SUPREME COURT OF QUEENSLAND

CITATION:	*Hirst v Nominal Defendant* [2005] QCA 65
PARTIES:	**GREGORY WARWICK HIRST** (plaintiff/respondent) v **NOMINAL DEFENDANT** (defendant/appellant) **GREGORY WARWICK HIRST** (plaintiff/appellant) v **NOMINAL DEFENDANT** (defendant/respondent)
FILE NO/S:	Appeal No 8095 of 2004 Appeal No 8142 of 2004 SC No 7921 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury - Liability & Quantum
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2005
JUDGES:	Jerrard and Keane JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. In each appeal, appeal dismissed** **2. In each appeal, there is no order as to costs**
CATCHWORDS:	TORTS - NEGLIGENCE - ROAD ACCIDENT CASES - LIABILITY OF DRIVERS OF VEHICLES - MISCELLANEOUS CASES - plaintiff police officer - injured when lost control of vehicle while pursuing unidentified car that had been observed exceeding the speed limit - cars reached speeds of up to 180 kph - pursuit took place at night on single carriageway highway - pursuit involved overtaking other cars - whether the police officer caused the accident rather than the unidentified driver - duties of police officers - whether the defendant was liable in negligence - whether the plaintiff's damages should have been reduced for contributory negligence - to what extent the plaintiff's damages should have been reduced for contributory negligence

Law Reform Act 1995 (Qld), s 10
Police Service Administration Act 1990 (Qld), s 2.3, s 3.2

Chapman v Hearse (1961) 106 CLR 112, cited
Enever v The King (1906) 3 CLR 969, cited
Haber v Walker [1963] VR 339, considered
Haynes v Harwood [1935] 1 KB 146, considered
March v E & M H Stramare Pty Ltd (1991) 171 CLR 506, cited
Medlin v State Government Insurance Commission (1995) 182 CLR 1, applied
Pallister v Waikato Hospital Board [1975] 2 NZLR 725, cited
Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492, cited
Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360, cited
Rice v Connolly [1966] 2 QB 414, cited
R v K (1993) 118 ALR 596, cited
R v Metropolitan Police Commissioner; ex parte Blackburn [1968] 1 All ER 763, cited
Thomson v C (1989) 67 NTR 11, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40, cited

COUNSEL: K N Wilson SC for the Nominal Defendant
M Grant-Taylor SC for Hirst

SOLICITORS: Hunt & Hunt for the Nominal Defendant
Schultz Toomey O'Brien Lawyers (Mooloolaba) for Hirst

[1] **JERRARD JA:** In this appeal I have read and respectfully agree with the reasons for judgment and orders proposed by Keane JA and Douglas J. I add only that s 2.3(d) of the *Police Service Administrative Act* 1990 (Qld) provides that the functions of the police include "the detection of offenders and bringing of offenders to justice". Mr Hirst was performing that function in the pursuit.

[2] **KEANE JA:** Mr Hirst suffered personal injuries on the night of 16 August 2001. At the time, Mr Hirst was an on-duty police officer. He lost control of the police car which he was driving and it collided with another vehicle. The accident in which he was injured occurred as a result of a high-speed chase of an unidentified "blue car". Mr Hirst brought an action to recover damages from the Nominal Defendant on the basis that the blue car could not be identified.

[3] The learned trial judge found against the Nominal Defendant on the footing that the accident had been caused by the negligence of the driver of the blue car, but apportioned liability as to one-third against Mr Hirst. His Honour gave judgment for Mr Hirst against the Nominal Defendant in the sum of $322,096.32 together with costs to be assessed. Both Mr Hirst and the Nominal Defendant have filed separate appeals against the judgment of the learned trial judge on the issues of liability and contributory negligence. There is no issue as to his Honour's assessment of damages.

[4] In Appeal No 8095 of 2004, the Nominal Defendant challenges the conclusions of the learned trial judge on the issue of liability, contending that the Nominal Defendant should not have been held liable at all for the injuries suffered by Mr Hirst, and alternatively, that Mr Hirst's damages ought to have been reduced by more than one-third on account of his contributory negligence.

[5] In Appeal No 8142 of 2004, Mr Hirst contends that the trial judge's assessment of contributory negligence on his part should be set aside entirely, and alternatively, that this assessment should not have exceeded 12½ per cent.

The circumstances of the accident

[6] The learned trial judge accepted Mr Hirst's version of the accident save in a few respects which are immaterial.

[7] Mr Hirst, who at the time of the accident was a Senior Constable working in the Traffic Branch at Gympie, was driving a marked police vehicle in a northerly direction on the Bruce Highway between Kybong and Gympie. He was alone in the vehicle. At the same time, Mr Larry Weldon was driving a Toyota Hilux utility towing a trailer in a southerly direction on the Bruce Highway somewhat to the south of the police vehicle being driven by Mr Hirst. At about 10.10 pm Mr Hirst saw, approaching from the north, a small blue sedan ("the blue car") which he believed was exceeding the speed limit.

[8] Mr Hirst activated the mobile radar fitting within the police vehicle and logged the speed of the southbound blue car at 126 kph. The applicable speed limit at that part of the highway was 100 kph. He then activated the revolving lights on the police vehicle and moved to the left hand side of the road, flashing the headlamps of the police vehicle as he did so, in an endeavour to make the approaching blue car pull over.

[9] The blue car went straight past Mr Hirst. Mr Hirst then performed a U turn and commenced a pursuit of the blue car. He saw that the blue car was accelerating and flashed his headlights again as an indication to the driver of the blue car that it should stop. It did not do so.

[10] There were three vehicles in front of the blue car travelling in the same direction, which led Mr Hirst to think that the blue car would have to slow down and that he could then intercept it. But the blue car accelerated, overtaking the three vehicles in front of it by crossing the double centre lines in a manner described by the trial judge as "dangerous".

[11] Mr Hirst then activated all of the lights and sirens on the police car. The learned trial judge inferred that the driver of the blue car must have been aware that he was being pursued by Mr Hirst. There is no reason to think that this inference was not correct.

[12] Mr Hirst endeavoured to send a radio message that he had begun a pursuit, but the microphone fell from his grasp 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 at which to overtake them, having regard to the road markings; and he then accelerated past them. At this point, he was able to grab the microphone and "call the pursuit".

[13] Shortly afterwards, the blue car approached the rear of the Weldons' vehicle and trailer, overtook it over double centre lines and disappeared over the crest of a hill. As Mr Hirst came over the crest, he saw that the blue car had crossed back onto its proper side of the road, ahead of a semi-trailer then travelling towards them. Mr Hirst said that as his police car passed the three vehicles travelling southbound ahead of him, he recalls that he was travelling at about 175 kph. The learned trial judge inferred that the blue car was travelling at about 160 kph as it passed the Weldons' vehicle and trailer. Once again, nothing has been suggested to cast doubt on the correctness of this inference.

[14] Mr Hirst saw the Weldons' vehicle and trailer before they went out of sight for a short time over the crest and, in anticipation of the Weldons' vehicle, he "backed off" as he was coming over the crest. When he again saw the Weldons' vehicle, Mr Hirst braked heavily. At this point his vehicle started to skid.

[15] His Honour found that, although Mr Hirst did slow down somewhat as he came to the crest of the hill, he was still driving very fast, probably at a speed of at least 150 kph. Mr Hirst hit the brakes hard and his car went into a "flat spin, [and] hit the side of the Weldons' trailer". His car continued spinning, and the on-coming semi-trailer passed between it and the Weldons' vehicle and trailer. Mr Hirst's vehicle came to a stop behind the Weldons' vehicle and trailer. Mr Hirst was thus fortunate to survive the accident.

[16] In relation to the occurrence of the accident, the learned trial judge found 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."

Liability

[17] The Nominal Defendant conceded, both below and on appeal, that the driver of the blue car was negligent, but argued that Mr Hirst was entirely responsible for the accident in which he was injured because of the manner in which Mr Hirst chose to continue the pursuit once the vehicles reached speeds of the order of 175 kph and Mr Hirst was required to take a blind bend knowing that the Weldons' vehicle was in front of him although he could not see it, and not knowing if there was a vehicle approaching from the other direction. The learned trial judge rejected this argument on the footing that the duty owed to Mr Hirst by the driver of the blue car included a duty not to expose Mr Hirst to the risks involved in the high-speed pursuit. The learned trial judge put the point in this way:

> "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.
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> 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. … "

[18] The Nominal Defendant argues that, by formulating the content of the duty of care owed by the driver of the blue car in this way, the learned trial judge failed to appreciate the force of the contention that Mr Hirst's injury was suffered as a result of his own deliberate act, voluntary or "abnormal", which broke the chain of causation. In my view, this argument is erroneous. The driver of the blue car, by acting as he did in circumstances where he knew he was being pursued by a police officer acting in the course of his duty, created a situation of radically heightened risk by making continued and accelerated pursuit likely. Mr Hirst's injury, in a very real sense, resulted from the heightened risk created by the conduct of the driver of the blue car who plainly knew that he or she was being pursued by the police in the discharge of their duty. In these circumstances, it can truly be said that the driver of the blue car caused Mr Hirst's injury, in that Mr Hirst's "voluntary" attempts to deal with the situation created by the driver of the blue vehicle did not constitute a novus actus interveniens or break the chain of causation.

[19] There is, in my opinion, much force in the invocation by Mr Hirst's counsel in his outline of argument of the analogy with the duty of care owed by tortfeasors to rescuers to support that conclusion.

[20] Thus in *Haynes v Harwood*,[1] the plaintiff police constable sued for negligence after he was injured while attempting to stop the defendant's runaway horses on a street on which a large number of people, including children, were present. In that case it was held that the defendant's negligence was the cause of the accident because:

> "If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence."[2]

The defence of volenti non fit injuria was raised but was held not to apply because the plaintiff was rescuing another from "imminent danger of personal injury or death". This was held to be even more relevant here because:

> "the man injured was a policeman who might readily be anticipated to do the very thing which he did…".[3]

Maugham LJ held, at 161 - 162 (Roche LJ agreeing at 166), that:

> "In my opinion the police constable was not in any true sense a volunteer. It is true that he was under no positive legal duty to run out into the street and at the risk of his life to stop two galloping horses; and I quite accept that nobody would have thought of reprimanding him if he had done nothing. It is also true that the primary duty of the police is the prevention of crime and the arrest of

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1 [1935] 1 KB 146.

2 Per Greer LJ at 156.

3 Per Greer LJ at 157.

> criminals; but that is only a part of the duties of the police in London. There is a general duty to protect the life and property of the inhabitants; there is a discretionary duty to direct the traffic, to help blind and infirm people to cross the road, and to direct people who have lost their way. I think it is common knowledge that the position of the police in this City has altered as the result of long habit and intercourse between them and the people since the year 1829, when Sir Robert Peel introduced his celebrated measure; so that the police are now regarded as the friends of the inhabitants whilst engaged in lawful avocations. In my opinion they are not mere lookers-on when an accident takes place, or seems likely to take place; they have, I think, a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street, if they are in a position to do so. At any rate, they have a moral duty to intervene in such a case as the present where it appeared, and rightly appeared, to the plaintiff that there was a reasonable chance of preventing a most serious accident. In deciding whether such a rescuer is justified in putting himself into a position of such great peril, the law has to measure the interests which he sought to protect and the other interests involved. We have all heard of the reasonable man whom the law postulates in certain circumstances; the reasonable man here must be endowed with qualities of energy and courage, and he is not to be deprived of a remedy because he has in a marked degree a desire to save human life when in peril. So regarded, the present plaintiff was not acting unreasonably in the risks he took; there was no such voluntary assumption of risk … as would bring him within the exceptions under consideration."

[21] The Nominal Defendant relies in its written submissions on observations of Smith J in *Haber v Walker*[4] where his Honour said:

> "Confining attention to what is relevant to the present case the main principles, I consider, are these. In the first place a wrongful act or omission cannot ordinarily be held to have been a cause of subsequent harm unless that harm would not have occurred without the act or omission having previously occurred with such of its incidents as rendered it wrongful. Exceptions to this first principle are narrowly confined. Secondly, where the requirements of this first principle are satisfied, the act or omission is to be regarded as a cause of the harm unless there intervenes between the act or omission and the harm an occurrence which is necessary for the production of the harm and is sufficient in law to sever the causal connexion. And, finally, the intervening occurrence, if it is to be sufficient to sever the connexion, must ordinarily be either–
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> (a) human action that is properly to be regarded as voluntary, or
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> (b) a causally independent event the conjunction of which with the wrongful act or omission is by ordinary standards so extremely unlikely as to be termed a coincidence: see *Hart and Honoré*, op. cit., especially at pp. 103-117, 123-134, 151-152 and 157-9.

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4 [1963] VR 339 at 358.

> What then is the result when these principles are applied to the question whether here the death of the deceased by suicide was a consequence of the defendant's negligence? The evidence at the trial clearly showed that the requirements of the first principle were satisfied. Furthermore, there was no real question of the causal connexion having been severed by the occurrence of a coincidence. We are not concerned here with a physical event as distinct from human action, nor with an act of a third person : compare *Hart and Honoré*, op. cit., Ch. VI, esp. at pp. 164-5 and 168-9. And here the proof that the requirements of the first principle were satisfied involved that the deceased's conduct which led to his death was not independent of the defendant's negligence. Accordingly, the critical question of causation which arose at the trial was whether the deceased's conduct which led to his death was properly to be regarded as a voluntary act."

[22] A proper understanding of these dicta of Smith J require, first, an appreciation that the actual decision in *Haber v Walker* was that the defendant was liable in damages to the plaintiff who was the widow of a deceased man who had committed suicide whilst mentally imbalanced as a result of serious injuries received in an accident caused by the negligence of the defendant. The basis of this decision was that the defendant's negligence had caused the accident which caused the husband's death even though his suicide was not reasonably foreseeable by the defendant. Secondly, it should be noted that Smith J went on, after the passage cited above, to explain what is meant by a "voluntary act" in this context:[5]

> "In some contexts expressions such as 'voluntary act' and 'act of volition' are construed so widely as to cover any act which cannot be said to have been reflex or done without understanding of its nature and quality or due to irresistible impulse. In relation, however, to the principle of causation now in question, the word 'voluntary' does not carry this wide meaning; and for an act to be regarded as voluntary it is necessary that the actor should have exercised a free choice. This, of course, is a conception involving question of degree: compare *Hart and Honoré*, op. cit., at p. 133; *Chapman v Hearse* (1962) [sic] 106 CLR 112, at p. 122; [1962] ALR 379. But if his choice has been made under substantial pressure created by the wrongful act, his conduct should not ordinarily be regarded as voluntary: see *Hart and Honoré*, op. cit., at pp. 38, 134.
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> Accordingly, the deceased's act in hanging himself was not, for the purposes of the relevant principle of causation, a 'voluntary' act, if the deceased, in consequence of the defendant's negligence, was acting under the pressure of a mental disorder such as was described in the evidence at the trial and he was thereby prevented from exercising a free choice: compare *Hart and Honoré*, op. cit., at pp. 145-146; *Cavanagh v London Transport Executive*, *supra*; *Pigney v Pointers Transport Services Ltd.*, *supra*."

[23] The decision in *Chapman v Hearse* referred to by Smith J is, of course, a rescue case. The decision of the House of Lords in *Reeves v Commissioner of Police of the*

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5 [1963] VR 339 at 358 - 359.

Metropolis,[6] referred to by the learned trial judge, affords another illustration of circumstances in which a plaintiff, who suffers injury as the immediate result of conduct in which he or she chooses to engage, will not necessarily relieve a negligent defendant of liability. The Nominal Defendant in oral argument relied upon dicta of Lord Hoffman[7] and of Lord Hope[8] but these dicta, like the dicta of Smith J referred to above, clearly do not mean that a defendant can never be liable for the voluntary or deliberate conduct of the plaintiff.

[24] In the rescue cases, a rescuer, responding to the call of a moral duty to help those in danger, voluntarily exposes himself or herself to a dangerous situation. In my view, the position of a policeman responding to the call of a legal duty to prevent unlawful conduct on the highway and to protect the safety of those making lawful use of it, must afford a stronger illustration of this point than the rescue cases. In such a case, the "free choice" of the police officer as to his conduct is constrained by the twin circumstances of his legal duties as a police officer,[9] and the occurrence of the unlawful conduct which it is his or her duty to prevent.[10]

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6 [2000] 1 AC 360.

7 368.

8 379 - 380.

9 Non-commissioned officers and constables have and may exercise the powers, and have and are to perform the duties, of a constable at common law: s 3.2(2) *Police Service Administration Act* 1990 (Qld). (Section 3.2(3) states that "An officer other than one referred to in subsection (2) [eg Commissioner, Superintendent and Inspector] has and may exercise the powers of a constable at common law..." but makes no reference to common law duties.)

In *R v K* (1993) 118 ALR 596 at 600 it was stated (per Gallop, Spender and Burchett JJ) that:

> "The powers and duties of police officers have always been expressed in the most general terms. In *Rice v Connolly* [1966] 2 QB 414, in the course of allowing an appeal against a conviction of wilfully obstructing a constable in the execution of his duty, Lord Parker CJ said (at 419):
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> > … that it is part of the obligation and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.
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> In *Thomson v C* (1989) 67 NTR 11 at 13, Angel J, addressing what are the duties of police officers, said that courts have sensibly been loath to clothe the ambit of a police officer's duties in specifics and said that his duties have always been expressed in the most general of terms. He cited *Rice v Connolly* and the next case to which we refer, *Innes v Weate* [1984] Tas R 14; 12 A Crim R 45 at 51 where Lord Parker CJ's observations were endorsed by Cosgrove J, who also referred to the fact that the concept of duty cannot be stated in other than general terms:
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> > … the range of circumstances in which the duty to act may arise is too wide, too various, and too difficult to anticipate for the compilation of an exhaustive list. The other is that the existence and nature of the duty often depends upon a reasonable assessment by the constable of any given situation. That assessment may be examined in the courts and held to be right or wrong. These difficulties cannot be overcome. It is important that a constable should have a wide discretion to act swiftly and decisively; it is equally important that the exercise of that discretion should be subject to scrutiny and control so that he should not too easily or officiously clothe himself with the powers of the State and by so doing affect the rights and duties of other citizens: cf for example, s 28 of the *Criminal Code*."

See also *Enever v The King* (1906) 3 CLR 969 at 991-992 per O'Connor J and *R v Metropolitan Police Commissioner; ex parte Blackburn* [1968] 1 All ER 763 at 769 E per Lord Denning MR and 771 B per Salmon LJ.

This is reflected in s 2.3 of the *Police Service Administration Act* 1990 (Qld) which provides that among the functions of the police service are:

> "(b) the protection of all communities in the State and all members thereof-
> (i) from unlawful disruption of peace and good order that results, or is likely to result, from-
> (A) actions of criminal offenders;

[25] Users of the highway are subject to lawful directions by police officers acting in the course of their duty. In this case, the driver of the blue car not only failed to obey a lawful direction to pull over, but created a specific situation of danger by driving on in circumstances where he should reasonably have known that Mr Hirst would be duty-bound to attempt to apprehend him, and would attempt to do so at least until the pursuit became too dangerous to continue. This situation of elevated risk arose because of the combination of the failure by the driver of the blue car to obey a lawful direction and the discharge by Mr Hirst of his obligations as a police officer. To say that, as between the driver of the blue car and Mr Hirst, Mr Hirst's actions in engaging in the pursuit were "voluntary" or even "abnormal" is to fail to recognize that Mr Hirst's conduct was constrained by his duties as a police officer and the offences which he, the driver of the blue car had committed.[11] Having created this situation, the specific content of the duty owed by the driver of the blue car to Mr Hirst was to put an end to the situation of elevated risk which he, the driver of the blue car, had unreasonably and unlawfully created, either by slowing down or by pulling over. His failure to do so prolonged the situation of elevated risk, and in a very substantial way caused Mr Hirst's injuries.

[26] The idea of constraint on a plaintiff's free choice as relevant to the liability of a defendant for loss suffered by the voluntary conduct of a plaintiff is illustrated by the decision of the High Court in *Medlin v The State Government Insurance Commission*.[12] In that case a university professor was injured in a motor accident caused by the negligence of the driver of the other vehicle. He resumed his employment, but then retired early. He claimed damages for loss suffered by reason of his early retirement on the footing that his injuries made him no longer able to discharge his teaching and research duties at a sufficiently high level to satisfy himself with his performance even though his employer was satisfied with that performance. The High Court held that this claim should not fail because the loss was brought about by the plaintiff's own decision to accept voluntary retirement. In a joint judgment, Deane, Dawson, Toohey and Gaudron JJ said:

> "For the purposes of the law of negligence, the question whether the requisite causal connexion exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved,

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(B) actions or omissions of other persons;

(ii) from commission of offences against the law generally."

(This was recognised by Atkinson J in *Peat v Lin* [2004] QSC 219; SC No 1007 of 2001, 3 August 2004.)

[10] In the present case the following offences are relevant:

Speeding - breach of s 20 of the *Transport Operations (Road Use Management - Road Rules) Regulation* 1999 (Qld)

Overtaking over double lines - breach of s 132(3) of the *Transport Operations (Road Use Management - Road Rules) Regulation* 1999 (Qld)

"A driver on a road with 2 continuous dividing lines must drive to the left of the dividing lines, except as permitted under section 134 or 139(2)."

Failure to stop - breach of s 51(2) of the *Police Powers and Responsibilities Act* 2000

"(1) A police officer may require the person in control of a vehicle, other than a train, to stop the vehicle for a prescribed purpose [including enforcing a transport Act];

(2) The person must comply with the requirement, unless the person has a reasonable excuse. Maximum penalty -

(a) for a private vehicle - 60 penalty units; or

(b) for another vehicle - 120 penalty units."

Dangerous operation of a vehicle - breach of s 328A *Criminal Code*.

[11] See *Schilling v Lenton* (1988) 7 MVR 3 at 9.

[12] (1995) 182 CLR 1.

> on the probabilities, as a matter of commonsense and experience. And that remains so in a case such as the present where the question of the existence of the requisite causal connexion is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the 'but for' test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connexion would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. 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. It will be seen that, on the plaintiff's evidence, the present was such a case."

[27] Their Honours went on to say:[13]

> "Specific mention should be made of the significance of the trial judge's finding that, if the plaintiff had not decided to resign his appointment, he would have remained in the employ of the University for the four and a half years that remained until his retirement on reaching sixty-five. The members of the Full Court treated the plaintiff's failure to prove that he 'could not have continued in his position as Professor of Philosophy and head of the Discipline until he reached the normal retiring age' as, of itself, requiring rejection of the plaintiff's claim for damages for loss of earning capacity. The basis of that approach would seem to be an assumption that the fact that an employer would not have dismissed an injured plaintiff who had not voluntarily retired, automatically means that the termination of that particular employment by such retirement cannot be seen as the product of an accident-caused loss of earning capacity. Such an assumption is mistaken. The necessary causation between a defendant's negligence and the termination of a plaintiff's employment, in the sense that the termination of the employment is the product of an accident-caused loss of earning capacity, can exist notwithstanding the fact that the immediate trigger of the termination of the employment was the plaintiff's own decision to retire prematurely. If, for example, it appears that a plaintiff's decision to retire prematurely would not have been made

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13 (1995) 182 CLR 1 at 10 - 11.

> were it not for the fact that the effect of accident-caused injuries is that continuation in employment would subject him or her to constant pain and serious risk of further injury, it may well be that commonsense dictates the conclusion that the plaintiff's decision to retire prematurely was a natural step in a chain of causation which suffices to designate, for the purposes of the law of negligence, the termination of the employment as a product of those injuries.
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> The learned trial judge did not fall into the error of treating his finding that the plaintiff could have continued in his University appointment as automatically defeating his claim for damages for loss of earning capacity. Instead, his Honour embarked upon the task of 'determining whether the plaintiff should have remained in his employment'. His Honour expressed the view that, in determining that question, 'the proper course is to apply a test that asks whether, in the light of the medical condition of the plaintiff and the fact that his post remained available to him and the other factors affecting him, the plaintiff's decision to retire early was reasonable'. One can point to some support in the decided cases for his Honour's approach in that regard. With due respect, however, the question whether a sixty-year-old man who has sustained permanently incapacitating injuries of the kind sustained by the plaintiff 'should' continue in his employment or is 'acting reasonably' in accepting premature retirement was not the appropriate one. As has been mentioned, the evidence established and the trial judge found that the injuries sustained by the plaintiff caused him chronic and sometimes intense pain and that the combined effect of the pain and consequent loss of sleep was to reduce the plaintiff's intellectual energy to an extent which prevented him from discharging the duties of his office to the standards which he considered appropriate. As has also been mentioned, the plaintiff's evidence supported a finding that the effects of the accident were that his routine administrative and teaching work used up all his energy with the consequence that he was incapable of doing the research and creative work which he desired to carry out and which, one would think, would be and should be expected of the holder of the Chair of Philosophy in a major university. In these circumstances, the relevant question was not whether the plaintiff 'should' have continued in his University post or whether his decision to retire was not 'reasonable' but whether, in the context of what was reasonable between the plaintiff and the defendant in determining the defendant's liability in damages, the premature termination of the plaintiff's employment was the product of the plaintiff's loss of earning capacity notwithstanding that it was brought about by his own decision to accept voluntary retirement."

[28] The question as to "what was reasonable between the plaintiff and the defendant in determining the defendant's liability in damages" was remitted to the Supreme Court of South Australia.

[29] The reasoning in *Medlin* confirms the propositions that voluntary or deliberate or unusual conduct on the part of a plaintiff does not necessarily sever the causal nexus so as to relieve a negligent defendant from liability for loss suffered by a plaintiff;

and that it is necessary to have regard to the extent to which the plaintiff's voluntary conduct has been constrained by the defendant's misconduct, and then to ask whether as between plaintiff and defendant it was reasonable of the plaintiff to make the choice which was the immediate cause of the loss. These propositions bear directly upon the issue of the Nominal Defendant's liability to Mr Hirst. In my respectful opinion, they are destructive of the Nominal Defendant's argument that the negligence of the driver of the blue car was not a cause of the accident and Mr Hirst's injuries. Further, while they recognize that there may be a point at which it is possible to say that it is not reasonable as between the plaintiff and defendant that the defendant is responsible for the voluntary conduct of the plaintiff, eg because the choice made by the plaintiff may be so unexpected a response to the defendant's conduct that the defendant should not bear any of the consequences of that decision,[14] it cannot be said that this point was reached in this case. That is because the driver of the blue car created, and then failed to resolve as he could and should easily have done, a dangerous situation which made it likely that Mr Hirst would continue the pursuit up to, and beyond, the point when it became imprudent or unreasonable for Mr Hirst to continue the pursuit. The driver of the blue car could have resolved the situation of danger by slowing down or pulling over even after Mr Hirst's persistence in the pursuit added to the dangerous situation.

[30] In summary on this issue, the Nominal Defendant's argument comes to this, that although the driver of the blue car owed a duty of care to Mr Hirst for breach of which he or she would have been liable had an accident occurred in the course of the pursuit up to the point at which Mr Hirst's speed reached 175 kph, that driver was able to avoid all liability by continuing to try to escape in a situation of even more elevated danger. It would be an odd result if the law were to hold the driver of the blue car liable up to that point, but regard him or her as freed of liability by persisting in unlawful conduct which was likely to lead to an even more dangerous situation. I do not consider that the law supports such a result.

[31] For these reasons, I conclude that the learned trial judge was correct to hold that the Nominal Defendant is liable to Mr Hirst, by reason of the negligence of the driver of the blue car.

Contributory negligence

[32] Section 10(1) of the *Law Reform Act* 1995 provided for a reduction in the damages recoverable by Mr Hirst "to the extent the court considers just and equitable having regard to [Mr Hirst's] share in the responsibility for the damage".

[33] This assessment involves a comparison both of culpability, that is, of the degree of departure from a proper standard of care, and of causal potency of the acts of the parties resulting in the damage suffered by the plaintiff.[15]

[34] The learned trial judge found that the circumstances which led to the high-speed pursuit in which Mr Hirst was injured were that the driver of the blue car had failed to pull over after being detected exceeding the speed limit by about 25 kph; and 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

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14 Cf *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* (1970) SC(HL) 20 and *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522; and see *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.

15 *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492.

and with a number of other vehicles being encountered within a minute or so. His Honour concluded in this regard that:

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

[35] It is contended on behalf of Mr Hirst that a quantification of his responsibility for the accident at one-third, that is as being as much as 50 per cent of that of the unidentified driver, cannot be regarded as truly reflective of the relative culpability and causal potency of the conduct of the unidentified driver and Mr Hirst's failure to exercise due care for his own safety.

[36] While it is true to say that Mr Hirst was engaged in the performance of his duty in pursuing the driver of the blue car, his decision, even in the heat of the moment, to accept the risks of travelling at between 170 kph and 180 kph at night on a two lane highway, on which vehicles other than those engaged in the pursuit were known to be present, and onto which side roads entered, inevitably made a significant contribution to the situation of elevated risk which ultimately led to Mr Hirst's injury. The real question, to my mind, in relation to contributory negligence, is whether Mr Hirst's decision to continue the pursuit at speeds of between 120 kph and 180 kph should be characterized as an error of judgment or a failure to take reasonable care for his own safety.

[37] The learned primary judge's finding that Mr Hirst was engaged in doing his duty, is, of course, important to the liability of the Nominal Defendant to Mr Hirst. But that finding also has implications for the assessment of Mr Hirst's conduct. High-speed pursuits of this kind create situations of elevated risk, both to other users of the highway, and to police officers engaged in such pursuits. The exercise of reasonable care, both for other users of the highway, and for the police officer in question, requires recognition of the significant level of responsibility attaching to a police officer who chooses to continue a high-speed pursuit at the risk of creating a more serious danger of death or injury for users of the highway, including the police officer in question.

[38] In this regard, the learned trial judge referred to the instructions contained in the Operations Manual, which required police officers to balance the risks involved against the necessity for the pursuit and instructed that 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". As his Honour noted, the factors to be considered by the officer in assessing the risk from the pursuit included the paramountcy of the safety of all persons (including the police officer himself), 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 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".

[39] His Honour correctly observed that the court should not be astute to conclude with "the benefit of hindsight that a pursuit was unreasonably undertaken". Nevertheless, and notwithstanding that Mr Hirst was endeavouring to do his duty, the continued prosecution of the high-speed pursuit at speeds of the order of 175 kph was a significant contributor to the situation of elevated risk as a result of which Mr Hirst was injured, and it involved a significant departure from the standard of reasonable care for his own safety as one of a number of users of the highway.

[40] The learned primary judge obviously took the view that Mr Hirst's decision to continue the pursuit was not a mere error of judgment essentially forced upon him by circumstances not of his own making. I have looked closely at Mr Hirst's evidence to see whether this view of Mr Hirst's conduct is justified.

[41] According to Mr Hirst's evidence at trial:

(a) the only time he remembers checking the speedometer was when he was overtaking the three vehicles: then it was 175 kph;
(b) he accelerated past those vehicles;
(c) he came back onto the left hand side of the road after overtaking and accelerated - the road was clear and straight in front of him;
(d) he may have travelled faster than 175 kph in the course of the pursuit, but not too much faster - in front of the airport he was probably travelling at 170 or 180 kph - "I was actually catching up to it along that [straight]";
(e) he then slowed down as he came past the intersection of the airport and then called pursuit;
(f) as soon as he grabbed the microphone he accelerated again;
(g) he "possibly" regained the speed of about 175 kph;
(h) he "possibly" maintained that speed as he went around the curve;
(i) then as he went up over the crest of the next hill he could see a 4WD with trailer behind it;
(j) he "backed off" his speed when he saw the 4WD;
(k) he estimates he was approximately three kilometres north of the airport turnoff when he did the U-turn;
(l) he estimates the other car overtook the three vehicles about two to two and a half kilometres north of the turnoff;
(m) he estimates that the straight section of the road continued for about two kilometres **after** the airport turnoff (where he slowed down).

[42] In an interview with police on 7 November 2001 he said that the distance from where the offender's speed was first recorded to where the crash occurred was approximately four kilometres; and that it was about three kilometres (and two minutes) from where he realised it was a pursuit situation (when the unidentified driver overtook the three vehicles) to the crash.

[43] On the plaintiff's evidence, therefore, he continued the pursuit for two to three kilometres over a period of about two minutes after reaching the speed of 175 kph when overtaking the three vehicles. He accelerated after overtaking, then slowed as he passed the intersection with the airport road, accelerated again and then slowed

when he saw the 4WD with the trailer. His Honour found that the plaintiff was probably travelling at least 150 kph as he came to the crest of the hill.[16]

[44] If one does the arithmetic on the basis that the figures for speed and distances are more reliable than Mr Hirst's necessarily impressionistic evidence of time, it can be seen that the time frame for decision-making was quite short, probably more like one minute than the two minutes estimated by Mr Hirst. Nevertheless, the decision to persist in the pursuit was deliberate. It was a decision which only Mr Hirst could make in the sense that it was part of his duty to make it. It was a decision which he was trained to make and he admitted that he was conversant with the policy in the Operations Manual which informed him of the need to make his decision on the basis that the paramount consideration was the safety of all users of the road. It was a decision with significant consequences for the safety of all users of the highway including himself. The making of this decision was very much part of his duty. He knew there was the vehicle in front of him (being driven by Mr Weldon) and, because of the topography he did not know whether there was a vehicle coming the other way, as in fact there was. In these circumstances, I consider that the learned primary judge was correct to conclude that this decision further to escalate the danger was unreasonable, and not merely an error of judgment.

[45] Once that conclusion is reached, it is difficult to identify a sound basis for interfering with the learned trial judge's discretionary apportionment of liability as to one-third against Mr Hirst.

[46] To say this is to hold police officers in Mr Hirst's position to a high standard of conduct; but to do so is in accordance with the Operations Manual, and recognizes that there is a real need for restraint on the part of police officers engaged in high-speed pursuit to give priority to the safety of life and limb of users of the highway including themselves.

[47] I conclude that Mr Hirst did act unreasonably in deciding to continue the pursuit and that this decision made a substantial contribution to the occurrence of the injury.

[48] I would dismiss the challenges to his Honour's apportionment of liability against Mr Hirst. It is a sound discretionary judgment of Mr Hirst's relative culpability and causal contribution to the accident.

Conclusion

[49] In my opinion each of the appeals should be dismissed. I would order in each appeal then that the appeal be dismissed.

[50] Having regard to the outcome of each appeal and the inter-relationship of the issues involved, in my view, the appropriate order in relation to costs is that there should be no order as to costs of either appeal.

[51] **DOUGLAS J:** I have had the advantage of reading the reasons of Keane JA. I agree with those reasons and the orders proposed by his Honour. I wish only to add some comments on the issue whether a duty of care was owed to Mr Hirst by the offending driver.

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16 Reasons for judgment [8].

[52] Here it was foreseeable, in the sense of it being a real and not far-fetched possibility, that the behaviour of the driver of the blue car may cause harm to a police officer who decided to pursue him. To use the language in the well known passage in the judgment of Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 - 48,[17] the conduct of the driver of the blue car involved a risk of injury to Mr Hirst which was not far-fetched or fanciful, was real and therefore foreseeable. His behaviour also occurred in a situation where the law imposes a recognized obligation on each road user to exercise reasonable care for others.[18]

[53] To that general duty the learned trial judge correctly added a specific duty to avoid the risk of injury that could occur through a deliberate response of Mr Hirst to this driver's conduct. His Honour, at [11] - [20] of his reasons, relied on passages in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 517 - 518, 518 - 519, *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6 - 7, *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 31 - 32 and *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 367 - 368 in reaching the conclusion that a duty was owed not to expose Mr Hirst to a risk of injury arising from his own deliberate conduct in seeking to uphold the law.

[54] The magnitude of the risk associated with the driver's conduct, the degree of the probability of the occurrence of harm to the pursuing police officer, coupled with the absence of expense, difficulty or inconvenience associated with the driver taking alleviating action, make it easy to conclude that he owed Mr Hirst a duty of care that he breached by the nature of his driving.

[55] To absolve him of a duty of care from the point when Mr Hirst might be criticized for pursuing him too enthusiastically would lead to the anomalous result described by Keane JA in his reasons at [30]. As Woodhouse J said in dissent in *Pallister v Waikato Hospital Board* [1975] 2 NZLR 725, 742: "The concept of a novus actus interveniens does not embrace foreseeable acts in respect of which the duty of care has specifically arisen."[19] Negligent behaviour by a police officer engaged in a high-speed car chase is foreseeable. It does not free the tortfeasor, whose behaviour caused the chase, from continuing to owe the officer a duty of care.

[56] In my view, therefore, it is clear that this is a case where a duty of care was owed by the driver of the blue car to Mr Hirst, including during the period when Mr Hirst's conduct could be described itself as careless of his own and others' safety.

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17 Cf *Sullivan v Moody* (2001) 207 CLR 562, at 576 - 577.

18 See, eg, *West v GIO (NSW)* (1981) 148 CLR 62, 67 - 68.

19 Cited with apparent approval by Lord Jauncey of Tullichettle in *Reeves v Commissioner of Police of the Metropolis* at 374.