# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Nyholt v Nominal Defendant* [2008] QSC 273 |
| PARTIES: | **STEVEN NYHOLT**<br>(plaintiff)<br>**v**<br>**NOMINAL DEFENDANT**<br>(defendant) |
| FILE NO/S: | SC 107/1995 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Townsville |
| DELIVERED ON: | 6 November 2008 |
| DELIVERED AT: | Townsville |
| HEARING DATE: | 29 and 30 October 2008 |
| JUDGES: | Cullinane J |
| ORDER: | **Judgment for the plaintiff against the defendant in the sum of $2,375,000 with costs to be assessed** |
| CATCHWORDS: | TORTS – NEGLIGENCE - ROAD ACCIDENT CASES – GENERAL – where plaintiff injured in motor vehicle accident in 1993 – where plaintiff suffered incomplete tetraplegia as a result of the accident – where bad weather conditions - where plaintiff was dazzled by lights on high beam from oncoming driver causing loss of or impairment of vision of road – whether there was another unidentified vehicle involved - whether the unidentified motor vehicle was negligent<br><br>TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE - ROAD ACCIDENT CASES – GENERAL – where plaintiff suffered personal injuries as a result of a motor vehicle accident – where bad weather conditions - where plaintiff not wearing seat belt – where plaintiff travelling at 60 to 70 kilometres in a 60 kilometre zone - whether the plaintiff was contributory negligent |

*Podreversek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 cited

COUNSEL: AR Philp SC with MA Drew for the plaintiff
DH Tait SC with C White for the defendant

SOLICITORS: Roati & Firth solicitors for the plaintiff
O'Shea Corser & Wadley solicitors for the defendant

[1] The plaintiff sues the Nominal Defendant for damages for serious personal injuries sustained by him in the early hours of 6 April 1993 when a van being driven by him in a northerly direction along the Bruce Highway, left the highway a little to the south of Edmonton and overturned. The plaintiff was ejected from the van.

[2] It is the plaintiff's case that the incident occurred as the result of the negligence of the driver of an unidentified motor vehicle travelling in a southerly direction with the lights of the vehicle on high beam resulting in the loss of or impairment of the plaintiff's vision of the road ahead and, in consequence, the loss of control of the vehicle.

[3] Damages are agreed upon in the sum of $4.75 million.

[4] The defendant has admitted due search and inquiry and the giving of the relevant statutory notice.

[5] The proceedings were instituted in 1995. No satisfactory explanation emerged as to the extraordinary delay in bringing the matter before the Court some fifteen and a half years after the relevant events.

[6] The plaintiff has suffered incomplete tetraplegia as a result of the accident and is confined to a wheelchair. He suffered a compression fracture of C4 with shift of C4 on C5. There was also mild sub-laxation of C3 on C4.

[7] The plaintiff was born on 8 April 1971. He was 21 at the time of the incident. He left school in 1986 at Grade 10 and had worked for a number of employers before accepting the offer of a position with Arrows Express where he commenced in about April 1992.

[8] His duties with this employer were to drive a Toyota Hi Ace van each evening from Townsville to Cairns delivering the newspaper, *The Australian*, which was printed in Townsville, to a number of places along the way. He returned to Townsville after doing this, arriving back about mid-morning.

[9] At the time of the accident he was doing this four nights a week. He had somewhat earlier being doing it for some five nights a week. As a consequence he was familiar with the Bruce Highway between Cairns and Townsville. He left Townsville each evening at 11 o'clock. It was his habit to stop at Tully for a cup of tea and then to drive on to Cairns. After leaving Tully, the next place at which he dropped newspapers off was Babinda. At Babinda it was not necessary for him to exit the vehicle. The papers were in the front of the van on the passenger side and

he would throw them out of the window. Similarly, newspapers were thrown from the vehicle in this way at Deeral and Fishery Falls.

[10] At Gordonvale it was necessary for him to leave the highway and drive into Gordonvale. Here it was necessary for him to get out of the van and take the newspapers from the van and deliver them to a newsagent.

[11] The plaintiff had been wearing a lap/sash seatbelt when he arrived at Gordonvale. He undid it to exit the vehicle and did not resume wearing it. He was not wearing a seatbelt when the accident occurred.

[12] The next stop was to be Edmonton. The plaintiff cannot now recall whether it would have been necessary for him to exit the van at Edmonton or not. The plaintiff says that it commenced raining at Gordonvale and that it was raining heavily as he approached Edmonton. The fact that the rain was heavy and indeed that there was something of a tropical downpour occurring is confirmed by evidence of the police officer, then Senior Constable Fitzpatrick and the ambulance officer, Mr Jensen, both of whom were based nearby.

[13] Exhibit 2 is an aerial photograph showing the Bruce Highway in the area to the south of Edmonton as it was in 1993. There were two lanes of the highway which as one travels north, described an S bend with the bend being initially to the right and then to the left. The plaintiff had completed the S bend and was travelling along a straight stretch of road which commences as one exits the S bend when he came to grief.

[14] Notations on Exhibit 2 give some indication of the distance of the highway from the commencement of the S bend to the point where the plaintiff's van left the highway. It would seem to be in the order of some hundreds of metres. The speed limit in the area was 60 kph.

[15] The plaintiff said that he was travelling at between 60 and 70 kilometres per hour and that as he approached the S bend he noticed a car coming in the opposite direction with its lights on high beam.

[16] He said in evidence that he could not say how far the vehicle was from him when he first saw it with its lights on high beam but said that at that point the lights did not have any effect upon him because it was before he had entered the S bend. He said, "It wasn't until I went around the corner, that's when the high beam dazzled me."

[17] As he exited the S bend he took his foot off the accelerator and slowed down. He said that he was watching the left hand side of the road and that as the car came closer he touched the brakes and the vehicle left the roadway. He said that the combined effect of the lights on high beam and the heavy rain prevented him from seeing the centre line and he moved over to the left. He then touched the brakes "as the car was coming upon me" to slow down further and "that's when I lost control of the van."

[18] The plaintiff could not say whether the other vehicle had passed him at the time his vehicle left the road.

[19] It seems clear that the front passenger side of the van after leaving the road struck the bank of a gully which caused it to rotate on its long axis and at the same time overturn. It came to rest substantially on its roof and facing south. The plaintiff was ejected from the vehicle and was found a short distance from the vehicle.

[20] The claim which the plaintiff makes is thus one that alleges the presence of a vehicle, which cannot be identified, the driver of which is alleged to have been negligent in driving with the vehicle's lights on high beam.

[21] By its nature such a claim requires careful scrutiny since it rests upon the plaintiff's testimony alone and it is not possible to independently confirm its veracity.

[22] In such a case attention will necessarily focus upon any account which the plaintiff might have given in the immediate aftermath or within a relatively short time of the accident. On the other hand the catastrophic injuries which the plaintiff has sustained and the impact upon him of those injuries and the medication administered to him during such a period also have to be considered when assessing such evidence.

[23] Here there was evidence placed before me from the investigating police officer, then Senior Constable Fitzpatrick, the plaintiff's employer, one Colin Hombsch, two ambulance officers, Mr Jensen and Mrs Oliveri and a former police officer, Mr Kerestzeny, who spoke to the plaintiff at the Princess Alexandra Hospital on 10 May 1993.

[24] The plaintiff says he has some recall of speaking to someone at the scene but he does not recall who or what it was about. He has no recall of speaking to Fitzpatrick, Jensen, Oliveri or Hombsch.

[25] He says that he recalls a nurse waking him at the Princess Alexandria Hospital to tell him that a policeman was there and he remembers being interviewed by a police officer but said that he could not recall exactly what he had said to him.

[26] Before turning to the evidence of these witnesses I should say that my impression of the plaintiff was that he was a quietly spoken young man who gave his evidence in a straightforward manner. This was the term used – I think realistically – by senior counsel for the defendant in his address. Nothing about his demeanour or the manner in which he gave his evidence leads me to doubt his veracity. Rather the manner in which he gave his evidence left a positive impression upon me.

[27] The first person upon the scene was the ambulance officer Jensen who at that time was based at Edmonton. He attended the scene and arranged for another ambulance officer from Cairns (Oliveri then McGregor) to attend the scene. Exhibit 6 is a copy of a report prepared by Mr Jensen. In it he refers to the car leaving the road and overturning after crossing a gully and the plaintiff being thrown from the vehicle in heavy rain.

[28] Mr Jensen gave evidence that when the telephone rang to inform him of the accident, it was very difficult to hear it ring because of the effect of rain upon the roof of the building. He was at that time only a couple of kilometres from the accident scene.

[29] There is no evidence as to who notified the ambulance or the police of the accident?

[30] Jensen said that when he got to the scene it was raining very heavily and there was a good deal of water upon the roadway.

[31] As he looked around the area at the side of the road for anyone who was in or had been in the vehicle he heard a voice call out, "I'm over here mate" and that this person then said, "I'm fucked mate".

[32] It is obvious from Mr Jensen's evidence that the contents of the report about the incident itself which I have referred to are the result of his own observations rather than anything the plaintiff told him.

[33] Fitzpatrick who was also stationed at Edmonton at the time, gave evidence of receiving a telephone call informing him of a motor vehicle accident. He also spoke of the difficulty in hearing the phone ring because of the heavy rain.

[34] He attended at the scene and prepared some notes whilst he was there. He completed a traffic accident report at the Edmonton Police Station.

[35] He gave evidence of the rain being "very, very heavy" and that water was flowing across the roadway, although he could not say to what depth.

[36] He had a brief conversation with the plaintiff. This occurred whilst the plaintiff was being loaded onto a stretcher and being placed into the rear of the ambulance and before the door of the ambulance was shut and the vehicle drove away.

[37] The notes record the following:

> *"Q: Can you remember what happened?*
>
> *A: The car just aquaplaned across and went over.*
>
> *Q: Was it raining heavily?*
>
> *A: Yes mate."*

[38] Subsequently after he had made arrangements for a photographer to take photographs under his direction and arranged for the removal of the vehicle he attended the Cairns Base Hospital in an attempt to interview the plaintiff and attempt to get further detail from him of what had occurred but he was not permitted to speak to the plaintiff who was taken to Brisbane later that day.

[39] Ultimately arrangements were made for the plaintiff to be interviewed by a police officer whilst in the spinal unit at Princess Alexandra Hospital and Fitzpatrick's report and the report prepared by the police officer, Kerestzeny were prepared in the form of a computerised report which became Exhibit 9.

[40] Oliveri was the other ambulance officer who attended the scene. She had a brief conversation with the plaintiff in the ambulance. Not surprisingly she has no recollection of this but recorded the following under "history" in exhibit .

> *"Pt was driver of m v which lost control on wet road. On arrival pt was out of the vehicle lying on ground. Pt had stated had not been wearing a seat belt and was travelling at approx 70 km/h."*

[41] It is not known whether this was in the nature of a narrative by the plaintiff of what had occurred or whether it was in response to specific questioning by the ambulance officer.

[42] Colin Hombsch flew to Brisbane to see the plaintiff at the spinal unit "a couple of days after the accident". The plaintiff at the time was in traction. His evidence on this subject was:

> "*All right, then. And can you tell us what discussion you had about the accident? – Yeah, we spoke about the accident, what happened, how it happened.*
>
> *Yes?-- It was pouring down rain.*
>
> *Yes? -- And the vehicle aquaplaned.*
>
> *Yes. And did you ask – were there any further discussions about other incidents and – concerning the accident? – No. No, not really.*
>
> *All right. Did – was a seat belt mentioned? – Yes, I did ask – I did ask was he wearing a seatbelt and -----*
>
> *Yes? -- ---- he said, 'No.'*
>
> *So he said he wasn't wearing a seatbelt? -- That's correct.*
>
> *And so simply to – just tell us again what his description of what happened when you asked him about the accident? – He said he was driving along and it was very wet, pouring down with rain and he – the – the vehicle aquaplaned and went into the ditch.*
>
> *Yes. And that was all he said about it? Well ----? – Yeah, no, that's all he said."*

[43] In cross-examination it emerged that he had earlier been informed of the accident by a police officer who told him:

> "*Look likes it aquaplaned in the – in the wet conditions."*

[44] In cross-examination the plaintiff appears to have adopted the term "aquaplaned" as a description of what had happened. He said that he understood it to mean "that I just lost control of the van".

[45] As I have said the plaintiff has no recollection of speaking to Hombsch whilst he was at the hospital. However, the information provided to him by the plaintiff coincides with what the plaintiff said in evidence.

[46] There was evidence from a pharmacologist, Dr Maguire, who examined the medical records and established the medication which the plaintiff had had administered to him. The plaintiff had been administered Midazolam for some 30 hours from 15:30 on 6 April to 4:30 on 7 April. She said that this can affect memory formation but it is memory forward from the time of the anaesthetic episode rather than retrograde memory.

[47] She was specifically asked to look at the position on 9 April when Hombsch visited the plaintiff. He had at this time been administered pethedine which is a narcotic and intravenous ranitidine which is a mild sedative.

[48] She thought that he would have suffered some effects of the drugs that had been administered on that day. In cross-examination she was asked about the impact of morphine and pethedine. She accepted that the administration of pethedine demonstrated that the plaintiff was suffering severe or serious pain, in consequence of which the drug was administered. The dosage was at a normal level. She accepted that the drug or the pain for which the drug was administered can adversely affect a person's cognition.

[49] Kerestzeny gave evidence that he was requested to attend the Princess Alexandra Spinal Unit for the purposes of obtaining a version from the plaintiff. The effect of his evidence was that what is contained in the report is all the information that he obtained from the plaintiff. It does not appear, if I understand his evidence correctly, that he engaged in any process of questioning of the plaintiff about the accident or that he sought any elaboration from the plaintiff of any of the matters mentioned by him.

[50] The account which was given by the plaintiff was:

> "*I was driving along the main highway heading towards Edmonton doing about 60-70 kph, and I was coming to an S bend and I saw a car coming the other way. I slowed down for the bend but the lights from the other car and the rain obscured the line markings on the road, and I touched the brakes and the rear end of my vehicle slid out and I lost control in the wet conditions, and went through the mud on the side of the road and rolled over. I don't remember too much after that.*"

[51] The defendant tendered the notice which was given to the Nominal Defendant pursuant to the statute. This is Exhibit 15.

[52] Some reliance was placed upon the sentence "we do not know as yet of any other vehicle involved."

[53] It is apparent from the evidence of the plaintiff that the plaintiff's stepfather consulted a solicitor in Townsville on his behalf. The plaintiff at this time was in intensive care at the spinal unit. It is not known whether the plaintiff's stepfather had spoken to the plaintiff prior to this letter being forwarded nor is it known where the information contained in it came from.

[54] The conversation with Fitzpatrick at the scene was so brief that it cannot in my view be of any assistance in any consideration of the question whether the

plaintiff's evidence that there was a vehicle approaching with its lights on high beam is truthful. The brief statement "the car just aquaplaned across and went over" is so far as it goes, an accurate description as I understand the plaintiff's evidence of how he came to grief. It is of course on his account not the whole picture.

[55] Similarly the brief account given to Oliveri states accurately, on the plaintiff's account, how the vehicle came to leave the road and the plaintiff to sustain injuries. Again it is not the full picture. I would not regard the failure by the plaintiff to mention the lights of an approaching vehicle to Oliveri as being necessarily inconsistent with the evidence he gave to the Court or requiring its rejection. It raises however some concerns and re-enforces the need for a close scrutiny of the claim advanced.

[56] The evidence of Hombsch falls, arguably, into a different category. This conversation did not take place in the limited and urgent circumstances of those at the side of the road or in the ambulance. One might have thought that an employee might have given his employer, who had an obvious interest in the matter, the full explanation he advances in evidence for the car leaving the road.

[57] On the other hand the conversation was a very brief one, Hombsch had already been given a brief outline by Fitzpatrick of what Fitzpatrick had recorded as happening. It is not known what his frame of mind was but given the enormity of the injuries he had just sustained and the medication administered to him it would not be surprising if he did not have a great desire to converse with visitors however welcome their presence might have been.

[58] The account given to Kerestzeny is consistent with the plaintiff's evidence before me. This account does not in my view have the self-serving character that one might expect of a false account invented in the period of his hospitalisation for the purposes of advancing a fraudulent claim for compensation. It does not seek to lay blame.

[59] The headlights of the approaching vehicle and the rain and their effects on him are mentioned matter-of-factly and with little use of the adjectival.

[60] This accords with the way in which the plaintiff gave his evidence before me.

[61] There was no attempt to embroider or to exaggerate.

[62] My impression of the plaintiff is of a person who in giving an account is likely to say less rather than more and is inclined to understatement rather than overstatement in his expression.

[63] Ultimately the matter comes down to whether I accept the plaintiff as a witness of truth, an assessment which must be made in the light of the evidence as a whole.

[64] Although his failure to mention the approaching vehicle with its lights on high beam, particularly to his employer raises some suspicions, the positive impression which he left me with whilst in the witness box has not been displaced by the evidence of what he did or did not say to the various witnesses who were called. In the final analysis I am satisfied that his account is a truthful one.

[65] It was common ground there were four issues that the Court had to address.

[66] The first was the issue just dealt with.

[67] The second issue is whether on the evidence the driver of the unidentified vehicle was guilty of negligence which contributed to the accident.

[68] The third issue was whether the plaintiff was guilty of contributory negligence in his manner of driving or controlling the vehicle.

[69] The final issue was whether the plaintiff in failing to wear a seat belt was guilty of contributory negligence which contributed to his injuries.

[70] As to the second of the above questions, it seems to me, that the driver of the unidentified vehicle ought to have realised that the impact of the lights of his vehicle on high beam on an approaching driver would be to impair the capacity of the driver to drive safely, particularly given the adverse weather conditions and that in doing so, he was guilty of negligence which was a cause of the vehicle leaving the road and the plaintiff sustaining his injuries.

[71] So far as the plaintiff's alleged contributory negligence is concerned, it is apparent that he drove for a significant time after seeing the vehicle with its lights on high beam without taking any steps to reduce his speed. He acknowledged that he made no attempt to draw the attention of the driver of the approaching vehicle to the fact that his lights were on high beam by flicking his lights up and down because he said he was concentrating on the roadway.

[72] It would seem that it was only, to use his words, as "the vehicle was upon me" that he attempted to brake having only a short distance before slowed his vehicle by taking his foot off the accelerator. It was as a result of his braking that he lost control of the vehicle. Had he slowed the vehicle at an earlier time, he would have been in a better position both to establish his position upon the roadway and to manage the situation by ensuring his vehicle did not get too close to the left hand edge of the roadway whilst remaining clear of the centre line.

[73] A person in the plaintiff's position particularly having regard to the adverse weather circumstances ought, when faced with an oncoming vehicle with its lights on high beam, to have taken care by substantially slowing the vehicle down, averting his gaze to the left hand edge of the roadway and ensuring that he remained safely on the roadway.

[74] He was guilty of contributory negligence which was a cause of his injuries.

[75] In relation to the seatbelt, this was the subject of a substantial dispute between Dr Griffiths, called by the plaintiff on the one hand and Dr Purssey for the defendant on the other. Dr Purssey's qualifications are medical whilst Dr Griffths' are in the mechanical and biomedical engineering. Both have long experience in the area but I regard Dr Griffiths' qualifications and experience as superior in the particular area. The defendant also called Dr John Cameron, a neurologist who expressed a similar view to that of Dr Purssey. Dr Griffiths' qualifications in the area must be regarded as superior to those of Dr Cameron.

[76] All started from the proposition that as a matter of principle a person wearing a seatbelt was overwhelmingly less likely to suffer serious injury than a person not wearing one. This may even understate the effect of Dr Purssey's evidence which was quite emphatic.

[77] Dr Griffiths' view can be summarised as being that the evidence suggested that there was a decompression of the driver's side compartment to such a degree that if the plaintiff had been wearing a seatbelt and was restrained within the vehicle, "he was exposed to a similar prospect of crush down his spine or serious head injury". One of the risks which he would have faced would have been that his head would have been outside of the driver's side of the vehicle with his body restrained inside when the vehicle overturned with the obvious risks to him.

[78] It was his view that the trauma which the plaintiff suffered substantially occurred whilst he was within the vehicle.

[79] He sought to demonstrate by reference to the photographs which are attached to his report (exhibit 1) the extent of the decompression. Photograph 11 shows Dr Griffiths' view of the extent of the crush line on the vehicle at the time of its overturning and before there had been some, to use Dr Griffiths' term, "springback" after the vehicle was put upright.

[80] Dr Purssey gave evidence which was based upon statistics relating to motor vehicle accidents gathered over a long period. He was not convinced that the photographic evidence was able to demonstrate a degree of decompression of the driver's side compartment which would be sufficient to cause injuries of the kind or similar to those sustained by the plaintiff. He said that he had never known an instance of a person restrained by a seatbelt within a vehicle suffering severe injuries where there had been some decompression on the part of the vehicle in which the person was seated. He did however accept the possibility that it might occur. Dr Cameron also accepted that compression of the driver's compartment could result in a fracture of the cervical spine if the plaintiff was restrained in the vehicle. Like Dr Purssey he thought it doubtful that there was evidence of the kind of compression of the driver's compartment that Dr Griffiths spoke of.

[81] Although Dr Griffiths was tackled strongly about his evidence as to the springback from the crush line of the parts of the vehicle shown in photograph number 11, I am not convinced that his opinion in this regard should be rejected. He is highly qualified in this area and has conducted many studies and investigations of car accidents.

[82] His evidence is related in a much more direct way to the specifics of this accident than is the evidence of Dr Purssey or for that matter, Dr Cameron.

[83] The onus of proof rests upon the defendant.

[84] The defendant has not satisfied me that it is more probable than not that had the plaintiff been wearing a seatbelt, he would have sustained a significantly lesser injury.

[85] In considering the question of an apportionment it is necessary to consider the whole conduct of both parties in relation to the circumstances of the accident and to make a comparison of this. See *Podreversek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494.

[86] This involves a comparison both of the degree of departure from the relevant standard of care involved and a consideration of the relevant importance of the acts of the parties in causing the damage.

[87] In my view it is appropriate to apportion liability equally.

[88] I give judgment for the plaintiff against the defendant in the sum of $2,375,000 with costs to be assessed.