse was prone on the roadway because it had been injured or killed by a motor vehicle; the horse had selected the road as its resting place or that it had collapsed on the road through natural causes or injury not connected with a motor vehicle.

[52] The passenger in the utility, who worked in the livestock feed industry, had driven over the road 20 or so times a year for many years. He had a longstanding familiarity with horses. He had seen brumbies twice on the Tin Can Bay-Gympie Road and on a number of other occasions in the general area. When observed by him the horses had been in a herd. His opinion, given without objection, was to the effect that brumbies would not be inclined to rest in the open. The evidence is of modest probative value as nothing is known of the witness's knowledge of the habits and propensities of brumbies beyond that acquired as a result of occasional sightings and some closer contact with brumbies, when a child, on Fraser Island.

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13 *Brew v WorkCover Queensland* [2004] 1 Qd R 621.

14 See eg. *Glover v Politanski* [1990] 2 Qd R 41.

[53] Even without such evidence, however, the primary judge was entitled to conclude as he did. The possibility that the horse was prone on the roadway for reasons unconnected with injury inflicted by a motor vehicle cannot be ruled out. But no great exposure to Australian fur-lined rural roads is required to acquaint a person with the perils such roads pose for wildlife. To conclude that an animal found dead or injured on a rural road was probably in that location and condition for a reason other than collision with a motor vehicle, in my view, would be bordering on perverse. That assumes, of course, the absence of evidence supporting such other reason.

[54] Here, there is evidence which supports the conclusion that the horse was killed or injured by an unidentified vehicle. The driver of the first vehicle which arrived at the accident scene after the accident, other than the vehicle which the respondent overtook, gave a detailed account of his observations concerning the horse. He said that its body "was totally distorted" and that there was horse hair and bodily fluid which appeared to be drag marks extending out about a metre from its body. Questioned about the marks, he explained that "it was a large smear on the road of hair and apparently some moisture, some bodily fluids such as might come from the skin being rubbed away".

Knowledge of the driver of the unidentified vehicle as to the obstacle on the road?

[55] The next issue to be considered is whether the driver of the unidentified vehicle "appreciated that his vehicle had collided with a large animal at a speed calculated to disable it".

[56] The appellant again points to the paucity of evidence about the nature of the unidentified vehicle, injuries to the horse and the circumstances of any collision involving the horse and the unidentified vehicle. Reliance is placed, in particular, on the absence of glass on the road. That, it is argued, suggests that any blow was a glancing one.

[57] The evidence of the drag marks and the position of the horse in the centre of the road tends to suggest that the blow which felled the horse was more than a glancing one. The absence of metal and glass on the road suggests that the unidentified vehicle was a truck or a large vehicle fitted with bull bars.

[58] In my view the primary judge was entitled to find it more probable than not that the driver of the vehicle which collided with the horse, whether or not the contact was glancing in nature, would have been aware of having struck a substantial object.

[59] I regard it as probable that the driver would have seen the animal immediately prior to or at the time of impact. A horse is, after all, of substantial bulk and height. The weight of this one was estimated to be about 400 kilograms. Even if the vehicle struck a blow of a glancing nature, the impact was obviously substantial. Once it is concluded that the driver probably saw the horse, it is difficult to challenge the implicit finding that the driver was probably aware that he had created a hazard on

the road. He would have been aware that a horse, or at least a very large animal, had been struck heavily by his vehicle on the roadway at substantial speed. An obvious inference for the driver to draw was that a large injured or dead animal was probably on the road.

[60] Counsel for the appellant referred in argument to the following passage from the reasons of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*:[15]

> "Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'. In *Warren v Coombes*, the majority of this Court reiterated the rule that:
>
> > '[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.'
>
> As this Court there said, that approach was 'not only sound in law, but beneficial in ... operation'."

[61] It was pointed out, correctly, that critical findings challenged on this appeal concern inferences to be drawn from unchallenged facts or the application of s 5(1)(b) in the light of such facts. I accept that, by and large, this Court is in as good a position as the primary judge in undertaking these tasks.

Negligent failure to warn

[62] The critical findings of the primary judge are as follows:

> "The interval between the initial impact with the horse and the plaintiff's arrival on the scene was, it may be comfortably inferred, long enough for the driver to have positioned his vehicle so that its lights illuminated the carcass and otherwise to warn of the hazard: for example, by turning on the vehicle's warning lights. There is no reason to suppose that the driver fled to find help. In any event, in view of the considerable distance to anyone living or working in the vicinity and the high risk that another road user would collide with the horse before a removalist arrived, in the prevailing circumstances, the exercise of reasonable care required the driver to stay and warn."

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15 (2003) 214 CLR 118 at 126, 127.

[63] The appellant's argument again relies on the paucity of evidence. Also challenged are the primary judge's conclusions concerning ways in which warning of the hazard could have been given to motorists happening on the scene of the accident. In my view, whilst it is possible to identify ways in which each of the examples given by the primary judge might fall short of perfection, the appellant's argument does not establish that his Honour erred in finding, implicitly, that there were means available to the driver of the unidentified vehicle to warn of the hazard.

[64] I do not consider that there is much substance in the argument that the use of headlights of a vehicle positioned on the road's shoulder perpendicular to the road would not illuminate the presence of the horse in the middle of the road. If perpendicular placement proved inadequate, a driver with a modicum of common sense would alter the vehicle's positioning so as to provide more effective illumination.

[65] Nor do I consider there to be substance in the point that the "use of hazard lights was not lawful in the circumstances". The argument relies on s 221 of the *Transport Operations (Road Use Management – Road Rules) Regulation 1999* (Qld) which provides:

> "The driver of a vehicle fitted with hazard warning lights must not use the hazard warning lights, or allow them to be used, unless –
>
> (a) the vehicle is stopped and is obstructing, or is likely to obstruct, the path of other vehicles or pedestrians;…"

Paragraph (a) would have applied if the unidentified vehicle had been positioned on the roadway. It would have had application also if the vehicle had been positioned off the roadway but on or near the shoulder of the road. It will be recalled that the road had only two lanes and that there was a substantial obstruction roughly in the middle of the road. In those circumstances a stationary vehicle at the side of the road could well be "likely to obstruct the path of other vehicles".

[66] It was argued on behalf of the appellant that if the unidentified vehicle was positioned on the roadway it would itself become a hazard and if positioned off the highway its lights would be ineffective. To my mind a lit up vehicle beside the road at night could be quite effective in alerting motorists to the existence of something unusual in respect of the road. As well as the methods of illumination or warning suggested by the primary judge, the flashing of headlights could have been used to attract the attention of approaching motorists.

[67] Although no solution available to the driver of the unidentified vehicle was likely to be perfect, the use of the vehicle's lights to warn of the hazard presented the driver with a reasonable and practical means of fulfilling his duty. I share the primary judge's view that, had the driver employed one or more of the measures identified by him, the plaintiff probably would have avoided the collision.

Conclusion

[68] For the above reasons, I would dismiss the appeal with costs.

[69] **JONES J**: I have read the reasons prepared by Muir JA and I am in respectful agreement with all that he has said and with the order he proposes. I wish only to add some further comments with respect to the second argument raised on the appeal, viz "that the wrongful omission in respect of the motor vehicle must concern one or more of the particular circumstances enumerated in s 5(1)(a)".[16] The facts and the statutory provisions are set out in those reasons and will not be repeated by me.

[70] Section 5 of the *Motor Accident Insurance Act* (MAIA) defines the ambit of the insurance cover provided by the statutory policy under the Act. That cover for personal injury caused by, through or in connection with the motor vehicle and is subject to two restrictions. The injury must be -

(a) the result of one or other of four specified aspects of the use, or condition, of the motor vehicle; and

(b) caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle.

[71] The appellant before the learned primary judge and again before this Court argues for a construction that the "wrongful act or omission in respect of the motor vehicle" must concern one or more of the four specified matters in paragraph (a) for the statutory policy to have application to the injury.

[72] The appellant relies particularly on the fact that the history of amendments to legislation providing this form of statutory protection has progressively restricted the ambit of the cover. One of these changes made in 2000 added to the stated objects of the legislation in s 3 of the Act, namely –

> "(aa) to establish a basis for assessing the affordability of insurance under the statutory insurance scheme and to keep the costs of insurance at a level the average motorist can afford".

[73] The appellant argues that legislation effects a compromise between conflicting interests and this counters the suggestion of the enactment being remedial legislation which requires a broad approach to its interpretation.

[74] The separate matters raised in the respective paragraphs of s 5(1) are in my view, quite distinct. Each of them has a common connection to the opening words of subsection (1) and are linked by the conjunctive "and". This identifies the step-by-step approach to determine whether the statutory policy applies. *Evans v Transit Australia Pty Ltd.*[17] But there is nothing in the actual terms of the subsection which directs that the liability in paragraph (b) is dependant upon and limited to the specified features in paragraph (a). The question of any such dependence was not argued in *Evans* nor in any of the other cases on this section or precursor to which we were referred.[18] The result in those cases turned mainly on the question of whether there was a "discernible and rational link" between the liability and the

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16 Ground 2(a); Amended Outline of Argument at para [13]

17 [2002] 2 Qd R 30

18 See particularly the Queensland decisions *Boath v Central Queensland Meat Export Co Pty Ltd* [1986] 1 Qd R 139; *Brew v WorkCover Queensland* [2004] 1 Qd R 621; *Glover v Politanski* [1990] 2 Qd R 41; *Curtain Bros (Qld) Pty Ltd v FAI General Insurance Company Limited* [1995] 1 Qd R 142; *Suncorp Insurance and Finance v Workers' Compensation Board of Queensland* [1990] 1 Qd R 185.

particular vehicle. *Technical Products Pty Ltd v State Government Insurance Office (Queensland).*[19]

[75] The appellant sought to draw support by way of analogy from the circumstances detailed in *Coster v Boral Gas (Qld) Pty Ltd.*[20] There the plaintiff, a tanker driver, was injured when in the course of filling the tanker with LP gas suffered injury because the hose connecting equipment became detached from the tank and struck him. Evidence was led that had a safety chain been attached to some strong point, but not necessarily to the tanker, to restrain a disconnection of this type then the injury would have been prevented. The question was whether the defendant was legally liable "in respect of such motor vehicle". The Court found that "it could not in any real sense be said to be liability in respect of the tanker merely because one end of the safety chain which should have been installed would conveniently have been attached to the tanker". This case is properly characterised as a system of work case and the liability arose in respect of the defective workplace equipment. The finding does not support the appellant's submission that it illustrates lack of connection between the obligation to prevent injury and the vehicle if there are other means by which the obligation can be discharged.

[76] That case is quite distinguishable from the circumstances of the case under consideration here. The learned primary judge found that the unidentified driver's omission which gave rise to the liability was his failure to use the vehicle's headlights and hazard lights which were part and parcel of the vehicle's normal use. That was not so in *Coster's* case. I do not find *Coster* in any way analogous to the circumstances which confronted his Honour.

[77] The appellant further argues that the use of the conjunction "and" in connection with the emphatic and intensive phrase "if and only if" requires the linking of the two paragraphs of s 5(1).

[78] In support of this argument the appellant relied upon the remarks of Keane JA (McPherson JA concurring) in *Raschke v Suncorp Metway Insurance Limited*[21] where Keane JA said:-

> "[37] Apart from the appellant's concession referred to above, it might be argued that the shifting of the load in the course of the journey from Moree to Rocklea was not a fact material to the plaintiff's right of action against the third parties. Similarly, it might be argued that having regard to the history of motor vehicle accident insurance legislation in Queensland and to the context of s 5(1) of the MAIA, the collocation of s 5(1)(b) with s 5(1)(a) has the effect, that when s 5(1)(b) speaks of a wrongful act or omission "in respect of the motor vehicle", it is speaking of a wrongful act or omission in respect of those matters concerning the motor vehicle referred to in s 5(1)(a). In other words, so the argument might go, the wrongful act or omission referred to in s 5(1)(b) must relate directly to one or more of the matters referred to in s 5(1)(a)(i) – (iv) of the MAIA."

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19 (1989) 167 CLR 45 at para 47;

20 [1986] 1 Qd R 393

21 [2005] 2 Qd R 549

[79] In *Raschke* the Court of Appeal was not dealing with the construction of the subsection but rather with an extension of time issue in which the application of the subsection may have defined what was a material fact of a decisive character. In fact, the issue was whether a causal nexus between the driving of a trailer and the subsequent shifting of a bale of cotton loaded upon it was within the means of knowledge of the plaintiff. The issue was raised against the background of the relationship between the MAIA and *WorkCover Queensland Act* wherein the terms of s 5 of MAIA were "apt to give rise to subtle arguments of law, or mixed fact and law"[22].

[80] The learned primary judge questioned the correctness of the obiter statement in *Raschke* and determined as follows:-

> "[61] For the most part, s 5(1)(a) focuses on the relationship between injury and actual operation and control of the vehicle. Section 5(1)(b) adds the additional limitation on the reach of the statutory cover that the injury must also be caused by another's unlawful conduct "in respect of the motor vehicle". But s 5(1)(b) does not, in terms at any rate, confine the indemnity to liability arising from tortious conduct that has a relationship with some particular use function or condition of the vehicle.
>
> [62] It is not suggested that a second reading speech or other intrinsic material evinces an anxiety to exclude claims like the present. No other section of the *Act* that would conform with the alternative contention was identified. Nor did the Nominal Defendant propose an object or purpose apparent on a consideration of the statute as a whole tending to sustain it. And had the s 5(1)(a) restrictions been intended to be restated in s 5(1)(b), that could readily have been achieved by express words."

[81] Had the legislation intended to make the liability question raised in paragraph (b) dependent upon the manner in which the injury was caused as raised in paragraph (a) then it could have done so by express words or even by combining the two concepts in one paragraph.[23]

[82] The proper construction of s 5(1) depends on giving the words their ordinary meaning consistent with the language and purpose of all the provisions of the statute viewed as a whole. *Project Blue Sky Inc v Australian Broadcasting Authority.*[24] The paragraphs each have their own words of limitation. In the case of paragraph (a) the injury must be "the result of" the specified aspects of the vehicle's use or condition. Separately, and quite differently, in paragraph (b) the words of limitation on the wrongful act or omissions are "in respect of the motor vehicle". Each paragraph is, of course, subject to the over-arching limitation that the injury must be "caused by, through or in connection with" the motor vehicle as those words have been authoritatively determined in *Technical Products* (supra) as requiring a "discernible and rational link" between the vehicle and the driver's wrongful act or

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22 Ibid at para [32]

23 Compare for example the NSW provision… "the injury is a result of and is caused during (i) the driving of the vehicle, or (ii) a collision etc."

24 (1998) 194 CLR 355/381

omission. But otherwise each paragraph is distinct in the topic of its enquiry and the scope of the words of limitation employed. There is no warrant for imposing the restrictive limitation on the application of the statutory policy contended for by the appellant.

[83] I would dismiss the appeal with costs.