

SUPREME COURT OF QUEENSLAND

CITATION: *Harris v Manton & Anor* [2020] QSC 101

PARTIES: **MITCHELL CHARLES HARRIS**
(plaintiff)
v
DANE DOUGLAS MANTON
(first defendant)
QBE INSURANCE (AUSTRALIA) LTD
ACN 003 191 035
(second defendant)

FILE NO/S: BS No 7044 of 2018

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 May 2020

DELIVERED AT: Brisbane

HEARING DATE: 5 May 2020 (with BS No 7043 of 2018)

JUDGE: Bradley J

ORDER: **The Court finds that:**

- 1. The first defendant did not breach the duty of care he owed to the plaintiff as a fellow road user in respect of the collision between the motor vehicle driven by the plaintiff and the vehicle driven by the first defendant, which occurred at approximately 7:40 am on 2 July 2015 near 240 Bribie Island Road, Caboolture.**
- 2. The collision occurred in the East-bound lane of Bribie Island Road.**

The Court will hear the parties on the appropriate form of Order.

CATCHWORDS: TORTS – NEGLIGENCE – STANDARD OF CARE, SCOPE OF DUTY AND SUBSEQUENT BREACH – GENERALLY – where the plaintiff and first defendant were driving towards each other on a single carriageway which had one lane in each direction – where the vehicles driven by the plaintiff and first defendant collided – where the plaintiff and first defendant suffered serious injuries as a result of the collision – where the plaintiff alleges the first defendant allowed his vehicle to veer left off the road, before overcorrecting with a sharp right-hand turn that caused his

vehicle to travel across the centre line of the road and collide with the plaintiff's vehicle – whether the collision occurred as a result of the first defendant's negligence – whether the first defendant breached the duty of care he owed to the plaintiff as a fellow road user

COUNSEL: M T O'Sullivan for the plaintiff in BS No 7044 of 2018
G C O'Driscoll for the defendants in BS No 7044 of 2018
B F Charrington, with B M Wessling-Smith, for the plaintiff in BS No 7043 of 2018
R Morton for the defendants in BS No 7043 of 2018

SOLICITORS: Everingham Lawyers for the plaintiff in BS No 7044 of 2018
Barry Nilsson for the defendants in BS No 7044 of 2018
Revolution Law for the plaintiff in BS No 7043 of 2018
McInnes Wilson for the defendants in BS No 7043 of 2018

- [1] On 2 July 2015, shortly before 7:20 am, the plaintiff Mitchell Harris left his home at Banksia Beach on Bribie Island to make his usual weekday morning trip to work in Caboolture. He was driving his dark grey single cab Mazda Utility with a silver tray and registration number MCH 97 (the **Utility**). About an hour earlier, the first defendant Dane Manton had left his home at Daisy Hill, driving his white Mitsubishi Pajero Wagon with registration number 458 GLW (the **Pajero**). He dropped his children at pre-school care and made his way North for a second day installing "pebblecrete" for a swimming pool on Bribie Island.
- [2] At about 7:40 am, Mr Harris was travelling West along Bribie Island Road. Also travelling West were Lynette Walsh and Graeme Creighton. At the same time, Mr Manton was travelling East on the same stretch of road. Also East-bound were Kylie McGinn, Wendy Spicer and Katrina Hardy.
- [3] As the cars approached each other, the East-bound line-up was Mr Manton, followed by Ms McGinn, then Ms Spicer and then Ms Hardy. Coming from the East to the West was Ms Walsh, followed by Mr Harris and then Mr Creighton. The timing of their respective trips to work resulted in each of these persons being a witness to the collision between the Pajero driven by Mr Manton and the Utility driven by Mr Harris. These reasons concern the respective liability of Mr Manton and Mr Harris for that accident.

Facts and matters not in dispute

- [4] On 22 April 2020, the parties filed a list of facts or matters that are not in dispute and of which proof is not required for the purpose of the proceeding. Amongst the matters are the following:
- (a) Mr Manton owed a duty to other road users, including Mr Harris, to take reasonable care to avoid a foreseeable risk of injury to those other road users having regard to the probability of injury occurring if care was not taken, the likely seriousness of injury and the burden of taking reasonable care to avoid the risk of injury;
 - (b) The second defendant is the insurer of the Pajero driven by Mr Manton; and
 - (c) The collision between the Pajero and the Utility was not caused by a mechanical defect in either vehicle.

Orders and directions

- [5] On 5 May 2020, this proceeding and Brisbane Supreme Court proceeding 7043 of 2018 were heard together in relation to the issue of liability only.¹ At the outset of the hearing, by consent of all parties, I directed that the evidence given in each proceeding would stand as evidence in the other proceeding, so that each party could rely on the evidence given, whether in this or the other proceeding.

Facts and matters not challenged at the hearing

- [6] The unchallenged evidence given by the various eyewitnesses establishes the following. The Pajero and the Utility collided near the driveway to 240 Bribie Island Road, Caboolture. The impact caused the lighter Utility to become airborne and fly backwards across the East-bound lane, land on the sealed shoulder of the roadway and continue East-North-Eastward until it came to rest in the ditch along the Northern side of the road corridor, almost parallel to the roadway with its front pointed towards Caboolture in the West. The rear wheels of the heavier Pajero, were lifted off the bitumen and the vehicle spun in an anti-clockwise direction around the impact, coming to rest across the West-bound lane with its front pointing North-North-Eastwards.

Photographs

- [7] The resting positions of the two vehicles are amply documented by 63 photographs, taken by the Queensland Police Service (**QPS**) Traffic Accident Investigation Team, under the supervision of Senior Constable Barry Griffin, and four overhead photographs taken by a QPS drone.
- [8] The photographs also show the cars driven by Ms Walsh and Mr Creighton, who respectively stayed to attend to the immediate needs of Mr Manton and Mr Harris, who were severely injured in the collision.
- [9] Some of the photographs show about 12 gouge marks in the bitumen on the East-bound lane² and a single scrape mark on the bitumen shoulder of the East-bound side of the roadway.³ The photographs were tendered by consent and short oral evidence was given by Senior Constable Griffin.
- [10] The scrape mark leads in the direction of the Utility. According to Senior Constable Griffin, it is shallower than the gouge marks. The most likely cause was the Utility landing in that area and a part of it scraping across the bitumen shoulder as it travelled towards its resting place.
- [11] The gouge marks are deeper and track “L” or “V” shapes into the bitumen. In evidence not challenged, they were caused by the impact of what Senior Constable Griffin called the “undercarriage” of a vehicle on the road. He drew a sketch of the accident site and marked the area where the gouge marks were found as “AOI”, meaning area of impact. The officer was not called as an expert witness and so the conclusion he drew (in both senses of the word) is not evidence that the gouge marks identify the point where the two vehicles collided. The gouge marks were

¹ This was pursuant to the Order of Martin J made on 15 November 2018.

² These include photographs 23, 36, 41 and 51 to 54.

³ This appears in photographs 40 and 55, amongst others.

entirely within the East-bound lane with none in the West-bound lane and none near the broken white line marking boundary of the East-bound and West-bound lanes.

- [12] Most of the debris from the accident, also captured in the photographs, is spread East of the gouge marks and across both lanes.

The eyewitnesses

- [13] Each of eyewitnesses was called to give evidence, with the exception of Ms Spicer.⁴ Owing to a health condition, Ms Spicer was unable to give evidence. Two statements by her were tendered and admitted, by consent, pursuant to s 92 of the *Evidence Act 1977* (Qld).

Ms Walsh

- [14] Ms Walsh gave evidence by video, from the Bundaberg Courthouse. She was driving West-bound in a silver RAV4. There was no car in sight in front of her on the road. The Utility was immediately behind her at a distance of about one car length. Ms Walsh was confident she was travelling at 100 kilometres per hour, as she had the car's cruise control operating. Ms Walsh noticed the Utility appear in her driver's side mirror as it pulled out suddenly, "as though it was going to pass me". She said the Utility was moving to the right and "pointed out towards the middle of the road". While giving this evidence, Ms Walsh used her hands to indicate the angle of the Utility, maintaining the gesture while saying the Utility was not parallel with her car. Ms Walsh agreed that at the time she saw the Utility pull out to her right, there were many cars approaching in the East-bound lane so there was no opportunity really for the Utility to overtake her car successfully.
- [15] Ms Walsh said she then looked in the rear-view mirror and saw the two vehicles collide and "go up in the air". Ms Walsh looked ahead, slowed her car, pulled up on the left side of the road and reversed her car to park closer to the scene of the collision. She walked near to the Pajero, where she saw a man lying on the road.

Mr Harris

- [16] Mr Harris gave evidence by telephone. He had no recollection of events between leaving his home on the morning of the accident and being attended by Mr Creighton while trapped in the Utility after the accident.

Mr Creighton

- [17] Mr Creighton gave evidence by video, using his mobile telephone. He said he was driving a Nissan Navara, about 100 metres or yards behind the Utility. There was no other vehicle between the two. He also was travelling from Banksia Beach to Caboolture for work.
- [18] At the outset of his evidence, Mr Creighton noted that the accident happened nearly five years ago and that his recollection was therefore not very fresh.

⁴ Mr Manton's counsel called Mr Manton, Ms Walsh, Ms McGinn, and Ms Hardy. Mr Harris' counsel called Mr Harris, and Mr Creighton.

- [19] According to Mr Creighton, just prior to the accident, he noticed a white Pajero in the East-bound lane with its two left-hand wheels off the road. He said the car “came back onto the road ... towards the centre of the road”. He saw the collision; and saw the Pajero spin and the Utility “forced backwards ... off the road at great speed”. He said he had last seen the Utility on its impact with the Pajero. He thought the Utility was “in my lane”, but could not be sure “due to the road not having a centre-line in the impact area”. He thought the collision happened in “approximately the centre of the road”. He repeated that in the impact area there was no centre line marked on the road.
- [20] Mr Creighton pulled up close to the scene. He saw the Pajero driver open the door of the car and stumble onto the road. He then heard the Utility driver calling for help, saying he was trapped in the car. Although Mr Creighton was not asked about it, Mr Harris had given evidence, which was not disputed, that Mr Creighton went to his aid, covered his leg injuries and comforted him until the ambulance officers arrived.
- [21] When asked in cross-examination about his observations of the Utility immediately before the accident, Mr Creighton’s answers were testy and evasive. At first, he said, repeatedly, “I can’t recall”. Then he said did not see any movement of the Utility. When pressed, he explained “I’m going directly off my statement at the time” and that as per his statement, he cannot “recall any other vehicles involved in this incident”.
- [22] At this point, Mr Creighton accepted that he had been looking at the statement for the purpose of giving his evidence at the hearing. He accepted he had not been giving evidence from any independent recollection of the events. Further tested about any memory of the Utility’s movements, he said he did not see the Utility as he was looking at the farm house on the Southern side of the roadway at the time. Still further pressed to explain, he said:

“I do not recall. I’ll stand by my statement ... what I saw was written in my statement ... I don’t know where the Utility was prior to the accident, because I wasn’t looking at the Utility. I was looking at the farm house ... I’m not saying any more ... I’m not offering any more information.”

- [23] Mr Creighton had drawn two sketches, which were tendered. He did not say when they were drawn or for what purpose. Mr O’Sullivan told the court they had been given to him that morning. They are not to any scale – although the roadway is the same in each, one shows the Pajero about three times larger than in the other, so that it is spread off the road on the left-hand side. The other shows both vehicles, with the smaller Pajero turned at an angle across the East-bound lane.

Mr Manton

- [24] Mr Manton gave evidence in person in the courtroom. He described driving the Pajero along Bribie Island Road at about 80 kilometres per hour, which he thought at the time was the speed limit. There were vehicles in front of him and behind him in the East-bound lane. He said the car immediately in front of him was about four car lengths ahead. He recalled the Utility in the West-bound lane came sharply across and struck the front of his vehicle. He thought it happened very quickly, in

about one second. He had no time to react or apply the brakes. He said he was in his lane and had not changed direction. He recalls that the back of the Pajero “went up” and the car spun around in an anti-clockwise direction. He remembered looking down at the road briefly for a second as the back of the car was up as it spun around. He said the car then “landed and dribbled back a bit”. Mr Manton thought the point of contact with the Utility was in about the middle of the front of the Pajero.

- [25] Mr Manton said the airbags went off in the Pajero and he had an instinct to get out of the car straight away. He opened the door and slid out, but, when he attempted to walk, his legs “just gave out” and he fell on the bitumen roadway. He later understood he had suffered multiple breaks and injuries to his foot, ankle, knee, legs, vertebrae and ribs.⁵ At this point he felt great pain in his legs, “like someone was pouring lava on my legs”. He agreed he was screaming about his legs while collapsed on the road and that he also said “What happened?” a number of times. Mr Manton said he was asking the latter question because he didn’t understand what caused the Utility to cross the centre line of the road into the East-bound lane.

Ms McGinn

- [26] Ms McGinn gave evidence by video from the Pine Rivers Magistrates Court. She said she was driving her black Ford Focus sedan in the East-bound lane towards her workplace on Bribie Island. She had dropped her daughter at childcare. The weather was fine. Ms McGinn was wearing sunglasses and had her sun visor down, which is her habit. She said there were no visibility issues driving East at that time. A couple of car lengths in front of Ms McGinn’s car was a silver Honda SUV, also travelling East. A couple of car lengths ahead of it was the Pajero. She estimated she was about 100 metres behind the Pajero at this time. She did not agree the SUV had obscured her view of the Pajero. She was able to say her speed was 100 kilometres per hour, as she had just activated the cruise control for that speed. She looked up from the speedometer on her dashboard and within a couple of seconds she saw the collision between the Pajero and the Utility. She recalled the Utility “swerved quickly” and was “coming into our lane” in a “sharp manoeuvre”, which she agreed was not an overtaking manoeuvre.
- [27] Upon impact, she saw the Pajero spin across to the other side of the road (the West-bound lane) and the Utility “flew up in the air and landed in the gutter”.
- [28] Ms McGinn applied her brakes and came to a stop on the road near where the Utility had landed. She stayed for a few seconds and then heard a woman in a car in front of her screaming for someone to call for help. She also heard the Pajero driver, Mr Manton, calling out in pain and asking, “What happened?”

Ms Spicer

- [29] A short handwritten statement that Ms Spicer signed at 8:00 am on the day of the accident and a longer typed statement, dated 1 September 2015, were tendered.
- [30] In the statement, signed within about 15 minutes of the collision, Ms Spicer said:

⁵ As the hearing was concerned with liability only, this evidence was not relied upon to prove any specific injury.

“I was travelling behind the Pajero. I was heading in a West Easterly direction to Bribie Island. All I was heard was a big bang. I didn’t see anything lead up to it. I have seen the ute go up in the air and bits and pieces everywhere. The ute was travelling West. I have got out and called 000.”

[31] The note is brief, almost contemporaneous and included corrections indicating Ms Spicer gave some consideration to its correctness.

[32] In her later typed statement, Ms Spicer said:

“I don’t know what happened but recall thinking to myself that the guy in the Pajero appeared to be drifting over his lane towards the centre line. I don’t know if he actually crossed the line or not. I was not really paying that much attention.

The next thing I heard was a very loud bang, and stuff went flying everywhere.

At this point I saw a utility flying off in the air to my left which is on the northern side of Bribie Island Road. The Pajero spun around and ended up across the centre line facing a general north easterly direction towards the utility.

I stopped my car and went to see if I could assist. I saw the young male driver of the utility was trapped and there were about 3 other males about to attend to him. One of these males said we will look after him you can call “000”.

I called “000” and advised them of the crash.

I don’t recall seeing the driver of the Pajero but I remember hearing him screaming out in pain. A short time later police arrived and I provided a version of what I saw.

I recall the weather at the time to be fine, dry and visibility was ok but the sun was a bit low but not low enough to cause any problems.”

[33] As noted, owing to her medical condition, Ms Spicer was not called or cross-examined at the hearing.

Ms Hardy

[34] Ms Hardy also gave evidence by video from the Pine Rivers Magistrates Court. She said she was driving a white Mazda 2 Hatchback East-bound towards Bribie Island. Ms Hardy thought she was driving at about 90 kilometres per hour, as she had just entered the 100 kilometre per hour zone. About two to three car lengths ahead of her was a white Pajero, also travelling in the East-bound lane. Ms Hardy said the Pajero seemed to be driving in the centre of the East-bound lane. She estimated there was almost a metre between the right-hand side of the Pajero and the broken white centre line markings. She did not see it move within the lane and did not see its brake lights come on.

[35] Immediately prior to the collision, Ms Hardy said she saw the Utility cross the dividing line and “enter our lane of traffic”. She said she saw it “veer sharply” as it

did so. She described the movement of the Utility as “too sudden and sharp to be overtaking”. It hit the Pajero “almost head-on” in the centre of the East-bound lane. She saw the Utility leave the road and the Pajero “spin in the middle of the road until it came to a stand-still”.

- [36] Ms Hardy pulled her car to a stop within metres of the Pajero. She satisfied herself that it was safe to move her car and then drove across the road and parked in the driveway of a nearby house. She did this because she knew emergency services would need to be able to access the scene. She saw the Pajero driver was out of his vehicle and lying on the ground. He was calling out, saying he had pain in his legs and asking, “What happened?”

Consideration of the evidence

- [37] Mr O’Sullivan, for Mr Harris, submitted that the gouge marks on the road surface did not indicate the point of collision, but were rather made by the Utility landing on the road after the collision. If the Utility (or the Pajero) had landed where the gouge marks are, then one would expect debris from the impact to be spread in most directions from the gouge marks. Almost all the debris is spread to the East. Nothing on the road surface indicates a collision point to the West of the gouge marks, from which point the Utility could have travelled airborne to land and create the gouge marks. It is highly improbable that the Utility collided with the Pajero to the East of the gouge marks, became airborne, landed where the gouge marks appear and then reversed its direction to travel back East-ward to its resting place off the roadway.
- [38] The respective resting places of the two vehicles shown in the photographs make it improbable that the gouge marks could have been caused by the Utility landing on the roadway. The more likely scenario is that, as the rear of the Pajero lifted off the ground at the point of impact, the front of the vehicle gouged the road surface before the forward momentum spun the whole vehicle, led by its airborne rear, in an anti-clockwise direction and pivoting away from where its front had scarred the bitumen. A number of the gouge marks track an “L” or “V” shape indicating such movement by the front underside of the Pajero against the bitumen surface. Just as the greater momentum of the Pajero pushed the Utility back to the East, it would likely have driven the associated debris in the same direction.
- [39] It follows that from the photographic evidence it is more likely that the collision between the two vehicles occurred at about the point where the gouge marks appear in the road. That is entirely within the East-bound lane of the road.
- [40] Mr O’Sullivan also sought to draw from the QPS photographs an inference that the Pajero must have crossed into the West-bound lane and collided with the Utility. He contended that the photographs appeared to show greater damage to the passenger side of the Utility and to the driver’s side of the Pajero. Such a contention is not obvious from the images, which show the front of each vehicle with very extensive damage.
- [41] Neither party called any expert evidence about the collision. I do not draw any conclusion from the photographs of the vehicles as to the parts of each vehicle that came into contact in the collision.

- [42] The evidence of Ms Walsh, Mr Manton, Ms McGinn and Ms Hardy was clear and consistent in all material respects with each other. It was also consistent with the gouge marks, the scrape mark, the distribution of debris and the resting places of the two vehicles, as shown in the QPS photographs. None had made a prior inconsistent statement. Each appeared to give their evidence frankly, without evasion and, when asked, was willing to consider an alternative possibility and respond thoughtfully to it, apparently drawing on a recollection of the day in question. There were imperfections in the recollection of each of them, but no more than might be expected of an event that occurred five years ago and was over in a matter of seconds.
- [43] I do not accept Mr O’Sullivan’s submission that Mr Manton’s asking, “What happened?” immediately after the collision should lead me to reject Mr Manton’s evidence of the seconds leading up to the collision. I accept, instead, Mr Manton’s explanation that he was asking how it was that the Utility came to cross over into the East-bound lane and collide with his Pajero.
- [44] The written evidence of Ms Spicer, unable to be tested by cross-examination, is equivocal. I do not consider the speculation in her longer statement to be a sound basis to conclude that Mr Manton crossed out of his lane. It is absent from her contemporaneous statement and may even be considered to contradict the timeous remark that she “didn’t see anything lead up to” the collision.
- [45] The evidence given by Mr Creighton was less satisfactory than that given by the other eyewitnesses, due to the more pronounced effect of the passage of time on his recollection and his reliance on an earlier statement, which was not put into evidence or explained. On the day of the collision, Mr Creighton showed commendable compassion in keeping company with Mr Harris until the ambulance officers and fire brigade arrived to extract him from the Utility. This may explain Mr Creighton’s unwillingness to answer directly the questions that might have impeached Mr Harris’ conduct in the moments before the collision. Whatever the explanation, Mr Creighton’s evidence of his recollection of events was quite diminished. His evidence is not internally consistent. He said did not observe the Utility because he was looking at a farm house, but he maintained he could observe the Pajero, which was further away but in the same direction as the Utility he did not see. No one else observed the Pajero move to the left and travel with its left-hand tyres on the shoulder of the roadway. His recollection that there were no middle line markings on the road is contradicted by the photographs and seemed to be a convenient reason to avoid saying whether the Utility had crossed to the other lane. I prefer the evidence of the other eyewitnesses, in these important respects, where they differ from the evidence given by Mr Creighton.

Findings

- [46] I find that the motor vehicle accident, near 240 Bribie Island Road, Caboolture at approximately 7:40 am on 2 July 2015, occurred as a result of the negligence of Mr Harris, while driving the Utility, in crossing into the lane in which Mr Manton was travelling in the Pajero, when it was unsafe to do so, and without giving way to the Pajero.
- [47] I am satisfied on the preponderance of the evidence and find that the Pajero did not move out of the East-bound lane of the road at any time before it collided with the

Utility and that the collision occurred within one or two seconds of Mr Harris in the Utility crossing into the East-bound lane. It follows that I find that Mr Manton did not breach the duty of care he owed Mr Harris, as another road user, to exercise reasonable skill to avoid causing injury to the person or property of another. I find there was no negligence on the part of Mr Manton that caused or contributed to the accident.

List of Issues

- [48] On 22 April 2020, the parties filed a List of Issues, which they described as “the real and substantial issues of fact and law” in dispute between them in this proceeding. At the commencement of the trial, the parties advised the court that the fourth and final issue was no longer an issue in the proceeding. As to the remaining issues, I have reached the following conclusions.
- [49] The accident did not occur as a result of any negligence by Mr Manton.
- [50] Mr Manton did not breach the duty of care he owed Mr Harris as a fellow road user. More particularly:
- (a) The Pajero did not veer left off Bribie Island Road with its two left-hand wheels off the road in the gravel and its two right wheels in the middle of his lane;
 - (b) Mr Manton did not turn back onto the road, over-correct and drive at a 45 degree angle towards the Utility;
 - (c) Mr Manton did not allow the Pajero to drift or travel over the centre line into the lane carrying West-bound traffic causing Mr Harris to veer to his right to avoid the Pajero; and
 - (d) Mr Manton did not take evasive action.
- [51] The collision occurred in the East-bound lane of Bribie Island Road.

Final disposition

- [52] Given the finding made about the alleged negligence of Mr Manton, the court may order that judgment be entered for Mr Manton on the claim by Mr Harris. However, I will hear the parties on the appropriate form of order.