

# SUPREME COURT OF QUEENSLAND

CITATION:	<i>Harris &amp; Montaigne &amp; RACQ Limited</i> [2011] QSC 113
PARTIES:	<b>MONIQUE LOUISE HARRIS</b> (plaintiff) <b>and</b> <b>ANDRE LEON MONTAIGNE</b> (first defendant) <b>and</b> <b>RACQ INSURANCE LIMITED</b> <b>(ACN 009 704 152)</b> (second defendant)
FILE NO:	S419 of 2010
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	11 May 2011
DELIVERED AT:	Townsville
HEARING DATE:	14 April 2011
JUDGE:	Cullinane J
ORDER:	There will be judgment for the plaintiff against the second defendant in the sum of \$3150.21.
CATCHWORDS:	DAMAGES – Measure and remoteness of damages in actions for tort – remoteness and causation – pre-accident condition of plaintiff
COUNSEL:	Mr P. Lafferty for the plaintiff Mr M O’Sullivan for the first and second defendant
SOLICITORS:	Roati & Firth Lawyers for the plaintiff Cooper Grace Ward for the first and second defendant

- [1] The plaintiff sues the defendants in respect of personal injuries sustained by her on 30 March 2007. She was riding her bicycle to work at about 6.45 a.m. on the morning of 30 March 2007, travelling in a bikeway on Cambridge Street, Vincent, when her head came into collision with a plank protruding from the back of the first defendant's vehicle across the bikeway.
- [2] The plaintiff was knocked from her bicycle to the ground.
- [3] The plaintiff's cause of action is admitted.
- [4] The plaintiff sustained a laceration to her forehead. It is her case that she sustained soft tissue injuries to the cervical spine and the lumbar spine and has been left with permanent disabilities in these areas. The claims in relation to the cervical and lumbar spines are strongly disputed.
- [5] The resolution of this issue largely turns upon when the plaintiff first commenced to suffer the symptoms in the cervical spine and the lumbar spine, which she claims are the consequence of the accident.
- [6] The plaintiff is a nurse working in midwifery. She has reduced her hours of work to approximately half of that which a full time nurse would perform and says that this is because she has found that she cannot perform a full days work as a nurse because of the neck and lumbar spinal problems.
- [7] The defendants' case is that the plaintiff embarked on a fraudulent exercise in maintaining that she sustained injuries to her cervical and lumbar spines in the accident and that she has disabilities arising from the accident. It is said that in reducing her hours to 20 hours per week, she is seeking to bolster the damages which she is claiming and to do so fraudulently.
- [8] In her statement the plaintiff speaks of the more or less immediate onset of pain in the lower and upper spine. On occasion this is what she said in her evidence. It is also what she told the specialists who examined her although she told Dr Fraser an orthopaedic surgeon when she saw him on behalf of the defendant that the lower back symptoms came on some six months after the accident. As will be seen she has given accounts of the onset of symptoms in the upper and lower spine which differ from this.
- [9] I should say that whilst there are a number of inconsistencies in the plaintiff's evidence, giving rise to the need to scrutinise her evidence and the evidence generally, with care. I formed the impression that the plaintiff found it something of an ordeal to be giving evidence and that she tended to acquiesce somewhat over-readily in propositions that were put to her in cross-examination.
- [10] Photographs which were tendered show extensive bruising to the buttocks and upper leg of the plaintiff.
- [11] Dr Campbell, a neurosurgeon called by the plaintiff, gave evidence that where a person is involved in an accident like the one out of which this action arises, where she strikes her head on a protrusion and falls on her buttocks or back, it can be expected they will have general aches and pains. If symptoms later develop within the next 24 hours or so after the accident, he would regard that as consistent with the usual pattern of that type of accident and those injuries. He would not regard

the failure to complain of such symptoms some days later as being inconsistent with the accident being the cause. He went on to say:

*"So if she complained of no neck pain, no lower back pain, you say that in – for days after the accident that wouldn't affect your opinion one iota?—No, I think – but I think thereafter I would be starting to, you know, have some issues whether there is a link or not. So I- I think the- the question you're asking I think it's a spectrum. So if- if someone has an accident and their pain occurs straight afterwards then I would say there's a hundred per cent cause and effect. If their- if their pain developed a month later I would say there is no cause and effect, zero per cent. And then I think in between those two dates you get a spectrum and there are some external factors as well such as, you know, if there's multi trauma or if they've had a head injury or they're on major painkillers for another problem these can all delay the onset of a pain – a pain syndrome. So I think within the first couple of days I don't have any issues because they have their accident. They've got- they've got a laceration, they're dazed, the adrenaline's running and it can take a couple of days for that to all settle down before pain will manifest. If- if the onset was a week later then I think the – the link is weaker and it gets weaker as the weeks go by."*

- [12] I accept this evidence and set it out at this stage before turning to the history of the plaintiff's complaints. I regard that evidence as requiring assessment by reference to the considerations set out in the passage from Dr Campbell's evidence above. It seems to me that this evidence is also broadly consistent with the view expressed by Dr McGuire, an orthopaedic surgeon called by the plaintiff.
- [13] The plaintiff was taken to the Townsville General Hospital and examined there by Dr Hartwig. She made no complaints of injury to her cervical or lumbar spine at that time but this is perhaps not surprising. She was treated for the laceration which she had sustained to her head.
- [14] The plaintiff was taken to the Mater Hospital where her lacerations were sutured by a plastic surgeon.
- [15] On the following day she saw Dr Jiang. She says she has no recollection of this. She had seen him somewhat earlier complaining of tiredness and this was, it would seem, a follow up examination.
- [16] The plaintiff claims to have felt as though she had been struck by a Mack truck during the first few days or a couple of weeks following the accident. I do not regard this as being inconsistent with the plaintiff's spinal conditions being related to the accident.
- [17] She again saw Dr Jiang on 18 April. On the consultation of 31 March, Dr Jiang had decided to leave the question of the plaintiff's tiredness until after the injury to when her head had healed and this was the follow up consultation for that purpose. He records her as having told him that she had had back pain intermittently for several years.

- [18] Plain x-rays were taken of the lumbar spine. His notes record "nil history of back injury".
- [19] The plaintiff gave evidence of having suffered from back pain intermittently in the course of her work as a nurse, which did not require her to take time off work.
- [20] In the material tendered before me are two documents relating to massages performed on 13 April 2007 and 23 April 2007. The documents which relate to a Medical Benefits Fund refund do not show the part of the body for which the plaintiff received massage but she gave evidence that it was for her neck and for her back.
- [21] The plaintiff made application for workers' compensation by a document dated 5 April 2007. This was filled out by another person on the plaintiff's behalf. The plaintiff signed it.
- [22] Under that part of the statutory form which asks for details of the nature of the injury and the part of the body which is injured, appear the words "laceration to scalp and (L) eye."
- [23] The form requests a list of all specific injuries giving examples of how they might be described.
- [24] She was pressed about this by counsel for the defendant and asked why she put nothing there about any injury to her neck or to her back.

*"HIS HONOUR: ----- of injury. Do you understand that? That you didn't suffer any injury to your neck or to your back in this accident. That's what he's suggesting?—Oh, okay. So I should have put down there that I suffered neck and back problems.*

*MR O'SULLIVAN: No, but you went on when I asked you the question---?—Oh, yeah.*

*---at this- up to this point in time? – Yes.*

*And what you're really saying, aren't you, is that ---?—Is just the ---*

*---up to the ----?-- -----laceration----*

*----5<sup>th</sup> of April 2007---?—Yes.*

*----the only injuries that you recognised as arising from this accident--- ?--- Yes.*

*----was the laceration to the scalp and the left eye?—Yes*

*And that is because you didn't have any pain in your neck or pain in your lower back up to the 5<sup>th</sup> of April 2007, that's correct? – Yes."*

- [25] At p 1-38 lines 25-40 when asked about the contents of her statement the plaintiff said:

*“When you say, ‘I’ve continued to experience significant ongoing pain in neck and lower back’ – again, I put to you that that’s wrong as well; that didn’t happen? – That’s false. Over the last four years that is true, I have been – I do experience ongoing pain. In the first initial couple of months of the accident, no, and I didn’t think anything of it, but yes, as the years have gotten on that statement is correct.”*

- [26] I should also make reference to what the plaintiff said at p 1-45 lines 10-55, in an attempt to explain when the symptoms developed and what their effect was:

*“Yes? -- ---- and then after a period of a couple of months, the back pain was no longer intermittent, it was constant. It was either a dull constant pain or it would be extreme. So after a couple of months of the accident, it became increasing on going pain but I – I thought, ‘Well, why go see a doctor about it’, you know. What are they going to do? Nothing. Go take some pain killers, here you go, see you later.*

*MR O’SULLIVAN: Yes.*

*HIS HONOUR: So are you saying that for the first couple of months or so after the accident, you just had the same sort of ----? – I had the sort of same intermittent back pain ---*

*That you----?-- ---- which-----*

*-----that you had before? --- Yeah, which I had which I put down ----*

*---and what area of this? What part of your body? – This was in my back, in my lower back.*

*Yes? – And then after a period of a couple of months towards the end of 2007, that’s when my neck – I started getting neck pain and tingling down my shoulder and then the constant back pain.*

*Mmm.*

*MR O’SULLIVAN: So that – so that came on at the end of 2007? – Yes, yeah, towards the end ---*

*About nine months?--- ---- of 2007.*

*About nine months after the accident? – Six to nine months, yes.*

*Mmm? – Yeah, I can’t recall the exact time.”*

- [27] In giving this evidence, the plaintiff may have not done full justice to her case. There is evidence of the plaintiff attending Dr Poggio in Ingham (he had apparently been the family doctor) on 5 May 2007 complaining of pain in the cervical spine which had appeared approximately five weeks earlier following the accident.
- [28] There is evidence from Dr Maguire, an orthopaedic surgeon, that radiological evidence revealed an injury to the cervical spine of recent origin in a spine which did not show any signs of degenerative change.

- [29] In addition the plaintiff has sworn that the massages which she had were for her back generally, including her upper and lower spine. The documents themselves do not show any details of what areas were involved.
- [30] Dr Maguire also thought that the nature of the impact was such as to make it likely some injury would or might be sustained to the cervical spine.
- [31] Dr Maguire knew the plaintiff from her work as a nurse at the hospital and spoke of the deterioration which he noticed in her at about this time. This was of course not a medical opinion or based upon any examination by him at the time.
- [32] There is no evidence of any other trauma being sustained by the plaintiff to her spine at this time.
- [33] There are undoubtedly some pieces of evidence supporting a causal link between the accident and the symptoms in the cervical and lumbar spines.
- [34] However, notwithstanding these considerations it is impossible to avoid the effect of the plaintiff's sworn evidence. On more than one occasion including a time when the plaintiff was not responding to leading questions, she stated that the symptoms in her cervical spine and the symptoms in her lumbar spine (qualitatively different from those which she had suffered for some years) did not appear until a time which would make it impossible to link it with the accident which has given rise to these proceedings.
- [35] In these circumstances, the plaintiff's claim that she sustained disabilities of the upper and lower spine in the accident which have impaired her capacity to engage fully in the work of a nurse cannot be accepted.
- [36] The damages which the plaintiff is entitled to recover are therefore quite modest and will be limited to the laceration to the head and the pain and suffering associated therewith and special damages.
- [37] The defendant contends that the appropriate item in the *Civil Liability Regulation* 2003 as amended is Item 22 . It seems to me that this is correct.
- [38] The plaintiff has made a very good recovery from this with the scar not being readily apparent.
- [39] The plaintiff is therefore entitled to the sum of \$2000 for general damages with interest since the accident of 2% on \$1500 providing a figure of \$125.
- [40] In addition, she is entitled to recover the following special damages:
- (a) special damages - \$320.00
  - (b) loss of wages - \$377.21
  - (c) *Fox v Wood* - \$328.00

There will be judgment for the plaintiff against the second defendant in the sum of \$3150.21.