# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Carlile v Hegedus & Ors* [2003] QSC 323 |
| PARTIES: | **EDGAR WILLIAM CARLILE**<br>(plaintiff)<br>**v**<br>**STEPHEN ISTVAN HEGEDUS**<br>(first defendant)<br>**GIGI GERHILD HEGEDUS**<br>(second defendant) |
| FILE NO: | S9539 of 2002 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| DELIVERED ON: | 25 September 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16, 17,18, 19 September 2003 |
| JUDGE: | Muir J |
| ORDER: | **Judgments for the defendants in the action** |
| CATCHWORDS: | TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – Special Relationships and Duties – Employer and Employee – where the plaintiff was employed by the defendants and was involved in an accident whilst carrying out his duties as an employee – whether the cause of the accident constituted a foreseeable risk and the defendants breached their duty of care to provide a safe system of work<br><br>*Uniform Civil Procedure Rules* 1999 (Qld), r 149(1)(c)<br>*WorkCover Queensland Act* 1996 (Qld), s 312(1)(b), s 312(1)(e), s 312(1)(f), s 312 (1)(h)<br><br>*Dixon v Cementation Co Ltd* [1960] 1 WLR 746<br>*Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18<br>*Neill v NSW Fresh Food and Ice Pty Ltd* (1963) 108 CLR 362<br>*Nagle v Rottnest Island Authority* (1993) 177 CLR 423<br>*Plumb v State of Queensland* [2000] QCA 258<br>*Wyong Shire Council v Shirt* (1980) 146 CLR 40 |
| COUNSEL: | The plaintiff appeared in person<br>M Grant-Taylor SC for the defendants |
| SOLICITORS: | The plaintiff appeared in person<br>O'Shea Corser & Wadley for the defendants |

**The plaintiff's claim and the background to it**

[1] **MUIR J:** The plaintiff, Edgar William Carlile who was born on 19 May 1956 was injured on 24 February 1998 when, dismounting from a bobcat owned by his employers, the first and second defendants, he fell, striking his head on a large rock. At the time, the defendants were subcontractors carrying out landscaping work in the Forest Lake residential development. The plaintiff had been employed by them to operate their bobcat and the accident occurred on the second day of the plaintiff's employment.

[2] In a statutory declaration accompanying a notice of claim for damages dated 23 March 2001 submitted to WorkCover Queensland, the plaintiff explained that his accident occurred when he dismounted from the bobcat in order to move an electrical lead placed by employees of another contractor or subcontractor in a location which impeded his work. He stated that he had complained about the positioning of the power lead "on several occasions during the day". In his oral evidence, it emerged that the complaints were made to persons other than the defendants. The male defendant, whose evidence I generally accept, said that he was unaware of any such complaints or that the plaintiff's use of the bobcat was impeded by an electrical lead.

[3] The March 2001 notice of claim identified the defendant's negligence as "permit(ting) other persons on the development to leave a power cable on the ground where I was required to work, thereby creating a risk of injury." The further details of negligence provided were all directed to the positioning of and failure to remove the power cable. The allegations of negligence in an earlier claim dated 16 February 2001 were similarly directed. In a handwritten attachment to the latter claim the plaintiff stated –

> "So I stopped the machine to move the lead as I hopped out of the machine, I lost my footing and stumbled sideways falling striking my head an' [sic] shoulder on a large boulder."

[4] In an application to WorkCover Queensland for compensation dated 13 March 1998, the plaintiff, in response to the question "Explain what you were doing at the time and how the injury happened", answered "tripped on hose bobcat (case 1845 bad design causing hitting head and shoulder on granite rocks". The original statement of claim filed on 17 October 2002 made no mention of the plaintiff's tripping on any hoses on the bobcat. It did, however, allege as a particular of negligence –

> "f. requiring the Plaintiff to perform his duties using plant and equipment which was poorly designed and unsafe."

The same allegation remained in an amended statement of claim filed on 21 May 2003.

**The plaintiff's account of his accident**

[5] The plaintiff's evidence was to the following effect. Flexible metal encased hydraulic hoses running from the front left hand side of the body of the bobcat to the bucket were not fastened by any device to keep them to the side and out of the way of a dismounting operator. The normal, and only reasonable mode of access to and egress from the bobcat's seat was by rising from the seat, stepping forward onto the bucket and then off the bucket onto the ground. The hoses were in a position in

which they could be tripped over by a person dismounting and the accident happened when the plaintiff did in fact trip over them. The plaintiff, in order to demonstrate the risk posed by the hoses placed in evidence photographs of bobcats, other than the one in question, with hoses extending from the left (viewed from the driver's seat) more than half way across the front of the bucket.

**The male defendant's evidence on the physical condition of the bobcat**

[6] The male defendant, Mr Hegedus, produced photographs of the subject bobcat showing the position of the hoses on it. There was no bracket or other device confining the hoses to the left of the bobcat's bucket or to the left of the bobcat itself, but they were positioned on the bobcat's left side and in such a way as not to pose any obvious risk to a person mounting or dismounting. Mr Hegedus said that there were two handles on the bobcat which a person mounting or dismounting could hold on to and that there was also a footrest moulded onto the bobcat itself which could be used for stepping down into the bucket. He said that the positioning of the hoses posed no interference with a person's access or egress and that he had used the bobcat, without any change in the position of the hoses, for a number of years without incident or difficulty.

**The plaintiff's evidence of his injuries and their consequences**

[7] The plaintiff's account of his injuries and his symptoms are as follows. He has only a vague recollection of events on the day of the accident after it happened. He remembers that "everything turned yellow" and a person spoke to him but he is unsure where that happened. He recalls a person speaking to him at the Forest Lake Medical Centre and being in hospital although he has no recollection of how he got there. His speech was affected badly as was his ability to think. His short term memory deteriorated very markedly and he experienced disorientation which caused him to stumble and trip. He also experienced confusion and fatigue to the extent that he "slept for 12 to 16 hours a day for the first 18 months". He became light sensitive and experienced extended periods of nausea which still occur. He experiences seizures and frustration and has developed an intolerance to noise or crowds. One of his major complaints is that he now has reoccurring severe migraines for which he takes medication. As a consequence of these matters he is practically unemployable.

**Other evidence of the plaintiff's injuries**

[8] The male defendant, Mr Hegedus, was not present when the plaintiff's accident occurred. He recalls receiving a telephone call on 24 February sometime after lunch. In response to it he went to the doctor's surgery at Forest Lake where he saw the plaintiff. His recollection was that the only observable sign of injury was a bandaid on the plaintiff's head. Later in his evidence he referred to a "bandage". He drove the plaintiff to the Princess Alexandra Hospital and recalls that on the way the plaintiff was "quite talkative".

[9] The plaintiff was admitted to the Princess Alexandra Hospital at 4.00 pm on 24 February 1998 where he gave a history of falling head first on to gravel ground after stepping from his bobcat "3 feet off ground". The medical records note that the plaintiff suffered lacerations to the side of head, a painful left shoulder and temporary amnesia. He was readmitted to the hospital on 6 March 1998 when a CAT scan was taken of his head and he was diagnosed as suffering from a personality disorder.

**The expert medical evidence called by the plaintiff**

[10] Dr Ebert, a general practitioner whom the plaintiff had been seeing since 1989, gave evidence on the plaintiff's behalf. In oral evidence, Dr Ebert said of the plaintiff –

> "Before the accident he was capable of carrying on his daily activities as well as being able to carry on his activity in relation to employment, meaning take instructions from the employer and carry it out in his working with heavy machinery and bobcat."

In his opinion the plaintiff's ability to carry out his daily activities such as looking after himself generally, preparing meals, dressing, managing a household and his capacity to take and carry out instructions had been impaired by the accident. That conclusion was based on his understanding of information given to him by the plaintiff.

[11] Dr Ebert was able to point to very little in the way of objective signs or indicia to support these opinions. The only matters he was able to identify in that regard were; the SPECT scan which a neurologist, Dr Sandstrom, had caused to be taken, perhaps the incidence of "migrainous headaches" and an episode of disorientation.

[12] Dr Sandstrom, a neurologist, wrote to WorkCover Queensland on 23 June 1998. In the letter he noted that the plaintiff had been admitted to the Princess Alexandra Hospital on 24 February 1998 and was under the care of the neurological unit. He added – "However, I understand that appropriate neuro-imaging revealed no major abnormalities." He went on to refer to a range of symptoms provided by the plaintiff stating, inter alia –

> "In retrospect, he maintains that consciousness was impaired and that, as well, over a time segment of two hours, he experienced post traumatic amnesia."

The plaintiff complained to him of symptoms including, nausea, positional vertigo, dizziness, reduced concentration and episodic confusion.

[13] The letter further stated –

> "Neurological examination was unremarkable and, specifically, there was no evidence or (sic) raised intracranial pressure or of focal deficits.
> Accordingly, *I concluded that Mr Carlile had suffered a post concussional syndrome or, alternatively a post traumatic instability syndrome.*" (emphasis added)

[14] In a report dated 21 November 2001 to the plaintiff's former solicitors, Dr Sandstrom reported in relation to treatment at the Princess Alexandra's Hospital that –

> "… both plain radiography and CT cranial imaging were reported to be within normal limits."

He referred to the plaintiff's "head injury" from a motor vehicle accident in 1982 and observed that he "appeared to exhibit dissociative amnesia as a consequence of the trauma". The letter records that the plaintiff associated his migraines and "vasospastic phenomena involving gait and postural instability" with the 1998 accident and reported that those complaints had worsened. Dr Sandstrom again expressed the view –

> "Beyond this, at this stage, there is no major evidence of a primary organic or progressive neurological disorder."

[15] In a further letter of 19 December 2002 to the same solicitors he stated –

> "As a further update to my correspondence dated 21st November, 2001, upon historical criteria, it seems likely that Mr Carlile's cognitive and executive functioning deteriorated subsequent to the accident occurring on 22nd February, 1998.
>
> Additionally, I wish to report the results of a cerebral perfusion study performed at the Prince Charles Hospital on 11th May, 2001. *This investigation revealed evidence of bilateral posterior parietal lobe perfusion defects, more obviously on the left side*. These changes are difficult to interpret although such problems are reported to occur in certain neurodegenerative disorders such as Alzheimer's disease. In my opinion, however, Mr Carlile does not suffer with this particular affliction. Should further information be required, please do not hesitate to contact me." (emphasis added)

[16] The plaintiff regarded Dr Sandstrom's interpretation of the results of the 11 May investigation by SPECT scan as strong evidence of organic brain damage (caused by his 1998 accident) and cross-examined a number of the defendants' expert witnesses about it. The usefulness of such information as a diagnostic tool was also the subject of evidence in chief from other witnesses.

[17] In cross-examination, when asked if he was suggesting that there was necessarily a causal connection between the plaintiff's injury on 24 February 1998 and his migraine complaints Dr Sandstrom said –

> "The only thing I could possibly make there is sometimes the process is accelerated after a head injury but that's usually a pre-existing complaint that can be accelerated by the head injury."

[18] He accepted that the only basis upon which he made his diagnosis of a "post concussional syndrome" of the plaintiff was on the strength of the history given him by the plaintiff. He said in relation to the suggestion that symptoms attributable to "a post-concussional syndrome or a post-traumatic instability syndrome" would abate over time, that –

> "In general terms people under satisfactory treatment – usually with a psychiatrist – they tend to settle down, as I said, within six months to two years."

[19] In cross-examination he accepted that he was unaware of the plaintiff's psychiatric history at the time of expressing his written views. It would seem, however, from his acceptance in re-examination that he had been told about Dr Reddan by the plaintiff, that Dr Sandstrom may well have been mistaken in his recollection in that regard. In Dr Sandstrom's recollection, although there had been complaints of headaches in his pre-accident contact with the plaintiff, they did not appear to be migraines of the type of which the plaintiff complained after the accident.

**The plaintiff's pre-accident work history and health**

[20] The plaintiff, however, had been suffering from a range of either physiological or psychological impairments prior to the accident which were similar in many respects to those of which he now complains.

[21] He was severely injured in a motor vehicle accident in 1982 when working as a plant operator. He was hospitalised for five months and was left with one leg markedly shorter than the other and recurring bouts of severe pain. The evidence as to his work history after that date is somewhat obscure.

[22] The plaintiff told Dr Nothling, a psychiatrist whose opinions will be referred to later, that after his 1982 accident he returned to work in about 1984 when he purchased a 120 acre property in New South Wales. He said that he had worked in a gold mine for a few months, then for "someone at Nambour driving plant and equipment" and then "at Sanctuary Cove, driving a dump truck". He said that after doing this for a while, he worked for Twin Waters and Solander Shore. After that he went back to north Queensland. In the course of his evidence, the plaintiff said directly or indirectly that he worked in north Queensland as a plant operator. Whether the work was constant or sporadic only is unknown but I consider that the latter is more likely than the former. I note that a letter from M & K Plant Hire Pty Ltd states that the plaintiff was employed by that company "on a casual basis between 1995-1998". Another letter, from Brancatella Plant Hire states that the plaintiff "was employed by this firm on a permanent casual basis during the period 1994 to 1995 approximately". The length of time the plaintiff actually worked for those employers is unspecified and no tax return for any of those years was tendered.

[23] Dr Ebert's records reveal that the plaintiff, since around 1990 at the latest, had been seeing him with complaints of pain associated with his leg injuries and other complaints which Dr Ebert diagnosed as symptoms of post traumatic stress disorder resulting from the motor vehicle accident. Dr Ebert received a psychologist's report in respect of the plaintiff in 1992. He referred him to Dr Sandstrom on 25 June 1994 with suspected multiple sclerosis. He referred him to a medical practitioner specialising in pain relief, Dr Williams, on 27 January 1993 and to a psychiatrist, Dr Redden, in 1995. In 1996 the plaintiff underwent treatment for chronic pain at the Greenslopes Hospital.

[24] Dr Ebert has had a considerable degree of contact with the plaintiff in recent times and acts as something of a general adviser to him. I formed the view that Dr Ebert, understandingly, was quite sympathetic to the plaintiff's cause and that, as a result, he was reluctant to say anything detrimental to the plaintiff's interests in this litigation. The objective evidence does not support Dr Ebert's views expressed in paragraph [10] above and I concluded that Dr Ebert's opinions needed to be treated with caution.

[25] The plaintiff has been in receipt of a disability pension since April 1996 and there is no evidence, which I accept, that since that date the plaintiff has notified the pension provider of any gainful employment held by him. The pension was obtained by the plaintiff because of his inability to work. That inability was probably the result of his post traumatic stress disorder, coupled with personality disorders and perhaps other psychiatric impairments.

[26] In the plaintiff's notice of claim for damages dated 23 March 2001, he declared that in the year ending 30 June 1996 he had been in receipt of a Disability Support Pension and had earned no more than $200. I note however that the form declares that he did some work in that period as a "plant operator/driver" on a "part-time casual" basis. He declared also that he had been advised by an accountant that he

was not required to lodge a tax return for the 1995, 1996 and 1997 years as he was a full-time student and had not earned sufficient income to require tax returns to be lodged.

[27] Although Dr Ebert appeared to me to be reluctant to provide details of the plaintiff's pre-accident symptoms in cross-examination, he did not deny that the plaintiff was experiencing "disordered thought" before his 1998 accident. He said that the plaintiff was "unable to cope with accident [the 1982 motor vehicle accident] and seemed to be reliving the experience". He said further that the plaintiff had "lots of problems related to the [1982] accident"; and that he suffered from "peptic ulceration" and was "subject to bouts of rage".

**The medical evidence called on the defendants' behalf**

[28] Dr Radel, a neuro psychologist, and Ms Austen, a psychologist working under him, assessed the plaintiff between 30 October 1998 and 28 January 1999 and concluded that the "pattern of deficits displayed" by the plaintiff during the assessment period were not consistent with any specific neuro psychological disorder. They further concluded that the plaintiff's deficits were probably attributable to "psychopathology rather than neuropathology" and that "any organic deficits which may exist are possibly being masked by the apparent overlay of psychological symptoms …".

[29] In Dr Radel's oral evidence he stated that the SPECT scan undergone by the plaintiff "mentions parietal lobe" and that deficits which one would expect from injury in that area "didn't show up as major problems on the testing" undertaken by himself and Ms Austen.

[30] The plaintiff was referred to Dr Reddan by Dr Ebert who expressed to her the views that the plaintiff was suffering from a post traumatic stress disorder, that he had a personality disorder and was dependant on narcotics. When the plaintiff first started seeing Dr Reddan he complained of matters which suggested the existence of short term memory loss. He also complained of chronic pain, anger, a tendency to be abusive, and of being "hypervigilant in the streets". In subsequent consultations, the plaintiff told her of concern about epileptic fits which he believed he was experiencing and of feeling suicidal at times.

[31] Over the time that Dr Reddan treated the plaintiff (effectively, from March 1995 to December 1997) she thought that his post traumatic stress disorder "was less and less relevant but that there were other problems that … were having a much more significant impact on his troubles and his difficulties in relating with others".

[32] There are also notes in Dr Reddan's records which suggest that the plaintiff reported himself as suffering from migraines from time to time.

[33] In a letter dated 23 May 2001 to another psychiatrist, Dr Reddan stated of the plaintiff –

> ""I first saw Mr Carlile on 29 March 1995. At that time he related his difficulties to a motor vehicle accident he had been involved in 1982 and stated that he had been involved in treatment at the Repatriation General Hospital at Greenslopes, the princess Alexandra Hospital Pain Clinic and the Behaviour Research and Therapy Centre at the Royal Brisbane Hospital.

> I was of the opinion that he was suffering from Post Traumatic Stress Disorder, however, as time went on it became apparent that, although he may have at some time suffered from PTSD, that the primary problem lay in his personality structure. He often complained of physical symptoms, but it was unclear to me what extent he somatised. There were often hints of narcotic or alcohol abuse … What always complicated the treatment was that Mr Carlile was reluctant to often provide details of the problems he reported and he also tended to split between his general practitioner and various other doctors he was seeing. He appeared to mobilise quite a lot of anxiety in others. …
>
> There were times over the years however, when Mr Carlile's behaviour improved. At various times he was employed as a plant operator he also commenced a course of study. I prescribed Clonidine initially. Later, I prescribed some Propranolol. At various times he reported taking Endone, but I never prescribed any opiates.
>
> Mr Carlile ceased attendance in early 1998. He had been uncomfortable with my move to Wickham Terrace and he had gotten into conflict with my staff which ultimately led to a breakdown of the therapeutic relationship. …
>
> Mr Carlile is a difficult person to assess in cross-section. He has unusual personality and he tends, at times, to ramble on in a discursive fashion. However, he was during that time, never psychotic, that is out of contact with reality.
>
> As stated earlier, it is quite likely that Mr Carlile has suffered from a Post Traumatic Stress Disorder and he may have also suffered from a Somatoform Disorder. I was under the impression that he had been diagnosed as having a Pain Disorder at the Greenslopes Pain Clinic. I think however at the time that I saw him, the major problem was really in relation to his personality with some contribution from substance problems."

[34] Dr Reddan informed another colleague, who had taken over the plaintiff's treatment from her, in a letter of 22 July 199 that the plaintiff's major problem was "on Axis II (Predominantly a borderline level of functioning), complicated by substance problems".

[35] Dr Lucille Douglas, psychologist, administered a personality assessment inventory test to the plaintiff on 30 May 2002. In a report dated 3 June 2002 in which she recorded the results of her test, she stated the conclusion that the plaintiff's responses were "completely at odds with his known case history and behavioural presentation on the day of testing". She noted that he was "overtly paranoid and hostile with the office staff and in his comments regarding the psychiatric profession".

[36] In evidence in chief she explained –

> "Well, the test itself, … indicates nothing more than a concern with physical functioning. There are number of scales on the PAI that speak to emotional distress, personality traits, alcohol and drug abuse, aggression, support in the environment, etcetera. Now, the only scales that Mr Carlile elevated were those relating to his physical functioning. So when I say there is no associated emotional distress or disturbance, every single scale that relates to anxiety, depression, paranoia, difficulty thinking … is non-elevated, so that means that this individual is saying, 'I have no problems in these areas' given his case history and how he presented on the day, where he was obviously quite distressed … you have to just look at the test results and say these two are completely incongruous with one another."

[37] In cross-examination, speaking of the nature of the information yielded by the test, she said –

> "The only thing it can get to is whether or not the individual will endorse items relating to having difficulties with attention/concentration and problems thinking clearly. Those items are on the test but they don't specifically evaluate attention/concentration as a cognitive construct."

[38] Dr Nothling, psychiatrist, saw the plaintiff on 30 May 2002 for the purpose of preparing a psychiatric medico legal report. In his report dated 17 June 2002 he noted that he relied on the personality assessment inventory prepared by Dr Douglas and upon a great body of other material. As much of it was not proved by admissible evidence, the opinions in the report are unable to be relied on by the defendants. Dr Nothling, however, felt himself able to express a strong opinion to the effect that "on the strength of (the plaintiff's) clinical presentation to me he did not satisfy the DSMIV criteria for the diagnosis of a major depressive disorder".

[39] Asked about the value of a SPECT scan as a relevant diagnostic tool, he answered –

> "A SPECT scan is regarded as somewhat non-specific today. It is not as accurate as a CAT-scan or an MRI scan. It is a functional scan of the brain looking at blood flow. Most authorities would regard a SPECT scan as not being a specific test today. It could be used to confirm – if there are abnormalities shown on an MRI or CAT-scan, it may be used to confirm those abnormalities but any abnormalities on a SPECT scan on its own would not, to the best of my knowledge, be taken as being very important in terms of a diagnosis if the other tests were normal."

[40] Dr Reid, a neurologist, saw the plaintiff on 15 October 1998 at WorkCover's request. In her report of that date, she expressed the opinions that –

(a) The plaintiff had "a very very mild head injury" in February 1998 which should have given rise to "no long term sequelae";

(b) The plaintiff was "quite bizarre" with "a floridly psychiatric presentation";

(c) The plaintiff could not be diagnosed as suffering from concussion or from a head injury.

She concluded by stating "… his current presentation would appear to be a manifestation of unusual pre-morbid psychiatric pathology".

[41] Dr Ljubisavijevic was a psychiatric registrar when she saw the plaintiff at the Prince Charles Hospital on referral by Dr Radel on 16 November 1999. In her report to Dr Bowles, consultant psychiatrist at the hospital, she wrote –

> "In summary this man presents with a number of somatic complaints, mostly neurological which might be due to conversion hysteria or considering his secondary gain due to malingering. My impression is that his main problem is personality disorder on histrionic and anti-social spectrum. I tried to encourage Mr Carlile to go back to his psychiatrist, Dr Richardson but he refused."

**Principles of law relevant to the determination of liability**

[42] The duty of the defendants was that of a reasonably prudent employer and it was "a duty to take reasonable care to avoid exposing [the plaintiff] to unnecessary risks of injury."[1]

[43] The risk must be one which is foreseeable by "a reasonable man in the defendant's position" and "a risk which is not far-fetched or fanciful is real and therefore foreseeable".[2] The latter observation was endorsed in *Nagle v Rottnest Island Authority,*[3] in which it was said also "…a risk may constitute a foreseeable risk even though it is unlikely to occur". Additionally, a person who owes a duty of care to others must take account of the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety.[4]

[44] In determining whether there was a breach of such duty, regard may be had to the considerations expressed in the following passage from the reasons of Dixon CJ and Kitto J in *Hamilton v Nuroof (WA) Pty Ltd* – [5]

> "It has been said that a reasonable and prudent employer is (i) bound to take into consideration the degree of injury likely to result; (ii) bound to take into consideration the degree of risk of an accident; (iii) entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures:". (References to authorities deleted)

[45] It was argued on behalf of the defendants that the plaintiff's claim fell within "that category of master and servant claims in which the injured worker, even if a reasonably foreseeable risk of injury is evident, cannot succeed in the absence of expert evidence 'to show any alternative way of organising these operations to eliminate the risk of injury'".[6]

[46] In *Neill v NSW Fresh Food and Ice Pty Ltd,*[7] Taylor and Owen JJ, after noting that "… in many cases no more than common knowledge, or perhaps common sense, is necessary to enable one to perceive the existence of a real risk of injury and to

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1 *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25.
2 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.
3 (1993) 177 CLR 423 at 431 per Mason CJ, Deane, Dawson and Gaurdron JJ.
4 *Nagle (supra)* at 431.
5 *(supra)* at 26.
6 Reference was made to Glass et al, *The Liability of Employers,* 2nd ed., at 33-34.
7 (1963) 108 CLR 362 at 368, 369.

permit one to say what reasonable and appropriate precautions might appropriately be taken to avoid it", went on to refer, with approval, to the following observations of Devlin LJ in *Dixon v Cementation Co Ltd* – [8]

> "I do not think it means that, in every case where an unsafe system of working is alleged, it is necessary for the plaintiff to undertake the burden of pleading, and proving, an alternative system of work which could have been adopted and which would have been safe. That is for the employer to provide. There may be cases in which the plaintiff will not get very far with an allegation of unsafe system of work unless he can show some practicable alternative, but there are also cases - and I think this is one of them – in which a plaintiff can fairly say : 'If this is dangerous, then there must be some other way of doing it that can be found by a prudent employer and it is not for me to devise that way or say what it is'." ([1960] 1 WLR, at p 748)

[47] Their Honours continued –

> "These observations, however, involve no departure from the proposition that in order to enable an injured workman to recover damages from his employer the evidence must be such as to justify a finding of negligence on the part of the employer and, if the negligence alleged is in relation to the system of work employed, the evidentiary material must be such as to enable the jury to find that the system unreasonably exposed the workman to risk of injury. In other words, it must appear that the employer failed 'to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation':". (reference to authority deleted)

**Conclusions on liability**

[48] The evidence establishes on the balance of probabilities that the plaintiff fell and struck his head whilst dismounting from the bobcat. It does not establish that tripping on the hoses on the front of the bobcat caused the plaintiff's fall. The only evidence of the circumstances of the fall is that of the plaintiff. He stated that he tripped on the hoses in his application for compensation dated 13 March 1998 but failed to mention that in his two notices of claim to WorkCover or in his pleading. The evidence reveals that the plaintiff's memory is impaired and I very much doubt that his recollection can be treated as reliable. I formed the distinct impression that he has no actual recollection of tripping over the bobcat hoses and that his belief in this regard is the result of a reconstruction by him of the circumstances of his fall.

[49] The plaintiff sought to differentiate between his short term memory which he described as "mostly pretty pathetic" and his long term memory. The latter, according to him, was not adversely affected but his evidence seemed to me to reveal substantial long term memory deficits. In cross-examination, the plaintiff said that he had "fragments of memory" about the incident but was "pretty certain" of the accuracy of those fragments. I accept that the plaintiff gave his evidence honestly and carefully. Unfortunately, it is not possible for me to be as convinced as is the plaintiff of the accuracy of his recollection in this critical respect.

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[8] [1960] 1 WLR 746 at 748.

[50] I am not satisfied either that the position of the hoses on the bobcat presented a foreseeable risk that a person alighting from the bobcat might bump or be caught in them so as to cause a loss of balance. The evidence of Mr Hegedus, which I accept, was that the hoses were in the position shown in Exhibit 5 to the left hand side of the bobcat's front. He had used the bobcat for some years without encountering a problem with the hoses. I accept his evidence that the hoses were in their original position at the date of the accident and that they were similarly located on other bobcats of the same make and model. There is no evidence that the position of the hoses caused any problem for other operators.

[51] It does not follow that if the plaintiff, as he contends, caught his foot on the hoses this, of itself, establishes a breach of the defendants' duty of care. The problem may have resulted from a quite unusual (an unforeseeable) movement by the plaintiff.

[52] The defendants contend that it has not been shown that on the model in question it was reasonably practicable for the hoses to be secured in a different position by means of a restraining device. In this regard, the plaintiff derives assistance from evidence that a later model bobcat of the same make was later fitted with an attachment which secured the hoses to the front of the bobcat. The evidence does not establish though the reason for the innovation on that, with the hoses so secured, an operator would be any less likely to trip over them. The hoses in the later model appear to be positioned in a generally similar location to those on the subject bobcat.

[53] The hoses are plainly visible in a prominent position on the front of the bobcat and are rather more vertical than horizontal in their placement. The plaintiff, in accordance with normal practice, dismounted facing to the front and it is not immediately obvious how he would have managed to catch a foot in the hoses. The possibility that such an accident might occur is not something which, in my view, was reasonably foreseeable.

[54] The process of alighting from the bobcat, although obviously rather more difficult than alighting from a car or many trucks, was not one which presented any special danger which could not be avoided by the exercise of reasonable care. Accordingly, I conclude that the plaintiff's fall has not been shown to have resulted from any breach of duty on the part of the defendants.

[55] Mr Grant-Taylor SC, for the defendants, also relied on ss 312 and 314 of the *WorkCover Queensland Act* 1996, asserting that the plaintiff had the onus of proving and failed to prove that –

- That the actual and direct event giving rise to the plaintiff's injury was either actually foreseen or reasonably readily foreseeable by the defendant[9]
- That the plaintiff did everything reasonably possible to avoid sustaining the injury[10]
- That the event giving rise to the plaintiff's injury was not solely as a result of inattention, momentary or otherwise on the plaintiff's part[11]
- That the plaintiff did not relevantly fail to inform the defendants of unsafe plant or equipment as soon as practicable after the plaintiff's discovery and relevant knowledge of the unsafe nature of the plant or equipment"[12]

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9 s 312(1)(b).

10 s 312(1)(e).

11 s 312(1)(f).

[56] None of these matters were raised in the defence. Mr Grant-Taylor argued, in reliance on *Plumb v State of Queensland*,[13] that the plaintiff had the onus of proof in relation to the above matters and that consequently, there could be no obligation on the defendant to raise them in its defence. I doubt that *Plumb* is authority for any such proposition. In it Davies JA concluded that s 312(4), although reversing the onus of proof on some matters, was not intended to alter the rules of pleading and that "nothing in s 312 required the making of any further allegations in the claimant's statement of claim". It does not follow that if a defendant wishes to rely on matters in those sections it is relieved of the obligation imposed by r 149(1)(c) of the *Uniform Civil Procedure Rules* to "state specifically any matter that if not stated specifically may take another party by surprise". I do not however find it necessary in view of the conclusions I have reached to express any concluded view on this argument.

[57] Nor do I find it necessary to express a concluded view on the defendants' argument that the plaintiff cannot rely on tripping over the hoses as a particular of negligence because that particular was not given in any notice of claim made under s 280 of the *WorkCover Queensland Act* 1996.

**Observations on quantum**

[58] I find that prior to the accident the plaintiff had a longstanding psychiatric condition. That condition, although able to be contained by treatment, was likely to have persisted to such an extent that the plaintiff would have found it impossible to obtain more than intermittent employment. The physical injuries sustained on 24 February 1998 were very limited in extent and did not include any material organic brain damage. It has not been demonstrated that any of the major problems and ailments from which the plaintiff alleges he suffers after the accident resulted from the physical injuries sustained in the accident.

[59] I accept the opinion of Dr Reid that the plaintiff's injuries are unlikely to give rise to any long term sequelae "and certainly not of an organic nature." If the plaintiff suffered from concussion as a result of the accident, and I accept that that is a possibility, it was only mild. Before the accident, it will be recalled, the plaintiff had been on a disability pension and was attempting to study. One can only speculate as to the degree of success he had experienced or was likely to have in that regard. There is nothing in any of the medical evidence, apart from that of Dr Ebert (which I reject), which encourages the conclusion that the plaintiff would have ceased, with time, to be a disability pensioner and resumed full-time employment or significant part-time employment.

[60] If liability were to be established any award of damages would therefore be extremely modest. An appropriate award of general damages would be $500.00. Past economic loss would be no more than a few hundred dollars and future economic loss, in my view, has not been demonstrated.

**Conclusion**

[61] There will be judgment for the defendants with costs.

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12 s 312 (1)(h).

13 [2000] QCA 258.