SUPREME COURT OF QUEENSLAND

CITATION:	*Carmichael v Welch & Anor* [2020] QSC 210
PARTIES:	**SARAI DANIELLE CARMICHAEL** (plaintiff) **v** **REBECCA LOUISE WELCH** (first defendant) **RACQ INSURANCE LIMITED** **ACN 009 704 152** (second defendant)
FILE NO:	BS No 12387 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	17 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	9, 10, 11, 12 March 2020
JUDGE:	Martin J
ORDER:	**The action is dismissed.**
CATCHWORDS:	TORTS – NEGLIGENCE – DAMAGE AND CAUSATION – GENERALLY – where the plaintiff was riding a moped down a one-way street that consisted of four lanes – where the plaintiff alleges that she was driving in the third lane and changed lanes approximately 35 to 40 metres away from an intersection – where the plaintiff alleges that she saw a vehicle driven by the first defendant start to pull out into the lane she was in – where the plaintiff alleges that she had no choice but to brake heavily – where the plaintiff did not collide with the first defendant's vehicle but was thrown from her moped and sustained multiple injuries – where the plaintiff claims that the accident was caused by the first defendant's actions – where the first defendant alleges that her vehicle remained stationary at all relevant times and did not enter the intersection – where the defendants allege that the plaintiff's injuries were caused by the plaintiff's own negligence – whether the plaintiff has established on the balance of probabilities that the injury caused to her was as a result of the negligence of the first defendant *Civil Liability Act* 2003 *Civil Liability Regulation* 2014

COUNSEL: DLK Atkinson QC and J Sorbello for the plaintiff
SC Williams QC and EJ Williams for the defendants

SOLICITORS: The Personal Injury Lawyers for the plaintiff
Cooper Grace Ward for the defendants

[1] On 21 August 2015, the plaintiff (Ms Carmichael) had been at work in a café at West End. She finished at about 3.15 pm and left to go home to her unit in Brookes Street, Fortitude Valley. It had been raining that day and it was still drizzling as she drove her Honda moped along Wickham Street toward her home. At the relevant time, she was approaching the intersection of Bridge Street and Wickham Street. Her intention was to continue along Wickham Street and then turn right into Brookes Street.

[2] Wickham Street allows only one way traffic and at the area of the intersection between that street and Constance Street and then Bridge Street, it has four lanes. The lane on the left of the road (referred to in the trial as Lane 1) and the lane on the right (Lane 4) have provision for parking except during peak hours. There is no parking allowed in Lane 4 from 4.00 pm to 7.00 pm.

[3] At a time between 3.30 pm and 4.00 pm, the plaintiff came off the moped and was injured. She says that the vehicle being driven by the first defendant (Ms Welch) was creeping forward from Bridge Street into Wickham Street and she had no choice but to brake heavily. She did not collide with the other vehicle but says that, as a result of braking suddenly, she was thrown from the moped and suffered multiple injuries including to both wrists, her left leg and her hip.

[4] The plaintiff says that the accident was caused by Ms Welch's actions. Ms Welch says she did not move into Wickham Street and the plaintiff's injuries were caused by her own negligence. Both liability and quantum are in issue.

The circumstances of the accident

[5] Three people were called to give evidence as to what had occurred: Ms Carmichael, Ms Welch and her husband, Jordan Carter.

[6] The contest between the parties is essentially as to their recollection of what occurred. There were no disinterested witnesses. There was no collision which might assist in determining where the vehicles were at the relevant time.

[7] Ms Carmichael's case was not consistent over time. In order to demonstrate that, some details of the pleadings need to be set out.

[8] In the first statement of claim, she pleaded that:

(a) she was driving in the third or fourth lane in Wickham Street,

(b) as she approached the Bridge Street intersection (when the defendant's car was about two car lengths away), the first defendant drove her car at least one quarter into the third or fourth lane.

[9] The defence deals with those allegations in detail. It is pleaded in the defence that:

(a) within approximately 10 metres of Bridge Street there were vehicles parked in the fourth lane on Wickham Street,

(b) the plaintiff was riding her moped in the third lane (not the third or fourth lane as alleged),

(c) immediately after the last of the parked vehicles in Lane 4 the plaintiff moved the moped into the fourth lane,

(d) the plaintiff did not activate any indicator to signal an intention to move lanes,

(e) the plaintiff accelerated into the fourth lane,

(f) the defendant's car did not encroach into the fourth lane and was not continuing to drive through the fourth lane.

[10] The defendants also pleaded that the fall from the moped was caused solely as a result of Ms Carmichael failing to maintain proper control over the moped.

[11] In her reply, the plaintiff denied those allegations and repeated the allegations in her statement of claim. There were a number of iterations of the reply, but in all of them the plaintiff denied the allegations referred to above in the defence.

[12] On the morning of the first day of the trial, the plaintiff obtained leave to file a third amended reply. The denials remained with respect to the allegation that the plaintiff was riding in Lane 3, but there was an admission with respect to the part of the defence alleging contributory negligence. Ms Carmichael admitted that she changed from Lane 3 to Lane 4, but says that that occurred approximately 40 metres before the intersection of Wickham Street with Bridge Street and that she indicated as she changed lanes.

[13] Ms Carmichael claimed, in cross-examination, that she had a clear recollection that she was travelling in Lane 3 and that she moved into the right lane some "35 to 40 steps" from Bridge Street. There was no accurate measure given because no serious attempt was made to measure the distance Ms Carmichael said she was from Bridge Street when, as she finally accepted, she moved from Lane 3 to Lane 4. At one point she said the distance was 35 to 40 metres which she appeared to regard as the same as 35 to 40 steps.

[14] In cross-examination she said that she did not remember having specifically denied that she had moved from Lane 3 into Lane 4 and maintained that she had been saying that for a long time.

[15] Her evidence was unsatisfactory with respect to the extent to which she said the defendant's vehicle had moved into her lane. In an interview she had with a police officer, she said:

> "I was coming down the right lane and the other vehicle started to pull out from that side street, … and she got at least halfway into my lane … so to me, that indicated that she's going, … so I braked."

[16] In her evidence, she said:

> "I saw the car pull up and stop. As I got closer, the car started to creep out into my lane. The closer I got, I realised that she wasn't going to stop. The car had gotten further and further into my lane. I couldn't merge back because there was now traffic there, and I felt - well, I - as I got closer and she didn't stop, my choice was to T-bone her or to brake."

[17] She was pressed in cross-examination about the position of the defendant's vehicle. She was asked where the vehicle was when she applied the brakes. Her answer was that the vehicle was "significantly in my lane". Later, she said that it was "past a quarter into my lane". Then she said: "[b]y the time I looked up and - had crashed and looked up, she had stopped at the halfway point in my lane."

[18] Ms Carmichael had an interview with a police officer in August 2016. She could not, when giving evidence, recall that taking place. In that conversation she told the police officer that:

(a) she was in the right hand lane,

(b) the ground was a bit slippery,

(c) "the other vehicle started to pull out from that side street … and she got at least halfway into my lane",

(d) "I braked … and my scooter slid out because it was wet and I couldn't catch it with my legs and I ended up in the lane to my left … on the ground".

[19] The version of events given by Ms Carmichael over time was inconsistent. In particular, the position of the other vehicle differed widely in her various recollections. It was, according to her, in various positions ranging from one quarter into Lane 4 to half way into Lane 3. Her version, which was reduced to the allegations in her statement of claim and all but the last version of her reply, contained elements which she did not convey when speaking to the police officer. When she spoke to the police officer, there was no reference to her changing lanes.

[20] Ms Carmichael's memory of what occurred on that day is unreliable. I do not accept that she recalls with sufficient clarity what she did or what the first defendant did immediately before the accident. That leads me to consideration of the evidence of the other witnesses on this subject.

[21] Ms Welch was the driver of the car in Bridge Street. Her evidence was unimpressive. She was argumentative and uncooperative in cross-examination. In an example of masterly understatement, Mr Williams QC (who called her) said that: "her demeanour in the witness box did make it somewhat difficult to discern, at times, what her point was."

[22] She accepted that the passage of time had affected her memory and that a statutory declaration which she had provided some four years ago would be a better record of what had occurred. That statutory declaration was made on 15 June 2016 – about 10 months after the accident. In it she records that she had picked up her partner from work, proceeded along Bridge Street towards Wickham Street intending to turn right, and came to a stop close to the broken white line near a "Give Way" sign facing traffic in Bridge Street. She then states:

> "10. Traffic on Wickham Terrace [sic – Street] was very heavy at that time of the day and it was practically stationary across Bridge Street as there is a set of traffic lights just a little further along Wickham Terrace from Bridge Street.
>
> 11. There were cars practically stationary on Wickham Terrace, and I was stationary a little back from the broken line associated with the 'Give Way' sign. I was hoping that a driver in one of the cars in front of me would allow me in when traffic started moving again.
>
> 12. I remember that it had been raining previously and the road was wet, but I can't remember if it was still actually raining at the time that I was stationary at the intersection.
>
> 13. Whilst I was still stationary, my attention was drawn to a rider falling off a scooter some distance to my left. The scooter was sliding along the roadway and skidded past the front of my car and came to a stop just to the right of the front of my car. The scooter did not come into contact with any part of my car."

[23] About two months after making that statutory declaration, Ms Welch had a conversation with a police officer and recounted the incident in a manner consistent with her recollection in the statutory declaration.

[24] Notwithstanding her uncooperative performance in the witness box, Ms Welch's evidence was relevantly consistent with what she had said on two occasions within one year of the accident.

[25] Mr Carter was the passenger in the car being driven by his wife, Ms Welch. His evidence was criticised by the plaintiff on a number of bases including his statement that he had never really spoken about the matter with his wife. That is inconsistent with other evidence. Other criticisms related to his evidence that his wife was looking left but that was an assumption he had made and he acknowledged that it was a guess. There were some other matters (such as the content of the conversation with Ms Carmichael after the accident) where his evidence was subject to some doubt but he was not shaken from his recollection that:

> "I seen her pull out. I believe she probably has got a shock on seeing a car parked there, pulled the brake on and because of the wet weather and the – it probably is the angle of the bike she was probably mid-turn – probably her own wheel slipped, bike gone."

[26] Similarly, he remained firm as to his recollection that the car in which he was a passenger remained behind the white line on Bridge Street.

[27] The plaintiff sought to make much of the conversation which took place between her, Ms Welch and Mr Carter after the accident. Ms Welch and Mr Carter had assisted her after she fell off the moped. Mr Carter pushed the moped to her unit building while Ms Welch drove her to the same place in her own vehicle. Ms Welch provided her name, mobile phone number and email address and this, it was argued, was evidence of some acknowledgement of responsibility. That is, I suppose, an inference which might be drawn but it is just as open to infer that it was an action by

someone who had been of assistance and was offering further assistance if that became necessary.

[28] The onus is on the plaintiff to establish, on the balance of probabilities, that the injury caused to her was as a result of the negligence of the first defendant. She has not. It is more likely than not that she was travelling at a speed which was not appropriate for the weather conditions, that she moved from Lane 3 to Lane 4, braked heavily and lost control of the moped. I accept that the vehicle driven by the first defendant did not enter upon either Lane 3 or Lane 4 at the relevant time. The action must be dismissed.

[29] Notwithstanding that the action must be dismissed, I will briefly assess quantum.

Assessment of damages

[30] It was not disputed that Ms Carmichael suffered an injury as a result of falling from her moped. The main point of contention was the true nature of the injury and, in particular, whether she was suffering from Complex Regional Pain Syndrome (CRPS). The defendants do not challenge the diagnosis of Dr Tadros (a consultant in pain medicine and rehabilitation medicine) that, in March 2018, Ms Carmichael was suffering from CRPS. The issue was whether she was still suffering from that condition at the date of trial.

The surveillance film

[31] The defendants allege that Ms Carmichael has materially misrepresented or exaggerated the true nature and extent of her injuries. As part of its case it produced a film taken of the plaintiff on 21 July 2018, that is, some three years after the accident and nearly two years before the trial was heard. Unknown, it seems, to the defendants was that that was the plaintiff's 30th birthday, a day which she remembered because it was a day on which she "took extra medication to go out with my mum and it was a good day." The film shows her: walking around a shopping centre, being accompanied at all times, appear to purchase food at a café and to eat and drink from a cup. She was also seen to close a car door and as the defendants put it, "[d]emonstrate a walking/standing endurance exceeding thirty-five minutes".

[32] She had, at or about that time, informed, among others, Dr Tadros, that "she has good days and bad days". She told Mr Zietek (an occupational therapist) that she would rate her severity of symptoms as varying between two to nine out of 10. She had told Dr Rice (a pain medicine specialist and psychiatrist) that she occasionally does the shopping and, with respect to the use of her right hand, she tried to paint, draw and use the tension ball regularly. Some of the images are not completely distinct, in particular, the film of what was described as her flinging a car door closed. I have examined the film again and I am not satisfied that it demonstrates that action to the level of certainty that is appropriate in a case such as this.

[33] I do not accept that the surveillance film demonstrates anything other than that, after having taken more pain medication than usual, the plaintiff was capable of performing relatively innocuous tasks on that particular day.

Does the plaintiff suffer from CRPS?

[34] Ms Carmichael was examined by Dr Tadros in March 2018. He is an acknowledged expert in the treatment of patients with chronic painful disorders. His description of CRPS, in summary, was that:

(a) it was a chronic painful disorder that can occur spontaneously after minor trauma or surgery and has a constellation of symptoms that include neuropathic pain, vasomotor disturbance, integumentary disturbance and some neurological disturbance,

(b) it is a variable disease with a number of different presentations,

(c) some cases are so severe that the clinical features progress over time,

(d) there can be variable expressions in the vasomotor disturbance.

[35] In moderate examples of the disease, what usually occurs is that in the early or "hot" phase of CRPS, all the symptoms and all the clinical features are present. It often occurs that over the next 6 to 12 months the vasomotor symptoms reduce, the integumentary symptoms reduce and the patient is left with neuropathic pain and joint contracture.

[36] Dr Tadros assessed a 37 per cent whole person impairment referable to the right upper limb due to CRPS.

[37] His unchallenged evidence was that the condition is one which waxes and wanes and that the clinical signs can be present on one occasion and be completely absent on other occasions.

[38] In cross-examination, it was put to him that the plaintiff had been assessed by other medical practitioners – Dr Blenkin, Dr Shaw, Dr Coleman, Dr Ballenden and Dr Rice – and on each occasion there had been no clinical sign of chronic regional pain syndrome. None of those doctors were pain specialists who deal with the condition on a daily basis. Dr Tadros said that: "it wouldn't surprise me, especially later on down the track, that she would see some doctors who would not make the diagnosis. So I think that it is reasonably consistent as we've established it does wax and wane. And over time, it can reduce in severity, or some of the symptoms can reduce in severity."

[39] When Dr Tadros was cross-examined about the surveillance film, he did not accept the conclusions which were said could be drawn from what was being demonstrated in the film. It was put to him that it demonstrated a person walking, using a right upper limb, and other functioning entirely normally. He made the valuable point that he did not know if Ms Carmichael had taken medication before she went out and, more importantly, the surveillance film lacked context. It was a series of short vignettes which did not demonstrate, over time, how Ms Carmichael was acting and reacting.

[40] Ms Carmichael was also examined by orthopaedic surgeons, psychiatrists and a cardiologist as well as an occupational therapist.

[41] Dr Shaw (an orthopaedic surgeon) examined the plaintiff in October 2016 and August 2019. In October 2016, he found continuing pain in her right hand but that

the injuries to her left lower leg and left wrist had resolved. While he acknowledged that he was not a pain specialist and that CRPS was not a condition that he treated or saw frequently, he agreed that when he first examined Ms Carmichael he did not observe any clinical signs consistent with CRPS.

[42] In his report of August 2019, Dr Shaw accepted that Ms Carmichael had "developed complex regional pain syndrome (CRPS) type 1 of the right upper limb. This has been confirmed by experts in this field including Dr Saul Geffen, Dr Mark Tadros and Dr Tarunish Sharma." He later said: "[t]he right thumb and wrist sprains have been complicated by the development of CRPS … I am now happy with the diagnosis of CRPS".

[43] In cross-examination, he agreed that there was a range of presentations of the condition and that his understanding, based on (among other things) Dr Tadros's assessment, was that she had a milder form of the condition. This must be viewed in the light of Dr Shaw's frequent admissions that he was not an expert in the field and the he would defer to Dr Tadros's assessment.

[44] The defendants relied substantially on the evidence of a number of specialists who had examined Ms Carmichael and who had not observed any clinical signs of CRPS. There are two things that may be said about those submissions. First, there was general acceptance by the experts that CRPS was an area of particular expertise which they did not possess. Secondly, that the absence of any clinical signs on a particular day or days is not inconsistent with Dr Tadros's diagnosis.

[45] Another basis of the defendant's case was the inconsistency of reporting by the plaintiff as to her condition. It is correct to say that the plaintiff's statements to various medical practitioners were inconsistent from time to time. This was the subject of comment by some of those experts. For example, Dr Chalk (a psychiatrist) said that "[i]t would appear that over time her symptoms have become more elaborate". Dr Rice considered her presentation was someone who was behaving with a degree of exaggerated illness behaviour.

[46] I am satisfied that, notwithstanding the number of expert witnesses who have expressed their views about the plaintiff's condition, I should accept Dr Tadros's diagnosis. His expertise, on the evidence of the other specialists, exceeded theirs in this area and many of them were happy to defer to him. It may be that there was some psychiatric or psychological component but, if there was, then that grew out of the existence of the injury for which she was seeking compensation.

General damages

[47] I have taken into account the plaintiff's age (27 years old at the time of the injury), her life expectancy, and the pain, suffering and loss of amenities which have been demonstrated through the evidence.

[48] I assess the plaintiff's general damages by having regard to Item 122 in Schedule 4 of the *Civil Liability Regulation* 2014 and assign an injury scale value of 30. It follows that general damages are assessed at $64,450.

Past economic loss

[49] At the time of the accident, the plaintiff was earning approximately $630 net a week. The plaintiff has been unable to return to commercial employment since the injury.

[50] The plaintiff had modest pre-accident earnings:

(a) 2012/13 - $33,184,

(b) 2013/14 - $27,826,

(c) 2014/15 - $20,914.

[51] The plaintiff's submissions refer to the possibility of earning a net weekly income of approximately $880 a week as a pastry chef. The plaintiff had never achieved that level of income. Had she not been injured, the plaintiff would have had significant interruptions to her capacity to earn income. She gave evidence that she had an intention of travelling overseas and seeking further training in order to obtain the skills necessary to be a pastry chef. There was no evidence as to her level of skill or ability. There was no evidence from her previous employers as to her capacity nor was there any evidence to support a conclusion that she would have found employment in the areas she desired. A reasonable amount to represent past economic loss is $500 a week. Superannuation would be additional at the rate of 9.5 per cent.

Future economic loss

[52] The plaintiff relies upon the submission that the net wage of a pastry chef in Brisbane should be used as the basis for calculation. There was evidence from Dr Rice that the conclusion of this litigation may provide some benefit to her but, given my finding as to CRPS, I do not assign much weight to that.

[53] After she had recovered sufficiently, Ms Carmichael made attempts to earn money through graphic design but her return to the workforce in anything approaching a full time basis would require further training and skills and some kind of graduated work program. She did have some employment of a secretarial nature but her injuries prevented her from working at full capacity and that inability would be reflected in most areas of employment.

[54] I accept that the submission of the defendants accurately sums up the circumstances in which the plaintiff finds herself, namely that the plaintiff would need to develop skills for alternative employment and that some allowance should be made for the prospect that in finding that alternative work she might earn wages in excess of a pastry chef. For those reasons I allow a global sum of $150,000.

Gratuitous services

[55] Gratuitous services are not recognised as giving rise to a right to damages unless those services are necessary. Section 59 of the *Civil Liability Act* 2003 provides that damages for gratuitous services are not to be awarded unless, among other things, the services are provided for at least six hours a week and for at least six months. The plaintiff did not make out that part of her case. There was no diary kept of any

care and assistance provided to her. On her own estimate, the level of care could have been as low as three and a half hours a week. The evidence of her parents was impressionistic – her mother had not been asked to consider the level of support she had provided until shortly before the trial – and did not provide any basis for a finding that the services were provided to at least the extent required under the Act.

Future care and the treatment

[56] The plaintiff seeks an award under this head for 55 years, being the remainder of her life expectancy. Some of these claims are very ambitious, for example, psychological expenses based on an average of one attendance a month is sought. There was nothing to suggest that the plaintiff would be required to see a psychologist when she is 60 or 70 years old. A more appropriate sum would recognise the need for future monthly sessions for a period of two years at $200 per attendance, which would allow also for travelling expenses.

[57] The CRPS will require her to seek continuing medication from time to time, and care. An allowance of $40,000 is appropriate.

[58] Dr Tadros recommended particular treatment with an approximate cost of $62,000. There was no examination of the need for these treatments. In his report, Dr Tadros advised that the plaintiff should be given an opportunity to undergo two weeks of multidisciplinary inpatient rehabilitation and that during that time it would be useful to increase her medication by placing her on a ketamine infusion. He goes on to say that should that fail then she would be "looking at" other treatments. The evidence does not support a conclusion that the treatments will be necessary but it is appropriate that some award should be made to cover the possibility of future treatments and I would allow $20,000.

[59] Dr Tadros also recognises that there will be a need for future training and I would allow the sum of $5,000 for that.

Miscellaneous matters

[60] I have not included amounts such as items which had been agreed by the parties or other matters such as interest on past economic loss, past loss of superannuation entitlements and future loss of superannuation entitlements as they can be calculated, if it becomes necessary, from the findings I have made.

Conclusion

[61] The action is dismissed.