SUPREME COURT OF QUEENSLAND

CITATION:	***Elphick v Elliott & Anor*** **[2002] QSC 189**
PARTIES:	**JASON DREW ELPHICK** (Plaintiff) v **GRAHAM JOSEPH ELLIOTT** (First Defendant) and **MMI GENERAL INSURANCE (ACN 000122850)** (Second Defendant)
FILE NO:	S22 of 1999
DIVISION:	Trial Division
DELIVERED ON:	27th June 2002
DELIVERED AT:	Rockhampton
HEARING DATE:	14th, 15th , 16th and 17th May 2002
JUDGE:	Dutney J
ORDERS:	**Judgement for the plaintiff against the second defendant for the sum of $97,008.24.**
CATCHWORDS:	NEGLIGENCE – PERSONAL INJURIES – LIABILITY & QUANTUM – CONTRIBUTORY NEGLIGENCE – MOTOR VEHICLES - Pl overtaking vehicle turning right without indicating *Jones v Rice* (1987) 6 MVR 77 – referred *McCutcheon v Muirl* (1989) 6 MVR 202 – referred *Cross v Callaghan* (1987) 6 MVR 504 - referred
COUNSEL:	D.V. McMeekin SC, with him Mr AG Crow for the Plaintiff. F.G. Forde for the first and second Defendants.
SOLICITORS:	Klein and Associates (town agents John Murphy & Co) for the Plaintiff.

McMahons National Lawyers (town agents Grant & Simpson) the first and second Defendants.

Liability

[1] Jason Drew Elphick ("the plaintiff") was born on 4th January, 1973. On 17 May 1996 in Gladstone he was involved in a motor vehicle accident which is the subject of these proceedings. At the time of the accident the plaintiff was 23 years old.

[2] The circumstances of the accident are in dispute. These facts are, however, common ground. The accident occurred in Beak Street at the intersection of Teak Street. The plaintiff had been riding his motor bike from the Dawson Highway. He turned right into Shaw Street, which becomes Beak Street after making a right angle sweeping bend. The plaintiff proceeded east on Shaw Street. After rounding the sweeping bend where Shaw Street becomes Beak Street, Beak Street rises to a crest. It then flattens out for some distance before falling away towards Teak Street over a distance of some hundreds of metres. After the Teak Street intersection it rises again. From the bend where Shaw Street becomes Beak Street the road is straight down the hill to Teak Street and up the other side past Teak Street. Teak Street intersects from the right traveling in this direction and does not cross Beak Street. Almost opposite the intersection or perhaps a few metres prior to it on the left is an engineering shop with a sealed parking bay adjacent to Beak Street. A few metres past the Teak Street intersection (on the right) Luscombe Street intersects with Beak Street on the left. The photographs suggest that there are two residential allotments between the engineering shop and the corner of Luscombe Street.

[3] The plaintiff was riding a Kawasaki 250 motor bike on a learner's permit. His accompanying rider was a Mr Oakey, a long time family friend. Mr Oakey was riding a Suzuki 750. The accident was the result of a collision between the plaintiff's bike and an unregistered Dodge Utility driven by a Mr Elliott. A permit had been obtained to drive the Dodge on the road on that day. The Dodge attempted to turn right into Teak Street and made contact with the plaintiff who

was attempting to overtake the Dodge on the right. The point of impact was the front right hand corner of the cab of the Dodge in the vicinity of the mudguard.

[4] The plaintiff's version of how the vehicles came to be in the situation they were in is as follows. The plaintiff was traveling along Shaw Street in a line of traffic. Mr Oakey was traveling behind him. Before reaching the sweeping bend where Shaw Street becomes Beak Street the plaintiff overtook one vehicle and was then traveling immediately behind the Dodge. The plaintiff continued behind the Dodge around the sweeping bend and into Beak Street and then down Beak Street towards Teak Street. He was traveling at about 55kph. The speed limit was 60kph. Assuming no accident the plaintiff intended to overtake the Dodge at the bottom of the hill. Mr Oakey had not overtaken the vehicle the plaintiff had overtaken and the line of traffic from the front was the Dodge, the plaintiff, the unidentified vehicle and then Mr Oakey. Just before the Teak Street intersection the Dodge veered towards the left hand side of the road. Believing the Dodge was either going to stop at the engineering works or turn into Luscombe Street the plaintiff veered to the right of the Dodge to overtake. He did not see any indicator or brake lights on the Dodge. The plaintiff does not recollect the actual impact.

[5] Mr Oakey's version of events is a little confusing. There were inconsistencies between the version given in chief and the version given in cross-examination. Mr Oakey says that as they proceeded up the hill in Beak Street he was following a Commodore, which was following the plaintiff who was in turn following the Dodge. They were traveling slowly and the distance between the Dodge and the plaintiff was about two car lengths. Mr Oakey was one or two car lengths behind the Commodore but could not estimate the distance between the Commodore and the plaintiff. Mr Oakey did not see any indicator on the Dodge but did not see the impact either. His only recollection is of seeing the plaintiff flying through the air. In cross-examination Mr Oakey said that the plaintiff was visible about 100 metres in front of him as they proceeded up the Beak Street hill. At that stage Mr Oakey could not see either the Commodore or the Dodge. As he crested the hill he saw the Commodore some distance away in front of him and the plaintiff between the Commodore and the Dodge. Although he was traveling at only 60kph Mr Oakey

closed on the Commodore to within one or two car lengths as he proceeded down the hill. He did not see the impact.

[6] A Mr Midgely gave evidence. Mr Midgely was an employee of the engineering yard. He gave evidence that he was driving down the hill in Beak Street towards the engineering shop. He was following the Dodge and a couple of motor bikes. He turned into the engineering yard. As he did so he heard a bang, looked and saw a motorbike cartwheeling through the air at the teak Street corner. Mr Midgely had no recollection of the Commodore.

[7] Mr Booth was the driver of the Commodore. He was also the owner of the Dodge being driven by Mr Elliott. Mr Booth gave evidence that he was following the Dodge and traveling slowly. He recollects the motor bikes coming in behind him at the crest of the hill in Beak Street. Mr Booth says that he saw the Dodge's brake lights and right hand indicator come on about 50 metres before the Teak Street intersection. At that point Mr Booth saw the plaintiff commence to overtake him. At this point the Commodore was only about a car length behind the Dodge. Mr. Booth put his arm out of the window to try to warn the plaintiff but without observable response. The motor bike ridden by the plaintiff passed the Commodore and continued to try to overtake the Dodge in the same manoeuvre. By this time the Dodge had commenced to turn. The plaintiff leaned the bike to try to avoid the collision by veering into Teak Street. The bike clipped the corner of the Dodge. The Dodge was already across the intersection when the impact occurred.

[8] The final version was given by Mr. Elliott. Mr Elliot was driving the Dodge. Mr. Elliott did not see the motor bikes until the point of impact. As he came down the hill in Beak Street he checked his rear vision mirror. There was no mirror in the cab itself but only the wing mirror. Mr. Elliott noticed the Commodore coming down the hill behind him but could only see the right hand side of that vehicle. About 60 metres from Teak Street Mr. Elliott put on his right hand indicator, checked his rear vision mirror again and noted that it was clear in the sense that he could not see any vehicle behind him. At this point he was traveling at about 10 to

15 kph. The impact occurred about half to two-thirds of the way across the intersection.

[9] Both Mr Booth and Mr. Elliott gave evidence about putting the Dodge into drivable condition to transport it from Yarwun to the destination in Gladstone. This included replacing some indicator bulbs, cleaning the connections and checking that the indicators were working. A Mr Jones, an auto-electrician, was called by the plaintiff. The effect of his evidence was that the wiring on this particular model of Dodge utility was extremely sensitive. Connections are somewhat tenuous and a jolt such as hitting a pothole can cause the indicators to malfunction or if malfunctioning to commence working again. The same effect could be achieved by an impact with a motor bike. A police officer, Ms Kelly attended the accident scene. She tested the indicator lights and noted that one of the rear indicator lights was not working. She could not recall which one.

[10] I was not impressed with Mr Oakey as a witness. His evidence was not given in a manner, which inspired any confidence that his account was accurate. In saying this I do not intend to convey that Mr Oakey was being deliberately inaccurate. Rather, I think he found the experience of giving evidence overwhelming which, coupled with the lapse of time, made the exercise too much for him. I was not impressed with the plaintiff either. I am not satisfied that he was as frank about matters generally both in relation to liability and quantum as he might have been. I am satisfied that both Mr Booth and Mr Elliott were doing their best to accurately recall events although the period that has elapsed since the accident is such that some care has to be taken.

[11] Having considered the various versions and my impressions of the witnesses I find that the plaintiff and Mr Oakey were riding their bikes on Shaw Street and into Beak Street heading south-east. The plaintiff was a considerable distance ahead of Mr Oakey. As the plaintiff came over the hill in Beak Street he saw two slow moving vehicles in front of him. These were the Commodore and the Dodge. The plaintiff closed on these vehicles as they proceeded down the hill and as they reached the bottom the plaintiff accelerated to overtake them intending to overtake both in the same manoeuvre. As he passed the Commodore, Mr Oakey came over

the hill and observed the plaintiff between the Commodore and the Dodge. The Dodge commenced to turn as the plaintiff was attempting to overtake and the collision occurred. I do not accept that the Dodge made any movement to the left before it commenced turning right. I accept that Mr Elliott applied his right hand indicator before commencing to turn right but on the balance of probabilities I am not satisfied that it was in fact working. I conclude on the balance of probabilities that Mr. Booth is mistaken about seeing this indicator work prior to the turn.

[12] The Dodge utility had not been registered throughout the period it had been owned by Mr. Booth. He had bought it twelve months before the accident for $300.00. To drive it from Yarwun to Gladstone Mr. Booth was required to replace some of the tyres, repair the brake lines, clean up the brake lines and drums, install a new battery, repair the wiring, replace bulbs and clean contact points with emery paper to restore connections. At least some of the indicator lights could be made to work or not work by simply kicking the mudguard[1]. Having regard to the condition of the Dodge I am not satisfied that it was reasonable to assume that the indicator lights would operate when switched on from inside the cab. There was always a likelihood that any bump en route could render them inoperative and a careful driver would have assumed that they were not working and been particularly astute to check for following vehicles before executing a right hand turn.

[13] I accept that the Dodge and the Commodore started to slow down as they approached the Teak Street intersection and were traveling very slowly at the point of impact. I accept that Mr. Elliott checked his rear vision mirrors before commencing to turn but in view of his evidence that he saw no one, not even the Commodore, I am satisfied either that he did so without proper care or alternatively the mirrors were not placed so as to give an acceptable view of the rear of the vehicle either because of the load on the back of the Dodge or for some other reason. I accept that Mr. Booth activated his right hand indicator about 50 metres from the intersection. The plaintiff did not see this indicator either because he was concentrating on his own manoeuvre or had already proceeded beyond the point where it would be visible to him. I am satisfied that the defendant was

[1] See Transcript pages 299 – 230.

negligent in driving a vehicle with defective indicator lights and commencing to turn without properly checking in mirrors so placed as to give a proper indication of whether it was safe to do so.

[14] The most significant factor in the collision, however, was the conduct of the plaintiff in attempting to overtake two vehicles at an intersection when it was plainly not safe to do so. The Dodge and the Commodore were clearly slowing down to an extent that suggested some manoeuvre on their part. The Dodge did not, as I find, move to the left to give the impression to any following driver or rider that it would attempt a left hand turn or pull off to the left as opposed to turning right. The plaintiff wrongly assumed it would stop at the engineering yard or turn left and ignored the equally likely possibility that it would turn right[2]. In all the circumstances the negligence of the plaintiff in attempting his dangerous manoeuvre was negligent and having regard to the onus placed on a following vehicle[3] I consider the that the plaintiff must accept 60% of the responsibility for the accident.[4]

Quantum

[15] Prior to the accident the plaintiff was in good health. He had suffered some previous injuries including a back injury when about 12 years old as a result of some boys falling or jumping on him. He also suffered injuries to his left knee and ankle in separate injuries involving trail bikes. The plaintiff said that he had recovered from these without restriction. In cross-examination the plaintiff said he had some slight restrictions in his knee prior to the accident but not enough to require medication or time off work. He had also told the occupational therapist, Ms Coles, that the childhood back injury had resulted in some restrictions in bending and lifting.

---

[2] There was also some evidence that the plaintiff might have thought the Dodge would continue up the hill. This came from a statement apparently made to the police shortly after the accident. It was not the plaintiff's evidence before me: see T28-29.

[3] *Rains v Frost Enterprises Pty Ltd* [1975] Qd R 287 at 294.

[4] While each case must be decided on its own facts the plaintiff relied on *Jones v Rice* (1987) 6 MVR 77 ; *McCutcheon v Muir* (1989) 8 MVR 202 and *Cross v Callaghan* (1987) 6 MVR 504. In each of these cases the plaintiff although overtaking a vehicle turning right was deceived by the fact that the defendant pulled to the left as well as turning without indicating. In each of those cases the motor cyclist was induced to undertaking the ultimately dangerous manoeuvre by the conduct of the defendant. That is not this case.

[16] In the accident the plaintiff sustained the following injuries:-

- Fractured ribs
- Internal injuries
- Injury to the lower back
- Fracture of left leg
- Head injury
- Fracture to right side of pelvis
- Injury to left knee
- Injury to the little finger on the left hand
- A neck injury
- An injury to the right shoulder

[17] The plaintiff's recovery from these injuries has been remarkable. He was discharged from the Royal Brisbane Hospital on 14 June 1996 but remained in close proximity to the hospital for outpatient care. From then until late August 1996 he stayed with relatives in Toowoomba. On 12 August 1996 the plaintiff was readmitted to the Royal Brisbane Hospital and discharged on 19 August. He then returned to Gladstone and attended as an outpatient at RBH every six weeks until February 1997. The plaintiff wore a leg brace for a year following the accident and then used a walking stick for a further period of time. While in hospital bone grafts were necessary to repair the injury to his leg.

[18] As a result of the pain suffered the plaintiff became depressed and became addicted to the medication he was taking which included Cipramil, Endone, Panadeine Forte, Paracetamol, Hydrocort, Dolased, Analgesic Calm, Tramal, Keflex, Efexor-Xr and Epilim. The plaintiff was eventually hospitalized at the Moura in April 2002 where he effectively went "cold turkey" to break his addiction to the medications. He no longer takes medication for pain.

[19] At present the plaintiff's complaints centre on constant pain in his left knee, scarring and numbness in the knee, a swollen ankle when walking and a "drop foot" syndrome. To a lesser extent the plaintiff experiences pain in the lower left

shin and in the left ankle and foot. Occasionally he suffers pain in the left hip at the site of the bone graft. The plaintiff has pain in his right shoulder that is always present but varies in intensity. He has significant back pain. He has trouble lifting, bending, sitting or standing for prolonged periods. He has trouble sleeping.

[20] For years after the accident the plaintiff suffered headaches and neck pain. He claims to have trouble with sexual intercourse. He says these symptoms have had a marked effect on his relationship with his wife. The plaintiff's relationship with his wife did not commence until after the accident and he has subsequently had two children.

[21] The plaintiff says he has attempted work unsuccessfully on three occasions since the accident. He worked as an unlicensed plumber for one week in January 1999. He found the work too strenuous. The plaintiff next worked as a tyre fitter for just over two weeks in August 1991. This position was only temporary but the plaintiff did not consider he would have been able to cope with the work in any event. He worked as a cleaner at a childcare centre for six months from July until December 2001. He says that he found this difficult and he required assistance from his wife.

[22] The plaintiff does not think he will be able to find work in future.

[23] The plaintiff's pessimism concerning his capacity to work is not shared by the bulk of the medical practitioners whose reports were in evidence.

[24] The defendant introduced into evidence covert video evidence taken of the plaintiff in July 2001. It is relevant that at this time the plaintiff was claiming that he required 14 hours per week voluntary domestic assistance. The video shows the plaintiff jumping over a low verandah fence on several occasions, squatting, lifting an obviously heavy toolbox and a car battery. It showed him walking in a squat position. It showed him chasing his son around in the garden in a bent over position trying to cut the child's hair. It showed him working under the bonnet of his car without apparent difficulty. Prior to his seeing the video the plaintiff claimed these were things he could not do.

[25] Dr Martin, an orthopaedic surgeon engaged by the defendant in a report dated 22 January, 2001 bluntly expressed the view that the plaintiff was overstating his symptoms. After viewing the video evidence Dr Martin opined that the plaintiff had no disability in the right upper limb and a barely perceptible limp in the left lower leg which was inconsistent with his presentation at the doctor's surgery and in Court. Dr Gale Curtis considered the plaintiff fit for light manual work. Ms Coles, the occupational therapist also agreed he was fit for light manual work. Despite this, it is common ground that the plaintiff was very severely injured and has and will continue to have some residual disability. The plaintiff's suffering including bone grafts, the fixed leg brace and extended use of crutches and a walking stick together with an addiction to pain relieving medication belies his present state. He will eventually need a knee replacement. I allow $60,000.00 for pain and suffering and loss of amenity.

[26] The plaintiff's denial of any significant working capacity matches his work history. Before the accident the plaintiff did not display any particular drive towards remunerative employment.

[27] In the three years preceding the accident the plaintiff was on unemployment benefits for the whole period save for the period from 8 September 1992 until 6 January 1993 and from 12 May 1994 until 5 January 1995 and from 25 August 1995 until 30 May 1996. The plaintiff's tax return for 1994/1995 shows gross income of $9358.00 of which $2994.00 was from Social Security benefits. The 1995/1996 tax return shows gross income of $9779.00 of which $2156.00 was from benefits.

[28] The plaintiff's case was that he intended to return to Cairns if the accident had not happened and resume work as a plumber's labourer working either for his step father, Paul Black or for Paul Black's brother, Patrick Black. The evidence of Paul Black cast doubt on whether any work was available and suggested that such work as had been carried out in the past was intermittent. Patrick Black suggested that the plaintiff was working for him for much longer periods than the tax returns and Centrelink suggested and being paid cash in hand without the sums being

recorded. Since the plaintiff in his evidence expressly denied receiving any money not declared and did not claim unemployment benefits while working, I reject this evidence.

[29] The end result is that the plaintiff's pre trial earnings were only of the order of $140.00 per week gross in the two preceding years apart from Social Security benefits. If this work pattern continued for the five years since the accident it would result in a loss of earnings of about 42,000.00 gross less some small amount of actual earnings. The tax payable on this sum would be very little. I propose to take a robust approach and allow a global sum of $40,000.00 for past economic loss. For the future it has to be recognised that the plaintiff was very young when injured and may well have acquired a more Protestant work ethic with maturity. He is now fit to return to work. He has in any event a significant residual working capacity and the probabilities are that his real loss is reflected in the more limited range of available occupations he has now that heavy manual work is excluded. However, the plaintiff is still young and has not established any work history such that it is likely to make the adoption of new career choices difficult. Neither is there any evidence to support a finding that the amounts the plaintiff might earn from any alternative career would be materially less than he might earn as a plumber's labourer. The evidence of Ms Coles does support a finding that finding suitable work will be more difficult and it follows that there is a greater likelihood of the plaintiff being unemployed than might otherwise have been the case. Under this head I propose to allow a sum of $100.00 per week for diminished earning capacity over a period of 36 years discounted by 20% for contingencies making $70,800.00 with a multiplier of 885.

[30] Domestic assistance is also difficult to assess in view of what I regard as the plaintiff's exaggeration of his difficulties. I accept that he required most things done for him in the period he resided at Toowoomba. Little effort was made, however, to justify the claim of 10 hours per day. It is difficult to see, in the absence of proper evidence what could have required the devotion of that amount of time. The quantum statement merely asserts that the plaintiff required "constant care" and baldly asserts that he "received at least 10 hours of care a day." I am not prepared to accept that evidence in a case where the plaintiff has, so I find,

exaggerated his symptoms and the level of care required in later periods. Recognising a significant need I will allow 4 hours per day from Mid June 1996 until Late August 1996 totalling 224 hours. From Late August 1996 until January 1997 I will allow 2 hours per day on the basis that the plaintiff was still incapacitated from performing many normal activities. This period totals 322 hours. Thereafter I will allow 5 hours per week until September 1997. This totals 160 hours. Thereafter the plaintiff had dispensed with his walking stick and crutches and was largely recovered from his injuries. He failed to prove to my satisfaction just what he cannot (as opposed to does not) do. Even in the quantum statement which was prepared in leisure and without the pressure of an adversarial court room the plaintiff has chosen not to descend to any particulars of the care provided. If regard is had to his capabilities as depicted in the video it is difficult to imagine what he could not do for himself in the domestic sphere if he were so inclined. I am not satisfied that the plaintiff has proved any specific need in this period but I am prepared to accept that there may have been short periods when his residual difficulties prevented him from being totally self reliant. I will allow a further 1 hour per week until trial totalling 250 hours. The total of voluntary care thus comes to 956 hours, which I allow at a rate of $12.00 per hour. While a letter from Domicare was tendered in relation to the appropriate rate. Domicare does not, as appears from the letter, provide services in Gladstone, Moura or Cairns which are all the places the plaintiff might have resided but for the accident. There is no evidence as to whether there is any agency servicing those locations or what the level of such an agency's charges might be. The Domicare letter is thus relevant only as a guide to the type of fees charged in metropolitan areas by a particular agency. The amount I have allowed is an average rate paid to metropolitan carers during the period since the accident. I would expect that non metropolitan services might be cheaper and this rate thus allows something for administration charges. In any case the type of services that the plaintiff has required since at least August 1996 are those ordinarily supplied by a cleaner or domestic and which are not necessarily the type of services sought from an agency as opposed to negotiated directly with the provider. I do not consider this

approach is inconsistent with *Goode v Thompson*[5]. The total allowance under this head for past care is therefore $11,472.00.

[31] I am not satisfied that any need for such care in future is demonstrated save for the possibility of care being required at some time well into the future when the knee replacement is likely. I allow $2,000.00.

[32] The other area of dispute concerns the cost of future medications and a possible operation for knee replacement. The evidence suggests such an operation is likely in about 30 years and would cost a little less than $20,000.00. The plaintiff claims the cost of Cipramil, an anti depressant, for the rest of his life at $18.00 per week. The plaintiff claims visits to his GP fortnightly for the rest of his life. These three claims together total $44,686.00. I would not expect the plaintiff to be on antidepressants for the rest of his life. Nor would I expect him to require fortnightly visits to the GP related to this accident for ever. The operation is likely although the award should be for the present value of the sum claimed. I propose to allow a global amount of $20,000.00 to cover all three heads.

[33] In summary, the plaintiffs damages are as follows:

Pain and suffering	60,000.00
Interest on $30,000 @ 2% for 6 years	3,600.00
Past economic Loss	40,000.00
Interest @ 5% for 6 years	12,000.00
Loss of superannuation benefits @ 7%	2,520.00
Future economic loss	70,800.00
Loss of future superannuation @ 9%	6,372.00
Past Care	11,472.00
Interest @ 5% for 6 years	3,441.60
Future Care	2,000.00
Special damages (paid by plaintiff)	8,358.00
Interest at 5% for 6 years	1,957.00
Future medical and medication expenses	20,000.00
Total	242,520.60

[34] Taking into account my findings on contribution this amount should be reduced by 60% to give a net amount of damages of $97,008.24. I give judgement for the plaintiff against the second defendant for this amount.

[5] [2002] QCA 138.