

SUPREME COURT OF QUEENSLAND

[2002] QSC 066
File No 8760 of 2001

BETWEEN:

LEESA MAREE BOND

Plaintiff

AND:

JOHN MICHAEL CERRUTO

First Defendant

AND:

ARTHUR JOSEPH PALK

Second Defendant

AND:

COLES MYER LTD

Third Defendant

AND:

THE NOMINAL DEFENDANT (QUEENSLAND)

Fourth Defendant

AND:

STATE OF QUEENSLAND

Fifth Defendant

AND:

THE COUNCIL OF THE SHIRE OF PINE RIVERS

Sixth Defendant

AND:

FAI GENERAL INSURANCE COMPANY LIMITED

Defendant by Election

MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON: 25 March 2002

HEARING DATE/S: 6 March 2002

ORDER: Action dismissed

Damages awarded

CATCHWORDS: PERSONAL INJURY – MOTOR VEHICLE ACCIDENT – where question of liability – where conflicting stories – whether second defendant caused motor vehicle accident.

DAMAGES – QUANTUM - post traumatic stress - loss of earnings – pain and suffering

COUNSEL: Mr R. Trotter for the plaintiff
Mr G. Mullins for the second and third defendant

SOLICITORS: Richardson McGhie for the plaintiff
McInnes Wilson for the second and third Defendant

- [1] The plaintiff sues to recover damages for injuries she allegedly suffered in a motor vehicle collision which occurred at about 7.15 am on Monday 22 November 1993. The trial proceeded against the second and third defendants who were the driver and the owner of a Holden Commodore sedan of which the defendant by election was the insurer.
- [2] The plaintiff was driving her Holden Commodore south in the right hand lane of the Bruce Highway in the vicinity of the Brays Road overpass. The Anzac Avenue overpass was about a kilometre north and the Dohles Rocks Road overpass was a similar distance ahead. At that time of day the traffic flow, particularly in the left hand lane, was prone to interruption by vehicles entering from Anzac Avenue, Brays Road and Dohles Rocks Road. The second defendant's evidence was that because of this he habitually travelled in the right hand lane in that area and that he moved into it some distance before he came to the Brays Road overpass.
- [3] As the plaintiff approached the vicinity of the Brays Road overpass the vehicles travelling south in both lanes began to slow down. The plaintiff applied her brakes but was unable to avoid running into the second defendant's Commodore, which was slowing down ahead of her. The impact with the plaintiff's vehicle drove the second defendant's vehicle forward into the vehicle ahead of him driven by a man called Cerruto which was also slowing down.
- [4] The plaintiff's case was conducted on the basis that immediately prior to her colliding with the second defendant's vehicle it had moved out of the left hand lane into the right hand lane in front of her cutting down her braking distance and causing her to collide with the second defendant's vehicle. There was about "a cars length" between the vehicles with which the second defendant moved.

- [5] Neither of the police officers who came to the scene, not surprisingly given the length of time which had elapsed, had any recollection of the incident when they came to give evidence. By the time of the trial neither a tape-recorded interview between the plaintiff and one of the investigating officers, Sergeant Josey, or a transcript of that tape was available. As I've indicated, Sergeant Josey had no recollection of attending the scene or the investigation. He gave evidence that had the plaintiff given an account of the second defendant's vehicle moving from the left hand to the right hand lane in front of her immediately prior to the collision, it would have been evidenced in the sketch and other material which had survived. I'm not persuaded that that necessarily follows and I think that there may be an element of inconvenience reconstructed at work.
- [6] A statement by Cerruto the driver of the vehicle in front of the second defendants, he had been a defendant in the action, was admitted pursuant to s 91 of the *Evidence Act*. I am not prepared to act on the contentious aspects of that statement without support by other acceptable evidence given that the evidence was not tested by cross examination.
- [7] I should also say that I am not prepared to find that immediately prior to the collision the plaintiff was distracted because she was making adjustments to the radio in her vehicle; a consideration which arises on some of the evidence. I do not think any inferences can safely be drawn from the skid marks and debris seen by the plaintiff and her husband a day or so after the accident.
- [8] I turn to the plaintiff's account of events. As I have indicated, her evidence was to the effect that the second defendant had moved from the left hand lane into the gap in front of her immediately prior to the collision. The plaintiff's husband gave evidence, that after the accident he picked her up from a tow truck depot at Strathpine. She was crying and distressed. The side of her face was bruised and she was complaining of a sore back and neck. He took her to her GP and for an x-ray. She gave him an account of the vehicle moving from the left hand lane, which had started to slow down. The plaintiff's stepson gave evidence that when she came home after the accident she gave a similar account.
- [9] In a worker's compensation claim form apparently completed on 8 December 1993 the plaintiff, in the course of answering a question as to how the injury occurred stated, that "everybody stopped suddenly". She ticked the "no" box in answer to a question whether any other party was to blame. In another worker's compensation form completed on 14 December 1993 the plaintiff answered that the accident occurred in circumstances that "a person about three cars in front stopped suddenly" and as to the cause of the accident she answered that she did not "know exactly. There was stopped traffic ahead". She indicated that she had "not yet" taken legal action against anybody as a result of the accident.
- [10] In a motor vehicle insurance claim form dated on 23 November 1993 the plaintiff described the evasive action taken by her vehicle as she "braked as soon as I could and then veered right" and that the evasive action taken by the driver of the "other vehicle" was the same as hers. The form sought her opinion as to who was responsible for the accident and she responded that "someone a few cars in front stopped suddenly. Then we all ran into each other". In answer to a question for in effect her reason for thinking so she answered, "when I stopped I hopped out and

John Cerruto, the man in the third car in front of me said ... he said it happens all the time, everybody braked suddenly”.

- [11] If the accident occurred as the plaintiff contends it is surprising that the forms do not give that account. In fact the answers appear inconsistent with the version that the plaintiff gave in evidence.
- [12] The plaintiff said that immediately after the accident she told the second defendant that he had just cut her off. He denies that she did. The plaintiff also said that both the second defendant, Cerruto and the police officer said at various times at the scene that she was to blame because she was “the last in the line”. This, she said, is why she did not nominate any other person as being responsible for the accident - she did not regard herself as responsible.
- [13] Although I accept that the plaintiff was upset by the accident and suffered the adverse reaction mentioned later she did strike me as someone who would stand up for herself. The explanation is not particularly satisfactory one for what is in the forms.
- [14] In the circumstances I am not prepared to conclude that the second defendant’s vehicle moved out of the left hand lane immediately prior to the collisions. The probability is that there was a general slowing down of vehicles in both lanes and the second defendant’s vehicle was already ahead of her. The plaintiff’s action therefore fails.
- [15] I turn nevertheless to the assessment of damages. The plaintiff was born on 24 August 1964 and at the time of the accident was employed by Woolworths at its Chermside supermarket in a supervisory capacity. She had left school at 15, married and had three children, separated from her husband and was working and bringing up the children. She had formed an association with Brian Horn who she married after the accident.
- [16] The plaintiff was competent at her work and was well thought of by her employer. She was likely to continue working up to retirement and had reasonable prospects of promotion at least to the next level of responsibility.
- [17] Immediately following the accident the plaintiff had pains in her neck, lower back, in her cheek and her face. She was “overcome by a strange feeling” of terror, which she had never experienced before and was sick, stressed and began crying.
- [18] I am satisfied as a result of the accident of 22 November 1993 the plaintiff suffered musculo ligamentous injury to the cervical and lumbar spine. These injuries were no doubt painful and disabling for a time, causing impairment for work, domestic tasks and social activity. They may still cause some discomfort and restriction from time to time but are not disabling to any significant degree. They have resulted in a permanent partial disability of the order of five percent. I am also satisfied that as a consequence of the accident the plaintiff suffers generalised anxiety and panic disorders, agoraphobia, chronic dysthymic disorder and hypochondriasis. These are disabling conditions, placing restrictions on the plaintiff ability to function as she did before the accident.

- [19] The plaintiff premorbid personality appears to have been normal and there is no suggestion of having any pre-existing psychiatric disorder.
- [20] The extent of the consequences of the plaintiff's psychological condition and the prognosis is however, controversial.
- [21] The plaintiff returned to work about four weeks after the accident. She suffered traffic anxiety driving to and from work. On her account this became generalised and she and her husband and her family moved into her a house at Bracken Ridge which was closer to work and used back streets.
- [22] She developed panic attacks in certain situations, eg using automatic doors. By the end of 1994 her psychological condition had reached a stage where she resigned from work. She has not worked since November 1995 apart from doing office work and book keeping for her husband who is a self employed house designer.
- [23] The plaintiff's condition progressed. She was afraid to leave the house, even to walk to the letterbox. As a result of an acute anxiety attack in 1995 she consulted her general practitioner and declined his advice to be referred to a psychiatrist, she could not afford it, and continued to rely on him for counselling and support. By March 1997 the plaintiff's condition was such that she was prescribed anti-depressant medication. This alleviated her condition, a reduction in the dose brought a severe reoccurrence of the symptoms and she began to consult a psychologist who provides counselling and support, for example with advice about coping techniques.
- [24] The plaintiff gave evidence that she fears suffering a heart attack and that something is going to happen to her or her children. She suffers nightmares and flashback and is frightened in shopping centres and crowds and in using transport.
- [25] Before the accident the plaintiff lived a very active life and engaged in running, touch football and she enjoyed going out, socialising and dancing. She liked her work. Her life now is completely different. Her participation in and enjoyment of those various activities is very much reduced.
- [26] I am inclined to think that the plaintiff's evidence somewhat overstates her disabilities and her restrictions but it is difficult to say at what extent. In this context the defendant points, for example, to the plaintiff's convictions for traffic offences including speeding subsequent to her accident as not being consistent with her claims of traffic phobia and that her claims of lack of memory in this context is not creditable. These submissions are not without merit.
- [27] The plaintiff has a mild to moderate psychological disorder. It is probable that its manifestation or effect will decrease and that the end of this litigation will contribute to that outcome. The plaintiff may be assisted in recovering from or coping with her problems by cognitive behaviour therapy provided by a psychologist.
- [28] The plaintiff will probably be left with some mild to moderate symptoms indefinitely but should be able to return to work; probably to a less stressful

occupation than her book keeping and accounts work and on a part-time basis at least initially.

- [29] The evidence is not such as to allow findings to be made as to a timetable for the future course of events responded to in the proceeding paragraphs with anything approaching precision.
- [30] I turn to the assessment of the plaintiff's damages in terms of the conventional headings:

Pain, suffering and loss of amenities: I assess these at \$25,000 and allow interest on \$10,000 at five percent for five years:

Damages	\$25,000.00
Interest	\$2,500.00

Special Damages - Special Damages are not contentious and I allow:

Damages	\$8,552.00
Interest on \$5,370 x 5% x 5 years	\$1,342.50.00

Past Economic Loss - The plaintiff contends for \$135,586 in accordance with calculations in exhibit 10 on the basis that she left work in November 1995 but without taking into account any question of promotion and unfavourable contingences.

The approach is acceptable. For reasons which I have canvassed I am inclined to think this figure must be nevertheless discounted somewhat.

I allow	\$90,000.00
Interest at 5% for 5 years	\$22,500.00
Less superannuation	\$6,300.00
Contribution (7%)	

Future Economic Loss - It is impossible to bring any degree of precision to this exercise given the reservations I have expressed about the plaintiff's disability and the uncertainties of her prognoses. The plaintiff contends for \$183,727 based on \$550 per week for 28 years discounted by 15% for contingencies and by a further 50% reflecting the prospects of future earnings.

The base figures are reasonable. The 50% discount probably undertakes the prospects for the plaintiffs future exercise and earning capacity:

I allow	\$150,000.00
Less superannuation contribution (9%)	\$13,500.00

Continuing medication and treatment - The amount allowed under this heading is fairly arbitrary given the consolidation I mentioned. The evidence does support a conclusion that the plaintiff will benefit from ongoing treatment and support in the form of counselling and the like and the use of drug for the pain relief and to control her condition. There will be a certain amount of travelling to and from treatment. I allow \$20,000.

Past Gratuitous Care - No doubt in the immediate aftermath of the accident the plaintiff's husband supported her by doing things she would have previously done herself and helped in her treatment, for example by massages. The plaintiff contends that for seven hours a week at \$10 per hour. No doubt the number of hours was higher at the beginning of the period and it has since tailed off. The evidence does not admit of precision in determining the care attributable under this head. I allow \$20,000 and interest at \$5,000.

Future Gratuitous Care - The defendant contends for \$51,000 being four hours a week at \$15 per week for 35 years. The defendant accepts correctly that there is a basis for making an award under this head but it is however submitted to the effect that the best that can be done on the evidence is to allow a small global sum I think that is the appropriate approach on the evidence and I allow \$10,000.

[31] I order that the plaintiff's action be dismissed.