

CITATION: *FOSTER v LALOR REMOVALS* [2009] NTMC 36

PARTIES: YVONNE FOSTER  
v  
LALOR REMOVALS PTY LTD

TITLE OF COURT: LOCAL COURT

JURISDICTION: SMALL CLAIMS

FILE NO(s): 20901704

DELIVERED ON: 31 AUGUST 2009

DELIVERED AT: DARWIN

HEARING DATE(s): 11 AUGUST 2009

JUDGMENT OF: ACTING JUDICIAL REGISTRAR SMYTH

**CATCHWORDS:**

EVIDENCE – Conflicting evidence unable to be resolved – plaintiff bears the onus to prove her case on the balance of probabilities – reasonable satisfaction

*Small Claims Act* (NT), s 12

*Briginshaw v Briginshaw* (1938) 60 CLR 336

**REPRESENTATION:**

*Counsel:*

Plaintiff: NA  
Defendant: NA

*Solicitors:*

Plaintiff: Self Represented  
Defendant: Self Represented

Judgment category classification: C  
Judgment ID number: [2009] NTMC 36  
Number of paragraphs: 31

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20901704

BETWEEN:

Yvonne Foster  
Plaintiff

AND:

Lalor Removals Pty Ltd  
Defendant

REASONS FOR JUDGMENT

(Delivered 31 AUGUST 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is a proceeding brought by the plaintiff in the small claims jurisdiction of the Local Court. The plaintiff seeks damages and costs from the defendant arising from a motor vehicle collision.
2. Section 12 of the *Small Claims Act* (NT) provides that the Court is not bound by the rules of evidence and may inform itself in any manner it sees fit. That does not mean that the Court will dispense with the rules of evidence altogether, but it does mean that the Court, in this jurisdiction, will tend to be considerably more flexible in relation to the manner and presentation of evidence, recognising that parties are commonly self represented. The rules of evidence have been developed in the Courts over a considerable period of time, they exist for good reason, namely they assist the decision maker in coming to a decision as to the facts of the matter.

3. Foremost amongst the rules of evidence in civil proceedings is that the party initiating a claim bears both the evidential and persuasive burdens on each and every material fact essential to the establishing of that claim. The civil standard of proof is generally expressed in terms of the balance of probabilities.
4. At hearing the plaintiff represented herself, assisted with my permission by her mother Dimity Foster. Mr Baker, an employee of the defendant company, was granted leave to represent the defendant. Both parties were sworn and gave evidence under oath. Further, witnesses were called for each party.

#### The Plaintiff's Evidence

5. The plaintiff's sworn oral evidence was as follows:
  - (i) On 26 September 2008 at approximately 8am she was driving her white Toyota Camry, NT registration 907 595, along Nemarluk Drive, Ludmilla in the Northern Territory towards the Bagot Road intersection. She was on her way from a friend's house in Ludmilla to the NT Institute of Sport where she had an interview at 9am. It was a clear day, she was travelling at about 40 km/h, the area being a school zone, and her vision was not obscured by the sun.
  - (ii) As she came around a bend in Nemarluk Drive, which occurs just before the Mosec Street intersection, she collided with the rear of a removalist truck owned by the defendant and which was being driven by an employee of the defendant.
  - (iii) The defendant's truck was reversing out of Mosec Street into Nemarluk Drive. She saw reverse lights on the back of the truck. Her car collided with the back of the truck, in particular the tray area, and damage was caused to the left side of her car. Minor damage occurred to the left side mirror, and significant damage to the centre strut, between left

front and back passenger doors, as well as significant damage to the back left door and the back quarter panels. Left side windows were shattered.

- (iv) She did not have time to stop before colliding with the truck. After the collision both vehicles pulled over to the side of the road where details were exchanged with the driver of the truck. The plaintiff was in a state of shock and upset, but otherwise was not physically injured.
  - (v) Following the exchange of details with the truck driver, the truck driver and other employees left, the plaintiff telephoned a friend to come to pick her up and she left the scene. The car was subsequently collected by the friend.
6. The plaintiff tendered a diagram of the locations of the vehicles at the time of the collision (marked exhibit P1). The diagram shows the location of her car about half way across the Nemarluk Drive/Mosec Street intersection and the truck angled at about 45 degrees and about one third out of Mosec Street.
  7. The plaintiff tendered a bundle of photographs (marked exhibit P2) showing damage to her car. Although the photographs were taken some time after the accident, there was no dispute that they depicted the damage as it had occurred at the time of the collision. Other photographs showing the Nemarluk Drive/Mosec Street intersection were also tendered.
  8. The plaintiff tendered an unsworn statement from Margaret Schoenfisch JP as to the description of the damage to the vehicle (marked exhibit P3).
  9. The plaintiff tendered an unsworn statement from her mother Dimity Forster, who was not a witness to the collision (marked exhibit P4).
  10. The plaintiff called one witness, Mr Vandenhoerst, who was not a witness to the collision. Mr Vandenhoerst was the friend who arrived shortly after

the collision to collect the plaintiff and who later collected her car. He testified as to a number of matters including her emotional state and as to the damage to the vehicle.

11. The plaintiff gave evidence in what can best be described as a timid and slightly confusing manner. I do not intend to be over critical of the defendant. She is a young woman, and having to give evidence in court can be an intimidating process. The matter was not assisted by the fact that the collision occurred almost 11 months ago and on her account she was shocked and upset shortly thereafter. However, it would have ultimately assisted her case if she had presented her evidence more clearly.

#### The Defendant's Evidence

12. The defendant relied on the affidavit of Thomas Chittock sworn 10 July 2009. Mr Chittock was the driver of the truck which collided with the plaintiff's car. Mr Chittock was also called to give oral evidence on oath.
13. Mr Chittock's evidence was as follows:
  - (i) On the day in question he was driving his employer's truck, NT registration "WEMOV4U" along Bagot Road. He was following another of his employer's trucks.
  - (ii) The leading truck turned down Namarluk Drive and he followed. The leading truck stopped after the Mosec Street intersection, then reversed into Mosec Street and then pulled back out onto Namarluk Drive. Mr Chittock did the same with his truck, namely he drove along Namarluk Drive past the Mosec Street intersection, then reversed his truck into Mosec Street before pulling it out slowly back onto Namarluk Drive.
  - (iii) Before he performed the reversing manoeuvre a fellow employee in the truck, who was identified as "Nick", got out and assisted in ensuring the reversing was safe.

- (iv) As he was pulling forward into Nemarluk Street and as he was about three quarters around the corner, his truck was hit by the plaintiff's car. He heard the breaking of glass.
  - (v) He got out of his truck to check the driver. The plaintiff said to him, and did so on more than one occasion "I didn't see you because the sun was in my eyes". After exchanging details he departed.
  - (vi) The employee "Nick" was a backpacker and no longer contactable, hence he could not be called to give evidence. Further, none of the other employees present on that day currently work for the defendant. Only Mr Chittock remains in the employ of the defendant.
14. Mr Baker gave evidence by way of affidavit sworn 10 July 2009. His evidence was as to the damage he would expect to the plaintiff's car if the plaintiff's account was correct. He acknowledged that he was not an expert in the physics of collisions or metallurgy. He also gave evidence as to company policy as it relates to turning vehicles, that is, it was company policy that trucks, if they were to be turned, were to be reversed into smaller less busy streets. Although this is not evidence of what in fact happened, and although it is quite possible Mr Chittock may have flouted company policy, on Mr Chittock's account he had acted consistently with company policy.
15. Mr Baker also gave evidence in relation to company policy in recovering damages from drivers. It is the defendant's policy to recover the costs of damage done to vehicles from drivers' wages in instalments. It was Mr Baker's evidence that Mr Chittock had been involved in an accident with another car earlier in the year resulting in \$2,000 damages which Mr Chittock was paying off, with only \$250 remaining. It was Mr Baker's evidence that, in his opinion, Mr Chittock had been honest in relation to that incident and he could see no reason why he would be dishonest in relation to this matter. In relation to Mr Chittock's employment record Mr

Baker gave evidence that Mr Chittock had been a truck driver for 30 years, the last 5 with the defendant, and that he could not believe that he would put a large truck into a busy street. He gave evidence that, in his dealings with Mr Chittock, he was an honest worker and honest in his dealings with the defendant. The defendant had no reason to doubt Mr Chittock's account of events.

16. Both Mr Chittock and Mr Baker gave their evidence in a forthright manner. There was no attempt, that I could detect, to evade questions and both were clear and certain in the evidence they gave.

### The Issues

17. Although not pleaded directly, which is not unusual for self represented litigants in the small claims jurisdiction, the plaintiff's claim is in negligence. That is, she claims that the defendant, vicariously through its employee, negligently reversed its truck into a fairly busy road, which had a bend in it, and into on-coming traffic.
18. In order to succeed in proving liability in negligence the plaintiff must prove that the defendant owed her a duty of care, that the duty of care was breached and that damages were caused as a result.
19. I have no doubt that, as a road user, the defendant owed the plaintiff, and any other road user, a duty of care. That duty is likely to have comprised the requirement to take reasonable precautions to avoid the foreseeability of risk to injury to other drivers or damage to their property.
20. The plaintiff claims that the defendant breached that duty by reversing its truck out of Mosec Street into Nemarluk Drive, such that any on-coming traffic, which was coming around the bend, would not have sufficient time to stop before colliding. It is the plaintiff's claim that, through the defendant's actions, there was a foreseeable risk of injury or damage, and the defendant should have taken reasonable precautions to reduce or avoid

that risk. Reasonable precautions would have comprised not reversing into Nemarluk Drive at all, but turning the truck at a safer location or proceeding “around the block”. It is the plaintiff’s case that, in doing what is alleged, the defendant breached its duty of care and caused damage to her car.

21. In contrast it was the defendant’s case that it was not negligent. Leaving aside the issue as to whether a duty of care existed, it was the defendant’s case that it did not breach its duty, as it took reasonable precautions to reduce the risk of injury or damage. It was the defendant’s case those reasonable precautions comprised reversing into Mosec Street, not out of it, and then pulling slowly out into Nemarluk Drive. Effectively it is the defendant’s case that there was no breach of a duty of care, and therefore no negligence.

#### Decision

22. The primary question in relation to liability rests on what the defendant did with its truck. If proven, I would have no doubt that, if the defendant had reversed its truck out of Mosec Street, there would have been a such foreseeable risk of injury or damage that the only reasonable precaution to avoid such risk would have been not to have done it.
23. There is no doubt that the plaintiff’s and defendant’s vehicles collided. The question is how ?
24. In my opinion, on the evidence, the damage to the plaintiff’s car is consistent with either party’s case. The damage to the left side of the plaintiff’s car could have occurred by either a collision with a truck reversing into the on-coming traffic, or alternatively by a collision between the truck pulling out of a street and traffic coming from behind. The photographs, although proof of damage, do not assist in ascertaining how the collision occurred.



25. The matter is made difficult by the conflicting evidence of both primary witnesses, who gave accounts of two totally opposite versions of events. Both did so under oath.
26. The plaintiff's evidence was given in a nervous manner, somewhat hesitant, and she did not fully, to my satisfaction at least, describe the collision. Her evidence was somewhat confusing as to whether she saw the truck actually reversing before the collision, the actual impact and the aftermath. The plaintiff is not to be criticised for the manner in which she gave evidence, however I simply make the point that I was not overly assisted by the way in which she gave evidence. It was her evidence however that she was one hundred percent sure that she collided with the reversing truck.
27. Mr Chittock's evidence was forthright. He was clear, without a doubt, that he had not reversed into Nemarluk Drive and his truck had been struck whilst pulling forward out of Mosec Street.
28. There were no other witnesses to the collision for either party.
29. As stated above, this is the plaintiff's claim and she bears the burden of proving it on the balance of probabilities. In order to find for the plaintiff I must, to use the words of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at pages 361-2, be reasonably satisfied that the facts as she has alleged are proven. I must be reasonably satisfied that the defendant's employee reversed his truck into Nemarluk Drive from Mosec Street.
30. I am not satisfied that the plaintiff has proved her case to the required standard of proof. That is, on the evidence, I am not satisfied that things happened in the manner claimed by the plaintiff. She has failed to satisfy me that the defendant's truck reversed into Nemarluk Drive from Mosec Street. The plaintiff's claim must therefore fail.

31. I order that the plaintiff's claim be dismissed.

Dated this 31 day of August 2009

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**CRAIG SMYTH**  
ACTING JUDICIAL REGISTRAR