By Kasarne Robinson

'Motor accidents' IN THE **WORKPLACE**

With access to workers' compensation benefits across Australia becoming more restrictive, it is imperative that lawyers advising injured workers can identify when the worker might have another cause of action.

One of those avenues is to consider whether the accident is actually a 'motor accident'.

Many workers may be able to access damages under the relevant state motor accidents scheme, such as the *Motor Accidents Compensation Act* 1999 in NSW (MACA).

Since 1 October 2006, 'motor accident' is defined in MACA as *'an incident or accident involving the use or operation of a motor vehicle where the death or injury to the person is as a result of and is caused (whether or not as a result of a defect in the vehicle):*

(a) during the driving of the vehicle, or
(b) a collision, or action taken to avoid a collision, with the vehicle, or
(c) the vehicle's running out of control, or
(d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle.'[1]

WHAT CONSTITUTES A 'MOTOR VEHICLE'?

In NSW, 'motor vehicle' is defined in the *Road Transport (General) Act* 1999 as *'a vehicle that is built to be propelled by a motor that forms part of the vehicle'*. The most commonly found motor vehicles in the workplace are forklifts and cranes.

In *Murad v Pacific Services Pty Ltd*,[2] Spigelman CJ stated:

> "In my opinion, the natural and ordinary meaning of the word 'motor vehicle' conveys the idea of conveyance or carriage and perhaps of movement within or upon the object. A device which does no more than push is not, in my opinion, unless perhaps the person operating it also travels in some way on the object."

The potential motor vehicle Spigelman CJ was considering in *Murad* was a troller shunter. With the greatest respect to the then Chief Justice, there is nothing in the definition that requires the driver to be carried on the 'vehicle'. Take, for instance, a reach pallet jack or lifter – they have a motor that forms part of the vehicle. Some have a platform on which the driver sits, and others require the driver/operator to walk behind it. Both fit within the definition of vehicle in the *Road Transport (General) Act*, but only the former fits the test in *Murad*.

Bulldozers, tractors, earthmoving equipment, cranes mounted on to a vehicle, cherry-pickers and scissor-lifts can be 'motor vehicles' within this definition.

USE OR OPERATION OF THE VEHICLE AND INJURY CAUSED DURING THE DRIVING OF THE VEHICLE

Having established that you are dealing with a 'motor vehicle', it is then necessary, in considering whether the claim can be brought under the motor accident legislation, to determine whether the accident involved the use or operation of the vehicle where the injury is caused during the driving of the vehicle, or one of the other three categories in s3 of MACA set out above.

The definition in s3 MACA was amended in 1995 to limit the definition of injury and narrow the overbroad reading of the definition of 'injury'. Examples of a broad interpretation giving rise to the legislative amendment can be found in cases such as *NRMA Insurance Ltd v NSW Grain Corp*[3] and *Mercantile Mutual Insurance (Australia) Ltd v Moulding*.[4]

In *Grain Corp*, a worker was injured while removing a grain elevator from the tray of a trailer to a vehicle. This action, which involved the unloading of the vehicle, was held to have arisen out of its use and operation.

In *Moulding*, a jillaroo was asked by her employer to place a lamb in the front of a utility. The lamb kicked a rifle that was on the front seat of the utility, which discharged, shooting the plaintiff. The Court of Appeal held that the injury arose out of the use of the vehicle as the loading of the lamb into the vehicle was an incidental part of the operation of the vehicle.

As both these cases involve the loading/unloading of a stationary vehicle, they would not now be held to fall with the scope of the motor accident legislation, as the amendment to the Act requires the injury to arise in the course of the driving of the vehicle, a collision or its running out of control.

In *Portlock v Baulderstone Hornibrook Engineering Pty Ltd*,[5] a mobile crane was being used to remove steel shutters from a concrete bridge. The crane tipped over, while it was stationary (with stabilisers out), and the employee operating it was injured. The employee sued his employee, also the owner of the truck, for damages under MACA. Hoeben J held that although the crane mechanism was being used, the vehicle was not being driven at the time the injury occurred, so the injury did not occur as a result of or during the driving of the vehicle.

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MOTOR ACCIDENT OR SYSTEM OF WORK? IDENTIFYING THE 'PROXIMATE CAUSE' OF THE INJURY

The leading case on this issue is the High Court's decision in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*.[6] In this case, an employee had been instructed by his employer to roll heavy containers to the rear of a truck manually using crowbars, because the unloading mechanism on the trailer attached to the truck was not working and hadn't been repaired. The employee suffered injury to his back while performing this task. The trial judge and the NSW Court of Appeal held that the injury fell within the then definition of injury in s3 of MACA. The High Court, however, held that the proximate cause of the accident was the direction to use the defective vehicle (the system of work) rather than the defective vehicle itself (a motor accident).

In *Nominal Defendant v GLG Australia Pty Ltd*,[7] the plaintiff was injured while unloading a shipping container by hand. He was placing boxes on pallets outside the container on a platform. The forklift being driven by a co-worker accessed the platform by a ramp to remove the pallets when full. The vibration of the forklift on the platform was transferred to the shipping container, which caused a stack of boxes to collapse causing injury to the plaintiff. The occupier of the factory in which the plaintiff's injury occurred alleged that the plaintiff's accident was a motor vehicle accident and that the Nominal Defendant was liable (the vehicle being unregistered and on a road or road-related area).

The High Court ruled that the driving of the forklift was the proximate cause of the injury, but the negligence of the defendant, as required by s122(1) MACA, was not fault in the use or operation of the vehicle. Applying *Allianz*, Gleeson CJ, Gummow, Hayne and Heydon JJ found that fault in the actual use or operation of the forklift truck had to be examined at the particular time and place of the injury '*and excludes an inquiry that goes more widely to instances of fault in the planning which leads to its deployment and which may have taken place at points of time and place remote from those of the injury*'.[8]

The issue of whether an injury arose from a system of work or during the driving of the vehicle was considered in *JA & BM Bowden & Sons Pty Ltd v Doughty*.[9] The plaintiff was employed as an orchard hand who suffered an injury when the tractor he was driving rolled over. The tractor was fitted with a roll bar, but he had been instructed by his employer to keep the roll bar lowered as it knocked fruit from the trees when it was raised. While the plaintiff was driving the tractor, the tractor rolled. The plaintiff would have been protected from injury had the roll bar been raised. The majority of the Court of Appeal held the injury arose because of the system of work – that is, the negligent instruction from the employer, rather than in the driving of the vehicle. It is interesting to note that the Court was split on this difficult issue. Sackville AJA, dissenting, categorised the respondent's injury as having been caused by the fault of the owner in the use or operation of the vehicle. His Honour was of the view that the fault was with respect to the use of the tractor at the particular time and place of the injury, given that the instruction not to use the roll bar remained in force at the time the respondent was injured.

The question that needs to be asked in these cases is what was the proximate cause of the injury. The NSW Court of Appeal recently considered this issue in *TVH Australasia Pty Ltd v Chaseling*.[10] In *Chaseling*, the respondent, who was employed by the appellant, was injured when a box fell from a forklift on to his leg. There was evidence that the box fell because the driver of the forklift had not spread the tines of the forklift. It was argued by the appellant that the predominant cause of the accident was not in the use or operation of the forklift, but some prior failure in establishing a safe system of work. The Court, rejecting that argument, said at [26]:

> 'It does not follow that, because one can characterise a fault in terms which appear to be detached from and antecedent to the actual use or operation of the vehicle, the definition is not engaged.'

The Court held:

> '...the negligence of the appellant was not in respect of a system of work ancillary to the use and operation of the forklift: it related directly to the manner in which the forklift was to be used and operated. It failed to inform the driver of the risk and how to avoid it materialising. The fact that the remedy may have lain at an earlier point in time did not mean that the proximate cause of the accident was not to be located in the manner of operating the vehicle.'[11]

A DEFECT IN THE VEHICLE

The definition of 'injury' in MACA was amended for accidents occurring after 1 October 2006, such that a defect in the vehicle alone is no longer sufficient. In *Zurich Australian Insurance Limited v CSR Ltd*,[12] the plaintiff was injured when he was lifting a ramp attached to a truck which was used for loading the truck. The NSW Court of Appeal found that the ramp constituted part of the vehicle and that the excessive weight of the ramp constituted a defect in the vehicle. The Court also held that the truck should have had a hydraulic lifting device and the failure to have such a device constituted a defect in the vehicle; thus, there was a direct causal link between this failure and the injury. This case was decided prior to the amendment to MACA.

The leading case on point is again *Allianz Australia Insurance Ltd v GSF*,[13] where the High Court had to consider the definition of defect in a vehicle. The worker was injured when he was directed by his employer to unload a truck manually because the mechanism on the truck that facilitated unloading had broken down. The High Court concluded that '*the temporal criterion is that the injury be a result of the use or operation of the vehicle because it was sustained during that activity. The other criterion is that the injury be caused by a defect in the vehicle.*' On the particular facts in this case, the High Court held that the defect in the vehicle did not cause the worker's injury and that it was the system of work that was the proximate cause of the injury.

IDENTIFYING THE OWNER OF A MOTOR VEHICLE

Where injures are sustained on worksites, it is often not a

straightforward task identifing who the 'owner' of a forklift is. Section 4(1)(b) of MACA provides that the owner of an unregistered motor vehicle is '*any person who solely or jointly or in common with any other person is entitled to immediate possession of the vehicle*'.

In the case of a forklift that is leased, possession does not pass from the true owner of the vehicle unless the lease is for more than three months.[14]

In *Caruana v Workers Compensation Nominal Insurer & Ors*, heard by His Honour McLoughlin DCJ, in 2011, the forklift in question had been leased to a transport business for more than three months; hence, ownership for the purpose of the Act had passed to the person entitled to immediate possession of the vehicle. This transport business involved a group of related companies, a number of which could have been the 'owner' entitled to immediate possession of the vehicle. Because of the structure of the companies, it was very difficult to ascertain which entity was entitled to immediate possession of the vehicle. The plaintiff was able to ascertain that one of two companies was arguably the 'owner' of the relevant forklift. The plaintiff issued against both companies (or one's insurer, to be accurate, as the company was deregistered) alleging that they were both 'owners' of the forklift. McLoughlin DCJ, in his judgment of 9 February 2012, found that both entities were owners. His Honour referred to the case of *Havas v Standard Knitting Mills Pty Limited*,[15] where Hodgson JA at [298] said:

> "'If a person is lawfully in actual possession of a motor vehicle, then that person has the immediate possession of the vehicle and is entitled to that possession and so falls within the description 'any person entitled to the immediate possession'. To my mind, it would not matter that another person who does not have actual possession may also be entitled to retake possession at any time. Until that later person has sought to exercise that entitlement, the person lawfully in actual possession is entitled to the actual possession and is clearly described as being entitled to immediate possession of the vehicle, that being the possession which that person lawfully has."

The case is currently on appeal on this issue, and also an issue relating to an indemnity under an insurance policy.

DOES IT MATTER IF THE VEHICLE IS UNINSURED?

Not necessarily. Section 3B of MACA places restrictions on the application of the claims provisions in MACA. This section applies for injuries after 1 October 2006. The application of the claims provisions in respect of death or injury that results from the use or operation of a motor vehicle is limited to death or injury that is caused by a motor accident for which the vehicle has motor accident insurance cover, or gives rise to a work injury claim (other than to a coal miner).

The definition of 'work injury claim', in the context of s3B(1)(b) MACA, is that a death or injury gives rise to a work injury claim if the death or injury is caused by the negligence or other tort of the worker's employer. In the author's view, the negligence of the worker's employer must still be in the use or operation of the motor vehicle where injury is caused during the driving of the vehicle, a collision or the vehicle's running out of control. However, this issue has not yet been judicially determined. Truss DCJ was recently asked to consider the issue on an interlocutory application to dismiss a statement of claim.[16] She held that it was an arguable issue and should be determined by the trial judge.

MACA will not apply to an injury arising after 1 October 2006 where the vehicle does not have motor accident insurance cover or there is not a 'work injury claim'.

VICARIOUS LIABILITY FOR THE DRIVER

If there has been fault on the part of the driver of the forklift in the use or operation of the vehicle, then you might consider whether you sue the driver's employer and allege they are vicariously liable for the negligent actions of their employee, the driver. Section 112 of MACA provides that the driver of a motor vehicle is deemed to be the agent of the owner. However, if you are having difficulty identifying the owner of the vehicle, or the vehicle does not have motor accident insurance cover, or there is no fault on the part of the worker's employer to render it a 'work injury claim', then you can bring the proceedings against the driver's employer who is vicariously liable for the actions of their employee driver and bound to indemnify the employee for the tort committed by the employee.[17] If the injury occurs after 1 October 2006 (the introduction of s3B MACA) and there is no motor accident cover and the injury is not a 'work injury claim', then such a claim will not fall under MACA. However, it is still possible to >>

sue the driver's employer proving duty, scope of duty, breach and causation with damages to be assessed under the *Civil Liability Act* (NSW) 2002.

Given the difficulty in identifying the owner in *Caruana*, the plaintiff sued the driver's employer. It was argued by the driver's employer during the course of that case that the employer could escape liability by virtue of s3(1)(b) *Employers Liability Act* 1991 (NSW). This section provides that the employer only has to indemnify the employee in respect of liability incurred by the employee if they commit a tort, where the employee is not entitled to indemnity by any other party. The employer alleged that the driver was entitled to indemnity by the owner of the vehicle and thus they could escape liability. The employer ultimately did not press this point at trial and McLoughlin DCJ found in favour of the plaintiff against the driver's employer.

REQUIREMENT TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF MACA

If the accident is a 'motor accident', then the worker must comply with the notice and procedural requirements of MACA. Section 72 of MACA provides that notice of the claim must be given within six months of the accident, by serving a Motor Accidents Personal Injury Claim Form. Notice would be given to the CTP insurer if the vehicle has CTP insurance, or to the owner and/or driver in the case of an uninsured vehicle. Accidents involving uninsured vehicles are entitled to automatic exemptions from the Claims Assessment Resolution Service (CARS) but it is the claim that is exempted, not the claimant. For abundant caution, claim forms in *Caruana* were served on all entities capable of being the owner and Certificates of Exemption were obtained against all entities, thus preventing the defendants' solicitor from taking the technical point that might result in the claim in court being struck out because no certificate of exemption had been obtained in respect of the claim against a particular entity.

If the accident is a 'motor accident' and you are suing the injured person's employer, then damages are assessed under MACA and the modified common law damages in Division 3 of Part 5 of the *Workers Compensation Act* (NSW) 1987 do not apply.[18] Given that s250 of the *Workplace Injury Management and Workers' Compensation Act* 1998 (the WIM Act) specifically excludes motor accident damages from the definition of 'work injury damages', there is no need to comply with the procedural requirements in Part 6 of Chapter 7 of the WIM Act. The limitation provisions that apply to a work injury damages claim, in s151D, also do not apply, by virtue of s151D(4) of the 1987 Act, although any motor accident claim would be subject to the limitation provisions in s109 of MACA.

A common mistake in the case of unregistered forklift cases is for the claim to be sent to the Nominal Defendant. A claim may be brought against the Nominal Defendant in the case of an unregistered motor vehicle if the accident occurs on a road or road-related area.[19] 'Road' is defined in the *Road Transport (Vehicle Registration) Act* 1997. The critical question is whether or not the road is in *'an area… that is open to or used by the public'*. A statement of principle concerning this phrase can be found in *Schubert v Lee*:[20]

> '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 license of a particular person for only causal 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 this shop or other premises.'

This issue was recently considered by the Supreme Court of South Australia in *Zerella Holdings Pty Ltd & Anor v Williams & Anor*[21] (see case note in this issue).

Each case will turn on its own facts. However, accidents involving forklifts commonly occur on worksites not open to or used by the public, and therefore it is incorrect to lodge such a claim on the Nominal Defendant, even if the vehicle is unregistered.

CONCLUSION

Damages available under the workers' compensation schemes across Australia are dismal, so it is important to look at other causes of action that an injured worker might be able to invoke in order to achieve the best result for your client. Remember, there are strict time limits under the motor accidents legislation, so if there is a possibility that an accident might be a 'motor accident', lodge a personal injury claim form early to protect your client's rights. You can always withdraw it after further investigations. Also, remember to check the version of the motor accident legislation in force at the time of the date of your accident. If you are not familiar with this area of law, seek advice from a barrister with expertise in motor accidents, or refer the case to an accredited specialist. If you fail to bring a motor accidents case in circumstances where the injured worker had a right to, you might find yourself conversing with LawCover. ■

Notes: **1** Section 3 *Motor Accidents Compensation Act* 1999 (NSW). **2** [2004] NSWCA 251. **3** (1995) 22 MVR 317. **4** (1995) 22 MVA 325. **5** (2005) 44 MVR 147. **6** (2005) 221 CLR 568; 79 ALJR 1079. **7** (2006) 228 CLR 529. **8** *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529. **9** [2009] NSWCA 82. **10** [2012] NSWCA 149 (22 May 2012). **11** At [30]. **12** [2001] NSWCA 261. **13** [2005] HCA 26. **14** Section 4(2)(a) *Motor Accidents Compensation Act* 1999 (NSW). **15** [2011] 52 NSWLR 293. **16** *Majid Alaee v Eptec Pty Ltd and Coates Hire Operations Pty Ltd (unreported)* **17** Section 3 *Employers Liability Act* 1991 (NSW). **18** Section 151E(2) *Workers' Compensation Act* (NSW) 1987. **19** Section 33 *Motor Accidents Compensation Act* 1999 (NSW). **20** (1946) 71 CLR 589 at 529. **21** [2012] SASCFC 100 (24 August 2012).

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