# SUPREME COURT OF QUEENSLAND

[2003] QSC 361
**File No 69/98**

BETWEEN: **PETER JOHN HOLDEN**

Plaintiff

AND:

**IAN JOHN HOLZHAUSER**

First Defendant

AND:

**FORTIS INSURANCE LIMITED**
**(ACN 004 167 953)**

Second Defendant

## MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON: 7 October 2003

HEARING DATE/S: 1 October 2002 – 3 October 2002

ORDER: **Judgment awarded for the plaintiff against the defendant's in the sum of $117,460.31**

**Parties to make submissions as to costs**

CATCHWORDS: NEGLIGENCE – PERSONAL INJURY – MOTOR VEHICLE

NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY – DAMAGES – collision between motor vehicle turning into path of motorcycle – whether defendant failed to keep proper lookout – whether plaintiff contributed to the collision – where plaintiff thought defendant was turning left – where plaintiff was in process of overtaking defendant car

COUNSEL: Mr D. Turnball for the plaintiff's

Mr M.D. Glen for the defendant's

SOLICITORS: Dean & Bolten for the plaintiffs

Gadens Lawyers for the defendants

[1] **MOYNIHAN J:** Shortly after 7:00am on 19 February 1996 the plaintiff was riding his Honda motorcycle east along Mulgrave Road, Cairns. Mulgrave Road is a busy

major arterial road. It has a generous two lane bitumen carriage way and a wider road reserve. It is straight and flat and the day was fine and clear. The plaintiff intended to turn right into and proceed down Newell Street before turning into a street running off it in which his place of work was situated.

[2] At about the same time the first defendant was driving his Ford Maverick vehicle east along Mulgrave Road. He too was travelling to work and intended to turn into Newell Street and drive down it to his place of work which was on his right.

[3] The plaintiff's evidence of the events leading up to the collision between his motorcycle and the vehicle being driven by the first defendant is as follows. He saw his vehicle come out of Tills Street. It entered Mulgrave Road from the plaintiff's left on the eastern (the furthest from the plaintiff) side of the Mulgrave Road Newell Street intersection. It crossed the carriageway of Mulgrave Road, turned right, and drove along what was described as a service road running parallel to the carriageway. The vehicle then turned left into Newell Street cutting the corner to do so and proceeded along it.

[4] The first defendant tells a different story. His evidence is that he too was driving east along Mulgrave Road and turned right into Newell Street, inferentially shortly before the plaintiff.

[5] Newell Street is also straight and flat with a wide road reserve and a generous bitumen two-way carriageway. The road reserve adjacent to the carriageway is in some areas sealed to the curb; in other parts it is gravel. There are driveways entering along Newell Street from adjacent premises and side streets coming from the left and the right.

[6] The plaintiff's evidence is to the effect that, having cut the corner into Newell Street; the first defendant drove in front of him along the left hand extremity of the carriageway. As his vehicle approached the junction of Newell and Sturt Streets it moved partly off the bitumen carriageway, although no indicator was activated, the plaintiff formed the view that it was going to turn left into Sturt Street. It did not; rather it crossed the junction and continued along the left hand fringe of the bitumen. It was travelling more slowly than the plaintiff and he determined to overtake it. After he had committed himself to doing so the first defendant's vehicle, suddenly and without any indicator turned right across his path and he collided with it.

[7] The first defendants' account is that he turned right intending to park his vehicle off the carriageway but on the road reserve under some trees in the vicinity of his work place at 187 Newell Street. He activated the right turn indicator, as he habitually did, in the vicinity of Lee Holman's garage some 80 or so metres back from where he commenced to turn. He checked his rear vision and side mirror prior to the turn but did not see the plaintiff before the collision.

[8] The plaintiff ran into the front right hand end of the first defendant's vehicle, the front end of which was on the gravel and the van on the bitumen. He landed on his back near some wheelie bins on the footpath.

[9] Essentially I accept the first defendants account. To travel from his home to his place of work involved travelling along Mulgrave Road and then in an easterly

direction and then turning right in Newell Street. He had no reason to be in Tills Street or the far side of the Mulgrave Road / Newell Street intersection.

[10] The plaintiff did not mention the first defendant's deceptive move left or sudden turn without indication at the scene of the accident. That might be explicable by the shock of events. He did not however mention it to the investigating police office, Constable Murphy, when interviewed him on the 15 March 1996. I accept Murphy's account of the interview. During it the plaintiff agreed that the collision could have been avoided if he'd taken more time and paid more attention, he did not mention a move left.

[11] The plaintiff did not defend a breach of the traffic regulations by overtaking to the right a vehicle turning right. He says he took legal advice. He had a personal injury action in contemplation; he says he believed he was in the right and a conviction has evidentiary consequences.

[12] The statement of claim, presumably consistent as with the plaintiff's instructions does not plead a deceptive movement left but does plead as a particular of negligence that the first defendant failed to keep as near as practicable to the left.

[13] Neither a notice of claim of 28 October 1996 (exhibit 6) nor a notice of proposed claim of 7 August 1996 (exhibit 7) refers to the plaintiff being misled by a move to the left in circumstances where it might be expected it would. Finally I note that the plaintiff admitted he worked for cash in hand while on Centre Care benefits, while this is not a major consideration it is correctly submitted that this reflects adversely on his credit.

[14] The plaintiff entered Newell Street some distance behind the first defendant. He was travelling at a greater speed particularly when it started to slow down preparatory to executing the right turn. I am not satisfied there was a deceptive move to the left. The plaintiff, determined to overtake the first defendant's vehicle on its right hand side, did not see the right turn indicator and when he appreciated the vehicle was turning right it was too late to avoid the collision.

[15] On the other hand there is no satisfactory explanation for the first defendant failing to see the motorcycle, its headlight was on, in his rear review mirror. Had he done so the collision could have been avoided. In my view speed was not a significant contribution to the accident. Neither party kept a proper look out.

[16] The circumstances being as I have found them the plaintiff's departure from the relevant standard of care was greater than the first defendant's. I apportion liability 80% against the plaintiff and 20% against the first defendant. I turn to the issue of damages.

[17] The plaintiff was born on 14 April 1968 in Hamilton, Victoria. He left school in year 10 and, having served his apprenticeship, became a fitter and turner. He worked in that trade and as a labourer in and around Hamilton until he and his partner Fiona Holden, whom he had met at school, came to Cairns in early 1995. They came for lifestyle reasons and better employment prospects. The plaintiff's father lived not far away. Their daughter was born on 6 December 1997 and they married in July 1998.

[18] When the plaintiff attempted to sit up after the accident he felt severe pain in his lower back. He was taken by ambulance to the Calvery Hospital were he was diagnosed as having suffered a fracture of the upper surface of the body of L1. This was treated conservatively by bed rest and analgesics and discharged after a few days. The plaintiff's father and Miss Holden cared for him in the three weeks or so after he came home. It is agreed $3000 should be allowed for the father's contribution.

[19] The plaintiff embarked on physiotherapy but this aggravated his back pain. He attempted to return to work on light duties but was unable to persist because of back pain and he sought medical attention.

[20] An MRI scan of 28 June 1996 demonstrated a healed L1 fracture, totally degenerative T12/L1 disc space, significant desiccation and degenerative changes in the L4/5 and L5/S1 discs and signs consistent with the traumatic elevation of a ligament at the back of the body of L5. These finds converted a relatively optimistic prognosis to something more serious.

[21] On 22 April 1997 the plaintiff was operated on under general anaesthetic and bone grafting was carried out between L4, L5 and S1. He was discharged on 27 April 1997. His progress appeared to be satisfactory. He wore a lumbosacral support corset and undertook a course of exercise. He has, however, continued to experience symptom and disability on account of the condition of his spine.

[22] In the six or so years since the accident the plaintiff has been much assessed and reported. He has been subjected to assessment and report across a wide range of health care discipline ranging from orthopaedics, physician, psychiatry and physiotherapy, rehabilitation and vocational consultants and occupational therapists. By and large this activity seems to have been directed to compensation and litigation issues rather than treatment.

[23] The plaintiff's back is stable and it is unlikely that any medical or surgical treatment will improve his condition. A regular exercise program and a good level of general fitness will help him deal with it.

[24] There is a difference of medical opinion as to the extent to which his present orthopaedic disability is attributable to the injuries he's suffered in the accident of 19 February 1996. It is likely that the plaintiff's pre-existing spondylolysis would have become symptomatic at some stage but a difference of opinion as to when this would occur. I note that the plaintiff's occupation involved placing stress on his back. The evidence in my view takes it no further than that the condition may have become symptomatic some indeterminate time five years or more years into the future, may not have become symptomatic until his forties. The plaintiff may have seen out his working life without the necessity for surgical intervention.

[25] I note that the plaintiff was injured in a motor accident in 1985/1986 and suffered relatively serious injuries, which however healed relatively quickly and caused no long-term pain or disabilities. I am satisfied that the major cause of the plaintiff's back disability is the accident of 19 February 1996.

[26] The plaintiff has been diagnosed psychiatry as suffering an adjustment disorder with disturbance of emotions and conduct; there are differences of opinion as to the degree the disorder and its implications. This condition is in my view attributable

to, the collision with the first defendant, the ongoing pain and disabilities following it and the effect they have on his earning capacity and the restrictions they place on his day-to-day functioning. It adds to his disability.

[27] As a consequence of the accident of 19 February 1996 the plaintiff walks with a limp, suffers back pain and is unable to stay in the same position for a long time and consequently gets up and moves about. He has difficulty in sleeping, is moody and frustrated. His stiff lumbar spine consequent on the 22 April 1997 fusion makes it difficult or impossible for him to engage in activities or occupations involving bending, leaning, crouching, pushing or pulling.

[28] Before his accident the plaintiff was active in sport and outdoor recreational activity, bush walking, four wheel driving and scuba diving. He had tried parachuting and bungy jumping and he rebuilt four-wheel drive vehicles. He can no longer enjoy such activities.

[29] He is a regular user of analgesics on prescription from a general practitioner or purchased without the need of prescriptions.

[30] The plaintiff finds it very difficult to get going in the morning and to walk other than short distances. He looks after the child particularly while his wife is working and provides some assistance to his wife in the conduct of her business. He does light cleaning work although they also use a cleaner.

[31] The plaintiff was not in constant employment prior to coming to Cairns but in my view that is a consequence of the economic conditions around Hamilton, they fluctuated with the wool market, than to any disinclination on his part.

[32] The plaintiff obtained employment in Cairns with Subsee Explorer Australia which fabricated and repaired aluminium products, particularly boats, underwater viewers and the like. The plaintiff exhibited particular competence as a fabricator welder particularly of aluminium. He was a competent tradesman with above average skill and application, well thought of by his employer and he took satisfaction from his success.

[33] In my view had he not been injured the plaintiff would have continued to obtain work in his chosen trade, he was less vulnerable to market fluctuations than the average tradesman because of his above average skills, application and expertise.

[34] Ms Holden worked full time as a hairdresser. In August 1997 the plaintiff's disability, Ms Holden's pregnancy and their financial predicament due to his loss of income and restrictions on her working ability led the plaintiff and his partner to go to Adelaide. Her father lived there and she had previously worked there.

[35] After a few weeks they decided to return to Hamilton. Ms Holden's mother offered them subsidized accommodation and they had support from friends and family. Shortly after they began to live in Hamilton the plaintiff obtained a disability pension and Ms Holden obtained employment as a hairdresser. In August 2000 or thereabouts she commenced her own hairdressing business, operated from their residence, obtained part-time work at a video store, the Hamilton Performing Arts Centre and as a night mistress at a boarding school. She wants to reduce her work commitments and spend more time with her child.

[36] There is no doubt that the plaintiff's disabilities consequent on the accident of 19 February 1996 have placed great stress on his marriage, more domestic work falls on his wife, he is unable to maintain the house and the yard to the extent of which he was able to prior to the accident. He is unable to service vehicles, he is unable to lift the child.

[37] Put shortly the plaintiff is unable to pursue his chosen occupation at which he was successful and which was rewarding. He is precluded from most of if not all of the recreational activity, which he enjoyed prior to the accident of 19 February 1996. The plaintiff has not worked since the accident and considers that he is unable to do so.

[38] The plaintiff has residual limited earning capacity but he is significantly restricted in working in occupations for which he is suited by reason of his qualifications and work experience. He is precluded from pursuing occupations involving heavy lifting or repetitive bending, which involved being seated or otherwise having to a maintain position for any length of time or prolonged activity. He is unlikely to be able to exercise his residual earning capacity other than intermittently in a low paying occupation.

[39] The plaintiff must compete on the labour market with other able bodied people and he has been out of the market for a long time. He will not be attractive to employers. In any event work is scarce in Hamilton where he has chosen to live because of the family support available to him, his wife and child.

[40] I turn to consider the plaintiff's damages in turn of the conventional heads of damage. In doing so I mention three things; first counsel have agreed either the amount or the rate in respect of many of the heads of damage. Secondly, as acknowledged by counsel in the course of addresses, many of the remaining heads of damage are not susceptible of mathematical calculation because of the lack of precision and uncertainties of the evidence; something of a global approach is called for. I note the plaintiff has received;

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| Centre Link payments | $38,135.00 |
| Workcover Lump Sum | $25,400.00 |
| Workcover Benefits | $31,768.00 |

[41] I assess damages in terms of the following categories:

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| 1. General Damages; (agreed) | $52,500.00 |
| Interest (discounted to reflect payment by Workcover) | $1,000.00 |
| 2. Special damages (agreed including interest) | $17,126.00 |
| 3. Past economic loss discounted for contingencies. | $156,000.00 |
| (agreed nett wage per week $500) | |
| Interest on 74,352 (reflecting payments) x 4.75% x 6.6 | $23,809.35 |
| 4. Past Superannuation at 6% | $9,360.00 |

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| 5. Future economic loss;<br>I adopt a nett weekly income of $594 a week the present value of which is $498,268 and discount it 15% for general contingencies and 30% for pre-exiting condition and residual work capacity. | $268,000.00 |
| 6. Future Superannuation; at 9% | $24,120.00 |
| 7. Past Gratuitous Care<br>It is agreed that $2,000 is attributable to the care provided by the plaintiff's father immediately following his operation. An hourly rate of $11 is agreed. The degree of this care has diminished over the years. The most satisfactory approach I think is to take a figure of 3 hours a week. | $13,205.00 |
| Interest at 5% | $3,737.00 |
| 8. Future Gratuitous Care<br>I accept that in future the plaintiff will be reliant on various degrees of assistance of others as a consequence of the disability he suffered from the accident of 19 February 1996. He is, however, able to do much to look after himself, it simply involve more time and effort than would have otherwise have been the case. Since he will not be in regular or full time work he will be able to do more for himself. | $10,000.00 |
| 9. Fox v Wood; Agreed | $8,444.20 |
| **TOTAL:** | **$587,301.55** |
| **I award -** | **$117,460.31** |

Written submissions as to costs should be exchanged and forwarded to my associate within 14 days of the public date of these reasons.

As I understand the submissions made at trial there are no orders to be made as to refunds or changes. If that is not the case it can be dealt with in the same way at the costs submission.