CONTRIBUTORY NEGLIGENCE – A TALE OF TWO INTOXICATED PLAINTIFFS

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Under the *Civil Liability Act 2003* (Qld) there is a presumption that if a plaintiff is intoxicated, they contributed to their own injuries (known as contributory negligence). The concept of contributory negligence has been incorporated into legislation in all Australian jurisdictions with slight variations. The High Court held in *Podresbersek* that the test for contributory negligence is to compare the relative culpability of the plaintiff and defendant for the acts that caused the damage. [1]

Two cases, *McConnell v Cosgrove* [2017] QDC 139 and *Allianz v Swainson* [2011] QCA 136 consider intoxicated plaintiffs and contributory negligence allegations.

In *McConnell*, the plaintiff had been drinking beer at home for around 5 hours. At 8:20pm, he decided to go for a ride on his bicycle along a busy Brisbane road. The defendant was driving behind the plaintiff, and attempted to overtake the plaintiff. The plaintiff was struck by the defendant's vehicle causing him to suffer injuries.

In *Swainson*, the plaintiff had been drinking at a pub at the Gold Coast. He decided hitchhike home instead of riding his pushbike because he had been drinking. He walked on the fog line of the road rather than the footpath. He was hit by a car and suffered injuries.

The facts seem similar, but one plaintiff was awarded $0 and the other plaintiff was awarded $106,000. Can you guess which plaintiff succeeded?

MCCONNELL

In this case, the plaintiff gave evidence that he was riding in the bike lane when he heard a car sound its horn. He was spooked by the horn, swerved to the right, and was hit by a vehicle (the defendant) from behind. The plaintiff claimed that the defendant failed to drive cautiously and should have given him more space in his lane.

The plaintiff's story at trial did not match what he told the police. His story to the police was that he was riding on the footpath and decided to veer onto the road. He was then hit by a car. He did not make any mention of a horn being sounded.

The plaintiff's case began to fall apart when it became apparent that there was no marked pushbike lane where the accident occurred. It was also established that he did not have lights, reflectors or mirrors on his bike, he was wearing dark clothing, and, instead of a helmet he wore a cowboy hat.

Even more concerning was the fact that the plaintiff admitted he had 7 beers prior to hopping on his bike. The attending paramedic noticed he smelt of alcohol and was slurring his words. The defendant argued that the plaintiff's intoxication caused or contributed to the accident.

The judge was persuaded that the plaintiff was intoxicated. In coming to this conclusion, he considered the evidence of the plaintiff's alcohol consumption, together with the lack of explanation about why he swerved to the right. It was likely that the plaintiff's capacity to exercise due care and skill was impaired.

The credibility of the plaintiff came under further scrutiny when it was discovered he had understated his income after the accident, inflated his claim for physiotherapy expenses, and had obtained money from Centrelink whilst working.

Because of the credibility issues, the judge was not convinced the defendant sounded the horn at all. The plaintiff failed to prove that the defendant had breached his duty of care, and was therefore awarded $0.

SWAINSON

In this case, the plaintiff had been drinking at a pub. He left the pub and decided to hitchhike as he was too intoxicated to ride his pushbike.

He chose not to use the footpath - because walking on the road would be better for hitchhiking. He walked on the fog line on the left hand side of the road with his back to the traffic. It was 9:30pm and dark. The walk home was around 6km.

The evidence was that the plaintiff stepped to the right when he saw a vehicle's headlights illuminated in front of him. The driver of that vehicle (the defendant) failed to notice the plaintiff in time, causing him to hit the plaintiff.

The court found that the defendant was negligent because he failed to keep a proper look out and failed to slow to a speed to avoid the collision. The defendant had just come around a corner and had seen the plaintiff walking on the road, but thought that he would be able to drive safely past him. There was no evidence that the defendant was speeding.

At first instance, the plaintiff was found to be 40% responsible for the accident for his failure to walk on the footpath provided, failure to walk on the right side of the road (facing oncoming traffic), and for stepping to the right further onto the road. It was determined the plaintiff did not take reasonable care for his own safety – but the defendant was mostly to blame because he had seen the plaintiff with time to avoid the collision.

This was appealed by the defendant. The Court of Appeal decided that the plaintiff should bear 60% of the responsibility. The Court of Appeal agreed that the defendant was partially to blame for failing to avoid the collision. However, the defendants were able to prove that the primary cause of the accident was the plaintiff stepping onto the road directly in front of the defendant's vehicle. The only explanation for the plaintiff doing this was because he was intoxicated.

The plaintiff was awarded around $106,000.

IMPLICATIONS

As per the *Podrebersek* test of culpability, drivers of motor vehicles are held to a high standard of care because cars have far greater capacity to cause damage than a vulnerable and unprotected pedestrian. However, these two decisions establish that pedestrians and cyclists may still be found to contribute to their own loss if they fail to have regard for their own safety.

In coming to a finding of contributory negligence, a court will consider each matter on a case by case basis. If the pedestrian plaintiff failed to take measures to avoid danger, then they may take the greater share of the blame.

[1] *Podresbersek v Australian Iron and Steel Pty Ltd* [1985] HCA 34; 59 ALR 492.

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