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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

SHORTLAND CITY COUNCIL v GOVERNMENT INSURANCE OFFICE of NSW

Jacobs P, Hardie and Bowen JJ A — 9 November 1973 — [1973] 2 NSWLR 257

INSURANCE – MOTOR CAR OF EMPLOYER HAVING BATTERY CHARGED – USUAL DRIVER REQUESTED TO START MOTOR TO SEE IF BATTERY FULLY CHARGED – DRIVER PUT HIS ARM THOUGH CAR WINDOW AND TURNED ENGINE ON – AS CAR IN GEAR VEHICLE MOVED FORWARD INJURING THE EMPLOYEE WHO WAS CHARGING THE BATTERY – ORDER MADE IN FAVOUR OF DRIVER – EMPLOYER INSURED AGAINST ALL LIABILITY CAUSED BY OR ARISING OUT OF THE USE OF THE MOTOR VEHICLE – WHETHER DRIVER WAS DRIVING THE VEHICLE WHEN IT MOVED FORWARD – APPEAL BY INSURANCE COMPANY.

In this matter one Blackeby was injured when a motor vehicle on which he was working moved forward and struck him. The movement of the car was caused by Mr Shepley putting his hand through the side window of the vehicle which was in gear and turning the ignition key that also operated the self-starter. Both men were employees of the plaintiff council. The Council owned the vehicle concerned, and the incident occurred in the Council's garage. Blackeby obtained a verdict for damages against the Council. The vehicle was insured third party by the defendant – Government Insurance Office of N.S.W. The Council by this policy was entitled to claim indemnity for the verdict Blackeby had obtained against it. However the Council chose not to rely on the indemnity but to seek from the insurer payment of the award of damages which it had received against the driver Shepley as third party pursuant to s15 of the *Motor Vehicles (Third Party Insurance) Act*. This claim was made upon the basis that judgment in the third party action had been obtained by it in respect of bodily injury to Blackeby caused by or arising out of the use of the insured's motor vehicle. That policy pursuant to s10(1)(b)(i) insured not only the County Council but also Mr Shepley as another person who "at any time drives the motor vehicle" against all liability incurred by him in respect of bodily injury to Blackeby caused by or arising out of the use of the motor vehicle. An order having been made in favour of the Council on the basis Mr Shepley was the driver, the Government Insurance Office appealed.

HELD: Appeal dismissed.

1. The real question was whether or not Shepley was the driver of the vehicle at the time of the injury. Then, if he was, was his action a use of the motor vehicle in the relevant sense? There was no doubt that he was the driver of the motor vehicle. He was the man whose action drove the motor vehicle forward. He was not in the driver's seat but that cannot be the test. He did not have the intention of driving the vehicle but again that cannot be a conclusive test of whether in fact he was the driver or not. He had control of the means of propulsion forward of that vehicle in the same way as if he had intentionally driven it forward, so with that means of propulsion of the motor vehicle under his control he inadvertently drove the motor vehicle forward. He did not steer it but that again was merely incidental.

Pullin v Insurance Commissioner **[1971] VicRp 31; (1971) VR 263, and**

Insurance Commissioner of State Motor Car Insurance Office v Pullin **[1972] ALR 399; (1971) 45 ALJR 176, followed.**

2. In relation to the question whether the injury arose out of the use of the motor vehicle, the motor vehicle was being used as such at the time when as a result of the inadvertent act of Mr Shepley it was driven forward so that it injured Mr Blackeby. The fact that the purpose of turning on the ignition and activating the self-starter was in order to test the efficacy of the battery was in the circumstances merely incidental to the driving of the motor vehicle. The case was quite different from the case where the motor vehicle was not driven at all but was merely being tested as an inanimate, immovable thing which nevertheless might cause damage as a result of a succession of events connected with its mechanical but static operation. A vehicle is not being used merely because it is being tested for use. It does not follow that because it is being tested for use it was therefore not being used.

Government Insurance Office of NSW v King **[1960] HCA 60; 104 CLR 93; [1960] ALR 629; 34 ALJR 208, referred to.**

3. It was not sufficient for the respondent Insurance Office to say that all Mr Shepley did was to test the vehicle. By his manner of testing it he put the vehicle into motion and thereby he drove the vehicle and thereby used that vehicle as a motor vehicle. Accordingly, the decision of the trial Judge at first instance was clearly correct and the appeal was dismissed with costs.

JACOBS P (with whom Hardie and Bowen JJA agreed): ... The question is whether when Mr Shepley put his arm through the window on the driver's side and turned the engine on so that the car went forward because it was in gear he could be described as the driver of the motor vehicle. If he could not then the application for judgment under s15 fails. If he could, the question still remains whether the injury in a relevant way arose out of the use of the motor vehicle. Collins J came to the conclusion that Mr Shepley was the driver of the vehicle at the relevant time and by inference that what he did was a use of the motor vehicle. I respectfully agree with him. Upon the view which I take of the action of Mr Shepley I do not think that the further evidence of the circumstances leading up to that action gives a great deal as assistance. However, I shall refer to them.

The usual driver of the motor vehicle was Mr Shepley and he drove it in connection with the Council's business. The vehicle had been taken into the garage section in order to have the battery charged. This was the work of Mr Blackeby. After the battery was charged he reconnected the leads to the terminals of the battery. At that stage Mr Shepley was standing nearby waiting to take the vehicle away. Mr Blackeby asked him to start the motor to see that the battery was fully charged and that it was connected properly. It was then that Mr Shepley placed his arm through the window and turned the key, starting the engine so that the vehicle being in gear went forward and struck Mr Blackeby.

I do not think it is relevant that Mr Shepley was the usual driver of the vehicle. The real question is whether or not he was the driver of the vehicle in his actions which I have described. Then, if he was, was his action a use of the motor vehicle in the relevant sense? I feel no doubt that he was the driver of the motor vehicle. He was the man whose action drove the motor vehicle forward. He was not in the driver's seat but that cannot be the test. He did not have the intention of driving the vehicle but again that cannot be a conclusive test of whether in fact he was the driver or not. He had control of the means of propulsion forward of that vehicle in the same way as if he had intentionally driven it forward, so with that means of propulsion of the motor vehicle under his control he inadvertently drove the motor vehicle forward. He did not steer it but that again is merely incidental. I respectfully agree with the Full Court of the Supreme Court of Victoria in their conclusion in *Pullin v Insurance Commissioner* [1971] VicRp 31; (1971) VR 263 that intention to drive is not the material test. This conclusion was affirmed in the High Court on appeal *Insurance Commissioner of State Motor Car Insurance Office v Pullin* [1972] ALR 399; (1971) 45 ALJR 176.

There remains the question whether the injury to Mr Blackeby arose out of the use of this particular motor vehicle. I am of the opinion that the motor vehicle was being used as such at the time when as a result of the inadvertent act of Mr Shepley it was driven forward so that it injured Mr Blackeby. In my opinion the fact that the purpose of turning on the ignition and activating the self-starter was in order to test the efficacy of the battery was in the circumstances merely incidental to the driving of the motor vehicle. The case in my view is quite different from the case where the motor vehicle was not driven at all but was merely being tested as an inanimate, immovable thing which nevertheless might cause damage as a result of a succession of events connected with its mechanical but static operation. This was the situation which was dealt with in *Government Insurance Office of NSW v King* [1960] HCA 60; 104 CLR 93; [1960] ALR 629; 34 ALJR 208. A vehicle is not being used merely because it is being tested for use. It does not follow that because it is being tested for use it is therefore not being used. This distinction was clearly perceived by Menzies J in the case to which I have referred. At p99 he said:-

> "I am not in doubt that to start the engine of a motor vehicle preparatory to driving off is part of the use of a motor vehicle itself, nor do I doubt that to drive a motor vehicle to test whether repairs have been effective is to use the motor vehicle. I have, however, found some difficulty in determining what is the central question here, i.e., whether the starting of an engine of a motor vehicle in the course of repairing it or to test the efficacy of repairs made can properly be said to amount to a use of the motor vehicle itself."

In my view this approach determines the present case. It is not sufficient for the respondent Insurance Office to say that all Mr Shepley was doing was to test the vehicle. By his manner of testing it he put the vehicle into motion and thereby he drove the vehicle and thereby he used that vehicle as a motor vehicle. For these reasons I am of the opinion that the decision of the learned Judge at first instance was clearly correct and the appeal should be dismissed with costs.