

Practitioners should seriously consider whether it is in the client's interest before making and pressing small economic loss claims as part of larger non-economic loss claims. This can result in a net loss to the client, with little prospect of attracting the operation of special circumstances provisions. ■

Endnotes:

- ¹ See *SDSS v Smith* 23 ALD 277.
- ² 30 FCR 61.
- ³ *Zaccardi v SDSS* 40 ALD 760.
- ⁴ 40 ALD 451.
- ⁵ 32 AAR 120, para 25-29.
- ⁶ (2001) AATA 480.
- ⁷ eg *SDFaCS v Hall* (2001) AATA 664 - \$7000 in a \$185,000 lump-sum settlement, where the plaintiff's injuries had deteriorated.
- ⁸ Unreported, 24 June 1993.
- ⁹ 38 ALD 152, at 38.
- ¹⁰ 38 ALD 736.
- ¹¹ at 738.
- ¹² at 739.
- ¹³ Unreported, 20 April 1999.
- ¹⁴ 32 AAR 370.
- ¹⁵ 40 ALD 745.
- ¹⁶ at 38.
- ¹⁷ Unreported, 24 April 1998.
- ¹⁸ para 18-19.
- ¹⁹ See *Re SDSS and Hill*.
- ²⁰ at 4.13.4.10.
- ²¹ Unreported, 14 August 1991.
- ²² at 17.
- ²³ Unreported, 23 December 1992.
- ²⁴ at 4.13.4.20.
- ²⁵ Unreported, 26 May 1993.
- ²⁶ 43 ALD 75.
- ²⁷ See *Re SDSS v Bolton* 18 ALD 464.
- ²⁸ See *Re Smith v SDFaCS* (2001) AATA 541; *Re SRL v SDSS*, unreported 14 October 1997.
- ²⁹ Unreported, 20 October 1995.
- ³⁰ Unreported, 17 September 1993.
- ³¹ at 10.
- ³² at 12.
- ³³ *SDSS v Thompson* 20 AAR 435.
- ³⁴ (2000)
- ³⁵ [2002] AATA 187.
- ³⁶ See *SDSS v Thompson* 53 FCR 580.
- ³⁷ 35 ALD 739.
- ³⁸ Unreported, 16 December 1994.
- ³⁹ See *SDSS v Thompson*.
- ⁴⁰ Unreported, 9 June 2000.
- ⁴¹ at 29.
- ⁴² *SDSS v Thompson*.

Similar fact evidence in civil trial:

A review of the law

In *Morris v Warrian & Suncorp Metway Insurance Limited*,¹ where both liability and quantum were in issue, Justice McGill considered the role of similar fact evidence in civil trials. He also greatly stressed the importance of the level of pain the plaintiff suffered, compared to the level of impairment at which he was assessed, when awarding his general damages.

The facts

The plaintiff was riding a motorcycle, which collided with the rear of the defendant's vehicle. The plaintiff said the accident happened because the defendant's vehicle moved to the left and slowed down as if it was going to park at the kerb. The plaintiff began to overtake the defendant's vehicle when it suddenly, without warning, swung to the right and into the path of the plaintiff, as if executing a u-turn.

The defendant said he had moved a little to the left to avoid a fire hydrant plug, which he could see above the surface of the bitumen. He had then moved back to the normal line of traffic when his vehicle was struck from behind by the plaintiff's motorcycle.

Similar fact evidence

The plaintiff called a witness who said he had seen the defendant on two other occasions, shortly before the accident, execute a u-turn at about the same place on the road without giving prior warning to other traffic. The question was whether the evidence about the earlier incidents was admissible.

One reason why similar fact evidence is inadmissible is that if admitted it would be given undue weight by a jury, making it more prejudicial than probative. This applies in criminal, not civil proceedings. In civil cases, such evidence cannot be prejudicial because there is no accused person.

It was stated that matters of habit, trade custom and business practices could be proved by evidence of what has been done on other occasions. Justice McGill examined a number of civil cases dealing with similar fact evidence. ►

Karen Aitken is an Articled Clerk at Carew Lawyers in Brisbane

PHONE 07 3236 1528 EMAIL kaitken@carewlawyers.com.au

In *Eichsteadt v Lahrs*,² concerning a motor vehicle accident, evidence of a particular habit was admitted. The admissible evidence was that the plaintiff had a habit of wheeling his bicycle when crossing a particular intersection. This went to the question of whether he was walking or leading his bicycle at the time of the accident. An appeal to the High Court was dismissed, and the evidence was held admissible.

In *Taylor v Harvey*,³ Justice Carter excluded similar fact evidence. The defendant, who knew the plaintiff, had on two previous occasions played 'chicken' with the plaintiff on exactly the same section of road where he later struck the plaintiff.

The approach in *Lahrs* was distinguished on the grounds that what was being alleged did not amount to a habit or habitual practice on the part of the defendant. Justice McGill disagreed with the exclusion of the evidence in this case, as it appeared to him to be logically probative of the proposition that the defendant was in the habit of driving in a particular way on the particular piece of road when he saw the plaintiff on his motorcycle coming towards him.

*Mood Music Publishing Co Ltd v De Wolfe Ltd*⁴ was another case where similar fact evidence was admitted to show a habit or a propensity to behave in a particular way.

In the present case, Justice McGill believed that the similar fact evidence only had to show 'a pattern which is different from what one would otherwise assume for a person in his position'.⁵

The real significance of the evidence was that the defendant had a propensity to make a u-turn without first indicating and without checking that there was no vehicle following close behind him.

Justice McGill held that the evidence did 'logically support the probability of the plaintiff's case being true'.⁶ The evidence was not excluded on the grounds that it was an excessive multiplication of collateral issues, as identified by Justice Gummow in *D F Lyons Pty Ltd v Commonwealth Bank of Australia*.⁷ The evidence was ruled to be admissible.

The plaintiff's injuries

The plaintiff suffered an extensive soft tissue injury to the right lower abdomen and right hip involving fat necrosis and haematoma, some damage to the nerve in the right thigh and probably an injury to the right sacro-iliac joint. The plaintiff had difficulty lying on his side at night due to the pain. He suffered from continuing pain, which interfered with his work. Walking on hard concrete floors and standing for long periods of time caused the plaintiff pain at work.

Dr Curtis found in June 2002 that the plaintiff was suffering from a 3% to 5% impairment of the whole person.

In July 2002, Dr Cook arranged for the plaintiff to receive an injection of cortisone and local anaesthetic into the right sacro-iliac joint. This decreased the plaintiff's pain by 70%. But the effect of the injection was only temporary, and after two weeks the pain began to come back.

Dr Cook found the plaintiff was suffering from a 3% to 4% impairment. Justice McGill accepted that the plaintiff was suffering from a 4% permanent partial impairment.

Justice McGill commented that the plaintiff had suffered from persistent pain, which was not exaggerated and not inconsistent with the injuries suffered. He stated that '[t]he percentage disability, 4%, is not very meaningful in this case because it does not take into account pain which is the main consequence to the plaintiff of his injuries'.⁸

The outcome

The defendant was found to be negligent. Justice McGill found that it was reasonable behaviour by the plaintiff to move to overtake the defendant the way he did, and that 'the plaintiff had no reasonable opportunity to avoid a collision once the defendant's vehicle moved to its right into his path'.⁹

Taking into account the high levels of pain suffered by the plaintiff, compared to the level of permanent impairment he had sustained, Justice McGill awarded the plaintiff \$32,000 for pain and suffering and loss of amenities. The plaintiff recovered \$124,633 in total. ■

Endnotes:

- ¹ [2003] QDC 009.
- ² [1960] Qd R 487.
- ³ [1986] 2 Qd R 137.
- ⁴ [1976] Ch 119.
- ⁵ at [14].
- ⁶ at [15].
- ⁷ (1991) 28 FCR 597.
- ⁸ at [43].
- ⁹ at [33].

arw

australian rehabworks

OCCUPATIONAL THERAPISTS BRAIN INJURY SPECIALISTS

- ◆ MEDICO-LEGAL REPORTS
- ◆ ADULT & PAEDIATRIC BRAIN INJURY
- ◆ COMPLEX ORTHOPAEDIC INJURIES
- ◆ MEDICAL NEGLIGENCE
- ◆ MULTI-DISCIPLINARY CAPABILITY

WE PROVIDE COST OF CARE REPORTS

Can meet urgent requirement

ANNA CASTLE-BURTON
SUITE 372, 4 YOUNG STREET, NEUTRAL BAY 2089
PHONE: 9908 4285