

# SPEEDING MOTORCYCLIST'S DAMAGES REDUCED BY 80% FOR CONTRIBUTORY NEGLIGENCE

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The plaintiff, Mr Swan, sought damages for personal injuries after the motor cycle he was riding collided with the defendant's motor vehicle. The accident occurred when the defendant attempted to turn right into a commercial driveway and collided with the plaintiff, who was travelling in the opposite direction and attempting to overtake another vehicle.

## IN ISSUE

The main issue to be determined at trial, and considered on appeal, was the extent to which the plaintiff's damages ought be reduced on account of contributory negligence.

## THE BACKGROUND

The defendant was travelling north-west on Lake Road, Port Macquarie when she commenced a right hand turn into a commercial property.

At the time of commencing the turn, she could see another vehicle approaching from the opposite direction, but believed she had time to complete her turn ahead of that vehicle.

The plaintiff, who was travelling on a motorcycle, was also travelling in the opposite direction to the defendant, behind the other vehicle and was obstructed from the defendant's view by the other vehicle.

At the same time as the defendant commenced the turn, the plaintiff sped up to overtake the other vehicle and the plaintiff collided with the defendant's vehicle.

The incident was captured on CCTV footage from a nearby business. At the time of the collision, expert evidence suggested that the plaintiff was travelling at approximately 100 - 120km/hour, which significantly exceeded the 50km speed limit which applied.

## THE DECISION AT TRIAL

At first instance, the District Court of NSW found that the defendant was liable for the accident, and assessed the plaintiff's contributory negligence at 50%.

The plaintiff's damages were assessed at \$307,365.46 (after the reduction for contributory negligence had been made).

## THE ISSUES ON APPEAL

The court of appeal relevantly considered:

- Whether the trial judge was correct in finding the defendant liable; and
- Whether the assessment of 50% contributory negligence against the plaintiff was sufficient.

## THE DECISION ON APPEAL

### Primary Liability

By a 2:1 majority, the court of appeal upheld the trial judges finding that the defendant had breached her duty of care in that she did not slow down 'to a point where she could see both lanes of oncoming traffic with no blind spot or blocked view' prior to commencing a right hand turn across two lanes of oncoming traffic. Her duty to 'act safely' was not altered by the lack of care the plaintiff took for his own safety.

### Contributory Negligence

The court of appeal found that the plaintiff's conduct in driving the motorcycle at a grossly excessive speed made a significant causal contribution to the accident and justified a substantial reduction in the defendant's liability.

Significantly, the court of appeal held that:

*"the precautions reasonably required of a party to a motor accident may be different in kind where the drivers were in control of different vehicles. A motorcyclist, like a pedestrian, faces a greater risk of harm relative to the driver of a car or truck. It is this harm against which the contributory negligence of the plaintiff is to be assessed. The plaintiff's wholesale disregard for his own safety in riding at a speed of at least 100 kph in an area where the designated speed limit was 50 kph and the very significant contribution of that excess speed in causing the accident justifies a substantially greater reduction in the liability of the defendant."*

The court of appeal therefore allowed the defendant's appeal in relation to the trial judge's assessment of the plaintiff's contributory negligence and assessed contributory negligence at 80% rather than 50%.

## IMPLICATIONS FOR YOU

This decision is an interesting application of the principles which underpin the assessment of the proportionate degrees of culpability of different classes of road users. It highlights the onus upon vulnerable road users, such as motorcyclists and pedestrians, to take a degree of care for their own safety proportionate to the potential harm which will be suffered by them if they fail to do so.

It is also a reminder of the significance of CCTV footage in respect of motor vehicle accidents. There are many and varied circumstances where CCTV or other video footage<sup>2</sup> may capture a motor vehicle accident. Early investigation and enquiry into the availability of such footage to ensure its preservation is essential. In this case, the CCTV footage provided the foundation for expert evidence which was pivotal to the court's determination of both primary liability and contributory negligence.

[Ayre v Swan \[2019\] NSWCA 202](#)

[1] There was also an appeal of the trial judge's assessment of damages, which was dismissed. It is not appropriate to discuss this aspect of the appeal in this brief case note.

[2] Including video monitors operated by the Brisbane City Council and Queensland Department of Main Roads and Transport.

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