SUPREME COURT OF QUEENSLAND

CITATION:	*Buchan v Nominal Defendant* [2012] QCA 136
PARTIES:	**JOHN DAVID BUCHAN** (appellant) **v** **NOMINAL DEFENDANT** (respondent)
FILE NO/S:	Appeal No 11763 of 2011 SC No 7075 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2012
JUDGES:	Holmes and Fraser JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where s 60 of the *Motor Accident Insurance Act* 1994 (Qld) entitles the respondent to recover from the owner or driver of an uninsured vehicle any costs it reasonably incurs on a personal injury claim arising out of a motor vehicle accident involving the uninsured vehicle – where the respondent made a claim against the appellant in respect of its costs of settling a dependency action – where the deceased in question had been thrown from a bridge as a result of a motor cycle accident and his body not recovered – where the appellant was the owner of the motor cycle involved in the motor vehicle accident that resulted in the death of the deceased – where there was a question as to whether the appellant or the deceased was the driver of the motor cycle at the time of the accident – where the appellant was also injured in the accident and had no recollection of the accident and associated circumstances – where the trial judge determined that it was reasonable for the appellant to compromise the dependency claim on the basis of a likely finding, were the matter to go to trial, that the

appellant was the driver of the motor cycle – whether the trial judge erred in making that finding

Motor Accident Insurance Act 1994 (Qld), s 60

Nominal Defendant v Buchan [2011] QSC 364, cited

COUNSEL: A J Kimmins for the appellant
K N Wilson SC for the respondent

SOLICITORS: Mellick Smith & Associates for the appellant
Cooper Grace Ward for the respondent

[1] **HOLMES JA:** Section 60 of the *Motor Accident Insurance Act* 1994 entitles the Nominal Defendant to recover from the owner or driver of an uninsured vehicle any costs it reasonably incurs on a claim for personal injury arising out of a motor vehicle accident involving the vehicle. The Nominal Defendant, the respondent in this appeal, made such a claim against the appellant in respect of its costs of settling a dependency action. The deceased, Kevin Beal, had been killed in an accident involving an unregistered and uninsured motor cycle belonging to the appellant. The appeal was from a decision of the Chief Justice giving judgment for the Nominal Defendant on its claim. It was common ground that de Jersey CJ had correctly characterised the issue as

> "whether it was reasonable for the plaintiff [Nominal Defendant] to compromise the dependency claim on the basis of a likely finding, were the matter to go to trial, that the defendant Buchan was the driver of the motor cycle".[1]

The appellant argued that the Chief Justice had erred in finding in the affirmative.

The evidence

[2] The circumstances of the accident were unusual. The appellant and Mr Beal had been riding the motor cycle near Weipa at night on 20 April 2002, crossing a bridge over the Mission River and travelling a little way beyond. They were returning over the bridge at about 10.00 pm when the driver lost control of the motor cycle. The appellant was found lying on the eastern side of the bridge, with serious head injuries. He had no recall of the events of the night. Mr Beal had fallen into the river below; his body was not recovered. A railway bridge ran parallel, at a distance of 850 mm, to the road bridge on its eastern side. It was possible that Mr Beal had been thrown over the railway bridge or that he had landed on it and rolled off. The Nominal Defendant compromised a dependency proceeding brought by Mr Beal's de facto wife and children on the basis that if the case were to go to trial it was likely that a trial judge would find, on the balance of probabilities, that the appellant was the driver of the motor cycle and Mr Beal his passenger.

[3] There was no dispute at first instance that the accident involved negligence on the part of whoever was driving the motor cycle, without any contributory negligence on the part of the pillion passenger. The Chief Justice considered various contentious pieces of evidence and the challenge the appellant made to the Nominal Defendant's reliance on them, before concluding that the aggregation of the

[1] *Nominal Defendant v Buchan* [2011] QSC 364 at [8].

circumstances identified provided a sufficient foundation for the Nominal Defendant's view that a court would, on the balance of probabilities, find that the appellant was driving the motor cycle. In dealing with those evidentiary matters, his Honour referred first to the fact that the appellant had been seen riding his motor cycle on the afternoon of the day of the accident. He was its owner and he had, in response to a request for information, said that he did not recall Mr Beal riding it at any time in the past or talking about doing so. The appellant's complaint of the primary judge's approach to the evidence in that respect was limited to an assertion that those considerations could be of little weight.

[4] More attention was given to challenging what the Chief Justice made of some eye witness evidence as to the appearance of the pillion passenger on the motor cycle. Two boys, aged 16 and 17, saw the motor cycle as it was heading towards the bridge where they were standing. Neither of the men on the motor cycle was wearing a helmet. The younger boy said he did not recognise either, although he had got a glimpse of the pillion passenger. In a statement taken in July 2002, he said that that man had "relatively short" hair, which looked a dark colour, although that might have been due to its being night time. At an inquest a year later, he said he remembered seeing that the man had wavy hair. The older boy said in a statement made in April 2002 that he did not see the driver of the motor cycle, but the passenger had hair to his collar, and he did not recognise him as the appellant, whom he knew. In a later statement, made in October 2002, he said that the pillion passenger had shoulder-length blonde or sandy coloured hair.

[5] Later still in a coronial inquest in August 2003, the older of the witnesses said that he was "pretty certain" that the passenger had blonde hair. His answers were not marked by their clarity. One particularly confusing passage read as follows:

> "And you can say that the fellow that was on the pillion passenger on this bike – on this motor bike this night definitely was not John Buckham [sic]? – Well I don't – he had – yeah – no.
>
> What? – What's that mean? – Hey? – What does, yeah – yeah, no – no – no, mean? – Well, no, it wasn't him.
> It wasn't him? – No."

He agreed, however, with the proposition that he thought the man was not the appellant "but there was a chance that it may be".

[6] Mr Beal's de facto partner described his hair in a statement as "about an inch long on top and shorter around the sides". A photograph of him was in evidence. It showed Mr Beal's hair cut short at the sides, but there was no way of discerning what its length was at the back or what colour it was. It was agreed that the appellant had short black hair.

[7] Counsel for the appellant submitted that it did not appear that the Chief Justice had put any weight on the evidence of the first of the two witnesses. His Honour did, however, refer to the fact that the older boy's evidence "even allowing for its shortcomings" would exclude the appellant as the passenger on the motor cycle.[2] Counsel contended that it was not reasonable to place any weight on the evidence because the witness was only 17; had made observations at night in a dark area; had not paid, as he himself said, any particular attention to the motor cycle or who it was

[2] At [13].

carrying; and did not have much of an opportunity to view the passenger. When cross-examined at the coronial inquest, he had given different answers depending on who was asking the questions. By the time the action was settled, four years had passed from the time of the accident, and the witness had not had to give evidence-in-chief of his recollection without the prompt of leading questions. It should have been anticipated that his evidence, as it might be given at any trial, would be worthless once the trial judge took into account all the problems associated with it.

[8] The final area of evidence which the Chief Justice considered in his reasons concerned what was loosely referred to as the "dynamics" of the accident. The passenger on the motor cycle would have been seated slightly higher than the driver. Both men were of similar height. That might have increased the changes of the passenger being thrown over the railing into the river, while the head and chest injuries which the appellant had sustained through contact with hard surfaces might have been more likely at the driver's lower level. A related piece of evidence was the finding of two cups which had contained rum, lying on the rail bridge. The cups belonged to the appellant; DNA found on one of them was consistent with Mr Beal's DNA profile. Their location raised the possibility that the passenger had been holding on to the cups, not the motor cycle, with the result that he was thrown some distance when the accident occurred.

[9] Counsel for the appellant contended that in the absence of expert evidence to relate the seat height factor and the finding of the cups to other factors such as how and where the motor cycle had moved after control was lost, the features of the road and any markings left from the accident on the road or bridge, they were of no evidentiary value. The cups were not precisely located in relation to where the motor cycle came to rest; the possibility existed that rider and passenger had got off the motor cycle to drink and left the cups behind. Finally, in this context, it was said that it was unreasonable for the Nominal Defendant to settle the action without having obtained an expert engineer's report.

[10] The appellant's argument required the quarantining of the various pieces of evidence, identifying flaws in each piece in its state of isolation, and seeking to dismiss it accordingly. I do not think there is any warrant for that approach. This was a case in which it was perfectly rational for the Nominal Defendant and, in turn, the primary judge, to consider the overall effect of the various pieces of evidence, slight as some of them were when taken individually.

[11] Contrary to what was submitted for the appellant, the fact that the appellant was the owner of the motor cycle, was given to riding it, and had no recollection of Mr Beal ever riding his motor cycle previously or talking about doing so, provided in itself a reasonably strong basis for a conclusion that the appellant was more likely than not the driver of the motor cycle in the night in question. I do not think that counsel was entirely correct in saying that the Chief Justice had not given any weight to the evidence of the younger boy about the appearance of the passenger on the motor cycle. His Honour did refer to his description of the passenger as having wavy hair which blew in the wind, in contrast with the appellant's short, dark hair. As with the older boy, his evidence clearly could have been subjected to challenge, given the relatively poor conditions for observation, the lapse of time and their lack of focus on the motor cycle. But it remains the case that their evidence pointed in one direction rather than another: towards the appellant being the driver of the motor cycle. It might properly be discounted for the reasons identified, but it could not be disregarded entirely.

[12] The value of the evidence as to the respective heights on the motor cycle of driver and passenger was dubious, it is true; it did not amount to much more than speculation. But the location of the cups was of some significance: the prospect that the cups were left on the railway bridge when the appellant and Mr Beal were drinking seems remote. A witness described seeing the light of the motor cycle, hearing its noise as it crossed the bridge, accelerated away and then returned to the bridge, accelerating before it suddenly fell silent. There seems to have been little opportunity in that account for the two men to have stopped, nor does it seem logical that the cups would have been left on the railway bridge. There was some basis for a conclusion that one of the men on the motor cycle, more probably the passenger, had been carrying the cups immediately before the accident and had, in consequence, no proper hold on the motor cycle when the impact occurred. That added some weight – albeit not a great deal - to the proposition that the passenger was the man who was thrown some distance.

[13] As to whether an engineer's report should have been obtained, an opinion from counsel had raised the possibility of doing so. That possibility was canvassed, however, in the context of a question as to how far the motor cycle could have travelled without a driver. An investigator had advanced a theory that the motor cycle had travelled 31 metres from the point at which the driver was dislodged, a notion which further investigations discredited. As counsel for the respondent pointed out here, it is to be doubted that expert opinion could have assisted more generally as to the sequence of events because of the lack of certainty about any of the variables: what the points of impact were; what the speed of the motor cycle was; or where either passenger or driver was actually dislodged from the motor cycle.

[14] There was not, in my view, any deficiency in the Chief Justice's assessment of the evidence on which the Nominal Defendant had acted. It was entirely appropriate to consider its cumulative effect, rather than examining it strand by strand in order to dismiss the weaker parts of it. No piece was overwhelming, but considered as a whole, the obvious conclusion was that it was more likely than not that the appellant would be found to have driven the motor cycle at the time of the accident. It was, therefore, reasonable for the respondent to settle the action and the Chief Justice properly gave judgment for the respondent accordingly.

[15] I would dismiss the appeal with costs.

[16] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.

[17] **FRYBERG J:** I agree with the orders proposed by Holmes JA and with her Honour's reasons for those orders.