



Précis Paper

Good Case Preparation Makes a Difference – a Motor Vehicle Accident

This discussion concerning a motor vehicle accident demonstrates the importance of thoughtful and careful preparation of evidence. It is a good production for those less experienced practitioners by very experienced and able practitioners.

Discussion Includes

- Motor vehicle and bicycle collision
- Facts of case
- Defence of illegality
- Expert reports – how to analyse and assess underlying facts and opinions
- Creative approaches to evidence
- Practice tips for lawyers
- Contributory negligence of cyclist

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Good Case Preparation Makes a Difference – a Motor Vehicle Accident

1. In this edition of BenchTV, Anthony Black SC (barrister) and Louise Mathias (barrister) discuss the decision of the ACT Supreme Court (Mossop AsJ) in *Hendricks v El Dik (No 4)* [2016] ACTSC 160. Mr Black SC appeared in the Supreme Court proceedings for the successful plaintiff, Hendricks. In many ways this matter is a typical motor vehicle accident case. However, Mr Black SC notes that the proceedings also serve as a useful reminder that the evidence each party brings to light will ultimately decide the issues.

Material Facts

2. The plaintiff, Mr Hendricks, worked in a full time position with the Department of Immigration as an IT consultant. In January 2012, whilst riding home from work on his electric bicycle, he was struck on a pedestrian footpath (which was part of the cycleway) by a car reversing out of a residence. A hedge blocked a view of the cycleway for the driver, El Dik, from where his car was parked inside his residence.
3. In the proceedings, the defendant maintained that he had reversed out of the residence very slowly. Furthermore, when he reversed out onto the cycleway, the plaintiff remained 10 metres from his vehicle, looking away from him. Conversely, the plaintiff alleged that the defendant's car suddenly appeared in front of him and he had no time to do anything.
4. There was evidence that earlier in the ride, the plaintiff had suffered difficulties with his bike. This was seized upon by the defendant to support the contention that the plaintiff was looking down at his bike at the time of the accident, because he would have been checking that his bike was properly functioning.
5. Additionally, the defendant's expert suggested that the plaintiff was travelling at at least 30km/hour on his bike at the time of the accident. The plaintiff claimed that he had instead been travelling at 10-15km/hour.

Issues

6. The issues that arose in the trial were not unusual in a motor vehicle accident proceeding. They included disputes regarding:
 - a. The defendant's speed;
 - b. The plaintiff's speed;
 - c. The defendant's look-out (awareness);

- d. The plaintiff's look-out;
 - e. Opportunities to stop, and
 - f. Time and distance arguments.
7. There was also an additional complexity that arose out of the way the defendant ran the trial. The defendant ran an illegality argument surrounding the fact that the motor the plaintiff had on his bike had a capacity of 500W whilst the regulations decreed the maximum capacity for such a bike on such a path was 200W. It was said that if the plaintiff was riding a 500W bike then, assuming that on at least some occasions he had applied full power, his presence at the scene of the accident was in part caused by the fact he was riding a bike that was illegal. In other words, if he was riding a 200W bike, he would not have been where he was at the time that the accident occurred because on a lower powered bike it would have taken longer to get to the location of the accident at the time of the accident. The judge dismissed this whole causation argument. Mr Black SC noted that the fact that a person was at a point in the Universe at a particular time cannot be a cause of an accident as a matter of law.
8. Mr Black SC considers that this case serves an important reminder to practitioners to have the evidence in the forefront of their minds. In *Hendricks*, because there were vastly opposed expert reports in relation to the speed the plaintiff was travelling, and because this issue was central to liability and contributory negligence, Mr Black SC devoted substantial resources to gathering as much evidence as possible on exactly what speed the plaintiff was travelling. This included employing a barrister to attend the scene of the accident at the same time of day as when the accident occurred with a view to speaking to regular users of the road and establishing the normal speed of cyclists on that road at that time of day. As a result of this effort, 3 such cyclists were called in the trial and they suggested that they would travel at about 20 km/hour. Furthermore, disguised speed cameras were constructed along the same pathway revealing that the range of speeds were 15-30km/hour with an average of 19km/hour.
9. An electrical engineer was also able to reconstruct the bike and determine that the maximum speed of the plaintiff's bicycle was 26km/hour and that the maximum speed the bike would have been travelling on the day would have been 22-23km/hour. Furthermore, by reference to the impact damage on the vehicle, it was accepted by the judge that the plaintiff was travelling at about 18 km/hour. Thus the plaintiff was travelling at the exact average speed of all other riders on that road at the same time of day, which was important for primary liability and contributory negligence.
10. The point to be made is that evidence is crucial in matters such as this and significant efforts need to be undertaken to discover evidence, sometimes through imaginative ways. Mr Black SC notes that an important task for practitioners is to isolate every factual assumption that an expert formed an opinion upon and then independently check their accuracy.

The Most Likely Alternative OR All Alternatives?

11. Ultimately, Mr Hendricks succeeded although the plaintiff was found to be 25% contributorily negligent. The damages were agreed at \$12million and thus a damages order of \$9million was awarded to the benefit of the plaintiff. His Honour concluded that the defendant should have reversed out of his residence in the same manner as he did but at a far slower speed.
12. This might be problematic because the *Civil Law (Wrongs Act) 2002* (ACT), which is largely analogous to the *Civil Liability Act 2002* (NSW), requires that duty and breach be assessed by reference to the precautions which a reasonable person would take against a risk other than an insignificant risk of harm.
13. The plaintiff's case had always been that if the defendant had intended to leave his premises at peak hour, knowing that cyclists would ride past and being on notice that cyclists ride past at quite considerable speeds, that he would have parked in the street or parked in the driveway such that he could come out forward or used his alternative driveway which had no such blind spot. Further in the alternative, it was said that if the defendant used the driveway he did, he should have done so extremely slowly and he should have stopped at a point where the tip of his car appeared in the cycleway before the rest of his car followed.
14. Mossop AsJ considered that the most likely alternative choice taken by a reasonable person would have been to reverse out backwards but at an extremely slow speed. But Mr Black SC wondered why a finding could not have been made that the defendant should have taken the other precautions in alternative, as well.
15. In relation to contributory negligence, the judge found that Mr Hendricks was not keeping a proper look out notwithstanding that he was not travelling at an excessive speed. This finding was based on the time and motion studies undertaken by the various experts. However, Mr Black SC questioned the size of the finding of contributory negligence especially since the road rules required vehicles to give way to bicycles on the cycleway and not vice-versa.
16. Mr Black SC considers that the defendant may well pursue an appeal in the matter given the quantum of damages.

BIOGRAPHY

Anthony Black SC

Senior Counsel, Elizabeth Street Chambers – Sydney

Anthony was admitted to the NSW Bar in 1983 and appointed Senior Counsel in 2010. His practice areas include Professional Negligence, Public Inquiries & Inquests, Personal Injury, Mediation & Dispute Resolution, and Criminal. He is also a Fellow of the Chartered Institute of Arbitrators.

Louise Mathias

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Louise Mathias is a Barrister and Accredited Mediator, providing advice and advocacy in Family Law, Medical Negligence and Personal Injury matters. In addition to assisting leading firms to implement effective dispute resolution strategies, Louise has lectured in law at the University of Sydney, and developed the Family Law Masters Parenting Masters course for the College of Law Australia. She has been widely published, including in the Law Society Journal and Commercial Law Quarterly, and has contributed content to The Laws of Australia encyclopaedia. Louise regularly writes on diverse topics on her blog at <http://www.sydneybarrister.net.au>.

BIBLIOGRAPHY

Focus Case

Hendricks v El Dik (No 4) [2016] ACTSC 160

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_12-07-2016_insurance_banking_construction_government.pdf

Judgment Link

http://courts.act.gov.au/_data/assets/pdf_file/0008/955088/hendricks_no_4.pdf

Legislation

Civil Law (Wrongs Act) 2002 (ACT)

Civil Liability Act 2002 (NSW)