SUPREME COURT OF QUEENSLAND

CITATION:	*Thurgar v Gollschewski & Ors* [2002] QCA 430
PARTIES:	**LORNE ALEXANDER THURGAR** (plaintiff/respondent) **v** **KEVIN GOLLSCHEWSKI AND JANINE GOLLSCHEWSKI** (first defendants) **AUSTRALIAN ASSOCIATED MOTOR INSURERS LIMITED** ACN 004 791 744 (second defendant/appellant)
FILE NO/S:	Appeal No 2521 of 2002 DC No 2960 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2002
JUDGES:	Davies and Jerrard JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – ROAD ACCIDENT CASES – where learned trial judge found that negligence of first defendant was the sole cause of a collision between first defendant and plaintiff/respondent – where appellant contends that the respondent should be held equally or to some degree responsible because he neglected his own safety – where learned trial judge found that respondent took all reasonable care for his own safety – whether contributory negligence should be found on the part of the respondent DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – PARTICULAR CIRCUMSTANCES – where second defendant/appellant contends that the amounts awarded to the respondent for loss

of earnings pre-trial and future economic loss should be reduced further than what the learned trial judge allowed – where appellant contends that the 15 year period, estimated by the respondent as the time in which he would have worked in a particular area of the police force had the accident not occurred, was excessive – where appellant contends that the learned trial judge did not make sufficient allowance for other employment possibilities of the respondent – whether such discretionary findings of learned trial judge should be disturbed

Traffic Regulations 1962 (Qld), reg 25(b)

Abela v Giew (1965) 65 SR (NSW) 485, cited
Braund v Henning (1988) 79 ALR 417, distinguished
Lopresto v Golding (1957) 31 ALJR 851, cited
Tucker v McCann [1948] VLR 222, cited
Twiehaus v Morrison & Anor [1947] NZLR 197, applied

COUNSEL: M Grant-Taylor SC, with P D Corkery, for the appellant
S CWilliams QC, with D L K Atkinson, for the respondent

SOLICITORS: Deacons Lawyers for the appellant
Maurice Blackburn Cashman for the respondent

[1] **DAVIES JA**: I agree with the reasons for judgment of Jerrard JA and with the orders he proposes.

[2] **JERRARD JA**: At about 9.00 a.m. on 4 October 1998 the respondent Lorne Thurgar was riding his motor cycle northwards along the Wivenhoe/Sommerset Dam Road at a steady 100kmph when he came up behind a Commodore car driven by Kevin Gollschewski, which was towing a trailer carrying a load of lucerne hay two bales deep. Mr Gollschewski's vehicle was travelling at a steady 60kmph. The plaintiff reduced his speed and followed Mr Gollschewski's car and trailer at its speed of 60kmph, and onto a bridge marked with a continuous white line on its southern end. By reason of that while line he did not overtake the white Commodore. Instead he positioned his motorcycle on the right hand side of the northbound lane, almost on the centre line, so that the driver of the Commodore could see his vehicle. At the northbound end of the bridge, where the roadway was marked with a single dotted line, and with the roadway clear of any danger to traffic from behind, and for 200 metres in front, the plaintiff indicated and pulled out to overtake the Commodore. As he drew level with it he saw Mr Gollschewski flick with his little finger the indicator on the Commodore, and it began coming across the road towards him. Mr Thurgar took evasive action, moving his motor cycle to the right, and braking as hard as he could; but could not avoid colliding with the Commodore as Mr Gollschewski partially executed an intended turn to the right at the end of the bridge, and into Stanley Pocket Road which comes in on the right and forms a T Intersection.[1] Mr Thurgar brought an action in the District Court against Mr Gollschewski and the appellant, the licensed insurer of Mr Gollschewski's motor vehicle, and by decision given on 15 February 2002 a learned judge of that

[1] The facts recited in this paragraph are those specifically found in the judgment under appeal, and in the plaintiff's evidence which the learned judge accepted without any reservation.

court held both that Mr Gollschewski was negligent in his driving of the Commodore, and that that negligence was the sole cause of the collision. The appellant brings this appeal, and asks this court to make a finding that the learned judge did not make, namely that Mr Thurgar failed to take all reasonable care for his own safety, and that his neglect caused or contributed to that collision.

[3] The findings of fact by the learned judge included findings that Mr Gollschewski did not look in his rear vision mirrors before commencing to execute his right hand turn, and that had he done so he would have seen the plaintiff travelling behind the Commodore and commencing to overtake it. The judge found that Mr Gollschewski put his indicator on simultaneously with his commencing to turn the Commodore to the right, and that when that indicator was put on, the plaintiff's motorcycle was already level with the driver's door of the Commodore. The judge found that Mr Gollschewski drove sharply to the right, such that had the collision not happened the Commodore would have entered the intersection with Stanley Pocket Road in the southern end of the intersection. The judge found that Mr Gollschewski failed to keep any proper lookout, failed to indicate his intention to turn right, and turned the Commodore vehicle to the right and across the path of the motor cycle when it was not safe so to do. All the findings of fact described so far were ones which were open to the learned judge on the evidence, and none are challenged in any way in this appeal.

Liability

[4] The appellant's contention, that the respondent/plaintiff bears either equal or some degree of responsibility for contributing to the collision by neglecting his own safety, is put in two ways. The first is by the argument that the respondent breached reg 25(b) of the *Traffic Regulations* 1962 (Qld), then in force, which regulation prohibited the driver of a vehicle upon a two way carriage way driving his or her vehicle onto the right side of the centre line of the carriage way when approaching within 30 metres of any intersection. The respondent/plaintiff concedes that he was attempting that overtaking manoeuvre within 30 metres of an intersection. The learned judge considered that the plaintiff was not in breach of that regulation, the judge accepting the plaintiff's evidence that the intersection was not visible to the plaintiff until he was about 15 metres from it, and when overtaking the Commodore.

[5] With due respect to the judge, failure to notice the intersection would be unlikely to excuse a breach of the *Traffic Regulations*. An honest mistake would only excuse from criminal responsibility if it was a reasonable mistake; but breach or otherwise of Regulation 25(b) was not really the issue. What was was whether or not the plaintiff acted without sufficient care for his own safety in pulling out to overtake at that particular part of the roadway, when both vehicles were in fact approaching and very close to that T intersection on the right. There is no suggestion that any other vehicle was approaching from that side road, or that the plaintiff would have failed to see it if one had been.

[6] The focus of the appellant's other argument is that from the fact that the first defendant's vehicle was travelling so slowly, relative to the plaintiff's, the plaintiff ought to have been put more on his guard about the possibility of a manoeuvre such as a turn into an adjourning side road.

[7] The first defendant's vehicle certainly was travelling at 40km below the permitted speed limit of 100kmph when the plaintiff's bike followed it across that bridge. The learned judge also found that the Commodore slowed down as it approach the intersection, but found it did so by Mr Gollschewski allowing it to slow without applying the brakes until he was very close to the intersection itself. The judge found that that the brakes were first applied only when the plaintiff was then overtaking the Commodore, and accordingly did not act at any sufficient warning to the plaintiff.

[8] The appellant referred the court to the judgment of the High Court in *Braund v Henning* (1988) 79 ALR 417. In that case a defendant driver, whose manner of driving was such as to reasonably lead following traffic to the belief that the driver would drive through an intersection, reduced speed suddenly and turned to the right, colliding with a following driver. The High Court considered there was evidence to support those critical findings quoted herein, but thought that in the circumstances of that case the driver of the following vehicle had to bear some responsibility for failing to avoid the consequences of the first driver's negligence. Their Honours apportioned responsibility 60% to the first driver and 40% to the driver of the following vehicle, whom the Full Court of Queensland Supreme Court had held solely responsible by reason of failure to keep a proper lookout when travelling too close, and simply running into the preceding vehicle.

[9] That case provides an illustrative example of the heavy responsibility placed on the driver of an overtaking vehicle, who is usually held primarily liable for the consequences of collision between that vehicle and one being overtaken. That responsibility was described many years ago, in a case cited by the appellant, by Johnston J of the New Zealand Supreme Court in *Twiehaus v Morrison and Anor* [1947] NZLR 197 at 202 in these terms:

> "The duty of an overtaking car is to watch carefully the leading car. If the onus lies on one more than the other, the overtaking car has to show that the leading car is responsible for the collision……(citing from *Kleeman v Walker* [1934] SASR 199) the driver of the leading vehicle may not know of the presence of the following vehicle, and the driver of the latter cannot assume, as the other may, that (the latter driver) is under observation".

[10] The appellant adds those observations to the submission that there was a breach of Regulation 25(b). Accepting those observations, the issue is still as the learned trial judge correctly identified in para 36 of the Reasons for Judgment, namely whether or not a breach of the regulation caused or contributed to the collision. Accepting the regulation was breached, it does not follow automatically that the plaintiff acted without reasonable care for his own safety, and that a lack of care on his part contributed to the collision.[2]

[11] The learned judge found that the first defendant's driving was responsible for the collision. Central to the judge's finding that the plaintiff took all reasonable care for his own safety was his acceptance that the plaintiff **had** tried to assess why the Commodore was travelling slowly; and the further finding that the plaintiff's opinion, that the Commodore was doing so to prevent the load of hay from blowing

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[2] *Abela v Giew* (1965) 65 SR (NSW) 485 at 489, *Tucker v McCann* [1948] VLR 222 at 225, *Lopresto v Golding* (1958) 31 ALJR 851 at 852.

away, was a reasonable view to form in the circumstances. The plaintiff's evidence (actually accepted by the judge) was that:

> "I was getting covered in lucerne as it was blowing off, and I basically tried to assess why the vehicle was going so slow, and it occurred to me that the reason was that his load was blowing off. If he went any faster he would probably arrive at his destination without any lucerne."

The load of lucerne was tied by rope to the trailer, but uncovered. The plaintiff's evidence in cross examination included his describing the hay as flying off in copious amounts, and not in small bits.

[12] Once His Honour accepted that evidence, it provided a reasonable explanation for the relatively slow speed of the Commodore, and an explanation which would be sufficient in the circumstances to satisfy a prudent overtaking driver. The appellant argues that the intersection the parties were approaching was capable of providing another explanation, and this is true. But so would the equally available explanation that for whatever reason the driver of the Commodore intended to pull to the left and stop, once his vehicle had cleared the bridge. When a reasonable explanation for the Commodore's slow speed presented itself to the plaintiff he was entitled to accept it and act accordingly. The learned judge having found that the Commodore only slowed down further when the plaintiff was already overtaking it, the judge was entitled to find that the plaintiff's overtaking manoeuvre was one taken with all reasonable care for the plaintiff's own safety, and that the plaintiff was not guilty of any negligence contributing the collision. The judge so found. The appeal against the findings on liability must be dismissed.

Quantum

[13] With respect to the appeal on quantum, it was limited in argument to the complaint that the learned judge had erred in assessing both past and future economic loss. The plaintiff at all relevant times has been a member of the Australian Federal Police, whose 20 years of service in that police force had followed a little over five years service in the Australian Navy. The plaintiff's service with the Australian Federal Police Force had included service in the Special Intelligence Branch, active duty with the Peace Keeping Force in Cyprus, experience as the liaison officer within the International Division of the Australian Federal Police, and service in the Intelligence and Organised Crime Section of that police force. He had been a fit and athletic person prior to the accident, who amongst other things had represented Queensland in American Football, and who held at that time a strong ambition to join the Close Protection Unit of the Australian Federal Police.

[14] The benefits of joining that unit included both the prestige of membership, and the accompanying 19% loading on base salary when a member. This was worth $26,800.00 per annum on a base salary of $47,000.00. The plaintiff had nominated for the Close Protection Course and passed the quite rigorous prerequisite trials in 1997. He had not started the complete course in 1997 because of the birth of his second child, but intended, pre-accident, to enrol in the next Close Protection Course. That was to be towards the end of 1998.

[15] His own evidence was that he expected to complete the course and that on completion he expected to obtain employment in close protection very quickly. This was both because the Olympics were then coming up in less than two years

time, and because he was hoping to transfer from Queensland where he was based to Canberra. He described there being a "huge" waiting list in Canberra of Australian Federal Police Officers wanting to transfer to Queensland, and that it would have been a simple matter to get back to Canberra from this State. His wife's brothers live in Canberra, and her evidence was that not only would she have supported her husband's career move to Canberra, but she also independently wanted to move there.

[16] The plaintiff called evidence from the ex-Australian Federal Police Officer responsible (as the Head of the Protection Training Team) for conducting those protection courses at the relevant time. His evidence was that currently "everybody that qualified in the AFP close protection is being utilised", and that upon the plaintiff successfully completing the course he would have been offered a position within Queensland or within Canberra. The courses contain between eight and 16 trainees when conducted, and on average "we'd probably only fail one". The most who have ever failed a course is three.

[17] The learned trial judge was clearly favourably impressed with the plaintiff both as a witness, and as to his enthusiasm and aptitude with his work with the Australian Federal Police. The judge found, and this is unchallenged, that there was a high degree of probability that if the collision had not occurred, the plaintiff would both have qualified for and worked in the VIP Protection Unit. The plaintiff's evidence was that he would have worked in close protection for as long as he could, and that that could have been for 15 years. Although the plaintiff was cross examined about that latter proposition, it was not seriously challenged before the learned trial judge, nor challenged on the hearing of the appeal.

[18] What was challenged was the calculation of past and future loss of earnings, based on the finding by the trial judge as to that high degree of probability of ultimate employment in the VIP Protection Unit within the AFP. It was agreed between the parties that the difference between the plaintiff's income when not a member of that unit, as opposed to being a member, was $284.00 per week after tax. The learned judge considered it proper to allow the plaintiff 2.5 years loss of earnings pre trial reduced by 20%, and the appellant argues that the reduction ought to have been a higher percentage. It reflects both the "failure" rate in the course the plaintiff intended to undertake, and the judge's finding of an 80% probability of the plaintiff's future in the Protection Unit. That finding was comfortably open to the learned judge.

[19] The judge then allowed a future economic loss at the same weekly rate of $284.00 per week over 12.5 years, (thereby accepting the 15 years hypothesised by the plaintiff), on the 5% interest tables, making a total of $137,740.00; and discounted that for general contingencies by 15%. The judge then applied the same 80% degree of probability to the resulting $117,079.00 figure, producing a future economic loss predicted by the learned judge of $93,663.20, which the judge rounded down to $93,000.00. The appellant again complains that that amount should have been further discounted, both because the 15 years allowed by the learned judge was too long, and because of insufficient allowance for other possibilities, such as the plaintiff choosing to remain in the general field of surveillance work in Brisbane, and close protected work opportunities being limited by comparison to other States, and the like.

[20] The difficulty with those submissions is that they do not make sufficient allowance for the plaintiff's evidence that he could easily obtain a transfer to Canberra where apparently there is more VIP work available, nor the judge's acceptance of the plaintiff's description that gaining a position in Canberra was his goal at the time of the collision. Those findings were open to the learned judge, and on those findings the discount of 15% overall for general contingency, and 20% thereafter was not beyond the bounds of the sound of discretionary judgment, and should not be disturbed.

[21] In my opinion the appeal should be dismissed with costs, assessed on the standard basis.

[22] **MACKENZIE J**: I agree that the appeal should be dismissed for the reasons given by Jerrard JA.