SUPREME COURT OF QUEENSLAND

CITATION:	*Ford v Nominal Defendant* [2022] QSC 179
PARTIES:	**TRENT ANTHONY FORD** (plaintiff) **v** **NOMINAL DEFENDANT** (defendant)
FILE NO/S:	BS 317 of 2021
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 August 2022
DELIVERED AT:	Brisbane
HEARING DATE:	22 and 23 August 2022
JUDGE:	Martin SJA
ORDER:	**1. The claim is dismissed.** **2. I will hear the parties on costs.**
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – UNIDENTIFIED VEHICLE – DUE INQUIRY AND SEARCH – where the plaintiff suffered injuries as a result of a motor accident – where the plaintiff is unable to establish the identity of the responsible motor vehicle or driver – where the plaintiff has brought a claim against the Nominal Defendant – whether 'proper inquiry and search' have been made by the plaintiff and failed to establish the identity of the motor vehicle STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – USE OF ADJECTIVE OR ADVERB – where the *Motor Accident Insurance Act* 1994 (MAIA) requires 'proper inquiry and search' of a plaintiff before a claim can be made against the Nominal Defendant – where the predecessor *Motor Vehicles Insurance Act* 1936 referred to 'due inquiry and search' – whether the change from 'due' to 'proper' means that a different and higher standard is to be applied under the MAIA *Acts Interpretation Act* 1954, s 14C *Motor Accidents Compensation Act* 1999 (NSW), s 34 *Motor Accident Insurance Act* 1994, s 31

Motor Vehicles Insurance Act 1936, s 4F(3)

Cavanagh v Nominal Defendant (1958) 100 CLR 375
Murray v Nominal Defendant [2014] QDC 144
Nominal Defendant v Meakes (2012) 60 MVR 380; [2012] NSWCA 66
Workers Compensation Nominal Insurer v Nominal Defendant (2013) 64 MVR 542; [2013] NSWCA 301

COUNSEL: CC Heyworth-Smith QC for the plaintiff
GW Diehm QC and MG Zerner for the defendant

SOLICITORS: Travis Schultz & Partners for the plaintiff
Jensen McConaghy Lawyers for the defendant

[1] On 11 March 2019, Trent Ford was riding a Honda motorcycle inbound along Redland Bay Road in Capalaba. He had finished his shift as a postal delivery officer and was returning to the Australia Post Delivery Centre on Dollery Road.

[2] At about 5.15pm, he was travelling up an incline on Redland Bay Road when a light truck passed him on his right and then began to enter the lane in front of him. As that was taking place, a small piece of timber slid off the tray of the truck and onto the roadway in front of Mr Ford. He swerved to avoid the timber. The front wheel of the motorcycle missed the timber, but the back wheel did not. As a result, the plaintiff was jarred and, as he later found out, he was injured.

[3] The defendant concedes that the incident described by the plaintiff did occur and that "the accident [was] occasioned by the negligence of the 'unknown person'".

[4] The issue to be determined is whether it has been established by the plaintiff that "proper inquiry and search have been made and have failed to establish the identity of the motor vehicle" – s 31(2) *Motor Accident Insurance Act* 1994 (MAIA).

[5] If that is determined in the plaintiff's favour, then he will succeed on this action. The parties have agreed on quantum.

The legislation – what is "proper inquiry and search"?

[6] The MAIA provides, putting it very broadly, that a person who has been injured in a motor vehicle accident and who cannot identify the responsible vehicle, may sue the Nominal Defendant.

[7] For the purposes of this decision, it is the requirements of s 31(2) which need consideration. It relevantly provides:

> "(1) **If personal injury is caused by, through or in connection with a motor vehicle,** the insurer for the statutory insurance scheme is to be decided in accordance with the following principles—
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> (a) if the motor vehicle is an insured motor vehicle—the insurer under the CTP insurance policy is, subject to this division, the insurer;
>
> (b) if the motor vehicle is not insured but a self-insurer is the registered owner—the self-insurer is the insurer;
>
> (c) if the motor vehicle is not insured and a self-insurer is not the registered owner—the Nominal Defendant is the insurer;
>
> (d) **if the motor vehicle, or insurer under its CTP insurance policy, can not be identified—the Nominal Defendant is the insurer**.
>
> (2) In any legal proceedings, **it is to be presumed that a motor vehicle can not be identified if it is established by affidavit or oral evidence that proper inquiry and search have been made and have failed to establish the identity of the motor vehicle…"** (emphasis added)

[8] The case mounted by the defendant is that Mr Ford did not establish that "proper inquiry and search" had been made.

[9] The predecessor to MAIA was the *Motor Vehicles Insurance Act* 1936 (MVIA) which, in a similar provision,[1] referred to "due inquiry and search". That is the term used in some other jurisdictions, for example, s 34 of the *Motor Accidents Compensation Act* 1999 (NSW).

[10] I was referred to the decision of Judge Farr SC in *Murray v Nominal Defendant*[2] where his Honour considered whether the change from "due inquiry and search" in the MVIA to "proper inquiry and search" in the MAIA meant that a different and higher standard was to be applied under the MAIA. His Honour considered the

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1 Section 4F(3), *Motor Vehicles Insurance Act* 1936.
2 [2014] QDC 144.

speech given when the relevant Bill was introduced and the dictionary meanings of the two words. He concluded:

> "[28] Given that the word "proper" on its everyday and ordinary meaning connotes something more strict than "due," and the fact that the legislature saw fit to replace "due" with "proper", I am of the view that s.32(1) of the *MAIA* requires inquiry and search of a higher standard than was required under the previous legislation, although the distinction appears slight. Whether or not, in any given case, that test is satisfied must depend upon its individual facts and circumstances, although it should be noted that the word "proper" does not require searches to be conducted that are unlikely to produce results. One can well envisage that, in many cases, there would be no effective difference between the application of "due inquiry and search" and "proper inquiry and search"."

[11] I agree with what his Honour said about there being, in many cases, no effective difference between the two sets of words. Indeed, in some dictionary definitions one of the meanings of "due" is "proper". In these circumstances, they are being used as adjectives to describe the nature of the search and inquiry which will satisfy the section.

[12] As is so often the case, resort to explanatory notes and second reading speeches leads to disappointment. There was nothing in those documents which would support a conclusion that "proper" imposed a higher test than "due".

[13] It may also be the case that the change from "due" to "proper" reflected a change in drafting practice and, so, s 14C of the *Acts Interpretation Act* 1954 would dictate a conclusion that "the ideas must not be taken to be different merely because different words are used." I was not referred to anything which would suggest that there had been a change in drafting practice.

[14] It has been held, on many occasions, that "due inquiry and search" means such inquiry and search as is reasonable in the circumstances. In *Cavanagh v Nominal Defendant*,[3] Dixon CJ (with whom Kitto, Taylor, Menzies and Windeyer JJ agreed),

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[3] (1958) 100 CLR 375.

when referring to the predecessor to s 34 of the *Motor Accident Compensation Act* 1999 (NSW), said:

> "The second element or part of the condition stands on a different footing. It is not satisfied unless due inquiry and search has been made. Doubtless the failure of the draftsman of the provision to say by whom it is to be done was deliberate. For the situations to which the provision might be expected to apply would vary infinitely in their nature and circumstances. But the word 'due' brings with it the circumstances of the case as the test of what inquiry and search will suffice. And **it is the circumstances of the case of the person suffering bodily injury or, where death has been caused, of the claimant that must be considered. It is the word 'due' which connects the inquiry and search with the person injured where, as here, the claim is for bodily injury. You must look at the circumstances in which he or she was placed and, bearing in mind that the question is one affecting that person's rights, say whether in those circumstances enough was done by or on behalf of or in the interest of that person to warrant the description 'due' inquiry and search.** A man picked up by the roadside with a fractured skull who remains unconscious for weeks cannot be denied the application of the provisions because no one has been active on his behalf in looking for the motor vehicle while he lay in that condition. But a very different view might be taken of the case of a man suffering a minor injury in comparatively full possession of his physical faculties. Perhaps the effect of the material part of the provision might be summed up by saying that the condition it imposes is that the claimant is not able to provide any adequate information as to the identity of the vehicle notwithstanding that the claimant and those acting for the claimant with his or her authority **have taken such measures to ascertain it as were reasonable in the circumstances of the case having regard to the situation of the claimant**."[4] (emphasis added)

[15] The reference to measures which "were reasonable" is not surprising. If an inquiry and search is to be described as "due" it will be because what was done was reasonable in all the circumstances. It can hardly be the case that the legislature intended, by substituting "proper" for "due", to impose on a plaintiff the burden of doing more than was reasonable in the circumstances.

[16] The words "proper" and "due" can, in different circumstances, encompass different levels of effort. But, in the context of this particular section, the change of words has not imposed a higher burden on a plaintiff. If I am wrong, and there is a difference, then it is so slight that the maxim *de minimis non curat lex* would apply. It follows, then, that decisions of appellate courts on "due inquiry and search" have the same weight as if they had been considering "proper inquiry and search".

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4 At 380 – 381.

[17] Little more need be said about this. In any event, the case for the plaintiff was, effectively, that he had satisfied the test, whether or not "proper" imposed a slightly higher burden. And the defendant's case was that the plaintiff did not satisfy the requirement whether or not a slightly lower burden was imposed by "due".

What happened to the plaintiff?

[18] The circumstances which gave rise to the plaintiff's injury may be summarised in the following way:

(a) at the relevant time, he was driving his Australia Post motorcycle along Redland Bay Road,

(b) he had reached a slight incline in the road when he noticed a light truck overtake him in the lane to his right,

(c) he described the truck as being of the kind often used by concreters,

(d) the truck was coloured white and he saw no markings or signage on it,

(e) after passing him, the truck moved into his lane approximately 10 m in front of him,

(f) a piece of wood about 50-60 centimetres long and about three centimetres square, slid off the tray of the truck on to the road in front of the plaintiff,

(g) the plaintiff lent to his left in order to steer the motorcycle away from the timber,

(h) the front wheel went past the timber, but the back wheel ran over it,

(i) he described the sensation as "like a bunny hop or when you get double-bounced on something. It's sort of that flicking motion that all of a sudden … it's not something that you expected at the time … it sort of just flicked me up."

(j) in examination in chief, he said that he "didn't really feel it at the time" and said that the sensation when he landed was "obviously jarring" but that he "sort of just got flicked and landed and kept going",

(k) he was still going up the hill when this occurred, and he thought he was doing less than 70km/h because cars were going past him and he wasn't keeping up with the flow of traffic,

(l) he didn't notice any change in the handling of the motorcycle,

(m) in cross-examination he agreed that when he had been examined by a doctor, he had told the doctor that he felt a "torsional force" as he made that movement and he agreed that "there was a degree of pain from riding over the timber at the time",

(n) he next saw the truck from which the timber had fallen when it was in a right-hand turn lane from Redland Bay Road into Sevenoaks Street,

(o) when he first saw the truck in that position, it was some 300 to 400 metres ahead of him,

(p) at that time, he was starting to accelerate again and would have been travelling at "70 getting towards 80 again",

(q) he was asked if he had the truck in his view for something in the order of 30 seconds and he said that it would have not been that long – "so at a stretch maybe mid-twenties, low twenty-second mark with – with traffic around me at the time",

(r) he was asked: "You would agree with me that it was something that you could have done to position yourself so that you could see the registration number on the truck? – – – Yes."

(s) he was asked:

> "This truck had dropped a piece of timber on the road that caused you to have this frightening episode? – – – Yes.
>
> And as far as you were aware, that piece of timber was still on the road? – – – Yes.
>
> That would have been another reason for you to pay attention to the registration number on the truck, wasn't it? – – – Yes, it could have been."

(t) the plaintiff did not know whether the other vehicle had turned right into Sevenoaks Street or had executed a U-turn to proceed outbound along Redland Bay Road.

[19] The plaintiff could give no other description of the vehicle. He did not attempt to observe the vehicle's number-plate.

[20] He continued to the Australia Post depot in Dollery Road. His motorcycle was inspected, and no damage was observed.

What inquiry and search took place?

[21] The plaintiff reported the incident to his supervisor the next day. An Incident Investigation Report was completed, and he and his supervisor went to the site of the incident where they looked for the piece of wood and took photographs of the area.

[22] In July 2019, after he had been suffering pain for some time, he was referred by his general practitioner to a specialist. He was cross examined about what he told that specialist. The following exchanges took place:

> "What you told him was that you experienced ankle pain and back pain at the time of the incident? … Sorry, it was like three or four months after the incident had happened and yes, I did tell him what I told you guys, that I ran over a lump of timber, you know, my heart was racing, I'm – I'm not injured, and that's where he said well, what-well, how did you feel from it? I said well, obviously I was sore, but I was in shock that I wasn't on the ground."

[23] Mr Ford was then asked some further questions about what he told the specialist and there was some uncertainty about whether he was giving his answers as to what he thought he had felt at the particular time or what he told the doctor. He was instructed to give his evidence of what he told the doctor. This exchange took place:

> "Do you recall that, that you told the doctor that you had this torsional force as you made that movement and that you experienced pain in your back and in your ankle at that time? – – – Yes, there was a degree of pain from riding over the timber at the time, yes."

[24] I am satisfied that Mr Ford understood that he was being asked to repeat what he told the specialist and that he had told the specialist that he had experienced pain following the motorcycle passing over the piece of timber.

[25] In October 2019, the plaintiff was prompted to seek legal advice after a discussion with a workmate. He spoke with Mr Shultz (a solicitor) by telephone and, following that discussion, notified the police of the accident. He went to three businesses situated on Redland Bay Road near where he said the incident occurred in order to see if they had any CCTV footage of the day in question. They did not.

[26] He then lodged his claim against the Nominal Defendant. He engaged an investigator who made enquiries but was unable to provide any useful information.

[27] The Nominal Defendant also engaged an investigator who made enquiries of people who lived in Sevenoaks Street and the nearby vicinity. He was unable to gather any useful information.

[28] In cross-examination, Mr Ford said that he had traversed Sevenoaks Street and another nearby street on many occasions in the months after the incident. I do not accept that he did that. There had been many opportunities for him to have provided that information including in response to requests made after the Nominal Defendant became aware of the claim. He first mentioned this during cross-examination.

[29] Sevenoaks Street is a dead end. It has residences on both sides of the street which are on blocks of land which appear to be of at least 1,000 m² in area. A vehicle the size of the one Mr Ford says passed in front of him could have been on a number of those blocks and not been visible from the road. In other words, had someone traversed that street immediately after the incident then, even if the truck had been parked on an allotment, it might not have been able to have been seen from the road.

Did the inquiry and search satisfy s 31(2) of the MAIA?

[30] The principles to be applied in a case such as this may be drawn from decisions of the New South Wales Court of Appeal which have considered what is, relevantly for these proceedings, the cognate provision in the *Motor Accidents Compensation Act* 1999 (NSW). Whether the obligation imposed by s 31(2) has been satisfied will

turn on the facts of the particular case. However, reference to other cases can be of assistance in determining how the section has been applied.[5]

[31] In *Nominal Defendant v Meakes*,[6] Sackville AJA (with whom McColl and Basten JJA agreed) examined the authorities and arrived at the following relevant considerations:

(a) the courts do not insist on inquiries that are likely to prove futile or purely ritualistic; and

(b) what constitutes "due" inquiry and search, as Dixon CJ explained in *Cavanagh*, must depend on the circumstances of the case, including the circumstances of the injured person.

[32] In *Meakes*, the plaintiff had been struck by a car while crossing a city street in Sydney. The vehicle stopped, the driver got out and there was a short exchange between the driver and the plaintiff. The plaintiff had suffered injuries, but he was able to walk away and continue with his business. He did not obtain the details of the car or the driver. Sackville AJA said that there were some striking circumstances in the case which suggested that due inquiry and search required the plaintiff to have taken steps to obtain the registration details of the vehicle. He said:

(a) first, it was not a case where there was any difficulty in ascertaining the identity of the vehicle, or for that matter, the driver;

(b) secondly, the plaintiff appreciated immediately after being struck by the vehicle that he had sustained injuries; and

(c) thirdly, the plaintiff was not so injured that he was unable to perform the simple task of recording the registration number of the vehicle.

[33] In this case, the capacity to record the registration number was not as simple as in *Meakes.* But, Mr Ford had about 20 seconds in which to put himself into a position where he could have observed the number-plate of the truck. Although there was moderate traffic on the road, Mr Ford did not say that it would have prevented him from getting to a position in which he could have seen the number-plate. Rather, he

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5 *Workers Compensation Nominal Insurer v Nominal Defendant* (2013) 64 MVR 542; [2013] NSWCA 301 at [91]-[99].

6 (2012) 60 MVR 380; [2012] NSWCA 66.

accepted that he could have moved to a point where he could have seen the number-plate.

[34] Mr Ford knew, almost immediately upon passing over the piece of timber, that he had suffered some form of injury. He had felt pain. As Sackville AJA observed in *Meakes*: "While the respondent, like many people injured in accidents, may not have appreciated at once the full extent of his injuries, he was aware that he had been injured and that his injuries were caused by the actions of the driver of the vehicle that had struck him."[7] Mr Ford was in the same position.

[35] Mr Ford was cross-examined about his knowledge of the ability to seek compensation for injuries caused to him. He accepted that he had seen advertisements to that effect. Sackville AJA did not appear to regard evidence on that as essential. He said:

> "[71] In assessing the "due inquiry and search" that should have been undertaken in this case it is appropriate to treat the respondent as a reasonably informed member of the community. Such a person could be expected to know that a victim injured in a motor vehicle accident, where another person is at fault, may be able to claim compensation from the person at fault."

[36] In the circumstances of this case, Mr Ford:

(a) could have, without great difficulty, observed and remembered the number-plate of the other vehicle;

(b) was aware, immediately after his motorcycle passed over the piece of timber, that he had suffered pain; and

(c) could reasonably have been expected to obtain the relevant details at the scene.

[37] Mr Ford, by failing to attempt to obtain the number-plate details, failed to engage in any proper inquiry and search.

[38] I will, for completeness, refer to two other matters raised by the Nominal Defendant. It was submitted that proper inquiry and search would have required Mr

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7 (2012) 60 MVR 380, [2012] NSWCA 66 at [64].

Ford to return to the site of the incident for a few days at about the same time as the incident, in order to observe the traffic and look for the other vehicle. That would not have been reasonable given the traffic which passes along Redland Bay Road and the absence of any evidence to suggest that the vehicle might pass that way again. It was unrealistic and a plaintiff is not required to take steps which are no more than a ritual and unlikely to be productive.[8]

[39] The second matter suggested by the Nominal Defendant was for Mr Ford to have undertaken some form of reconnaissance in Sevenoaks Street and nearby areas. This was prompted by Mr Ford having seen the vehicle on Redland Bay Road at a point where it could have turned into Sevenoaks Street or have undertaken a U-turn. That would have been appropriate within a short time after the incident. But, given that there was no unusual activity which might have alerted the residents of Sevenoaks Street, the inquiries might not have borne fruit. That is not to say, though, that appropriate inquiries taken within a short period would not have constituted proper inquiry and search. The placing of notices seeking information in letter boxes in that street would, for example, have been a reasonable step to take in the circumstances.[9] Mr Ford failed in that respect. To go back some months later, though, would have been the triumph of enthusiasm over reason. As McColl JA observed in *Workers Compensation Nominal Insurer v Nominal Defendant*, the period when inquiry should have been made is "before the scent was cold", that is, before it might reasonably be expected that the passage of time would have dulled people's recollections.[10]

Conclusion

[40] The plaintiff has not established that he conducted a proper inquiry and search.

[41] The claim is dismissed.

[42] I will hear the parties on costs.

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8 *Workers Compensation Nominal Insurer v Nominal Defendant* (2013) 64 MVR 542; [2013] NSWCA 301 at [85].

9 See, for example, *Workers Compensation Nominal Insurer v Nominal Defendant* at [106].

10 At [109].