

12 December 2018

Our ref: KB: ACTLC

Hon Yvette D'Ath MP
Attorney-General and Minister for Justice
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By email: attorney@ministerial.qld.gov.au

Dear Attorney

Proposed amendment to section 5 of the *Civil Liability Act 2003*

The Queensland Law Society's Accident Compensation/Tort Law Committee has been considering the application of the *Civil Liability Act 2003* (CLA) to claims for compensation that arise out of, or in the course of, employment.

Section 5 of the CLA sets out the civil liability claims that are excluded from this legislation. Section 5(1)(b) provides that the act will not apply in relation to deciding liability or awards of damages for personal injury if the harm resulting from the breach of duty is or includes:

(b) an injury for which compensation is payable under the Workers' Compensation and Rehabilitation Act 2003, other than an injury to which section 34(1)(c) or 35 of that Act applies.

Subsection (2) of this section clarifies that it is immaterial whether compensation for the injury is actually claimed under the relevant Workers' Compensation Act or whether the entitlement to seek damages for the injury is regulated under that Act.

The Society's concern is that amendments enacted in 2007 with the stated intention of protecting workers' rights where they suffer injuries whilst on the roads in the course of their employment, have not achieved their purpose and may require further amendment.

Background

In a decision of the Queensland Court of Appeal in *Newberry v Suncorp Metway Insurance Limited* [2006] 1 Qd R 519, the Court interpreted section 5 of the CLA in a way which focused on the nature of the civil claim for damages, rather than the harm that resulted from the breach of duty. It resulted in a worker who, in the course of his employment was a passenger in the delivery truck, being denied an assessment of damages at common law, as would have been the case for any other worker who was injured in the course of their employment and made a claim against a 'non-employer'. The decision was handed down simultaneously with the Court

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of Appeal's decision in *King v Parsons* [2006] 2 Qd R 122, where the same approach was taken in a case involving an Australia Post delivery worker who was injured when riding his motorcycle on a footpath to make deliveries.

The Newberry Amendments

As a consequence of those decisions, parliament introduced amendments to section 5 of the CLA. The explanatory notes to the bill which introduced these amendments explained their purpose: -

"The amendment to the Civil Liability Act 2003 aims to redress the effect of the Queensland Court of Appeal decision in *Newberry v Suncorp Metway Insurance Limited* [2006] QCA 48 (*Newberry*), which was handed down on 3 March 2006. In *Newberry*, although the claimant was injured in a motor vehicle accident while at work, the damages were assessed under the Civil Liability Act 2003 because his claim was against a third party (the driver of the other vehicle) and his employment was not a material ingredient to the claim against the third party.

The intention of the amendment is to protect workers' rights by providing that a common law claim for damages by a worker in factual situations such as those in *Newberry*, will be assessed at common law, rather than under the Civil Liability Act 2003. The amendment will reinstate the Government's stated intention regarding the protection of worker's rights under the Civil Liability Act 2003."¹

We do not consider that the amended section 5 of the CLA has been interpreted by the Court in a way that is necessarily consistent with the explanatory notes and this was confirmed recently by the Queensland Court of Appeal.

RACQ v Foster

On 2 February 2018, the Court of Appeal handed down its decision in *RACQ v Foster* [2018] QCA 252.

The case involved a civil claim for damages by a bus driver who was injured when the bus she was driving was hit by a motor vehicle. The Court of Appeal found that the bus driver was not entitled to have her damages assessed at common law but rather, subject to the limitations imposed by the CLA.

Philippides JA delivered the reasons for judgment, with which Gotterson and Morrison JJA agreed. Her Honour acknowledged that the amendments to section 5 of the CLA had resulted in a shift of focus, stating the "inquiry is directed to whether damages for personal injury results from negligence causing harm being an injury for which compensation is payable under the WCRA" and "[t]hat change of focus... requires consideration of causal issues but also a consideration of the meaning of "injury" under s 32 of the WCRA. Section 32 continues

¹ *Criminal Code and Civil Liability Amendment Bill 2007*, Explanatory Notes, at p.3

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to be a central provision since by s 108 of the WCRA, compensation is payable to a “worker” for an “injury” as defined by s 32.”²

In the end, the Court found that the Plaintiff’s work was not a significant contributing factor to her injury such that the exclusion provisions in section 5 of the CLA would apply. It appears that the Court has introduced concepts of causation and the potency of the contribution by the work to determine whether there were some exigencies of the employment that made a material contribution to the cause of action. This interpretation would appear, however to be inconsistent with the explanatory notes.

The decision raises two issues for consideration by government:

1. The stated intention of the 2007 amendments have not been met by the changes that were introduced to section 5; and
2. The recent decision in *Foster* leaves open a new argument that where a worker is injured whilst on the roads in the course of their employment, unless there is something unusual about their employment (such as riding on a footpath in the course of delivering mail as in the case of *King v Parsons*), then the work may not be a ‘significant contributing factor’ to the injury. The result is that section 32 of the *Workers’ Compensation and Rehabilitation Act 2003* may not be satisfied, thereby arguably denying a worker even an entitlement to no-fault statutory benefits under the workers’ compensation scheme.

In the circumstances, the Society believes that consideration of the issue is needed so that if necessary, further amendments to the CLA can be implemented so as to achieve the stated intention of the 2007 amendments.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Kate Brodrik by phone on (07) 3842 5851 or by email to k.brodrik@qls.com.au.

Yours faithfully



Ken Taylor
President

² [2018] QCA 252 at [83]