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Précis Paper

The Nominal Defendant v Cordin

Abstract – A discussion of *The Nominal Defendant v Cordin [2019] NSWCA 85* where the Court of Appeal dismissed the appeal after a retrial and confirmed the trial judge's award of damages.

Discussion Includes

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Précis Paper

The nominal defendant v Cordin

1. **In this edition of BenchTV, Hugh Marshall SC, (Barrister, Jack Shand Chambers, Sydney) and Ian Benson, (Solicitor, AR Connolly and Company Lawyers, Sydney) discuss the case in the NSW Court of Appeal.**

<u>The facts of the case</u>

2. **Mr Cordin, the plaintiff was riding his pushbike down Minyon Falls Road in the Nightcap National Park, north of Lismore, NSW. He was an experienced bike rider, it was a dirt road with potholes all over it at this particular place and he had an accident.**
3. **His memories of what happened are clouded by the incident. His last memories were of approaching the potholes with which he was very familiar, slowing down to walking pace, standing on the pedals of his bike, when he felt a shunt, or was 'propelled', to use his words, forwards.**
4. **The next thing is he was found some time later, face down in a pothole filled with water.**
5. **He was very confused, in a great deal of pain having suffered very severe injuries.**
6. **Other passers by stopped to give what assistance they could. They also said he was incoherent, confused, rambling.**
7. **About 40 minutes later an ambulance arrived and he was taken to hospital.**
8. **Mr Cordin didn't see a car. He didn't hear a car. And he began proceedings against the nominal defendant purely upon his feeling of being shunted or propelled forwards and the damage to the bike.**
9. **The case became interesting because the ambulance officer who took a history of him, such as he was capable of giving, did not mention the involvement of a motor vehicle. Everyone it seems assumed he'd hit a pothole and come off his bike.**
10. **However the damage to the bike wasn't consistent with that.**
11. **When examined at Lismore Base Hospital again there was no mention of him having mentioned a motor vehicle as having been involved in this accident.**
12. **He was airlifted to Princess Alexandra Hospital in Brisbane and again there isn't a notation by the admitting orthopaedic surgeon or intensive care specialist of the involvement by a motor vehicle.**
13. **It wasn't till the following day when visited by his wife and daughter he said I must have been hit by a car.**
14. **Re damage to the bike – there were experts called in the case. The first, Dr Carnavas, had noticed three things of relevance: the first was the rear axel had been displaced by 6 mm on one side. He said that was indicative of a downward force on the wheel at an angle which had forced the alignment of the rear axle out.**
15. **The second was the buckling of the rim.**

16. The third was the absence of any damage to the other parts of the bike which would have been expected if a bicycle had hit a pothole at some speed.
17. The only inference he could draw was that the bicycle had been hit by a motor vehicle.
18. The expert for the insurer took the view that the cause of the accident could have been hitting a pothole.
19. In the final analysis, the trial judge preferred the evidence of Dr Carnavas.
20. Mr Griffith who examined the bike after Dr Carnavas didn't see the axle displacement as that had been put back in place by Dr Carnavas.
21. Mr Griffith, the trial judge found, was somewhat of an advocate for the defendant's position, and argumentative, and she preferred the evidence of Dr Carnavas. That had some significant bearing on the way the Court of Appeal dealt with the case.

<u>Inference on honesty of solicitor in first trial</u>

22. There was another interesting development. This case had gone to trial before Judge Levy in the District Court. Judge Levy found for the plaintiff. The defendant appealed. At the Court of Appeal the defendant successfully persuaded the Court of Appeal that the trial judge had not dealt with all the evidence in the manner to deal with all the issues and sent it back for a rehearing.
23. Hugh Marshall SC appeared at the rehearing and subsequent trip to the Court of Appeal. The second trial judge Sharon Norton SC in the District Court found again for the plaintiff. Her reasons were quite expansive, and at the Court of Appeal the argument that the trial judge hadn't dealt with all the relevant material was ultimately rejected.
24. There was an interesting point at trial, leading counsel for the defendant said the first time the plaintiff had mentioned a motor vehicle was when he went to the police to make a complaint, after he saw a solicitor, cast an inference against the professional honesty of the solicitor. Later a file note showed an initial call from the plaintiff had mentioned a motor vehicle – he had reported accident to police. That essentially cleared any suspicion on honesty of solicitor.
25. Trial judge had believed in Mr Cordin, his wife and daughter and those findings were attacked in the Court of Appeal, ultimately without success.

<u>The nominal defendant – a statutory creature</u>

26. Because no vehicle was involved that could be identified, the plaintiff took proceedings against the nominal defendant – the nominal defendant is a statutory creature that comes into being when a person cannot identify a driver or owner of a motor vehicle causative of plaintiff's injuries. Often, when a car is run off the road, or doesn't stop. It is funded by the other CTP insurance companies, s 34 of the *Motor Accidents Compensation Act* allows for the recovery of damages in circumstances where the identity of the vehicle cannot be established. However, the entitlement to recovery depends upon the plaintiff or those he instructs carrying out due search and enquiry. If

satisfactorily completed and no owner or driver is identified the nominal defendant steps in.

27. In this case, the solicitor had arranged for signs to be put up on the dirt road leading to the national park and these enquiries and any by the police were not fruitful in identifying anyone who knew anything about this other vehicle that was said to be involved.
28. At both trials, due search and enquiry was not an issue. It was accepted by the defendant that if there was another vehicle its identity could not be established. If there was liability, the nominal defendant would fund that liability.
29. That was one of the few concessions made in the case.
30. It was also conceded that if the accident was found to have involved another motor vehicle, it must have involved the negligent driving of that motor vehicle.

Massive forensic disadvantage to nominal defendant

31. The nominal defendant would be at a massive forensic disadvantage. The plaintiff in cases such as these has to give evidence themselves as to how the accident happened, sometimes there are witnesses. Often the defendant has no one.
32. The approach of the Court in cases such as this is that all the unanswerable evidence given by a plaintiff in cases such as this has to be viewed with caution.
33. This point was made in submissions and the Court of Appeal considered the various cases at some length.
34. The Court of Appeal said "the nominal defendant is not in any special position, the decisions merely establish that where one party in any case, not just a nominal defendant case, is in a position of disadvantage, evidence against it needs to be evaluated with care."
35. In my respectful submission this a very common sense and practical consideration of how courts at first instance should deal with cases involving unanswerable or unanswered evidence.
36. The trial judge at rehearing had taken that into account and the Court of Appeal found that she had.
37. The submission advanced by the insurer, the appellant, was that she had been far too liberal in her approach to the plaintiff's and his witnesses' evidence, and the Court of Appeal found that, contrary to those submissions, the approach taken by the trial judge was precisely that adumbrated in the earlier decisions concerning unanswered evidence.
38. The conclusions she reached heavily depended on acceptance of the evidence of the plaintiff and family.

Why the Court of Appeal dismissed the appeal

39. **The Court of Appeal dismissed the appeal. They found the trial judge had carefully evaluated the witnesses of the plaintiff and accepted them as witnesses of truth, despite a prolonged attack on their credibility which they withstood well, as to how the accident happened as far as the plaintiff was concerned, his state of health by the time the ambulance officer came to examine him, corroborated by witnesses about his confusion.**
40. **The fact he had not recounted that feeling to the ambulance officer or the examining doctors at the various hospitals was discounted by virtue of him being in extreme pain and medication he had been provided – one of which was Fentanyl, which causes confusion.**
41. **Medical notes – came off bike, hit pothole – was not conclusive.**
42. **Trial judge found plaintiff and wife, daughter credible witnesses and the Court of Appeal found she approached it carefully and were not prepared to interfere with her judgment, applying *Fox v Percy*.**

<u>Application of Fox v Percy</u>

43. ***Fox v Percy [2003] HCA 22* at [28] and [29] concluded that the trial judge's finding of fact should not be interfered with unless those findings are demonstrated to be wrong by 'incontrovertible facts' or 'uncontested testimony' or they are 'glaringly improbable' or 'contrary to compelling inferences'.**
44. **The criteria for appellate interference was not justified in this particular case – at the Court of Appeal all three judges dismissed the appeal and upheld the trial judge's orders as to cost which involved costs of both trials being on an indemnity basis.**

<u>Appeals by rehearing of paper evidence</u>

45. **All these appeals to the Court of Appeal are governed by s 75A of the *Supreme Court Act* which requires them to be by way of rehearing.**
46. **Rehearing is based on papers not oral evidence – they read the judgment, transcript of the trial and hear submissions.**
47. **Where a trial judge has made a finding about a witness's credit, that is very difficult to overturn as a generalization.**

<u>The issue of witness demeanour</u>

48. **The trial judge has some advantage after hearing the witness. There has been much criticism of the importance of a witness's demeanour and the trial judge determining whether the witness is telling the truth.**
49. **Demeanour can be an influencing factor – I think by and large judges are experienced in their ability to determine a witness's truth. Somebody has to do it and the trial judge usually has trial experience and can see whether someone is making inconsistent statements etc.**

Instructive to practitioners re costs

50. These cases involve a great deal of money, not so much in damages, but insofar as legal costs are concerned. Even though damages have been agreed before the first trial of $350,000, the consequence of running a case such as that would involve a pyrrhic victory in the sense of the plaintiff recovering very little damages after he or she has paid out their solicitor's costs.

51. Ordinary costs represent 50 or 60 per cent of a solicitor's costs and the gap has been widening for many years. It has been said that costs are compensatory and ought not be regarded as punitive but the essence is that even if costs are recovered on an ordinary basis all plaintiffs are severely prejudiced because of having to pay the additional 40 or 50 per cent from their verdicts. In a case such as Cordin that might run to hundreds of thousands of dollars.

52. The solicitors very astutely put in an offer of compromise, even after damages had been agreed at $350,000. I think the offer was of $200,000 or $250,000, that is, offering the insurance company, the nominal defendant, the opportunity to get out of the case for a significantly lesser sum and avoiding the costs of two trials and two trips to the Court of Appeal.

53. They didn't avail themselves of that opportunity hence we had two trials and two trips to the Court of Appeal and the trial judge on the first occasion awarded indemnity costs as did the trial judge on the second occasion.

54. The insurer, the nominal defendant, complained about this in the Court of Appeal and the Court of Appeal dismissed it but said the nominal defendant is in no different position than any other defendant in this sort of matter when it came to making commercial decisions.

55. The nominal defendant argued it was in a special position because it properly had to investigate as far as it was able, it had an obligation to run these matters. It would have to capitulate to accept a lesser figure and it argued in the Court of Appeal that it shouldn't be subject to the ordinary rules of the court when it was in a special position.

56. The Court of Appeal said that wasn't so and it had the opportunity to resolve this case at a significant discount had it accepted the offer of compromise and as a consequence of its failure to do so, had to pay the plaintiff's costs on an indemnity basis, that is close to 100 per cent of his costs in this case.

Tactical advice to practitioners on an offer of compromise

57. It's very controversial and it varies from case to case but where there is an opportunity to put an offer of compromise, I would regard it generally speaking as professionally obligatory for practitioners to seriously consider putting on an offer of compromise.

58. An offer of compromise needs to be made after a plaintiff has provided the defendant with all relevant material upon which a considered evaluation of damages in the case can be made.
59. To do it earlier would mean defendant wasn't in a position to evaluate the case, and any offer of compromise would be regarded as nugatory.
60. In cases where that information has been provided, if there is a court appointed mediation, if you make an offer of compromise from a plaintiff's perspective before a mediation, an insurer will take the view that is where negotiations should start from their perspective – they will offer less than what you wanted in an offer of compromise. Plaintiffs properly take the view that this is where it should finish. Because an offer of compromise has to be less than a plaintiff would ordinarily want or expect a Court to give them.
61. It is generated by a need to resolve litigation and secondly by the need to compensate the plaintiff for those costs if the offer of compromise is not accepted and the matter proceeds to a trial, and large sums of money are involved in expenditure on costs.
62. I would tend to suggest that following an unsuccessful mediation, plaintiffs, and indeed insurers, should seriously consider filing an offer of compromise.
63. From a plaintiff's perspective, it should be at level where they feel confident that they will be able to exceed that figure at a trial. There's no point where you don't feel confident you will exceed it, it's a pointless exercise.
64. But it also has to be pitched at a level where settlement with the insurer is possible. After all, the exercise is geared towards early resolution of cases.
65. Equally, it applies to insurers. If there is a plaintiff whose expectations are excessive as far as the insurer is concerned then an attractive offer of compromise becomes an important tool for the insurer because if the plaintiff does not accept that offer and does not do better than that offer then the insurer is quite entitled to ask for, and often receives, an order for costs on an indemnity basis which may in some cases completely erode the plaintiff's verdict.
66. It's a useful tool for practitioners and has to be used judiciously.
67. It's not in every case that an offer of compromise will guarantee an indemnity order. But in most cases, it works to provide the successful party with an order for indemnity costs. A powerful weapon indeed.
68. That's the nature of the beast – it's in essence a compromise. A plaintiff will be unhappy if they set an an offer of compromise and it is accepted because they will feel they should have got more.
69. An insurer in accepting that offer may well have been told that they would expect a verdict less than the offer of compromise and feel that they have paid too much. But that is the essence of compromise. One side pays too much and the other feels it receives too little.

70. But my experience is that after a day or so they are happy the whole litigation is ended. And insurers feel the same. So it is by its very nature a compromise, as it should be.

BIOGRAPHY

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Focus case

The Nominal Defendant v Cordin [2019] NSWCA 85

Benchmark Link

https://benchmarkinc.com.au/.../benchmark_03-05-2019_weekly_civil_law_review.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/5cbe93f8e4b0196eea406585

Cases

Fox v Percy [2003] HCA 22

Legislation

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Supreme Court Act 1970