DISTRICT COURT OF QUEENSLAND

CITATION:	*Murray v Nominal Defendant* [2014] QDC 144
PARTIES:	**NEVILLE LESLIE MURRAY** **(plaintiff)** **v** **NOMINAL DEFENDANT** **(defendant)**
FILE NO/S:	1502/13
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 April, 1 & 2 May 2014
JUDGE:	Farr SC DCJ
ORDER:	The claim is dismissed.
CATCHWORDS:	MOTOR VEHICLE ACCIDENT - NOMINAL DEFENDANT – rear end collision at drive-thru- application of *Motor Accident Insurance Act* 1994- requirement of proper inquiry and search – where requirement not satisfied- where claim dismissed. MOTOR VEHICLE ACCIDENT – PERSONAL INJURIES- QUANTUM – application of AMA Guides Fifth Edition – where degree of impact was minor – where evidence of defendant Orthopaedic Surgeon preferred- where amount awarded would have been limited to $1,000.00.
COUNSEL:	A J Williams for the plaintiff R Dickson for the defendant
SOLICITORS:	Slater & Gordon for the plaintiff Moray & Agnew for the defendant

Nature of claim

[1] The plaintiff's action is for personal injuries, loss and other damage allegedly suffered as the result of a rear end motor vehicle accident which is said to have

occurred on 22 August 2011 in the drive-thru lane of a McDonald's fast food restaurant at Springwood.

Summary of plaintiff's case regarding incident

[2] The plaintiff claims that at about 9.46 p.m. on 22 August 2011 he was seated in the driver's seat of a white Nissan Maxima motor vehicle with his wife in the front passenger seat beside him. Their vehicle was stationary in the drive-thru lane with the rear wheels of the car sitting on top of a speed bump that traversed the lane. The plaintiff was looking diagonally to his right at the menu board and had his foot on the brake at all relevant times.

[3] Whilst in that position the plaintiff said that he heard the sound of an engine revving loudly, coming from somewhere behind him, although there was no car in the drive-thru lane behind his vehicle at that time. That sound ended as quickly as it had started, but some short undefined time later the plaintiff's vehicle was struck from behind, causing it to move forward off the speed bump. The speed bump was less than 3" high.[1]

[4] The plaintiff's wife, after being told by the plaintiff that they had been struck from behind, immediately exited her vehicle and walked to the rear of it. At that time the vehicle which had struck hers was approximately one metre away. Mrs Murray could see no damage to her vehicle but noted that the front number plate of the other car had been crushed in such a way that it was impossible to read that vehicle's registration number. She said that the positioning of that number plate coincided with the positioning of the towbar on her car and that she formed the immediate belief that the towbar had caused the damage to the number plate.

[5] The other driver, a male, also exited his vehicle and moved to a position near the driver's side front wheel of that vehicle, at which time he allegedly loudly said to Mrs Murray:

> "*There's nothing wrong with your fucking car, you fucking idiot. Get the fuck back in your car.*"[2]

[6] Mrs Murray said that she felt intimidated by this man, who was tall and was of a large stature. She said that she could also smell alcohol on his breath. As a consequence of his behaviour, she re-entered her vehicle.

[7] The plaintiff did not exit his vehicle, but he did advise a McDonald's employee via the intercom that is used to place food orders from the drive-thru lane, that the vehicle behind had just struck his and he needed assistance. That employee advised him to place his order and move to the next window, which he did. At that window he again complained and sought assistance from the manager of the restaurant. He at that stage paid for his order. He was advised that the manager would speak to him and that he should move to the next window. At the next window he was supplied with the food he had ordered and was told to pull his car over to a position

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1 Transcript p 1-36 line 35; Ex 5.

2 Transcript p 2-40 lines 22-25.

a short distance away from the drive-thru lane and wait for the manager who would come out to speak to him.

[8] Shortly after parking nearby, the plaintiff and his wife saw the offending vehicle drive off as if to leave the McDonald's grounds. Mrs Murray immediately jumped from the car and yelled abuse and made an offensive gesture at the occupants of that vehicle. They both then observed that vehicle come to an immediate stop and reverse back in the direction of the plaintiff's parked vehicle and pull up beside and parallel to the plaintiff's vehicle with each car facing in the same direction.

[9] The front seat female passenger of that vehicle asked, in a sarcastic way, as to the welfare of the plaintiff and his wife. Upon being told by Mrs Murray that they were not alright, the driver said something which the plaintiff and his wife could not understand and then drove forward a short distance, executed a U-turn and drove off past the plaintiff's vehicle.

[10] The plaintiff and his wife then waited for the manager of the store to come out, but after a few minutes decided to leave without seeing or speaking to him.

The requirement of proper inquiry and search

[11] The defendant has submitted that the plaintiff has not complied with the provisions of s 31(2) of the *Motor Accident Insurance Act* 1994 ("*MAIA*") and that his claim must therefore fail.

[12] Section 31(1) and (2) relevantly states:

> ***31 Principles for determining the insurer***
>
> *(1) If personal injury is caused by, through or in connection with a motor vehicle, the insurer for the statutory insurance scheme is to be decided in accordance with the following principles—*
>
> *(a) if the motor vehicle is an insured motor vehicle—the insurer under the CTP insurance policy is, subject to this division, the insurer;*
> *(b) if the motor vehicle is not insured but a self-insurer is the registered owner—the self-insurer is the insurer;*
> *(c) if the motor vehicle is not insured and a self-insurer is not the registered owner—the Nominal Defendant is the insurer;*
> *(d) if the motor vehicle, or insurer under its CTP insurance policy, can not be identified—the Nominal Defendant is the insurer.*
>
> *(2) In any legal proceedings, it is to be presumed that a motor vehicle can not be identified if it is established by affidavit or oral evidence that proper inquiry and search have been made and have failed to establish the identity of the motor vehicle.*

[13] Accordingly, a claim against the Nominal Defendant can only be successful if the threshold test is satisfied, that is, that proper inquiry and search have been made and have failed to establish the identity of the motor vehicle.

[14] The onus is on the plaintiff to establish compliance with that provision.[3] The phrase "proper inquiry and search" has not been the subject of judicial determination in Queensland. The word "proper" was introduced in 1994. The Act's predecessor, the *Motor Vehicles Insurance Act* 1936 ("*MVIA*"), used the term "due inquiry and search".[4] The word "due" is also used in equivalent legislation in New South Wales[5], South Australia[6] and Western Australia[7]. In Victoria the term used is "strict"[8] whilst in Tasmania the requirement is simply that "the identity of the motor vehicle cannot be established"[9]. In the ACT the legislation requires "reasonable inquiry and search"[10]. I could find no equivalent legislation in the Northern Territory.

[15] What therefore is meant by the word "proper"? The plaintiff has submitted that there seems to be very little difference between due inquiry and search and proper inquiry and search and that "proper" means that a person takes all reasonable and appropriate steps to identify the vehicle in question.

[16] In support of that submission the plaintiff argues that Queensland's compulsory third party insurance is for the benefit of the public and ought to ensure that all valid claims are met. Reference was made to the Legal Handbook, Personal Injury Law Manual Queensland by Murphy and Jensen, wherein the authors state at pp 1-2406, 3.710-3.730:

> "*S.31(2) of the 1994 Act provides that it is to be presumed that a motor vehicle cannot be identified if it is established by affidavit or oral evidence a proper inquiry and search have been made and have failed to establish the identity of the motor vehicle. While the wording of the previous Act was slightly different, in that it required an affidavit or oral evidence establishing 'due' inquiry and search, the effect is the same.*"

[17] Counsel for the plaintiff has also referred the court to Hansard. On 16 February 1994 the Hon. K E DeLacy sought leave to bring in a Bill for an Act to provide for a compulsory third-party insurance scheme covering liability for personal injuries arising out of motor vehicle accidents, and for other purposes. The second reading defined the object as being to provide meaningful protection to Queensland motor vehicle owners, drivers and persons injured through motor vehicle accidents where liability exists. The explanatory notes listed the proposed legislation's objectives. It is submitted that the most relevant was *"by continuing the system providing for personal injury claims arising from uninsured or unidentified motor vehicles."* One of the issues identified as being relevant to the need for new legislation was the introduction of measures to combat fraud. The Hon. DeLacy addressed that issue by stating that *"the 1936 legislation does not include any significant process or strategies for the prevention and detection of fraud. It is unfortunate that there are*

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3 *Plesa v Griffiths* (1976) 15 SASR 434 at 442-443 (although in South Australia the requirement is for "due inquiry and search" (s.115(1) *Motor Vehicles Act* 1959 (SA))).

4 Section 4F(3).

5 Section 34 *Motor Accidents Compensation Act* 1999 No.41.

6 Section 115(1) *Motor Vehicles Act* 1959.

7 Section 7 *Motor Vehicle (Third Party Insurance) Act* 1943.

8 Section 157(1)(c) *Transport Accident Act* 1986.

9 Section 16 (1)(a), *Motor Accidents* (Liabilities and Compensation) Act 1973.

10 Section 62(1)(a) *Road Transport (Third-Party Insurance) Act* 2008.

those in our community who wish to criminally advantage themselves to the cost of the overwhelming number of honest citizens in our society. This Bill provides a framework and process to ensure that fraudulent activity does not become endemic in the Queensland CTP system." He later said *"... this Bill retains the philosophy of the existing legislation."* Unfortunately, specific identification of the measures that were being introduced to combat fraud were not identified.

[18] The plaintiff has submitted that it is questionable whether s. 31(2) was one of those measures.

[19] The plaintiff has also submitted that the term "proper inquiry and search" is merely an evidentiary formality to assist in the completion of valid claims, the key word being "valid". In that regard he has referred to a second reading speech by the Hon. L. R. Edwards in relation to an alteration to the wording of s. 4F of the *MVIA* (although that alteration did not change the term *"due inquiry and search"*) wherein he said *"it is considered that the Government, having set up a system of compulsory third party insurance for the benefit of the public, ought to ensure that all valid claims will be met. Accordingly, the Bill extends the liability of the Nominal Defendant (Qld) to include claims arising in circumstances where the insurer of the offending vehicle cannot be found after due inquiry and search."*

[20] The plaintiff has submitted therefore that the term "proper inquiry and search" is merely an evidentiary formality to assist in the completion of valid claims, rather than "a brick wall whereby innocent and suffering parties are denied access to the compensation they deserve."

[21] The defendant on the other hand has submitted that the change from "due" to "proper" was done for the purpose of toughening up the requirements of recovery against the Nominal Defendant in claims said to involve unidentified vehicles, and accordingly is a more demanding test.

[22] It seems to me that the starting point when considering this issue is the well established principle of statutory interpretation that courts are not at liberty to consider any word or sentence as superfluous or insignificant.[11] This principle is more compelling if the word in question has been added by amendment.[12] Whilst in this matter the introduction of the *MAIA* did not constitute an amendment to the *MVIA*, it was nevertheless akin to an amendment given that one of the objects of the *MAIA* is to continue and improve the previous system.

[23] The words "proper" and "due" are ordinary everyday words, and unless the context dictates otherwise, should be given their plain and ordinary meaning.[13] The Macquarie Dictionary relevantly defines "proper" as "strict; accurate; complete or thorough" whilst the Oxford English Dictionary relevantly defines it as "suitable for a specified or implicit purpose or requirement; appropriate to the circumstances or conditions; of the requisite standard or type; apt; fitting; correct; right."

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11 See Pearce and Geddes, Statutory Interpretation in Australia, sixth edition, 2006, paragraph 2.22.

12 *Transport Accident Commn v Treloar* [1992] 1 VR 447 at 462 per Brooking J.

13 *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 per Dixon J at 647; *Maunsell v Olins* [1975] AC 373 at 382 per Lord Reid.

[24] "Due" is relevantly defined in the Macquarie Dictionary as "rightful; proper; fitting; adequate or sufficient." The Oxford English Dictionary defines "due" as "such as is necessary or requisite for the purpose; adequate; sufficient."

[25] The Macquarie Concise Thesaurus lists entries relative to "proper" as including "particular", "precise" and "thorough", and relative to "due" as including "adequate".

[26] Consistent with those dictionary definitions, in *Towney v Minister for Land and Water Conservation for New South Wales & Ors* (1997) 147 ALR 402, a "proper understanding" relative to s 126 of the *Evidence Act* 1995 (NSW) was held to be one that is "complete or thorough".[14]

[27] The phrase "due inquiry and search" has, of course, been the subject of considerable judicial consideration. In *Blandford v Fox*[15], the court held that it meant such inquiry and search as is reasonable in the circumstances. In *Cavanagh v Nominal Defendant*[16], it was said: "*You must look at the circumstances in which he or she was placed and, bearing in mind that the question is one affecting that person's rights, say whether in those circumstances enough was done by or on behalf of or in the interest of that person to warrant the description 'due' inquiry and search.*" In *Slinn v The Nominal Defendant*[17], Barwick CJ said that it is essential that close regard be had to the nature of the situation in which the need to establish the identity of the vehicle arises. In *Harrison v Nominal Defendant*[18], the court held that searches and inquiries that were unlikely to produce results were not a requirement of "due inquiry and search", whilst confirming that clues should be followed up and the trail should not be allowed to grow cold.

[28] Given that the word "proper" on its everyday and ordinary meaning conotes something more strict than "due," and the fact that the legislature saw fit to replace "due" with "proper", I am of the view that s.32(1) of the *MAIA* requires inquiry and search of a higher standard than was required under the previous legislation, although the distinction appears slight. Whether or not, in any given case, that test is satisfied must depend upon its individual facts and circumstances, although it should be noted that the word "proper" does not require searches to be conducted that are unlikely to produce results. One can well envisage that, in many cases, there would be no effective difference between the application of "due inquiry and search" and "proper inquiry and search".

Has proper inquiry and search been established?

[29] Before this question can be addressed the plaintiff must first establish that an impact occurred as alleged.

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14 At p 414.
15 (1945) ALJR 124 at 126.
16 (1958) 100 CLR 375 at 380-381 per Dixon J.
17 (1964) 112 CLR 334 at 339.
18 (1975) 7 ALR 680 at 683-5.

[30] The defendant has conceded that there is evidence capable of supporting such a conclusion and I agree, although the point of impact to the Nissan has not been established. Neither the plaintiff nor his wife were able to identify any damage to her vehicle associated with the incident. I note that her vehicle had a towbar attached at the rear which protruded well beyond the rear boundary of the vehicle and that it had what appeared to be a polished chrome cover over the tow ball. Neither the tow bar nor the tow ball cover exhibited any signs of damage.

[31] I infer from the lack of damage and the fact that the vehicles were in a fast food outlet drive-thru lane with one vehicle stationary at the time of impact, that the impact occurred at low speed and was therefore minor in nature.

[32] It then becomes necessary to conduct an assessment as to whether proper inquiry and search to identify the other motor vehicle has been established.

[33] The incident occurred at approximately 9.46pm. The following day the plaintiff made a telephone inquiry with a firm of solicitors seeking legal advice as he was allegedly suffering pain to his neck at that time. Those solicitors contacted McDonalds Springwood the following day seeking the CCTV footage for the period around 8.45pm on the evening of 22 August. Despite providing an incorrect time, the inquiry was never going to yield results as it was discovered that the camera recording system was not operational at the time of the incident.[19] On 29 August 2011 the solicitors forwarded a completed Traffic Incident Form to the Slacks Creek Police Station for investigation. A newspaper notice was published in the Courier Mail on 10 & 11 March 2012 calling for witnesses to the incident to come forward, although no one did.

[34] The defendant has submitted that proper inquiry and search did not occur because:

(a) the plaintiff did not even get out of his car after the impact;
(b) the plaintiff had ample opportunity at the time to record the registration number of the unidentified vehicle but failed to do so;
(c) the plaintiff was acting unreasonably in purporting to rely on the fast food outlet CCTV system to record the registration number of the other vehicle when he had no knowledge of the workings of that system[20];
(d) the plaintiff made no attempt to ascertain if another vehicle was positioned behind the unidentified vehicle and if so, whether its occupants might have witnessed the impact and noted the vehicles registration number; and
(e) the plaintiff made no inquiries that night as to whether anyone inside the restaurant witnessed the incident.

[35] Both the plaintiff and his wife attested that they had no opportunity to note and/or record the other vehicle's registration number. Neither were able to see the number on the front number plate due to its crumpled state and they each said that they did not have any opportunity to view the rear number plate.

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19 Statement of Andre Erik Johansson-Walder, exhibit 23.
20 Transcript p 1-46 line 8.

[36] Of course, with a collision as obviously as minor as this, a reasonable person may well take the view that there was no necessity to record the registration details of the other car, as there would be no reason expect any adverse consequences to flow from the collision. But that was not the case here.

[37] On 13 August 2012 the plaintiff consulted with Dr Scott Campbell, Neurosurgeon. Dr Campbell's reports (exhibit 13) state that the plaintiff told him that he noted "immediate onset of neck pain, mid back pain and right jaw pain", after the impact. Dr Campbell confirmed in evidence that the plaintiff did make such a complaint to him.[21] The plaintiff also stated that he suffered "immediate onset of soreness to the neck and discomfort to the jaw" in an affidavit dated 4 July 2013.[22] In evidence however, the plaintiff attested that he didn't remember previously asserting that he felt immediate discomfort to the jaw, although he confirmed that he did suffer immediate onset of soreness to the neck, albeit briefly.[23]

[38] Despite this inconsistency, the evidence discloses that the plaintiff has consistently alleged that he suffered immediate pain or soreness to one or more areas as a result of being jolted forward in this collision. He therefore had an interest to pursue or protect and a reason to, at the very least, obtain the identification details of the other vehicle and/or its driver.

[39] It seems that that fact was not lost on the plaintiff. In evidence-in-chief he said that he didn't get a chance to see the rear number plate of the other car because of the angle it pulled up at after the plaintiff had moved his car over to the side.[24] I infer from that statement that he, at that time at least, appreciated the need to obtain the registration details and attempted to obtain them, albeit unsuccessfully. He confirmed the correctness of that inference in cross-examination where he said that when the cars were stationary alongside each other he asked the other driver to swap insurance details, but that the other drive was "taking off" at the time and did not respond.[25]

[40] Additionally, he also gave the following evidence:

> *You didn't take any steps to identify the car by its number plates?--- I didn't get a chance to see his number plate.*
>
> *You didn't try to look at the front of the car? --- I saw the front of the car briefly, but it was – I couldn't recognise any of the numbers on the number plate. All I know it was a green and white number plate, that's all I know.*
>
> *So what you're saying is that you did think of getting the number, but you couldn't get the front one? --- No.*
>
> *But you did nothing about getting the rear one? --- I didn't get a chance to see his rear number plate.*

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21 Transcript p 2-25 lines 30-35.
22 Exhibit 7 para 11.
23 Transcript p 1-37 lines 20-38; page 1-71 lines 1-10.
24 Transcript p 1-27 line 9.
25 Transcript p 1-45 line 23.

> *But there was a number of minutes where this was on your mind? --- Yeah.*
>
> *So what's your evidence today? You didn't think about getting the number, is that what you're saying? --- No. I thought about getting – I didn't get the opportunity to get the number.*
>
> *But you did think, 'yes. I must get this man's number'? --- Yes.*
>
> *Yeah? --- But I also assumed that they would have it on the camera footage because it says it's got 24 hour camera footage. I even said that to Yasmine, I said: 'don't worry about it' ---*
>
> *Don't tell us what you said to your wife. You had no experience of what this closed circuit TV involved? --- Not really, no. I just assumed ---*
>
> *You had no experience? --- it runs 24 hours a day, that's what it says.*[26]

[41] Consequently, there is no doubt that the plaintiff appreciated the necessity to obtain the registration number of the other vehicle. An important issue therefore is whether the plaintiff and his wife were correct in their evidence when they asserted that they had no opportunity to see the rear number plate.

[42] In my view the evidence does not support that assertion. Even putting to one side the fact that all the plaintiff had to do was exit his car and walk behind the other vehicle, he had, on his and his wife's evidence, ample other opportunity to see the rear number plate.

[43] After collecting and paying for their meals, the plaintiff pulled over to the side nearby. Shortly after that (and approximately up to three minutes after the impact) he saw the other vehicle drive off from the fast-food outlet as if to leave. At that time, according to the evidence of both he and his wife, his vehicle was stationary facing away from McDonalds. He was sufficiently close enough however to hear the engine of that other vehicle rev before driving off.[27]

[44] Upon seeing this Mrs Murray quickly exited her vehicle and yelled abuse and made an obscene gesture at the departing vehicle, which according to her statement of 21 January 2012 was travelling slowly.[28] That vehicle then stopped and reversed quickly back towards the plaintiff's vehicle, ultimately stopping alongside it. Both the plaintiff and his wife testified that the two vehicles were then each facing in the same direction with the drivers side of the plaintiff's vehicle alongside the passenger side of the other vehicle. They each testified that after some brief words were exchanged the other vehicle drove off in a forward direction for only a short distance (a few car lengths at most) before executing a u-turn and driving off past

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26 Transcript p 1-45 line 30 to p 1-46 line 10.

27 Transcript p 1-26 line 35.

28 Exhibit 21 para 27.

the plaintiff and his wife. There is no suggestion that the other vehicle's lights were not on at the time.

[45] Accordingly, on their own evidence, the plaintiff and his wife had the opportunity to observe the rear number plate and note the registration number as that car first drove off, then as it reversed in their direction to a very close distance from them, then again when it drove off in front of them before executing a u-turn and finally as it drove past them before leaving the grounds.[29]

[46] No explanation has been offered by either the plaintiff or his wife as to why they failed to even attempt to note the registration number on any of these occasions. It was said that the external lighting in that area was poor, but that is by and large irrelevant given that the other vehicle's lights were on. Equally, it cannot be said that the plaintiff felt so intimidated or anxious that he forgot or did not think to note the registration number as:

(a) that is entirely inconsistent with his evidence that he "thought about" getting the registration number of the vehicle during the incident; and

(b) any feelings of intimidation or anxiousness would not have been relevant to him noting the registration number from within the safety of his own vehicle, particularly as that other vehicle drove away.

[47] The plaintiff did make the point that he did not have a pen and paper in the car to note down the registration number, but that provides no excuse whatsoever. He did not appear to be of such low intellect as to be unable to remember a registration number for a short period of time. He could have immediately repeated the number to his wife and then gone into the McDonald's store and asked for a pen. He would only have had to remember the number for a matter of seconds.

[48] Furthermore, having reported the incident to the assistants at the two windows of the fast food outlet, he could have asked either or both of them to note and record the registration number of the vehicle behind his as it left. It is no excuse to say that he expected the driver of that vehicle to pull over after collecting his order given the alleged behaviour and comments of that person immediately after the impact. In that circumstance, such an expectation would have no reasonable foundation.

[49] Finally, the plaintiff's assertion that he was aware that the fast food outlet had CCTV cameras in place and he believed that they would capture the registration number of the vehicle, also provides no excuse for his failure to do so, as he conceded in cross-examination that he had no knowledge of the workings of that system. Accordingly:

(a) even though he had seen a sign indicating that the premises was subject to 24 hour CCTV surveillance, he in fact did not know whether it was functioning at that time. For all he knew, the system may not have been functioning due to technical difficulties;

(b) he had no knowledge of whether the CCTV system, even if it was operating appropriately, recorded or merely displayed activity;

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[29] Transcript p 1-55 line 38 to p 1-56 line 24; p 3-10 line 21 to p 3-11 line 24.

(c) even if recorded, he did not know how long the recordings were kept; and

(d) he had no knowledge as to whether the technology was sufficient to record registration details of a motor vehicle in the drive-thru lane, and even if it was, whether the recording showed only the front of a vehicle, or only the rear of a vehicle or both.

[50] Comment must also be made about the fact that the plaintiff did not get out of his car at any stage, let alone immediately after being struck from behind. No evidence was given as to why he did not immediately get out of his car, other than for the fact that his wife owned the car. Even though they were separated at the time whilst living under the one roof, his immediate inaction was extraordinary, particularly as he claimed in cross-examination that his immediate concern was for the car and his wife.[30] Whilst it is alleged that the other driver spoke in an aggressive manner to Mrs Murray whilst she was still standing at the rear of her vehicle, that alleged behaviour does not explain the plaintiff's initial inertia.

[51] Furthermore, I am also not satisfied that the other driver spoke in an aggressive manner to Mrs Murray as alleged. The evidence in support of that allegation is most unsatisfactory. Mrs Murray alleges that the other driver made the aggressive and offensive comment whilst he was standing near the front drivers side wheel of his vehicle. She also alleged that she could smell alcohol on him at that time, despite the fact that they were outdoors and she was near the rear towbar of her car. Yet in her statement dated 21 January 2012 she said:

> *"The male person yelled out something to the effect 'There's nothing wrong with your car, so get back into it you fucking idiot'. Neither occupant of the Commodore sedan got out of their car."*[31]

[52] Furthermore in paragraph 31 of that statement, she said that when that vehicle pulled up beside hers a few minutes later, it did so with its driver's side closest to the driver's side of her vehicle (i.e. the opposite direction to that which she alleged in evidence) and that at that time she believed she detected the smell of alcohol on the male driver.

[53] Mrs Murray alleged that these comments in her statement misrepresented what she told the investigator who prepared the statement and that her oral testimony was the only version she had ever given.[32] She was then referred to her affidavit dated 4 July 2013 which failed to allege that the other driver got out of his vehicle and in fact asserted that:

> *"At this point, due to the behaviour of the people in the Commodore, I began to suspect that they may be under the influence of alcohol."*[33]

[54] I also note that the investigator who prepared Mrs Murray's statement (Mr Kearney) gave evidence that the information contained in her statement accurately reflected

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30 Transcript p 1-38 lines 15-27.

31 Exhibit 21.

32 Transcript p 3-18 line 15 to 3-21 line 19.

33 Transcript p 3-23 line 37.

information she provided to him and that he asked her to read that statement before she signed it to confirm its accuracy. He said that she did these things.[34] Mr Kearney was an impressive witness and I accept the accuracy of his evidence.

[55] Similarly, the plaintiff gave evidence that he saw the other driver get out of his vehicle, yet he also previously had said that the male driver yelled abuse at his wife whilst seated in the drivers seat and had made no prior mention of seeing that man exit his vehicle.[35]

[56] These are significant inconsistencies and they cause considerable difficulty in allowing acceptance of the accuracy and reliability of the evidence of both the plaintiff and his wife regarding this issue.

[57] That difficulty is exacerbated by the evidence of the McDonalds Springwood Manager, Mr Johansson-Walder, who spoke to the other driver from one of the restaurant windows as that vehicle progressed through the drive-thru process. That conversation occurred whilst the plaintiff's vehicle was still directly in front of the unidentified vehicle in the lane. Mr Johansson-Walder said that the male driver did not display any signs or behaviour that caused him to believe that that person was under the influence of alcohol or drugs. He also noted that the driver exhibited a 'jovial' demeanour.[36]

[58] In these circumstances I am not satisfied that the driver of the unidentified vehicle behaved or spoke as alleged by the plaintiff and his wife.

[59] For these reasons, the plaintiff has failed to establish that proper inquiry and search was made in an attempt to establish the identity of the other motor vehicle. In fact, in the circumstances of this matter, the test would not have been satisfied even if the requirement was "due inquiry and search". The failure to even attempt to note the registration number of the vehicle, in these circumstances, where clear opportunity existed, was unreasonable. The comment by Dickson CJ in C*avanagh v Nominal Defendant* as referred to in paragraph [28] above is particularly apt.

[60] I am supported in this conclusion by *Nominal Defendant v Meakes*[37] where Basten JA at [3] noted that the first issue was whether the phrase "due inquiry and search" extended to making a note of the registration number of the vehicle which has stopped and is available to be recorded. It was held that it did.

[61] Sackville AJA, summarised the relevant considerations in that matter as including the following:

- *unlike most cases involving "due inquiry and search", the identity of the vehicle which struck the respondent was readily ascertainable by him, had he made a simple inquiry at the scene of the accident;*
- *the respondent was aware at the time of the accident that he had suffered injuries as the result of being struck by the motor vehicle;*

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34 Transcript p 3-33 lines 34-46; p 3-35 line 40 to 3-36 line 3.
35 Affidavit of Neville Leslie Murray dated 04/07/13; Exhibit 7.
36 Exhibits 16 and 23.
37 [2012] NSW CA 66.

- *the respondent was not so injured as to be unable to perform the simple task of recording the registration details; and*
- *an injured person in the situation of the respondent could reasonably have been expected to obtain the relevant details at the scene.*[38]

[62] These observations have equal relevance to this matter.

[63] Sackville AJA also noted at [56], that the question for the primary judge was "*not whether it was 'understandable and excusable' for the respondent not to have recorded vehicle identification details immediately after the accident*", nor whether it was "unreasonable" for the respondent to have allowed the driver to leave the scene without taking his or her details but rather "*whether the respondent had shown that the identity of the vehicle would not be established after due inquiry and search*."[39] Again, such a statement has relevance and application to this case.

[64] As I am not satisfied that "proper inquiry and search" has occurred in this matter, the claim should be dismissed.

Quantum

[65] Notwithstanding my conclusion above, it is nevertheless desirable that I assess the quantum of damages.

[66] The plaintiff relies heavily upon the reports and evidence of Dr Campbell. Dr Campbell diagnosed the plaintiff as suffering a "chronic soft tissue musculo-ligamentous injury to the cervical spine" displaying a 50% decreased range of movement of the cervical spine in all directions. In his report dated 17 March 2014 he noted that the plaintiff had advised him that the collision from behind was at moderate speed and that he experienced immediate onset of neck pain, mid back pain and right jaw pain. Examination of the plaintiff occurred on 13 August 2012 and 17 March 2014. Dr Campbell said that there was tenderness and guarding over the cervical paraspinal muscles bilaterally still present at the second examination.

[67] In accordance with the AMA Guides Fifth Edition DRE Category II, ("*AMA Guidelines 5th Edition*"). Dr Campbell was of the opinion that the plaintiff is suffering a 6% whole person impairment.[40]

[68] The defendant on the other hand relies upon the evidence of Dr Ian Dickinson, Orthopaedic Surgeon. Dr Dickinson examined the plaintiff on 5 December 2012 and was told by him that his symptoms were unchanged from those he initially suffered after the collision and that he had pain in the line between the right shoulder and the neck along the line of the trapezius with symptoms radiating into his scapular region.

[69] Dr Dickinson was of the view that the plaintiff's symptoms were not consistent with the stated cause and that he was suffering no impairment as a result of the incident.

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38 At [72].

39 Affirmed by Basten JA in *Nominal Defendant v Browne* [2013] NSW CA 197 at [10].

40 Exhibit 13.

He noted that the plaintiff had pre-existing degenerative changes in the cervical spine which would constitute an impairment, although no assessment of that issue occurred.

[70] Dr Dickinson said that it may have been reasonable for the plaintiff to take a day or two off work after the collision as "a result of the upset caused by the accident", but he was of the view that the plaintiff would have no restrictions to his future working capacity. He concluded his report by stating that the pain that the plaintiff complains of is not related to any underlying objective findings of any abnormality and his findings are inconsistent with the plaintiff suffering any significant injury.[41]

[71] Additionally, during the course of the evidence the defendant tendered a DVD filmed by a private investigator showing the plaintiff going about driving, shopping and other every day activities. This recording was made on 15, 17, 23 and 24 May 2013. On viewing that recording Dr Campbell was of the view that the plaintiff's movements were restricted. He said:

> "*He looked like he moved with someone with pain – a pain source somewhere and that could have easily been spinal axis pain. When I saw him, on both occasions his range of movement was restricted by 50%. From the video I wouldn't say his range of movement was restricted by 50%. It would certainly have been less than that so there may have been some improvement in his symptomatology when that video was taken.*"[42]

[72] Dr Campbell said that the plaintiff exhibited some problems with his gait, in the recorded footage, in that he appeared to move slowly and in a protective way. This caused Dr Campbell to opine that the plaintiff was in pain although he was unable to determine the location of the pain. In fact, Dr Campbell conceded that the alteration of gait could well have been explained by the plaintiff's unrelated long term chronic lower back pain.[43]

[73] During his first examination of the plaintiff, Dr Campbell formed the view based on the information provided by the plaintiff, that his neck pain was in the range of moderate to severe however he conceded that he could not discern that the plaintiff was suffering such a degree of pain to that region in any part of the recorded footage.[44]

[74] Dr Dickinson was also shown the recorded footage. He was of the view that the plaintiff's neck movements appeared normal and he highlighted numerous specific occasions of movement in support of that opinion.

[75] Furthermore, Dr Dickinson could find no pathological basis for the plaintiff's alleged regional tenderness. He also held the view that neither tenderness nor guarding would be expected to be present "at such a long time after the injury."[45]

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41 Exhibit 15.
42 Transcript p 2-22 lines 27-34.
43 Transcript p 2-25 lines 35-45.
44 Transcript p 2-27 line 25.
45 Transcript p 2-47 lines 29-42; p 2-53 lines 28-34.

[76] Dr Dickinson said that it was unlikely that the plaintiff would have a consistent 50% reduction in range of motion from a chronic ongoing problem when there is no identifiable significant pathology.[46]

[77] He was also sceptical of the plaintiff's alleged claim of loss of range of movement of 50% in all directions. He said that following an event where a particular structure of the cervical spine has been injured, the mechanism of movement of the neck will be altered in one direction or another to reflect an attempt either to reduce pain in that particular injured part, or because that part is so structurally damaged it doesn't move at all.[47]

[78] In that regard, Dr Dickinson also referred the court to the provisions of the *AMA Guidelines 5th Edition*. The first alternative in Table 15.5 is the only alternative of relevance, and it requires that the clinical history and examination findings be compatible with a specific injury – something which is absent in this case. It also suggests that any loss of range of movement should be asymmetric or that nonverifibale radicular complaints are present - again features which are absent in this case. Dr Dickinson was of the opinion that in this matter DRE Cervical Category I was more appropriate which equates to a 0% impairment of the whole person.

[79] Finally, Dr Dickinson made the obvious observation that the greater the impact, the greater the likelihood of injury.

[80] Of course the plaintiff has given evidence of the pain he has allegedly experienced in his neck since the evening of this incident until the present time and how it has adversely impacted on his life. His wife also gave evidence of the changes that she has noted to the plaintiff since the incident.

[81] Despite that evidence, I am not persuaded that the plaintiff has suffered in the manner and to the extent alleged. As I have already indicated, whilst I am satisfied that the collision as alleged occurred, the only reasonable conclusion that the evidence allows is that the degree of impact was minor. Accordingly if one accepts the general proposition that the greater the impact, the greater the likelihood of injury, then of course one would also accept that the converse is true.

[82] That fact, when coupled with the absence of any pathological injury, further weakens the plaintiff's position in this regard.

[83] Furthermore, I accept Dr Dickinson's evidence that the plaintiff did not exhibit any restriction in the movement of his neck on the covertly recorded footage. Dr Campbell did not give any evidence to the contrary. Upon my viewing of that footage, I found myself in agreement with Dr Campbell that the plaintiff appeared to move slowly and in a protective way, consistent with what one might expect of a person with pain, but I equally agree with Dr Dickinson's observations that the

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46 Transcript p 2-53 lines 16-21.

47 Transcript p 2-47 lines 23-27.

plaintiff's movement of his neck appeared normal. Such behaviour is entirely consistent with the plaintiff's chronic lower back problems.

[84] Finally, I found the plaintiff and his wife to be unimpressive witnesses. They each demonstrated numerous instances of inconsistency regarding relevant issues in their evidence which significantly impacted on their reliability and credibility. For instance, the plaintiff was inconsistent on issues such as whether the driver of the unknown vehicle exited his vehicle after the impact; where the plaintiff parked after exiting the drive-thru; what direction his vehicle was facing when so parked; which side of the unknown vehicle pulled up closest to the driver's side of the plaintiff's vehicle; when he first felt pain and in what areas; whether he in fact attempted to or even thought to note the registration number of the other vehicle; and whether he complained of neck pain to his general practitioner on occasions where she had only recorded being told of complaints regarding back pain. Similarly, Mrs Murray was also inconsistent as to whether the driver of the unknown vehicle exited that vehicle after the impact; whether she smelled alcohol on him at that time or through open car windows at a later time; whether she smelled alcohol at all or merely suspected that the occupants of that vehicle had been drinking because of their behaviour; where her husband parked after leaving the drive-thru and in what direction the car was facing when so parked; which side of the unknown car stopped closest to the driver's side of her car; and whether she thought to try and get the registration number of the other car or whether she was too upset to even think of that issue.

[85] Additionally, where Mrs Murray's evidence conflicted with the evidence of Mr Kearney, the private investigator who prepared her statement, I prefer the evidence of Mr Kearney. He was an impressive witness whose recollection of relevant events was clear. Mrs Murray, on the other hand, was unable to satisfactorily explain why she would have signed her statement knowing it to contain significant errors. Furthermore, her affidavit contained similar errors despite being prepared by her husband's solicitors.

[86] Additionally, I prefer the evidence of Dr Dickinson to that of Dr Campbell due to the fact that Dr Campbell's opinion was based on inaccurate information, that is that the impact occurred at moderate speed, and that the *AMA Guide 5th Edition* does not support his findings. In that regard neither does the covert recording taken in May 2013 of the plaintiff's movements. Finally, the fact that the plaintiff is now the recipient of a disability support pension is not indicative of any substantial harm done by any injury to the neck. Doubtless there was and remains a lower back condition. I note that the disability support pension was obtained on the strength of Dr Campbell's first report.[48] Centrelink did not have the advantage of Dr Dickinson's report at that time. It is also not without relevance that the plaintiff had made application for a disability support pension at a time which predated the incident the subject of this case.[49]

[87] Taking all these matters into account, I am not persuaded that the plaintiff has suffered an injury as alleged. In these circumstances I assess the plaintiff's injury

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48 See Centrelink records (Exhibit 24).

49 Exhibit 12.

scale value at zero.[50] It follows that I am not persuaded that the effects of the incident have materially diminished the employability of the plaintiff nor that it resulted in him requiring the care that he and his wife claim was necessary.

[88] The defendant has submitted that an award of $1,000.00 would have been appropriate to recognise the days off work that the plaintiff took following the incident and for some expenditure on medication. It is not necessary in the circumstances to conduct an assessment of the plaintiff's income at that time. It suffices to say that even on his own evidence he was earning $1,000.00 gross per week. Accordingly, the defendant has been generous in its concession that an award of $1,000.00 would have been appropriate.

[89] Nevertheless, if the claim had been successful, the amount awarded would have been limited to $1,000.00.

Order

[90] The claim is dismissed.

[91] I will hear the parties as to costs.

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[50] See Schedule 4, Item 89, *Civil Liability Regulation* 2003.