

SUPREME COURT OF QUEENSLAND

CITATION: *Rogers v Vasicek & Anor* [2010] QSC 72

PARTIES: **MARK LINDSAY ROGERS**
(Plaintiff)
v
JOHN MICHAEL VASICEK
(First defendant)
SUNCORP METWAY INSURANCE LIMITED
(ACN 075 695 966)
(Second defendant)

FILE NO/S: 265 of 2005

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 18 March 2010

DELIVERED AT: Cairns

HEARING DATE: 3 November 2009

JUDGE: Jones J

ORDER: **1. Judgment for the defendants.**
2. Allow 28 days in which the parties may make submissions on costs if that issue cannot be determined by agreement.

CATCHWORDS: NEGLIGENCE – LIABILITY – where the plaintiff seeks damages for personal injury arising from a motor vehicle accident – where the level of damages are agreed but the issue of liability is contested – where the plaintiff alleges that the negligence of the defendant caused the accident – when liability depends on the credibility of evidence – has the plaintiff established any basis for asserting negligence on the part of the defendant

COUNSEL: A. Philp for the plaintiff
R Douglas for the first and second defendants

SOLICITORS: Roati and Firth Solicitors for the Plaintiff
Cleary & Lee Solicitors for the first and second defendants

- [1] By this claim the plaintiff seeks damages for personal injuries arising from an incident on 8 July 2008 where the Kenilworth B Double prime mover and trailers he was driving left the roadway and overturned down an embankment.
- [2] The parties have agreed on the level of damages at \$425,000 but the issue of liability to pay those damages remains to be determined.
- [3] The plaintiff claims that he lost control of the vehicle taking evasive action because the defendant, who was driving a similar combination of truck and trailers in the opposite direction moved onto its incorrect side of the carriageway. The defendant denies that he drove on the incorrect side of the road and asserts that the plaintiff lost control of his vehicle because he was driving at an excessive speed and without due care and attention.

Background facts

- [4] The plaintiff and the defendant were both experienced truck drivers. The plaintiff had been licensed to drive semi-trailers since 1970. The defendant held a truck driver's licence since 1984 and a semi-trailer licence since 1994. They were employed as truck drivers by Johnstone River Transport Company which had a fleet of 70 trucks. Both drivers had substantial experience in driving trucks over the section of the South Johnstone Road where the incident occurred.
- [5] On the day of the incident, the plaintiff was transporting raw sugar outbound from the South Johnstone Mill to the sugar terminal at Mourilyan Harbour. Typically, a driver engaged in this task would make 13 to 14 return trips in a working day. The defendant was engaged in carting chopped cane inbound towards the mill from Kennedy. Typically a driver engaged in this task would make 3 or 4 trips in the day.
- [6] The truck-trailer combination was the same for each vehicle – a B double with two trailers. Each truck and trailer combination had an all up weight of approximately 60 tonnes. The width of the truck was 2.4 metres. The truck combinations had a slight difference in length – the plaintiff's was 23 metres long and the defendant's 25 metres.¹
- [7] The road surface on the curve where the incident occurred was bitumen and marked with double centre lines. There were no other markings. The width of the bitumen surface was 7.4 metres on the outbound approach to the curve and immediately after the curve was 6.2 metres wide.² The road has been built upon an embankment and the sides of the embankment are approximately 2 metres high and relatively steep as can be seen from the photographic exhibits.
- [8] Driving in the outbound direction as followed by the plaintiff requires the crossing of a narrow one-lane bridge and then travelling up a steep rise to the commencement of a right-hand curve where the incident occurred. A driver travelling in this direction has right of way over oncoming vehicles not already entered upon the bridge. Beyond that curve the road gradually rises over a distance of approximately one kilometre to a high point which witnesses call the "jump-up".

¹ Transcript 45/50

² Ex 19

- [9] From the point of view of a driver travelling inbound there is a slope from the jump-up down to the subject curve, a left turn and then a downhill approach to the bridge where the vehicle might have to give way to oncoming traffic. Because of the curve and the slope the sight-line to the bridge is not long and this requires a driver to exercise control over the speed of the vehicle.
- [10] The photographs taken by police soon after the incident show scuff marks on the road surface which are likely to have been made by the plaintiff's vehicle. These suggest that the nearside wheels had left the bitumen surface at a point near to a single arrow sign at the outbound commencement of the curve.³
- [11] The importance of this observation is that it tends to confirm the defendant's version as to the relative position of the vehicles when they passed each other. The plaintiff in his evidence said that when he first saw the defendant's vehicle it was on the jump-up. Even if it were partway down that slope, it was much further away from the apex of the curve than the plaintiff's vehicle. The defendant said the vehicles passed as he was exiting the curve and controlling his speed in case he had to give way at the bridge. He estimated his speed at 40-45 kilometres per hour.
- [12] At that speed I am satisfied the defendant would be able to correctly judge his driving line so as to remain on the correct side of the road and have the trailer track safely around the bend without excessive creep to the left.
- [13] The plaintiff maintained that his vehicle was travelling at 60 kilometres per hour which seems to me to be a fast speed for a vehicle of that length and weight to negotiate a sharp right curve. There would be a problem with braking on the curve because this could result in a jack-knife between the prime mover and trailers.⁴ The difficulty for the driver travelling outbound is in choosing the correct driving-line. If too tight on the curve the right-hand creep would cause the trailers to travel on the incorrect side of the carriageway. If a correction was necessary to move the vehicle to the left there could easily be problems with the prime mover going too close to the edge or with the load moving inside the trailers forcing them to the left and over the edge.
- [14] The plaintiff said that as he approached the curve he saw the front driver's side wheel of the defendant's vehicle over the centre-line. He pulled the prime mover to the left and in his side mirror he noticed that the wheels of the trailer had lifted up and the rig was pulled over the side of the road.⁵
- [15] The defendant said he did not see any of that action, he had safely passed the plaintiff's vehicle and continued on to the mill. He said his vehicle did not, at anytime, cross over the centre lines. Only much later did he realise that the incident happened at about the time of his passing the plaintiff's vehicle.⁶
- [16] The defendant gave evidence that in his view 60 kilometres an hour was too high a speed for that location. The maximum speed to take the curve safely was, in his

³ See ex 15 photo 3, ex 17 and transcript 65/5-45

⁴ Transcript 58/45

⁵ Transcript 19/1-30

⁶ Transcript 48/55

view, 45 kilometres per hour.⁷ He normally took the curve at 40 kilometres per hour.⁸ Any higher than this and it was necessary for the trailers to cut the corner.

- [17] The issue of liability depends upon which version I accept and the question of credibility generally.
- [18] The plaintiff was quite frank about the level of his speed but I had difficulty accepting that at that speed he could negotiate the curve safely particularly with the presence of an oncoming vehicle. I had difficulty accepting that he had not previously passed a truck while negotiating the curve.
- [19] I accept the evidence of Sergeant Anderson that the plaintiff spoke to him after the plaintiff's discharge from hospital and in that interview the plaintiff did not claim that the other vehicle had crossed the centre line.
- [20] I accept the evidence of the defendant and Mrs Driessing that they had conversations with the plaintiff during the period of his convalescence and that he made no suggestion to them that the defendant's vehicle came onto its incorrect side. I accept also in that conversation the plaintiff stated that he was going too fast.
- [21] As a result of my consideration of this evidence there is no support for the plaintiff's contention that the defendant vehicle travelled on the incorrect side of the roadway. Had this been the circumstance, I would have expected the plaintiff to have said so to Sergeant Anderson. I would have expected also that when talking to the defendant and Mrs Driessing he would have raised the possibility that the defendant's driving had at least contributed to his loss of control of his vehicle.
- [22] On balance I find that the plaintiff's vehicle was travelling too fast as he approached the curve. The presence of the defendant's vehicle took away the opportunity of cutting the corner causing the plaintiff to make the sudden correction in his driving line resulting in a loss of control of the vehicle. The plaintiff has not convinced me that the defendant's vehicle crossed the centre line in any way. In these circumstances, the plaintiff has not established any basis for asserting negligence on the part of the defendant and his claim therefore must fail.

Order

- [23] I make the following orders:-
1. There will be judgment for the defendants.
 2. I allow 28 days in which the parties may make submissions on costs if that issue cannot be determined by agreement.

⁷ Transcript 47/5-10; 50/18

⁸ Transcript 55/40