

SUPREME COURT OF QUEENSLAND

CITATION: *Bowditch v McEwan and Ors* [2002] QCA 172

PARTIES: **JOHN LUKE BOWDITCH (by his litigation guardian)**
JOHN STANLEY BOWDITCH
(plaintiff/respondent)
v
JOYCE ANNE McEWAN
(first defendant/appellant)
DANIEL TIMOTHY STUTT
(second defendant/not a party to appeal)
DIGITAL EQUIPMENT CORPORATION
(AUSTRALIA) PTY LTD ACN 000 446 800
(third defendant/not a party to appeal)

FILE NO/S: Appeal No 11576 of 2001
SC No 1008 of 1995

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 May 2002

DELIVERED AT: Brisbane

HEARING DATE: 10 May 2002

JUDGES: de Jersey CJ, McPherson JA and Atkinson J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made.

ORDER: **Dismiss the appeal, with costs to be assessed.**

CATCHWORDS: TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – PARTICULAR CASES – OTHER CASES – duty of mother to unborn child - whether a mother can be liable to her child who was born with disabilities in respect of injury caused to that child while *in utero* due to the mother's negligent driving - the doctrine of parental or intra-familial immunity not recognised in Australia

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – PARTICULAR PERSONS AND SITUATIONS – MOTOR VEHICLE CASES - determination of judicial standard of conduct for pregnant women – development of standard with respect to negligent driving as opposed to general pre-natal

negligence and maternal risk-taking – policy considerations arising from a claim based on negligent driving compared with a claim based on a mother taking other unjustified risks to the foetus during pregnancy

Uniform Civil Procedure Rules, r 483(1)

Body Corporate Strata Plan No 4303 v Albion Insurance Co Ltd (1982) VR 699, distinguished

Caltex Oil (Australia) Pty Ltd v The Dredge “Willemstad” (1976) 136 CLR 529, referred to

Dobson v Dobson (1999) 174 DLR (4th) 1, considered

Donoghue v Stevenson (1932) AC 562, applied

Hahn v Conley (1971) 126 CLR 276, 283-4, referred to

Kars v Kars (1996) 187 CLR 354, referred to

Lister v Romford Ice and Cold Storage Co Ltd (1957) AC 555, referred to

Lynch v Lynch (1991) 25 NSWLR 411, applied

McCull v Bright (1939) VR 204, 211, distinguished

Perre v Apand Pty Ltd (1999) 198 CLR 180, applied

Watt v Rama (1972) VR 353, referred to

COUNSEL: S C Williams QC, with K P Kimmons, for the appellant
M Grant-Taylor SC, with D Bates, for the respondent

SOLICITORS: Eardley Motteram for the appellant
Garrahy & Associates for the respondent

- [1] **de JERSEY CJ:** On 7 May 1987 the appellant, then pregnant with the respondent, was driving a motor vehicle on the Bruce Highway when it collided with another vehicle driven by the second defendant and owned by the third defendant. The same company was the licensed insurer of both vehicles. When born on 17 November 1987 the respondent was disabled, allegedly because of injuries suffered in the collision. By his father, the respondent sued the defendants for damages, alleging the injuries were the result of the negligence of his mother, the appellant, and/or the negligence of the driver of the other vehicle, the second defendant. In their defence, the defendants admitted that the appellant caused the collision, but denied that the appellant owed the respondent any duty of care.
- [2] The respondent then applied to the court for the determination of the answer to this question:
“Did the first defendant, as the admitted driver of the Datsun sedan referred to in paragraph 3(a)(i) of the statement of claim, owe to the plaintiff a duty of care, breach of which would afford the plaintiff a cause of action in negligence for his injuries, if any, sustained as a result of the collision admitted in paragraph 2 of the amended defence?”
- [3] The learned primary Judge answered the question in the affirmative. (Her Honour proceeded under rule 483(1) of the *Uniform Civil Procedure Rules*, which relates to decisions on questions dealt with separately from others.) In a compelling

judgment, Her Honour comprehensively analysed the contrary approaches to this issue taken by the New South Wales Court of Appeal in *Lynch v Lynch* (1991) 25 NSWLR 411 – where the court held that a child, when born, may maintain an action for damages in respect of injuries sustained because of the negligent pre-natal driving of the mother; and by the majority of the Supreme Court of Canada in *Dobson v Dobson* (1999) 174 DLR (4th) 1, holding to the contrary.

- [4] The essential difference between the approaches taken by those two courts centres on the question addressed. The court in *Lynch* confined the issue to the immediate facts, the arguably negligent driving of a motor vehicle. The court in *Dobson* broadened the issue into the question whether a child may sue in respect of the mother's conduct (generally) during pregnancy – inevitably raising matters of considerable social complexity, bearing on aspects of lifestyle – and that court's rejection of the suit was the result of policy considerations bearing on a woman's right to privacy and autonomy.
- [5] The court in *Lynch* affirmed that there is, in Australia, no doctrine of intra-familial tort immunity (*Hahn v Conley* (1971) 126 CLR 276, 283-4), and that a third party may be held liable to a child in damages for injuries negligently inflicted upon the child while *en ventre sa mere* (for example, *Watt v Rama* (1972) VR 353). It was then for that court but a short step – the issue of foreseeability and the delineation of a standard of care being clear, and public policy in its view plainly favouring the availability of the claim – to confirm that such a claim could be sustained against the mother in respect of the manner of her driving of the motor vehicle.
- [6] Before us, counsel for the appellant urged that we address the broader issue, as framed by the Supreme Court of Canada, and follow that court's approach, leaving the issue for resolution by the legislature – as could be achieved by legislation such as the United Kingdom's *Congenital Disability (Civil Liability) Act* 1976. Unsurprisingly, counsel for the respondent urged us to follow *Lynch*.
- [7] This is a case where, substantially agreeing with the reasons for judgment of the learned primary Judge, I would have been content simply to adopt them. But taking that course is not the practice, and because of specific challenges, it is necessary in any event that there be some separate elucidation of the reasoning of the appeal court. I may, however, be brief.
- [8] The major challenge to Her Honour's approach, and critically of *Lynch*, concerned any relevance of the currency of compulsory third party insurance cover ensuring recovery under any judgment given. This consideration plainly influenced Clarke JA who delivered the leading judgment in *Lynch* (cf. pp 415-6) and to some limited extent Her Honour (reasons for judgment paras 32, 33). Such an approach may gain some support from statements in judgments of the High Court (for example, *Kars v Kars* (1996) 187 CLR 354, 382). But the traditional approach would ignore considerations of insurance in determining the existence or scope of a tortious duty of care (*Lister v Romford Ice and Cold Storage Co Ltd* (1957) AC 555, 576-7; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, 580-1; *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 230). The reasoning basing that traditional and orthodox approach is to my mind compelling. Why, as Mr Williams QC for the appellant submitted, would not the rational extension of the contrary approach be to determine the existence of a duty of care by reference, if

among other things, to a prospective respondent's financial capacity to meet any judgment?

- [9] But that influence was not critical to Her Honour's conclusion, on my reading of her reasons, and in so far as it may have featured more prominently in *Lynch*, I believe the result in that case to have been plainly right in any event. Mr Grant-Taylor SC, for the respondent, urged us to accord that decision considerable persuasive weight (cf. *McCull v Bright* (1939) VR 204, 211; *Body Corporate Strata Plan No 4303 v Albion Insurance Co Ltd* (1982) VR 699, 705): as a decision on this precise point of a court of coordinate jurisdiction, we should do so, unless persuaded it is wrong.
- [10] This is a case which is readily susceptible of appropriate determination consistently with the fundamental principles established by the House of Lords, as long ago as 1932, in *Donoghue v Stevenson* (1932) AC 562, and proceeding incrementally as discussed in the High Court in, for example, *Perre v Apand Pty Ltd* supra, p 217.
- [11] Foreseeability being clear and the standard of care for motorists so well defined, and the respondent having an established cause of action against a driver in this situation had the driver not been her mother, it would in policy terms be insupportable were the court not now to "extend" the field of liability to confirm this potential liability of mother to child. The desirability of that extension is so plain that the court should not hesitate to effect it. It is not a matter which need be left to the parliament.
- [12] The justifiability of this approach becomes compellingly evident through the realization that to the determination of the issue, the appellant's being the mother of the foetus was really incidental: the driver owes a duty of care to others within the vehicle, including any foetus within a passenger – that the foetus is within the driver herself is only incidentally relevant.
- [13] It should be clearly expressed that this determination of the appeal says nothing in relation to the many complex social considerations raised in argument before us, and many of which moved the Supreme Court of Canada in dealing with the broader question it framed: such questions as whether a mother's smoking or consuming excessive amounts of alcohol during pregnancy, or engaging in other dangerous activity and the like, could give rise to a claim by an infant born exhibiting adverse consequent effects.
- [14] I would dismiss the appeal, with costs to be assessed.
- [15] **McPHERSON JA:** I agree. It is not the appellant's conduct as a mother, but as a driver, that the plaintiff is complaining about and that is the subject of the proceedings which he has brought against her. The appeal should be dismissed with costs.
- [16] **ATKINSON J:** For the reasons given by the Chief Justice, I agree that the appeal should be dismissed with costs.