Hooper v Territory Insurance Office & Anor [2005] NTSC 3

PARTIES:	HOOPER, MICHAEL JOHN v TERRITORY INSURANCE OFFICE AND: STANFORD, PHILLIP JOHN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No. 220 OF 1997 (9721238)
DELIVERED:	10 FEBRUARY 2005
HEARING DATES:	4 FEBRUARY 2005
JUDGMENT OF:	ANGEL J

CATCHWORDS:

HIGHWAYS – MISCELLANEOUS MATTERS

Stock route – whether a "public street" – whether "place open to, or used by, the public" – relevance of Ministerial declaration – whether open to use by the public for a limited purpose rather than use by limited members of the public – whether particular use must be lawful

Crown Lands Act (NT), s 113
Motor Accidents (Compensation) Act (NT), s 4, 6(1)(b)
Motor Vehicles Act (NT), s 5(1)
Stock Routes and Travelling Stock Act (NT)

Chellingworth -v- Territory Insurance Office (1984) 70 FLR 22; *Darwin City Council -v- McDonnell & Ors* (1998) 8 NTLR 106, applied

Re Maurice's Application; Ex parte A-G (NT) (1987) 18 FCR 163; *Ward -v- Marsh* [1959] VR 26, considered

Harrison v Hill [1932] SC (J) 13; *Ireland v Haesler* [1959] VR 4; *Schubert v Lee* (1946) 71 CLR 589, distinguished

STATUTES – ACTS OF PARLIAMENT

Motor Accidents (Compensation) Act (NT) – meaning of "accident' - *Motor Vehicles Act* (NT) - meaning of "public street" – meaning of "place open to, or used by, the public"

Motor Accidents (Compensation) Act (NT), s 4, 6(1)(b)
Motor Vehicles Act (NT), s 5(1)

Chellingworth -v- Territory Insurance Office (1984) 70 FLR 22; *Darwin City Council -v- McDonnell & Ors* (1998) 8 NTLR 106, applied

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INSURANCE – OTHER INDEMNITY INSURANCES - MOTOR ACCIDENTS COMPENSATION

Vehicle rollover on a stock route – insurer not party to proceedings giving rise to default judgment against insured – default judgment not create rights in the third party against insurer

Motor Accidents (Compensation) Act (NT), s 4, 6(1)(b)

REPRESENTATION:

Counsel:

Plaintiff:	R Bruxner
First Defendant:	I Nosworthy
Second Defendant:	No appearance

Solicitors:

Plaintiff:	Cridlands
First Defendant:	Ward Keller

Judgment category classification:	A
Judgment ID Number:	Ang2005003
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hooper v Territory Insurance Office & Anor [2005] NTSC 3
No. 220 of 1997

BETWEEN:

MICHAEL JOHN HOOPER
Plaintiff

AND:

TERRITORY INSURANCE OFFICE
First Defendant

AND:

PHILLIP JOHN STANFORD
Second Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 10 February 2005)

[1] By Originating Motion dated 23 September 1997 the plaintiff seeks a declaration that the second defendant ('Stanford') is entitled under s 6(1)(b) of the Motor Accidents (Compensation) Act (NT) ('MACA') to be indemnified by the first defendant to the extent of Stanford's liability to the plaintiff arising from a motor vehicle accident which occurred on or about 20 February 1990 in which the plaintiff's wife died.

[2] Relevant to the present proceedings are earlier proceedings (SC29/1993) between the plaintiff and Stanford in which default judgment for damages to be assessed was entered against Stanford on 11 August 1995 in favour of the plaintiff. Those damages remain to be assessed. The first defendant chose to have no involvement in the conduct of those separate proceedings. Should the plaintiff obtain the declaration sought in the present action, he intends to proceed with the assessment of damages against Stanford and enforce against the first defendant his judgment against Stanford.

[3] A Statement of Agreed Facts became Exhibit P1 before me. The plaintiff's claim arises out of a motor vehicle rollover that occurred on or about 20 February 1990. The plaintiff's wife, Robyn Elizabeth Hooper ('the deceased'), died shortly after the rollover as a result of the injuries she sustained in it. At the time of the rollover:

(a) the deceased was riding in the tray of a Toyota Landcruiser utility which was unregistered but carried the registration number NT 176 - 487 ["the motor vehicle"];

(b) Stanford was the driver of the motor vehicle; and

(c) Stanford had resided in the Territory for a continuous period of at least three months.

The rollover occurred on unfenced land in the Northern Territory. While not agreed in the Statement of Agreed Facts, counsel indicated during the hearing that it was agreed that the accident site is within the boundaries of a

stock route within the meaning of the Stock Routes and Travelling Stock Act (NT), namely the Arltunga Stock Route, declared under the then Crown Lands Act on 24 November 1986 and depicted in Northern Territory Government Gazette No. S 83.

[4] At the time of the rollover

(a) the deceased was not a "resident of the Territory" within the meaning of the MACA;

(b) the motor vehicle was not registered in the Territory or elsewhere, its most recent Territory registration having expired on or about 22 September 1989; and

(c) Stanford was not indemnified under any contract of insurance for the purposes of s 6(2) MACA.

[5] Counsel for the plaintiff, submitted that Stanford is entitled to indemnity from the first defendant under s 6(1)(b) MACA because:

(a) the accident in which the plaintiff's wife died was an accident within the meaning of s 4 MACA - specifically within the meaning of paragraph (a)(i) of the definition of "accident"; or

(b) alternatively, the indemnity in s 6(1)(b) is not limited by the definition of "accident" in s 4 - "accident" in s 6(1)(b) means accident according to ordinary Australian usage.

[6] At the relevant time s 6(1) MACA was in the following terms:

> "Subject to subsection (2), where a person is liable to pay damages in respect of the death of or injury to any person in or as a result of an accident –
>
> (a) that occurred in the Territory and at the time of that accident the first-mentioned person was in control of a motor vehicle other than a Territory motor vehicle; or
>
> (b) that occurred in any place, whether or not in the Territory, and at the time of that accident the first-mentioned person was -
>
> (i) the owner of a Territory motor vehicle involved in the accident and in respect of which he was so liable; or
>
> (ii) in control of a Territory motor vehicle,
>
> the Office shall indemnify him or his personal representatives to the extent of his liability."

[7] It is not in contest that Stanford was in control of a "Territory motor vehicle" for the purposes of s 6(1)(b) MACA. The sole question before me is whether the rollover was an "accident" within s 6(1)(b) MACA.

[8] The term "accident" was defined in s 4 MACA at the relevant time in the following terms:

> "In this Act, unless the contrary intention appears –
>
> 'accident' means -
>
> (a) in relation to the Territory - an occurrence –
>
> (i) on a public street, as defined in the Motor Vehicles Act, caused by or arising out of the use of a motor vehicle; or
>
> (ii) in any place in the Territory, other than a public street, caused by or arising out of the use of a Territory motor vehicle in respect of which a

compensation contribution under Part V or section 137 of the Motor Vehicles Act has been paid or a motor vehicle currently registered in a State or another Territory in accordance with the law relating to the registration of motor vehicles applicable in that State or Territory; and

…

occurring on or after 1 July 1979, and which results in the death of or injury to a person".

[9] The plaintiff's primary submission is that the rollover was an "accident" because it was an occurrence on a public street, as defined in the Motor Vehicles Act (NT), arising out of the use of a motor vehicle which resulted in the death of the wife of the plaintiff.

[10] Section 5(1) Motor Vehicles Act (NT) at the relevant time provided:

" 'public street' means any street, road, lane, thoroughfare, footpath or place open to, or used by, the public.... , but does not include -

(a) [omitted]

(b) a road, or part of a road, that is closed under the Control of Roads Act or under the Local Government Act; or

(c) a street, road, lane, thoroughfare, footpath, or other place, under construction,

and not open to or used by the public,".

[11] Counsel for the plaintiff submitted that the stock route was a "place open to, or used by, the public" for the purposes of this definition, and therefore a "public street" for the purposes of the definition of "accident" in s 4 MACA.

He referred to *Darwin City Council v McDonnell & Ors* (1998) 8 NTLR 106 at 111 where the Court of Appeal (not the Full Court as reported in the NTLR) in considering this definition said:

> "(i) the words 'open to, or used by, the public' qualify the words 'street', 'road', 'lane', thoroughfare', 'footpath' or 'place';
>
> (ii) the word 'place' is not to be read ejusdem generis with the preceding words;
>
> (iii) the words 'open to' in relation to the words 'street' and 'road' and 'place' do not mean open as opposed to closed under the Control of Roads Act or the Local Government Act, but rather places where the public can go".

[12] It was contended that the stock route was a place open to or used by the public as it was open to or could be used by any member of the public, albeit for a particular purpose. That purpose appears from s113 Crown Lands Act (NT) (at the relevant time) that the "Minister may … declare routes … to be routes for the passage of travelling stock".

[13] The Stock Routes and Travelling Stock Act (NT) regulates the passage of travelling stock, in terms that are restricted as to purpose but not as to the persons who may drive such stock. Anyone is entitled to use a stock route provided he or she does so lawfully. The fact that only a limited class of members of the public (pastoralists) might in practice avail itself of the facility, and then only occasionally, does not deprive the stock route of its

public character: *Ward v Marsh* [1959] VR 26 at 27-28 per Lowe J; see also *Chellingworth v Territory Insurance Office* (1984) 70 FLR 22 at 27 per O'Leary J.

[14] Counsel for the first defendant referred to a line of authority commencing with *Harrison v Hill* [1932] SC (J) 13 in submitting that "place open to, or used by, the public" was a composite phrase and the question was whether the "public actually and legally enjoys access to it". As Lord Justice General, Lord Clyde said in that case at 16:

> "I think also that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as a matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed - that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor. The statute cannot be supposed to have intended by public 'access' such unlawful access as may be had by members of the public who trespass on the property of either individuals or corporations."

[15] Lord Clyde's observations were approved in *Ireland v Haesler* [1959] VR 4 at 8, where Dean J said:

> "It is established that the words 'open to the public' do not mean open as a matter of right. It means something more than being physically open in the sense that there are no gates or other barriers which obstruct entrance by the public."

Dean J concluded that Lord Clyde's approach also "appears to be the view taken by the High Court [in *Schubert v Lee* (1946) 71 CLR 589 at 592] which drew no distinction between the two parts of the definition".

[16] In *Schubert v Lee* Latham CJ, Rich and Dixon JJ in a joint judgment stated at 592–593:

> "The definition contained in the statute might very readily have been limited to 'public' streets, roads, lanes, &c., but such a limitation has not been included in the definition. The words 'open to or used by the public' are apt to describe a factual condition consisting in any real use of the place by the public as the public - as distinct from use by licence of a particular person or only casual or occasional use. It may be necessary to distinguish places open to members of the public as such from places left open by the owner but obviously intended only for the use of a particular description of person, for example, visitors to his shop or other premises. Prima facie the words of the section mean streets, &c., which actually are open to or used by the public, so that there is some need for protection of the public in the use of such streets, &c. .... In our opinion the words 'open to or used by the public' should … be construed in the same way, so that a lane falls within the definition if in fact it is 'open to or used by the public', whether or not there is a public highway over it."

[17] Having regard to this composite test, counsel for the first defendant submitted that:

(a) as there is no evidence that the stock route was actually accessed by the public for any purpose; and

(b) because under the Stock Routes and Travelling Stock Act (NT) the use of a stock route is only lawfully permitted for the purpose of the passage of travelling stock and there is no evidence that Stanford was using the stock route for the

purpose of exercising that right or indeed any right open to the public,

it followed the plaintiff had not established the accident site was a "place open to, or used by, the public".

[18] It is to be noticed that in none of the cases relied upon by counsel for the first defendant was the place shown to have been dedicated to the public. In each the question therefore devolved to the factual consideration of actual lawful use by the public. The High Court in *Schubert v Lee*, supra, at 593, stated that "a lane falls within the definition if in fact it is 'open to or used by the public', *whether or not there is a public highway over it*" (emphasis added). I do not consider their Honours intended by this observation to suggest that although there has been dedication of a place to the public, it would nevertheless cease to be a "place open to or used by the public" if only subject in fact to occasional or casual use by one or more members of the public. I cannot conceive this to be the effect of that passage. It would involve a member of the public injured in a little used public park having to present evidence of the degree of its use upon challenge that it was not a place open to the public.

[19] Lord Clyde in *Harrison v Hill*, supra, at 16, spoke of finding a balance as between extremes, there being no physical obstruction to public access at one extreme and at the other that the public has a positive right of its own to access. His Lordship appears to have intended that in finding that balance anything beyond the point within the spectrum which marked a place as

"open to or used by the public" ("to which the public has access" in terms of the provision before His Lordship) would be such. Clearly the most obvious example of that would be the extreme position he identifies, that is where the public has a positive right of access. In *Darwin City Council v McDonnell & Ors*, supra, at 111, the Court of Appeal concluded that "a place to which the public could physically go as of right … was a place open to the public", in which case "the question of actual use of the vacant Crown land is otiose". Where the public is shown to have a positive right of access, there is no need to embark upon the additional consideration of actual user.

[20] In the present case the Arltunga Stock Route exists by reason of Ministerial declaration in the Gazette pursuant to a procedure laid down in an Act of Parliament, namely the Crown Lands Act s 113 (as it then stood). I agree with counsel for the plaintiff's submission that its legal and factual existence is established by that procedure and does not, for example, depend upon common law notions of "dedication" and "acceptance". In my view this renders irrelevant any consideration as to whether the Stock Route is or was in fact used for the purpose of moving stock.

[21] Counsel for the first defendant submitted that the stock route was not in any event a place the public had a positive right of its own to access. It was not open to use by the public generally but only to particular or limited members of the public, that is, persons requiring it for the passage of travelling stock:

Chellingworth v Territory Insurance Office, supra, at 25-28; *Harrison v Hill*, supra. However, this fails to recognise the critical difference between use by the public for a limited purpose and use by limited members of the public (cf *Re Maurice's Application; Ex parte A–G (NT)* (1987) 18 FCR 163 at 170–176).

[22] Counsel for the first defendant also submitted with reference to the authorities discussed above that the use must be lawfully performed. Under the Stock Routes and Travelling Stock Act (NT) the use of a stock route is only lawfully permitted for the purpose of the passage of travelling stock. There is no evidence that Stanford was using the stock route for the purpose of exercising that right or indeed any right open to the public. However, in my view this submission confuses the assessment of whether a place is a "place open to or used by the public" with the lawfulness or otherwise of the actions of any member of the public in that place at any particular time. Once it is determined that the Stock Route is a place open to or used by the public it is irrelevant why Stanford was driving his vehicle on the Stock Route at that time. A place open to or used by the public does not cease to be so because a particular individual may be acting unlawfully or otherwise at any time in that place.

[23] I consider that the Arltunga Stock Route is a place open to or used by the public for the purposes of the definition of "public street" in the Motor Vehicles Act and that the accident in which the plaintiff's wife died was therefore an accident within the meaning of s 4 MACA. In the light of that

conclusion I have not considered the plaintiff's alternative submission that the indemnity in s 6(1)(b) is not limited by the definition of "accident" in s 4 – specifically, it is not limited by paragraph (a)(ii) of the definition.

[24] Counsel for the first defendant further argued that the first defendant was not a party to the proceedings commenced in 1993 in which the Plaintiff obtained default judgment against Stanford. That being so, he contended that the first defendant is not bound by the default judgment and is free to dispute Stanford's alleged liability to the Plaintiff, or alternatively that the issues presently sought to be established by the plaintiff as against the first defendant were not decided in the default judgment.

[25] However the issue is not whether the first defendant is 'bound' by the judgment against Stanford in SC 29/1993. Indeed, the plaintiff does not contend that the first defendant is so bound, but accepts that the judgment does not of itself create any right in the plaintiff as against the first defendant. Rather, there is merely the expectation that the first respondent will perform the public duty cast upon it by s6 MACA in the event the declaration sought is made. If the declaration is made, the plaintiff concedes the first respondent (acting under s 40 MACA) could apply on Stanford's behalf to set aside the default judgment.

[26] For these reasons it is appropriate to make the declaration sought by the plaintiff, that is, that the second defendant is entitled under s6(1)(b) MACA

to be indemnified by the first defendant to the extent of the second defendant's liability to the plaintiff arising from the rollover.
