

SUPREME COURT OF QUEENSLAND

CITATION: *Schluter v Barney* [2003] QSC 335

PARTIES: **ANNE MARY SCHLUTER**
(Plaintiff)
v
VIOLET BARNEY
(First Defendant)

NOMINAL DEFENDANT
(Second Defendant)

FILE NO: S589 of 2000

DIVISION: Trial Division

DELIVERED ON: 10 October 2003

DELIVERED AT: Rockhampton

HEARING DATE: 18 and 19 August 2003

JUDGE: Dutney J

ORDERS: **Judgement for the plaintiff against the second defendant in the agreed sum of \$245,506.39.**

CATCHWORDS: PERSONAL INJURIES – MOTOR VEHICLE ACCIDENT – LIABILITY – where dispute of fact exists – whether or not first defendant grabbed wheel whilst plaintiff was driving – whether or not the plaintiff's consumption of alcohol affected the outcome

COUNSEL: Mr J.R. Webb for the Plaintiff
Mr D.O. North SC for the Defendant

SOLICITORS: Suthers Lawyers for the Plaintiff
Moray & Agnew for the Defendant

[1] Anne Mary Schluter was injured in a single vehicle accident at Normanton in the Gulf Country on 26th July, 1998.

- [2] Ms Schluter suffered serious spinal injuries, but they are no longer a matter of concern in this trial because the issue is limited to liability. Quantum has been agreed between the parties at \$245,506.39.
- [3] Ms Schluter was a school teacher. She did not have, and had never held, a driver's licence although she had had driving lessons and had held a learner's permit for a number of years. In July, 1998 Ms Schluter was 26 years of age.
- [4] On the day of the accident, Ms Schluter was house-sitting for her then boyfriend who was in Cairns. He had also left the keys to his car with her. Her address on the day was 20 Brodie Street.
- [5] During the day a gathering took place next door to 20 Brodie Street. The gathering was "low key". A few people were sitting around on couches in the back yard. There was loud music and some drinking.
- [6] Ms Schluter went next door a couple of times during the afternoon. Her recollection was that she may have had a beer during the afternoon. During the afternoon she spoke with a person called Quadrio. He was with Violet Barney. Ms Barney was a teacher's aid at the school where Ms Schluter taught. The two had not formally been introduced before this day but Ms Schluter was aware of Ms Barney, having seen her at school.
- [7] At one point during the afternoon Ms Schluter overheard a conversation between Ms Barney and Quadrio. The conversation concerned "doing cones and smoking mull." From time to time they would disappear into the house for five or ten minutes and then come out.
- [8] Around 4 pm a group went to the "Purple Pub". Ms Schluter and Ms Barney went with them. The group were all women. They were not drinking in "a shout" but were all drinking. Ms Schluter had two "Stolles". By a "Stolle" she meant a pre-mixed vodka, lemon squash and wine drink.

- [9] After a period, the group, including Ms Barney and Ms Schluter, left the hotel. Ms Schluter went back to 20 Brodie Street, where she had dinner. After dinner Ms Schluter returned next door. Ms Barney approached Ms Schluter and suggested they go for a drive. Ms Schluter thought that was a good idea and agreed.
- [10] Ms Schluter and Ms Barney went back to 20 Brodie Street where Ms Schluter retrieved the car keys. They tried to open the garage door but could not do so. Two men came and assisted in getting the door open.
- [11] When the key was turned in the ignition the car wouldn't start. Ms Schluter turned off the ignition and said "We won't go." Ms Schluter had been distressed during the afternoon. She had been in Normanton only about 2 months. She discovered that afternoon that she had been the subject of a bet involving the boy-friend whose house she was minding. When Ms Schluter turned off the ignition Ms Barney said something to the effect of, "Oh don't worry Annie. He's a bastard. You can take his car. Go and do what you want to do." Ms Schluter again attempted to start the car, this time successfully. When the engine started the oil warning light stayed on. Ms Schluter turned off the engine again.
- [12] When the engine was turned off on this occasion Ms Barney looked for some oil in the garage. She found some and poured it into the engine. The two women then got back into the car. This time it started without problems. The pair drove off with Ms Schluter as the driver and Ms Barney as the front seat passenger.
- [13] The car headed out of town on the Old Croydon Road. After a short distance the Old Croydon Road becomes a gravel surface. By this time it was becoming dark. The car was travelling at about 60 kph.
- [14] Ms Schluter said that when they first left 20 Brodie Street, Ms Barney was fiddling in the glove compartment. Ms Schluter told her to stop. She then commenced fiddling with the radio and talking about having some fun.

- [15] As the car went onto the gravel surface of Old Croydon Road Ms Schluter said that Ms Barney asked her to go faster. Ms Schluter responded saying she was slowing down. Ms Barney then leaned across the front seat and pulled the steering wheel hard to the left. The car suddenly veered left. Ms Schluter pulled back to the right but overcorrected. The rear of the car lost traction. Ms Barney again pulled to the left knocking Ms Schluter's left arm off the wheel. The car rolled.
- [16] Ms Barney's version of events was quite different.
- [17] Ms Barney said that during the afternoon Ms Schluter had been unhappy about her relationship with her boy-friend. Ms Schluter said that he either had or had threatened to hit her and she spoke about taking his car for a drive.
- [18] Ms Barney said she offered to drive but was told by Ms Schluter that she couldn't because she only had a learner's permit. Ms Schluter did not reveal that she was herself unlicensed. Ms Schluter was fairly adamant that she was going for a drive. Ms Barney admitted to being "tipsy" and thought Ms Schluter was the same. Ms Schluter's driving appeared normal. As they proceeded along the Old Croydon Road Ms Schluter accelerated and was going quite fast. Ms Barney became fearful because of the speed. The car started to fishtail and then hit a bank and rolled over.
- [19] Ms Barney did not recollect smoking marijuana on that day although she was a regular user.
- [20] Since the versions of the two principal witnesses are incompatible it is necessary to make a choice between them as to which I accept.
- [21] The conduct of both principals after the accident is of relevance. At the hospital on the night of the accident Ms Barney told the investigating police officer that immediately before the accident she heard a bang. Her intention was to convey to the police officer the impression that there had been a blow

out. There had not in fact been any such blow out. Ms Barney said that she concocted this version to protect Ms Schuler. Ms Schuler gave evidence that at the scene while they were waiting for the ambulance Ms Barney had said to her, "You're all right. You're not dead. You tell the police you blew a tyre. We had a tyre blowout."

[22] Ms Schuler gave no account to the police at the scene of the accident. She did not give any account to the ambulance officers who attended to her or to the medical staff at Mt Isa or Townsville Hospitals. She gave no account to her boy friend who visited her in hospital in Townsville. Her first report in the terms given in Court was to her parents while she was recuperating in Rockhampton some time afterwards. Her stated reason for not giving any version of the event earlier was that she was afraid Ms Barney might go to gaol.

[23] Ms Schluter's parents put her in touch with her present solicitor. After returning to Normanton Ms Schluter attended the police station with her boyfriend and gave a statement materially in accordance with her evidence before me.

[24] Some time after she returned to Normanton Ms Schluter said she spoke with Ms Barney. Up until that time Ms Schuler had the impression Ms Barney was avoiding her. Ms Schluter said in the course of a short conversation, "Do you remember grabbing the steering wheel?." Ms Barney was said to have replied, "Oh, I might have. I don't remember, it doesn't sound like something I'd do but I don't remember."

[25] On a later occasion at the Central Hotel Ms Barney was in a corner drinking with some people. As Ms Schluter came in Ms Barney went up to her, visibly upset, and said "People in this town hate me because they know what I did." Ms Schluter said, "Violet, why do they hate you, what did you do?" Ms Barney said, "Oh, they think I grabbed the steering wheel."

- [26] Ms Barney said that when Ms Schluter raised the subject of pulling the steering wheel with her, she was at first uncomprehending and when she realised that it was being suggested she had pulled the steering wheel, she was incredulous.
- [27] Shortly after Ms Schluter returned to Normanton, Ms Barney got a job at the Century Mine and left the district.
- [28] While at Century Mine Ms Barney received a message to contact the local police to give a statement about the accident but she did not ever attend.
- [29] Ms Barney seems to have been on the Sunshine Coast by about late 1999. She gave evidence that by that time she had suffered a drug induced psychosis and described herself at trial as a recovered drug addict. By November 1999, she was before the Court in Maroochydore charged with a number of dishonesty offences.
- [30] Ms Barney presented well in Court particularly in view of her subsequent history as disclosed in the evidence. Objectively speaking, however, there are a number of factors that cause me to prefer the version of the accident given by Ms Schluter. The two principals in this accident were barely known to each other. This makes it more likely that Ms Schluter's knowledge of Ms Barney's involvement with marijuana was as a result of overhearing conversations on the day as she said in evidence. Use of marijuana on the day was also consistent with Ms Barney's history over the next twelve months. While the conduct of grabbing the steering wheel is something one would not ordinarily expect, it is not such unlikely behaviour if the person grabbing has spent an afternoon consuming a cocktail of alcohol and marijuana. The allegation that Ms Barney was wanting to liven up the ride is also more likely in those circumstances.
- [31] Not having a license herself I doubt that Ms Schluter would have refused a request from Ms Barney to be able to drive on the basis that Ms Barney only

held a learner's permit. It seems to me that Ms Schluter was more likely to say nothing about the state of their respective licences.

[32] The fact that Ms Barney made up the false account of the blow out, suggested that Ms Schluter adopt it, and gave it to the police is consistent with some personal apprehension if the true story were told. As a passenger, she would have no cause for such apprehension unless she had some direct involvement in the event.

[33] It seems to me to be unlikely that Ms Schluter would have approached the topic, as she did in Normanton after her return, if she were endeavouring to enlist Ms Barney's aid in concocting a story that would support an insurance claim. Both women agree in substance on the way the topic was raised. They disagree in relation to Ms Barney's response. Ms Schluter's approach seems to have been to state the involvement of Ms Barney as a fact rather than endeavouring to elicit support for a false account. Ms Schluter's evidence as to Ms Barney's vague response to her statement is consistent with Ms Barney having a poor recollection of events as a consequence of the use of drugs and alcohol.

[34] Having regard to Ms Barney's subsequent history of drug abuse and that fact that she gave no formal statement to anyone concerning the matter until some years later I have reservations generally about the quality of Ms Barney's recollection.

[35] Ms Schluter's training was as a drama teacher. Her presentation in Court was consistent with that. At times her presentation was over dramatic. Nonetheless, I generally found her a satisfactory witness and for the reasons given I preferred her version over that of Ms Barney. I was satisfied that her explanations for not talking of the accident sooner were legitimate.

[36] In the result, I am satisfied that the principal cause of the accident was Ms Barney's pulling the steering wheel of the vehicle and that this is what caused

Ms Schluter to lose control of the vehicle. I am satisfied that this conduct by Ms Barney was negligent.

- [37] In view of the evidence it is necessary consider whether alcohol consumption played any part in the accident. Ms Schluter had been drinking. The evidence as to how much is somewhat equivocal. A report from the Government Medical Officer discloses that at 8:35 pm her blood alcohol reading was 0.047%. This was about a hour and three quarters after the accident. At an average rate of absorption on an empty stomach this would translate to a blood alcohol reading at the time of the accident of 0.082%. The evidence suggested that Ms Schluter had had a meal between her last drink and the accident. In evidence Dr Carroll gave the range depending on the rate of absorption as between 0.065% and 0.099%, but indicated it could be lower if a substantial meal had been eaten because the effect of such a meal would be to delay the absorption of alcohol into the bloodstream. According to Dr Carroll, some experts have estimated that the effect of a substantial meal can be to lower alcohol readings by up to 20% because the alcohol remains in the stomach rather than being absorbed.
- [38] In the end result Dr Carroll conceded that Ms Schluter's blood alcohol reading at the time of the accident may well have been similar to the reading at the time the test sample was taken. In other words it was about the legal limit for an open licence, either slightly higher or slightly lower. In view of the gross nature of Ms Barney's interference with the manner of Ms Schluter's driving, however, I am not satisfied that the alcohol consumption had any bearing on the outcome. It seems probable to me that having the steering wheel pulled suddenly and unexpectedly on an unfamiliar gravel road in failing light would result in loss of control and an accident whether or not the driver was affected by alcohol.
- [39] I am satisfied that the vehicle was not travelling at an unduly fast speed, Ms Schluter was managing the vehicle competently, as acknowledged by Ms Barney, and Ms Schluter did not otherwise contribute to the accident.

[40] In the circumstances I give judgement for the plaintiff against the second defendant in the agreed sum of \$245,506.39.