SUPREME COURT OF QUEENSLAND

CITATION:	*Nominal Defendant v Buchan* [2011] QSC 364
PARTIES:	**NOMINAL DEFENDANT** (plaintiff) **v** **JOHN DAVID BUCHAN** (defendant)
FILE NO:	SC No 7075 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18, 21 November 2011
JUDGE:	Chief Justice
ORDERS:	**Judgment for the plaintiff, against the defendant, for** **1. the amount of $769,863.27;** **2. interest fixed in the amount of $257,904.19; and** **3. costs, including reserved costs, to be assessed on the standard basis.**
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – UNINSURED VEHICLE – LIABILITY OF NOMINAL DEFENDANT – RECOVERY BY NOMINAL DEFENDANT FROM OWNER OR DRIVER – where the Nominal Defendant plaintiff had compromised a dependency claim bought by the widow and children of the deceased – where the deceased been thrown off a bridge as a result of a motorcycle accident and not been seen again – where the defendant owner of the motorcycle was also found seriously injured at the scene but had no recollection of the events – where the police report and inquest had failed to determine who was the driver of the motorcycle at the time of the accident – whether it was reasonable for the plaintiff to compromise the dependency claim on the basis of a likely finding of a trial court, on the balance of probabilities, that the defendant was the driver of the motor cycle *Motor Accident Insurance Act* 1994 (Qld), s 4, s 37, 60(1) *Nominal Defendant (Qld) v Langman* [1988] 2 Qd R 569,

considered
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603, applied

COUNSEL: D Schneidewin for the plaintiff
A J Kimmins for the defendant

SOLICITORS: Cooper Grace Ward for the plaintiff
Mellick Smith & Associates for the defendant

[1] On 21 July 2006 the plaintiff compromised a dependency claim brought by Ms Martin, the de facto wife of the deceased and her two children by the deceased. The total amount paid out was $769,863.27, comprising $625,000 in damages, the plaintiff's own costs of $52,331.02 and the claimant's costs of $92,532.25. The claim arose from the death of Kevin Beal in consequence of the driving of an unregistered and uninsured motor cycle on Mission River Bridge outside Weipa at about 10 pm on 20 April 2002.

[2] The deceased was thrown from the motor cycle over the railing of the bridge into shark and crocodile infested waters, and was not seen again. Shortly after the incident, in which the driver of the cycle apparently lost control (after hitting a speed bump), the defendant John Buchan, the owner of the motor cycle, was found at the scene in a seriously injured condition. There was evidence that two men had been travelling on the motor bike. Buchan suffered serious head injuries and has no recollection of the events. There was other evidence that the deceased was with Buchan that night.

[3] On or about 27 May 2002 Ms Martin and her two children lodged a notice of accident claim pursuant to s 37 of the *Motor Accident Insurance Act* 1994. The plaintiff embarked upon an investigation into the incident, including retaining a loss assessor, solicitors and counsel. On 18 April 2005 Ms Martin and her two children commenced a proceeding in the Supreme Court claiming damages, in which it was alleged that the cycle was owned and driven at the time by Buchan. That was significant because the police incident report had not nominated anyone as the driver, and at an inquest held on 21 August 2003, the Coroner had felt unable to make any findings as to who was driving.

[4] The plaintiff compromised the dependency proceeding because of its expectation that were the proceeding to go to trial, the court would be likely to find, on the balance of probabilities, that Buchan was the driver and the deceased was his passenger, the driver of the motorcycle was negligent, and there was no contributory negligence on the part of the deceased. The evidence before me comprised a statement by the plaintiff's solicitor Mr Barnes (Ex 1), and an affidavit by Mr Evans, a claims manager of the plaintiff at the time of the compromise. Each was cross-examined. Their evidence comprised a comprehensive account and compilation of the extensive material which informed the plaintiff's decision to compromise the dependency claim.

[5] In this proceeding, the plaintiff seeks to recover that sum of $769,863.27 from the defendant Buchan pursuant to s 60(1) of the *Motor Accident Insurance Act*, which provides:

> "(1) If personal injury arises out of a motor vehicle accident involving an uninsured vehicle, the Nominal Defendant may recover, as a debt, from the owner or driver of the vehicle (or both) any costs reasonably incurred by the Nominal Defendant on a claim for the personal injury."

[6] (The statutory definition of "costs" in s 4 of that Act extends to amounts paid under such compromises.)

[7] In its amended statement of claim, the plaintiff pleaded that the defendant, Mr Buchan, was the owner and rider of the motor cycle, and that the deceased was "at all relevant times…a pillion passenger". In his defence, the defendant pleaded that he "does not admit that he was the rider of the motorcycle", and asserts:

> "The Defendant has made reasonable inquiries and remains uncertain of the truth or otherwise of the allegation and is unable to admit it because the evidence is inconclusive as to who the rider of the motorcycle was."

[8] The only live issue before me was whether it was reasonable for the plaintiff 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. (There was no challenge to other matters, such as the reasonableness of the amount of the settlement.) One assesses that outstanding issue objectively, having regard to the material available to the party in the position of the plaintiff (cf. *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, 653). In *Nominal Defendant (Qld) v Langman* [1988] 2 Qd R 569, 572 Thomas J suggested the court "should [not] be too astute to make microscopic examinations of compromise arrangements which save costs and which avoid the perils of litigation and which prima facie seem sensible". I agree with that, although the ultimate question is whether settling on this basis was reasonable. Applied to this situation, that translates to whether or not it was reasonable to rely on legal advice anticipating a finding on the balance of probabilities that Mr Buchan was the driver.

[9] In agreeing to this compromise, the plaintiff acted on such legal advice. As Hayne J said in *Unity Insurance Brokers*, *supra*, it is important to examine the reasoning behind that advice. It is not necessary for me to recapitulate here the extensive analysis contained in the advices of Mr Lane of Counsel (dated 26 May 2005 and 31 August 2005) and the numerous letters of advice from the plaintiff's solicitors. The advices were apparently carefully prepared and presented: there was nothing "slipshod" about them, to use Thomas J's term in *Nominal Defendant v Langman*. Rather, it suffices for me to focus on the points of challenge raised by Mr Kimmins, who appeared for the defendant, in the course of his cross-examination of the claims manager Mr Evans and in his written submissions.

[10] Those points principally concerned first, evidence that the defendant had earlier that day been riding the motor cycle; second, evidence from Mr Blanco and Mr Adams who saw the pillion passenger as the motor cycle neared the bridge that night; and third, evidence from Sergeant Symonds about the mechanics of the passenger's departure from the cycle, including evidence about locating two cups at the scene after the incident. Other points were advanced, but those were the principal material points.

[11] As to the first matter, Buchan had been seen riding his motor cycle at around 2.30 pm that day. The incident occurred at about 10 pm. Just prior to that, it had been heard driving off from the defendant's house. There is no direct evidence as to who then drove it. The issue was raised by reference to a so-called "presumption of continuance", but that may unduly confuse the question of the relevance of simple factual considerations. Mr Kimmins suggested it was drawing a long bow to infer from the circumstance that the defendant had been driving at 2.30 pm that he was probably driving the cycle so many hours later at 10 pm, and that would be right. But there is another matter. The defendant was the owner, and he informed the plaintiff, in response to a request for information by the plaintiff's solicitors, that he did not recall the deceased riding the motor cycle at any time in the past, or recall the deceased talking about riding the cycle at any time in the past. In summary then, as owner and usual driver of the cycle, the defendant in fact drove it earlier that day, and could not recall the deceased's ever having driven it. This provides at least an informative entrée into the next species of evidence, which is the eye witness evidence.

[12] The two witnesses, both teenaged boys, had a concededly limited view of the persons on the cycle. At the inquest, Mr Blanco said that the passenger had wavy hair which blew in the wind. The loss assessor, in a report of 17 July 2002, confirmed the defendant had "short dark hair".

[13] The other witness, Mr Adams, informed the police that the passenger had collar length hair, and in addition and importantly, that he did not recognise the passenger as the defendant Buchan, whom he knew. Adams told the loss assessor on 15 October 2002 that the hair of the passenger was blonde or sandy in colour. At the inquest, Adams again said that the passenger on the cycle was not the defendant Buchan, and that the passenger had blonde hair, which is not the case with Buchan. While there was evidence from the deceased's de facto partner that the deceased had shortish hair, as may also be suggested by the photograph contained within the material before me, the point of the above evidence of Mr Adams in particular, even allowing for its shortcomings, is that it would exclude the defendant as being the passenger on the cycle. There was criticism of the evidence for vagueness and inconsistency, but more significant is the circumstance that it was given by a completely independent witness, who appears to have been candid, and who did not waiver from the essence of his recollection that the passenger was not the defendant.

[14] As to the third matter, the passenger, because of the configuration of the seating on the cycle, would have been at a higher level than the driver. The two men were of approximately the same height (about 180 cm). That feature may therefore, other matters being equal, increase the prospect of a passenger rather than the driver being thrown over the railing (allowing for the height of the railing) into the river. Also, the head injuries to the defendant through contact with hard surfaces may have been more likely suffered at the lower level of the driver. There was debate about whether "expert" evidence to that general effect could be given. Regardless of that matter, the circumstances to which I have referred were appropriate for inclusion in the circumstantial mix.

[15] So also, though of much lesser potential weight, was the locating at the scene of the two cups which smelt of rum. There was evidence that the men had earlier been drinking rum. The possibility was raised that the passenger may have been carrying the two cups while on the motor cycle and perhaps not holding on in the ordinary

way to the driver, thereby leaving him more vulnerable to the event which befell him: the driver could not practicably have been carrying the cups because the driver would have been holding on to the handle bars of the cycle. Of course the passenger may not have been holding on to the cups, but they got from the house to the accident scene somehow, and that possible scenario reasonably fell into the mix, although obviously not possible of substantial weight in the end – and the plaintiff's lawyers did not suggest that scenario could be given substantial weight.

[16] The question in the end is whether in this unusual case the aggregation of those circumstances meant the plaintiff could reasonably proceed on the basis that a trial court would probably, on the balance of probabilities, conclude that the defendant was the driver. I consider they did, particularly because of the conjunction of the first two features, though without in the end excluding the third. The defendant being the owner and driver on the day and not recalling the deceased's ever having driven the cycle, together with the eye witness evidence of Mr Adams which, if accepted, excluded the defendant as being a passenger, in circumstances where the dynamics of the situation – with the more elevated deceased as passenger more likely to be thrown over the railing than the lower down defendant more likely from that position to suffer the injuries he did: that aggregation of circumstances provided sufficient foundation for the apparently measured legal advice given to the plaintiff of an expectation that a court would on the balance of probabilities find that the defendant was driving.

[17] Other subsidiary issues were raised. One was whether the plaintiff should have obtained an engineer's expert opinion. There would doubtless have been questions about the admissibility of any such opinion, and the plaintiff – based on years of experience in the field – reasonably took the view that the cost would not be justified. Another was whether the plaintiff was unduly timid about the prospect of litigating the matter in the Supreme Court at Cairns. That disinclination was expressed within the plaintiff's organization, but there is no basis to conclude that any such disinclination substantially contributed to the decision to compromise the claim, beyond the usual disinclination to avoid litigation and the associated costs, estimated by the plaintiff in the range of $40,000. That decision was driven by a conviction that a court would likely find that the defendant was the driver, and that conviction was rationally based. Another issue was any significance for present purposes in the plaintiff's not having admitted, in the dependency proceeding, the allegation that Mr Buchan was the driver of the motor cycle. That is explained, however, by the obvious lack of certainty that Buchan was the driver, and as cross-examination of Mr Barnes may have emphasized, a "model litigant" should be careful only to admit matters known or believed after inquiry to be true.

[18] There should therefore be judgment for the plaintiff, against the defendant, for:

1. the amount of $769,863.27;
2. interest fixed in the amount of $257,904.19; and
3. costs, including reserved costs, to be assessed on the standard basis.