

## **CASENOTE - *Dominello v Dominello and Anor;* *Dominello v the Nominal Defendant and Anor* [2009] NSWCA 95**

June 2009

by Glenn Biggs, Partner

This case involved an appeal from the earlier decision of the District Court of New South Wales. The case examined the liability of the driver of a vehicle and the Nominal Defendant for a spillage of diesel fuel on a highway.

### **Facts**

At approximately 1am on 3 July 2008, a Toyota HiAce van being driven by Mr Dominello, containing his wife and their eight children, encountered diesel fuel on the Pacific Highway causing Mr Dominello to lose control of the vehicle and collide into a tree. Mrs Dominello was injured as a result of the collision and brought an action against Mr Dominello.

Where a person is injured as a result of the negligent driving of an unidentified or uninsured vehicle, the plaintiff can receive compensation from a statutory body known as the 'Nominal Defendant'. As the vehicle that caused the diesel spill could not be identified, the plaintiff also brought an action against the Nominal Defendant.

The trial judge found that the first defendant, Mr Dominello, was liable for Mrs Dominello's injuries but found in favour of the Nominal Defendant. Mrs Dominello was awarded damages in the amount of \$2,775,035.00.

The trial judge found that Mr Dominello was liable for the plaintiff's injuries for the following reasons:

- Mr Dominello was driving at 100 kilometres per hour (kph) when he lost control;
- a driver taking reasonable care would have been driving at 75-80kph; and
- if Mr Dominello had been driving at 75-80kph, he would have regained control of the vehicle and avoided the collision.

The Nominal Defendant was found not to be liable for the plaintiff's injuries as it was found on the balance of probabilities, it could not be said that the spillage of diesel fuel was caused by a negligent act of the driver of the unidentified vehicle.

Mr Dominello appealed against the finding of liability, challenging the three primary findings of the trial judge. Mrs Dominello, the plaintiff, appealed the finding in favour of the Nominal Defendant.

### **Decision**

The Court of Appeal, comprised of Justices Beazley, Macfarlan and Handley, dealt with each appeal in turn.

#### *Decision regarding Mr Dominello*

The court unanimously held that the decision regarding Mr Dominello be overturned, however differed in their reasons.

His Honour Justice Macfarlan, with whom Justice Beazley agreed, found that Mr Dominello failed to take reasonable care by driving at a speed faster than a reasonable person would have driven in the circumstances. It was held that the trial judge's finding that a reasonable driver would have been driving no faster than 75-80kph, was well founded as the road was wet, it was night, there was no street lighting, and Mr Dominello was driving a van with a tendency to oversteer with a fully loaded trailer.

Justice Macfarlan also agreed with the trial judge's findings that Mr Dominello's breach of duty, by driving at a speed in excess of what a reasonable driver would have driven in the circumstances, materially contributed to the plaintiff's injury. The fact there was no reason for Mr Dominello to expect there was diesel fuel on the road did not break the chain of causation as both the presence of the diesel fuel and the speed at which Mr Dominello was driving were necessary conditions for the accident to occur; neither would have caused the crash alone.

Justice Macfarlan, contrary to the view of the trial judge, found that the evidence did not support the conclusion that a reasonable driver would have been able to regain control of the vehicle at 75-80kph. While the plaintiff's liability experts suggested that the speed at which Mr Dominello could have regained control of the vehicle was between 75-80kph, they could not refute that Mr Dominello may not have been able to regain control of the vehicle even if he had been driving at 50kph.

It was His Honour's view that the trial judge placed too much weight on the evidence that Senior Constable Szlicht, and Mr Toovey, of the State Emergency Service, regained control of their vehicles after encountering the fuel. Mr Dominello correctly argued that the ability of both Constable Szlicht and Mr Toovey to regain control of their vehicles was significantly better than Mr Dominello. Constable Szlicht was warned of the spill and approached the area with caution at approximately 60kph when he began to slide. Mr Toovey, a professional driver, gave evidence he had experience in "*sliding out on slippery substances on roadways*". It was therefore held that they did not provide a reliable guide that Mr Dominello would have been able to regain control of his vehicle if he had been travelling at 75-80kph.

Justice Handley also held that the appeal should succeed. His Honour found that Mr Dominello could not have foreseen the presence of diesel fuel on the road, nor was he required to drive from Queensland to Sydney at a speed which would have allowed him to avoid an unforeseeable risk such as the diesel spill. Although it was held that it would have been appropriate to drive below the advisory speed as a driver taking reasonable care would, it was not established that it was a breach to be driving at the speed the defendant was driving. His Honour agreed with the trial judge's finding that the accident would not have occurred except for the speed at which Mr Dominello was driving, but found that it did not establish causation between the

speed the defendant was travelling and the plaintiff's injuries. His Honour was therefore not prepared to hold that Mr Dominello was negligent in driving at more than 80kph, nor driving at the speed limit which would have been safe but for the presence of diesel fuel on the road.

Mr Dominello's appeal therefore succeeded as the plaintiff failed to establish, on the balance of probabilities, that Mr Dominello would have been able to regain control over the vehicle if he was driving at what was found to be a reasonable speed. The trial judge's decision was therefore overturned and Mr Dominello was found not to be liable for the plaintiff's injuries.

### *Decision regarding the Nominal Defendant*

The Court of Appeal was unanimous in allowing the plaintiff's appeal and finding the Nominal Defendant liable for the plaintiff's injuries.

The court agreed that the most likely cause for the presence of the diesel fuel on the highway was that the fuel spilled from the fuel tank of an unidentified heavy truck due to the driver failing to properly fit the fuel cap after refuelling.

The court examined if the accident fell within the *Motor Accidents Compensation Act 1999* (NSW) (**the Act**). Section 34(1) of the Act provides:

*"(1) An action for the recovery of damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle on a road in New South Wales may, if the identity of the vehicle cannot after due inquiry and search be established, be brought against the Nominal Defendant"*.

Section 3 of the Act prescribes the definition of injury to mean:

*"...personal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if, and only if, the injury is a result of and is caused during:*

- (i) the driving of the vehicle, or*
- (ii) a collision, or action taken to avoid a collision, with the vehicle, or*
- (iii) the vehicle's running out of control, or*
- (iv) such use or operation by a defect in the vehicle ... "*

As the court held that the source of the diesel fuel was a poorly fitted fuel cap, the Nominal Defendant could only be liable if it was the driver of the vehicle who had failed to properly fit the fuel cap.

On examination of the evidence, the court found that there were only self service stations in the vicinity of the diesel spill. The court also found that if the vehicle had been refuelled elsewhere there would have been diesel fuel on other sections of the highway. It was therefore held that it could only be the driver who had refuelled the vehicle and failed to replace the fuel cap properly.

The court then questioned if the Nominal Defendant was responsible for negligence of the driver in failing to replace the fuel cap. It was held that the open fuel cap was the predominant and immediate cause of the spillage, and the spillage of fuel was the immediate cause of the plaintiff's injuries. The plaintiff's injury was a result of the driving of the unidentified vehicle and caused by the driver by failing to remember that he had not replaced the fuel cap, and driving a vehicle with a defect, being no fuel cap.

The appeal was therefore allowed and the Nominal Defendant was required to pay the damages in the amount of \$2,775,035.00 awarded to the plaintiff.

### **Conclusion**

This finding shows that there is a very strict duty of care when driving a vehicle even in circumstances of an unforeseen fuel spillage. It was only the finding that the collision could have occurred even at a reasonable speed that Mr Dominello was not liable for the plaintiff's injuries. In this instance a reasonable speed was held to be up to 25kph below the speed limit. This strict duty of care means that even where there is an unforeseeable risk, such as an oil spill, the driver of the vehicle may still be liable if they are found not to be driving reasonably.

In the event the truck which caused the spill could be identified, it is clear the driver would have been liable for the plaintiff's injuries. The case therefore presents a warning to drivers to take care not only when physically driving the vehicle but also undertaking auxiliary requirements, such as refuelling.

The case also confirms that the Nominal Defendant can be held liable even where the plaintiff's injuries are not brought about in the typical circumstance of a collision between two vehicles.

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