SUPREME COURT OF QUEENSLAND

CITATION:	*Hirst v Nominal Defendant* [2004] QSC 272
PARTIES:	**GREGORY WARWICK HIRST** (plaintiff) v **NOMINAL DEFENDANT** (defendant)
FILE NO/S:	BS 7921 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	27 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	17, 18, 19 August 2004
JUDGE:	McMurdo J
ORDER:	**Judgment for the plaintiff in the sum of $322,096.32**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – MISCELLANEOUS CASES – where plaintiff was on-duty police officer driving a marked police car – where he measured that another car was speeding – where it failed to pull over after plaintiff signalled for it to stop – where pursuit – where police car collided with another vehicle – whether pursued driver owed a duty to avoid a risk of injury to the plaintiff through a deliberate response of the plaintiff TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – whether chain of causation broken by plaintiff's "voluntary" act of taking pursuit and driving at high speeds – whether question of causation should be answered with reference to scope or content of the duty of care – whether plaintiff's injuries were a result of pursued driver's negligence TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – ROAD ACCIDENT CASES – whether taking pursuit was reasonable in the circumstances – whether plaintiff was contributory negligent TORTS – NEGLIGENCE – ROAD ACCIDENT CASES –

ACTIONS FOR NEGLIGENCE – APPORTIONMENT OF DAMAGES – where plaintiff claims to suffer permanent physical disability and post traumatic stress disorder as a consequence of the accident – where calculation of economic loss – whether damages discounted for contingency that another event would result in same condition

Civil Liability Act 2003, s 60(2)
Motor Accident Insurance Act 1994 (Qld), s 31, s 55E

Environment Agency v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22, cited
Fox v Wood (1981) 148 CLR 438, applied
Haber v Walker [1963] VR 339, considered
Hopkins v WorkCover Queensland [2004] QCA 155, cited
March v E & M H Stramare Pty Ltd (1991) 171 CLR 506, applied
Marshall v Osmond [1983] 2 All ER 225, cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1, applied
Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360, cited
Schulz v Morrison (1984) 1 MVR 34, cited
Scott v Stanford (1991) 14 MVR 85, distinguished

COUNSEL: M Grant-Taylor SC for the plaintiff
K N Wilson SC for the defendant

SOLICITORS: Shultz Toomey O'Brien for the plaintiff
Hunt & Hunt for the defendant

[1] **McMURDO J:** On the night of 16 August 2001, the plaintiff was an on-duty police officer driving a marked police car along the Bruce Highway near Gympie. He saw a blue car speeding in the opposite direction, and he performed a U-turn and began to follow it, signalling with his lights for the driver to stop. The car sped away from him and he decided to pursue it. A few kilometres on, he lost control of the police car and it collided with another vehicle.

[2] The plaintiff claims that he suffered a physical injury and a post traumatic stress disorder from this accident, and that it was caused by the negligence of the driver whom he was pursuing. The Nominal Defendant is sued on the basis that the car cannot be identified, as is now conceded.[1]

The issues

[3] The negligence of the driver of the blue car is apparently conceded, but the defendant denies that this negligence was a cause of the plaintiff's accident. The

[1] The defendant conceding that proper inquiry and search have failed to establish the identity of that motor vehicle: *Motor Accident Insurance Act* 1994 (Qld), s 31(2)

defendant claims that the sole cause of the accident was the plaintiff's carelessness. Alternatively, the defendant says that there was at least contributory negligence, for which any award should be reduced by two-thirds.

[4] The plaintiff claims to have suffered a permanent physical disability from a musculo-ligamentous injury to the cervical spine. The defendant denies that such an injury caused him any disability beyond a few weeks from the accident. It is common ground that the plaintiff suffers from a post traumatic stress disorder to which this accident at least contributed. It is also common ground that there was at least one other contributing and earlier incident. The plaintiff's case is that absent the accident the subject of this case, his psychiatric condition would have allowed him to continue his police career instead of having to retire as medically unfit, as he did on 11 January 2002. But the defendant argues that, absent this incident, the plaintiff was very likely to have developed his present condition by now, so that any award must be heavily discounted.

The accident

[5] The plaintiff's vehicle collided, not heavily, with a trailer pulled by a car carrying Mr and Mrs Weldon. To the extent that their versions at all differ from the plaintiff's evidence, the differences are not important for the outcome of this case. Save in a few respects which I shall mention, I accept the plaintiff's account which is as follows.

[6] The plaintiff worked in the Traffic Branch at Gympie. At about 10 O'clock at night, he was driving alone on the Bruce Highway towards Gympie, when he saw the blue car coming towards him. With a radar detector, he measured its speed at 126 kph. He activated the revolving lights on the police vehicle, flashed his head lights and moved towards the left hand side of the road, thereby indicating that he wanted the other car to pull over. It went straight past him and the plaintiff performed a U-turn and followed him. The plaintiff saw that the blue car was accelerating and he flashed his headlights again as an indication to the other car that it should stop. There were three vehicles in front of the blue car and travelling in the same direction, which made the plaintiff think that the blue car would have to slow down and that he could intercept it. Instead the blue car accelerated, dangerously overtaking the three vehicles by crossing double centre lines. At that point the plaintiff activated all of the lights and sirens on the police car. He endeavoured to send a radio message that he had began a pursuit, i.e. he tried to "call the pursuit", but the microphone fell from his grasp on to the floor. He was then behind the three vehicles and the blue car was in front of them and still accelerating. He remained behind them until there was an appropriate place in which to overtake them, having regard to the road markings. He then accelerated past them and was able to grab the microphone and call the pursuit. Shortly afterwards, the blue car approached the rear of the Weldons' vehicle and trailer. The blue car overtook it over double centre lines and disappeared over the crest of a hill. As the plaintiff came over the crest he saw that the blue car had crossed back on to the left hand side of the road, ahead of a semi trailer travelling towards them. Mr Weldon said that he was driving at about 100 kph when he was overtaken by the blue car, which he said made him feel as if his own car was stationary, so fast was

the blue car travelling. And the plaintiff says that as his police car passed the three vehicles, he recalls that he was travelling at about 175 kph. I infer that the blue car was travelling at at least 160 kph as it passed the Weldons.

[7] The plaintiff says that he saw the Weldons' vehicle before it went out of sight for a short time over that crest, and that in an anticipation of the Weldons' vehicle, he "backed off" as he was coming over the crest. He says that when he again saw the Weldons' vehicle, the brake lights on its trailer had lit up, in consequence of which the plaintiff braked heavily and his vehicle started to skid. He says he:

> "… backed off the brakes, moved the car to the right hand side of the road to allow myself a bit more room to stop and pull in behind (the Weldons). I then hit the brakes as hard as I could and the car just went into a flat spin, (and) hit the side of the trailer. I could see the (semitrailer) approaching towards (my) driver's door. At that stage I thought I was a goner."

He says that his car continued spinning and the oncoming semitrailer passed between it and the Weldons. The plaintiff believes that he not only collided with the Weldons' trailer but with the rear wheels of the semitrailer. He was by now stationary but he was able to then drive to where the Weldons had stopped at the bottom of the hill. The semitrailer did not stop.

[8] I am prepared to accept that the plaintiff did slow down somewhat from his 175 kph as he came to the crest of this hill. But I infer that still the plaintiff was driving very fast and probably had a speed of at least 150 kph. I am not prepared to accept that the Weldons' vehicle braked as the plaintiff now says. The Weldons could not deny that their vehicle braked but they had no recollection of it, and it does not seem to be likely that they did so. The plaintiff may have believed that they braked because he was alarmed by the closeness of their vehicle to his as he came over the crest of the hill. In that split second, the plaintiff could have misunderstood the rear lights on Mr Weldon's trailer, which Mr Weldon had built himself, to be brake lights.

[9] The defendant challenges the plaintiff's version in two further respects, on the basis of the evidence of engineers who have examined the skid marks at the scene and the damage to the police vehicle and Mr Weldon's trailer. Although the plaintiff also called an engineer to say something of what must have happened to the police car, the expert evidence called by the defendant was hardly challenged. The first of these matters is that the defendant argues that the police car must have swerved hard to the left after it began to skid to the right of the Weldons' car. The second is that the defendant argues that the police car did not come into contact with the semitrailer. Ultimately neither point is significant for the outcome of this case, and the plaintiff did not press for findings that his version should be accepted in relation to either of these matters. The plaintiff's case is argued on a basis, accepted by the defendant's expert witnesses, that the plaintiff lost control of his car because he was travelling "very, very fast". What precisely occurred as he lost that control, such as whether he swerved left or also hit the semitrailer, is unimportant. In particular, if the plaintiff was not already driving negligently before he lost control, he could not be said to have been negligent in his response to that lack of control.

[10] I find that the plaintiff lost control by driving so fast that he found himself too close to the Weldons' car as he came over the crest and again saw it. At that point such was his speed and position that either he had to take evasive action or he left himself insufficient time to properly judge what he should do. In either case, he was travelling so fast that his ability to control his car was very much less than it should have been.

Causation

[11] The defendant concedes that the driver of the unidentified car was negligent, but argues that the negligence was not relevantly causative of the accident. This was said to be because the accident was due to the plaintiff's driving, and his "voluntary" act of pursuing the blue car by driving as fast as he did. The argument strongly relied upon what Smith J said in *Haber v Walker* [1963] VR 339 at 357-358.

[12] Causation is a factual question, which is to be answered not simply by the application of a "but for" test but by reference to commonsense and experience and is one into which considerations of policy and value judgments necessarily enter: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506. The question cannot be answered in this way without reference to the particular content or scope of the duty of care owed by a defendant and of what was involved in its breach. Mason CJ referred to the relevance of identifying the particular duty of care in his judgment in *March v Stramare* at 517-518:

> "The fact that the intervening action is deliberate or voluntary does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct. In some situations a defendant may come under a duty of care not to expose the plaintiff to a risk of injury arising from deliberate or voluntary conduct or even to guard against that risk: see *Chomentowski v Red Garter Restaurant Ltd* (57). To deny recovery in these situations because the intervening action is deliberate or voluntary would be to deprive the duty of any content."

[13] Similarly, in *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, Lord Hoffman at 31-32 said:

> "These examples show that one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. Does the rule impose a duty which requires one to guard against, or makes one responsible for, the deliberate acts of third persons? If so, it will be correct to say, when loss is caused by the act of such a third person, that it was caused by the breach of duty. In *Stansbie v Troman* [1948] 2 K.B. 48, 51-52, Tucker LJ referred to a statement of Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956, 986, in which he had said:

> "In general … even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause."

Tucker LJ went on to comment:

> "I do not think that Lord Sumner would have intended that very general statement to apply to the facts of a case such as the present where, as the judge points out, the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened."

Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a question of common sense fact; it is a question of law. In *Stansbie v Troman* the law imposed a duty which included having to take precautions against burglars. Therefore breach of that duty caused the loss of the property stolen. In the example of the vapour-filled drum, the duty does not extend to taking precautions against arsonists. In other contexts there might be such a duty (compare *The Fiona* [1994] 2 Lloyd's Rep 506, 522) but the law of negligence would not impose one."

[14] What then was the content or scope of the duty owed by the unidentified driver? I infer that the driver must have been aware that he was being pursued by the plaintiff, at least once the siren and all of the lights on the police car had been activated. The driver thereby knew, or should have known, that if he drove as fast as he did, there was a real prospect that the plaintiff would seek to catch him and in doing so would drive so fast that he could lose control of the police car and cause injury to himself or others. The driver thereby owed a duty not to drive as he did, and to avoid any further pursuit by pulling over. Of course, this was but one part of a more general duty of care owed by the unidentified driver. But this specific duty is to avoid a risk of injury which could occur through a deliberate response of the plaintiff to that driver's conduct. It was foreseeable that the plaintiff would judge it appropriate to drive as he did, motivated by a desire to uphold the law. He was obliged to avoid the prospect of the plaintiff taking the deliberate step of driving as he did, compromising the plaintiff's own safety in an endeavour to apprehend the driver.

[15] What occurred was then precisely the kind of damage which it was the driver's duty to avoid. In this case therefore, it provides no answer to the plaintiff's claim to say that his loss came from his own deliberate act. The point is starkly demonstrated by *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, which concerned the liability in negligence of police for the suicide of a prisoner in police custody. The specific duty owed was to guard against that deliberate act of the prisoner, so that the deliberate nature of the act did not negative causation where the defendant was in breach of that specific duty. At 367-368 Lord Hoffman said:

> "On the first question, Mr Pannick relied upon the general principle stated in *Hart and Honoré, Causation in the Law*, 2nd ed (1985) p 136: 'the free, deliberate and informed act or omission of a human being intended to exploit the situation created by a defendant, negatives casual connection.' However, as *Hart and Honoré* also point out, at pp 194-204, there is an exception to this undoubted rule in the case in which the law imposes a duty to guard against loss caused by the free, deliberate and informed act of a human being. It would make nonsense of the existence of such a duty if the law were to hold that the occurrence of the very act which ought to have been prevented negatived causal connection between the breach of duty and the loss. This principle has been recently considered by your Lordships' House in *Environment Agency (formerly National Rives Authority) v Empress Car Co (Abertillery) Ltd* [1998] 2 WLR 350. In that case, examples are given of cases in which liability has been imposed for causing events which were the immediate consequence of the deliberate acts of third parties but which the defendant had a duty to prevent or take reasonable care to prevent."

To the same effect is the statement by Mason CJ in *March v Stramere* which I have set out above.

[16] In the same way, the causative chain is not broken by the negligent act of another, at least where it represents the very contingency which the defendant was obliged to avoid. *March v Stramere* provides an example, in which Mason CJ also said at 518-519:

> "As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things. In such a situation, the defendant's negligence satisfies the "but for" test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it."

[17] In *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7, Deane, Dawson, Toohey and Gaudron JJ said:

> "The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. *An example of such a case is where the*

> *negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision.*" (Emphasis added)

[18] Further, the defendant's submission appears to misapprehend the reference in *Haber v Walker* to a "voluntary" act, as severing the causal connection. In that judgment Smith J made it clear that he used the word "voluntary" in a particular sense, as referring to the exercise of a "free choice" and not an act "made under substantial pressure created by the wrongful act".[2]

[19] The defendant also relied upon *Scott v Stanford* (1991) 14 MVR 85, a decision of the Supreme Court of Western Australia. The case has some factual resemblance to the present one in that a police officer involved in the pursuit of a motorist who was avoiding apprehension was injured when she lost control of the police car and it overturned. This was not a common law action, but an appeal from a magistrate's decision that the motorist should be acquitted of dangerous driving causing bodily harm to the police officer, because the element of causation was not established. The judgment is of limited assistance to the present case for at least two reasons. First, like the present case, it involved a question of fact. Secondly it was a decision in the context of attributing criminal responsibility, as Murray J emphasised at 89 and 93.

[20] It is not the case that any damage caused by a collision involving a police vehicle, in the course of a pursuit, could be said to be relevantly caused by the instigator of the pursuit. It is necessary to look at all of the circumstances by which damage resulted. Cases can be imagined where a police officer's driving in a particular respect could not be fairly attributed to the defendant. In the present case however, it is from the very high speed at which the pursuit occurred that the plaintiff lost his ability to effectively respond to the presence of another vehicle which he saw in front of him, and the speed of the pursuit was of the other driver's making. The unidentified driver drove in breach of a specific duty not to make it likely that a police officer would take an abnormal risk in trying to apprehend him.

[21] In my view, as a matter of logic, commonsense and policy, the driver's negligence was a cause of the accident and any resultant damage.

Contributory Negligence

[22] The standard of care relevant to this issue is the same as that which applied to the duty which the plaintiff undoubtedly owed to other road users as he undertook this pursuit. It is not, and could not be, suggested that he owed no such duty of care because he was engaged in this particular task. But the relevant standard is according to what was reasonable in all of the circumstances, and one of the circumstances was that the other driver was not only driving dangerously, but may

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[2] Thus when McHugh J cited *Haber v Walker* in *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 55, his Honour referred to the breaking of the causal connection by "the free, informed and voluntary act of the plaintiff" or a third party.

have been attempting to evade the plaintiff for reasons to do with other criminal activity. The relevance of this as a circumstance by which the police officer's conduct should be assessed, was acknowledged by the Court of Appeal in *Marshall v Osmond* [1983] 2 All ER 225 at 227 and in this court by Thomas J in *Schulz v Morrison* (1984) 1 MVR 34 at 37. Absent this particular circumstance, his driving would plainly be regarded as a breach of a duty to other road users, and as contributory negligence. But the plaintiff argues that it was not unreasonable for him to pursue the vehicle even at high speed, this being a matter of judgment as to whether the circumstances warranted the pursuit. He then argues that he lost control not through a failure to exercise such care and skill as could be reasonably required of him in the context of a high speed pursuit, but through an error of judgment not amounting to negligence.

[23] The respective arguments require some assessment of the reasonableness of the pursuit itself. The practice of high speed pursuits by police vehicles has been controversial, as is demonstrated by the report of the Crime and Misconduct Commission on the subject which was published last year.[3] When this accident occurred, police officers acted according to an Operations Manual which provided guidance only in relatively general terms. According to that document, officers had to balance the risks involved against the necessity for the pursuit, and pursuits were to be conducted only when "… the known circumstances are sufficient to justify a pursuit and identifying or apprehending the occupant(s) of the pursuit vehicle at a later time is unlikely". The factors to be considered by the officer in assessing the risk from the pursuit included the paramountcy of the safety of all persons, the known circumstances that initiated the pursuit, the possible consequences, the manner in which the pursued vehicle was being driven, the speed of both vehicles and any other relevant circumstances, such as road, weather, visibility and other traffic conditions. The pursuit was to be abandoned "if the risk outweighs the necessity for, and known circumstances of, the pursuit". The Manual appears to suggest that in some cases at least, a pursuit might be justified although it created a risk which would not exist from the ordinary and safe driving of the police car. Undoubtedly, police can be confronted with a difficult dilemma in some such situations, and courts should not too readily conclude, with the benefit of hindsight, that a pursuit was unreasonably undertaken.

[24] However, in the present case, the known circumstances of the offender which led to the pursuit were that he failed to pull over after being detected as exceeding the speed limit by about 25 kph. The result of the pursuit was that the other vehicle drove yet much faster, and the police car drove at 170-180 kph at night on a highway with but one lane in each direction and with a number of other vehicles being encountered within a minute or so. The known circumstances of this offender in my view did not justify the pursuit at least once the vehicles reached anything like 175 kph. I have no doubt that the plaintiff was endeavouring to do his duty. However, in all the circumstances the speed at which he was driving made for a high risk that he would fail to adequately control his car, and in my view his conduct was negligent. It was more than an error of judgment to be driving so fast

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[3] *Police Pursuits: A Law Enforcement and Public Safety Issue for Queensland:* Crime and Misconduct Commission 2003

especially as he had seen the Weldons' vehicle ahead of him earlier and should have anticipated its presence as he came over the crest.

[25] How then should the responsibility for the accident and any injury be apportioned? It was of course that the other driver's negligence which led to the pursuit and there is no apparent justification for that driver's conduct. The plaintiff's blameworthiness, whilst not negatived by the fact that he was genuinely attempting to apprehend an offender, is somewhat mitigated by that circumstance. In my conclusion, the appropriate apportionment is to reduce any damages by one-third.

Neck Injury

[26] I find that the plaintiff sustained a whiplash injury to his neck. But I am not persuaded that the injury was as serious as claimed. I find that the effects of this injury had passed within a few months of the accident.

[27] Dr Macneil, a surgeon, saw the plaintiff on 20 August 2002. According to his report of that date, the plaintiff had a whole person permanent impairment of 14 per cent due to his neck injury. This opinion was based upon information from the plaintiff's description of his medical history and symptoms. Dr Macneil recorded some of that information as follows:

> "All of his activities around the home are modified. He carries out gardening but is much slower than previously and his daughter has had to take over the lawn mowing. His son does any heavy lifting and his wife now does most of the car driving.
>
> The client's chief recreation prior to his injury was fishing, but this is now impossible because of the movement of waves jolted his boat and he has been obliged to sell it."

[28] Yet two months after the date of Dr Macneil's report, the plaintiff and Mrs Hirst went fishing at the Sunshine Coast. A video recording shows the plaintiff manually winching a boat from the water on to a trailer. It also shows him in and around the boat and his car, moving without any apparent difficulty. It was submitted that the defendant failed to observe the rule in *Brown v Dunn*, because it was not specifically put to the plaintiff that he had not sold his boat. I accept that it is possible that he had sold his boat as he told Dr Macneil, because the plaintiff was not given an opportunity to explain that matter. But he was able to go fishing, as he agreed in cross-examination. He explained the October fishing trip by saying that he felt better on some days than on others, and that this must have been a "good day". If that were the case, I do not understand how he could truthfully tell Dr Macneil that he had given away fishing entirely. His misstatement to Dr Macneil about this matter, coupled with what appears on the video recording of the fishing trip, leaves me unpersuaded that he still had any of the physical symptoms upon which Dr Macneil made his assessment.

[29] A further reason for this conclusion is the evidence of his general practitioner, Dr Heath. On 23 November 2001, Dr Heath wrote a report to WorkCover in which he described the physical and psychological effects of the accident. According to that report, the plaintiff had suffered a neck injury but was "now physically recovered", and his unfitness for police duties was "on the basis that he is unable to concentrate, is afraid to undertake his previous hazardous position and has reactive elements of depression". And in his oral evidence, Dr Heath said that his examinations of the plaintiff had confirmed that the plaintiff recovered from his whiplash injury within six to eight weeks.

Post Traumatic Stress Disorder

[30] According to the evidence of each of the psychiatrists, the plaintiff suffers from a post traumatic stress disorder, the effects of which are permanent. He has difficulty in sleeping, is irritable and has outbursts of anger, finds it difficult to concentrate, and is hypervigilant, and his condition causes significant distress and impairment. He suffers intrusive recollections of dramatic events in his life, nightmares and physiological reactivity to reminders of his experiences. He has been on medication continuously. At least from the time of this accident he has been permanently incapacitated from performing police duties, and upon the psychiatric evidence, I am satisfied that he is effectively unemployable.

[31] The unanimous opinion of the psychiatrists is also to the effect that his condition does not result solely from this accident but is partly due to at least one other experience which was an incident in 1995. He was then attempting the rescue of a person from a capsized boat when he became trapped in an air pocket filled with petrol fumes which made him believe that he was about to be killed. In addition, there have been other traumatic incidents in the course of his police duties. In 1990, he attended an incident in which he witnessed a teenager shoot himself. In June 2001 he attended a motor vehicle accident in which a young girl who had been of similar appearance to the plaintiff's daughter had died. He was suffering from stress from years prior to this accident, and from about 1995, he had been taking Zoloft. He had had substantial periods off work suffering from stress at various times from 1991, although the precise periods of leave are not established. He had asked to be moved to the traffic branch at Gympie, where he worked for the ten months leading to this accident, because of stress.

[32] His stress disorder is therefore the cumulative result of a number of experiences of which this accident was one. But prior to this accident, he was able to serve in at least some sections of the police service. The accident has caused him loss and damage: it is common ground that he is less well than before the accident and that the effect was to make him thereafter unable to perform any police work.

[33] The issue is whether the accident affected his health and employability in the long run. The defendant argues that the effect of the accident was to bring forward a post traumatic disorder which would inevitably have occurred upon some further stressor, which was likely in the life of a serving police officer. The plaintiff's case is that he had taken up police duties of a kind which made it unlikely that he would

experience such a stressor, so that in all probability he would have remained in the police force until retirement at aged 60. The question then is the extent to which his damages should be discounted for the contingency that another event would have resulted in the same condition.[4] That is a question which cannot be answered only by reference to medical opinion, because a psychiatrist cannot assess the probability of such a stressor occurring. Undoubtedly such an event was less probable if he was doing some types of police work rather than others, but the performance of traffic duties was not risk free and in the course of a police career of a further 16 years, there was the real prospect of some further experience which would have been sufficiently serious to have resulted in his present condition. It was not inevitable that he would develop this condition, but given the extent to which he was already suffering from stress, the chances of it, taken with the possibility of other contingencies affecting his career, warrant a reduction in his claim for past economic loss of 10 per cent, and for future economic loss of 50 per cent.

Damages

[34] I assess general damages for pain and suffering and loss of amenities at $40,000. Having regard to the plaintiff's interim receipt from WorkCover of a permanent partial disability benefit of $40,405, it is not appropriate to award interest on the part of that component which is a past loss.

[35] At the date of the accident, the plaintiff held the rank of Senior Constable (Class 3). The base salary for that rank during the 2001-2002 financial year was $45,239 gross. I accept that because the plaintiff consistently earned extra amounts for overtime and shift allowances, it is necessary to compensate him by bringing those likely receipts into account. In the year to 30 June 2001 he was paid a gross amount of $53,164. I accept also the plaintiff's submission that it would be reasonable to assume that he would have attained the rank of Senior Constable (Class 6) by the commencement of the 2003-2004 year, and Senior Constable (Class 7) at the commencement of the present financial year. I accept the plaintiff's submissions that the proper calculation of the component for past economic loss results in a figure of $142,777.39, before consideration is given to any discount for the prospect that the plaintiff would have suffered a post traumatic stress disorder by now. It is submitted that I ought not to discount this component, because the plaintiff's calculations assume that he would not have done any work relieving as an acting sergeant, and because in certain other respects the calculations are conservative. I have considered these matters, but the prospect that some event would have caused him to retire by now requires some discounting of past economic loss. Applying a discount of 10 per cent the past economic loss should be assessed at $128,499.65.

[36] I accept the plaintiff's submissions that before any discounting, the plaintiff's future economic loss would be appropriately calculated by using a rate of $1,025.38 net per week, discounted at 5 per cent over 12.8 years to age 60 yielding $508,588.48. After application of the discount of one half, the result is $254,294.24.

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4 *Hopkins v WorkCover Queensland* [2004] QCA 155

[37] An accountant's report which is unchallenged demonstrates that had the plaintiff not retired until aged 60, he would have been entitled to an additional superannuation payment of $28,020, which discounted at 50 per cent warrants a further component of $14,010.

[38] I do not consider that the plaintiff has established an entitlement for any award for past or future care, because I have rejected his case insofar as it relies upon the neck injury. I accept that Mrs Hirst has been providing more assistance after the accident, but this in itself does not establish an entitlement to care.

[39] I accept that the plaintiff will require future psychiatric treatment and will have pharmaceutical expenses. As to the latter, I have noted that he was being treated with Zoloft even before the accident. Because of the relatively high likelihood that he would have developed a post traumatic stress disorder even apart from this accident, it is appropriate to allow an amount of $15,000 for future medical care and pharmaceutical expenses, including the expenses of travel for medical care.

[40] The plaintiff claims $8,289.21 for WorkCover medical expenses, a further $416.85 for medical expenses which have been met by Medicare, $957.70[5] for the purchase of analgesics and other medication between the accident and now, and $1,772.50 for (past) travelling expenses, and interest on those last two amounts. There should be some discount applied for the prospect that much of that would have been required in any event, and $10,500 will be allowed.

[41] There should be a *Fox v Wood* component, calculated according to the plaintiff's submission in the amount of $12,124.84.

[42] Accordingly the plaintiff's damages are quantified as follows:

General damages for pain and suffering and loss of amenities	$ 40,000.00
Past Economic Loss	$128,499.65
Interest on Past Economic Loss @ 2.93%[6]	$ 8,715.76
Future Economic Loss	$254,294.24
Loss of Superannuation	$ 14,010.00
Future treatment (including travelling) and pharmaceutical expenses	$ 15,000.00
Past treatment, travelling and expenses (including interest)	$ 10,500.00
Fox v Wood component	$ 12,124.84
Total	**$483,144.49**

[43] That amount should be reduced by one-third for the plaintiff's contributing negligence, with the result that there should be judgment for the plaintiff in the sum of $322,096.32.

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5 Calculated according to the plaintiff's submissions

6 Section 55E of the *Motor Accident Insurance Act* 1994 now in s 60(2) of the *Civil Liability Act* 2003