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Unusual defences in motor vehicle cases

A denial of a claim by an insurance company on the basis of an unusual defence can provoke sudden and real concern in a plaintiff's lawyer. What may have been regarded as a strong claim may suddenly and unexpectedly be under threat.

INTRODUCTION

This article examines three unusual defences occasionally encountered in motor vehicle personal injury cases. First, the defence of inevitable accident. Second, the defence that the defendant was incapable of meeting the standard of care expected of a reasonable person due to an incapacitating event. Third, in New South Wales only, that no action lies against the nominal defendant in respect of injuries suffered by the negligent driving of an unregistered motor vehicle, unless immediately before the accident the vehicle was capable, or would have been capable following the repair of minor defects, of being registered.

INEVITABLE ACCIDENT

There is authority that suggests that 'inevitable accident', which may be defined as an accident that was '...brought about without fault by the defendant or by a person for whom he is responsible in law',[1] may be a defence to negligence. But how - if at all – does inevitable accident differ from arguing that the defendant was not at fault?

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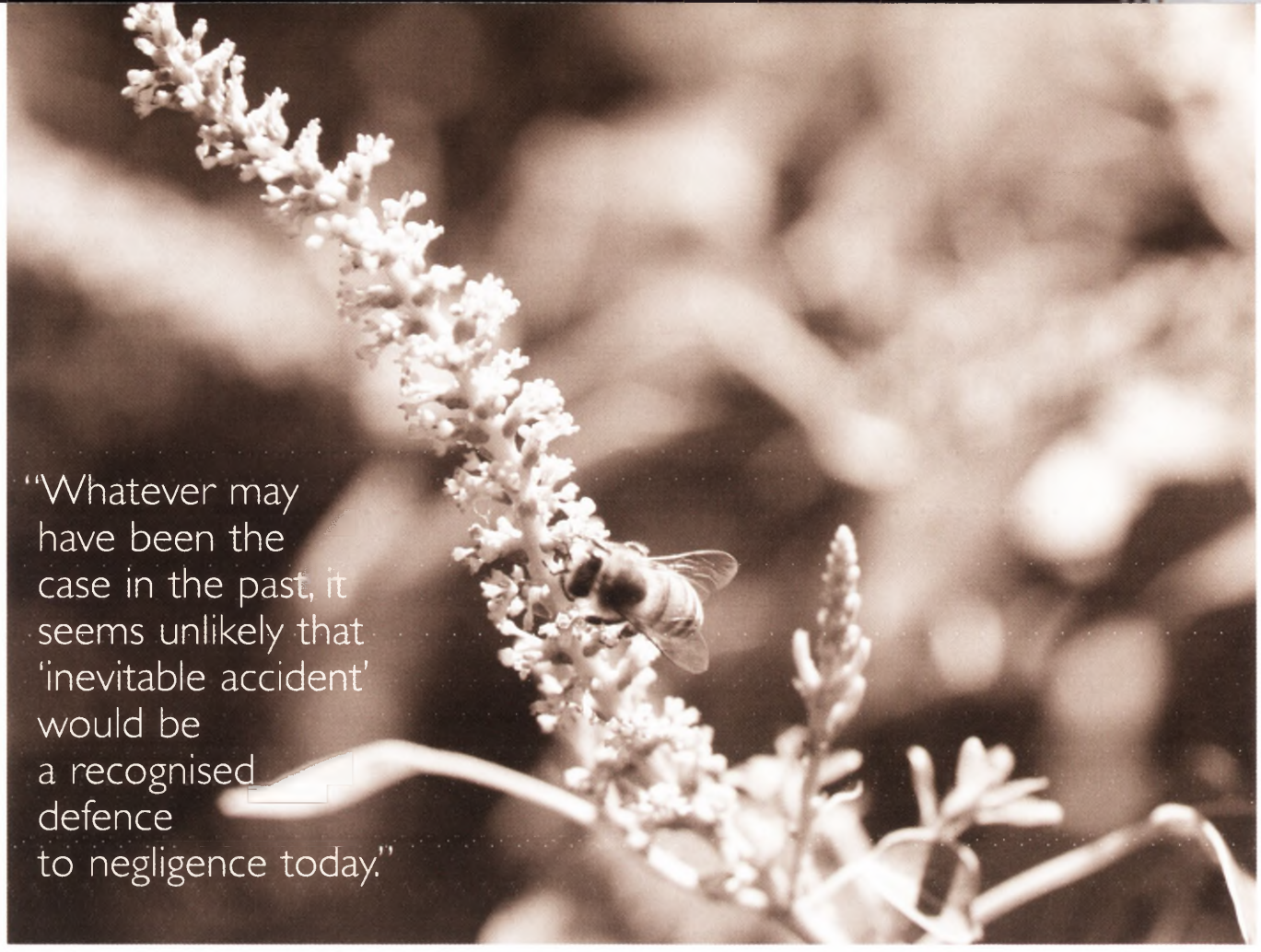
In *Cook v Nash*,[2] Stanley J, with whom Hanger J and Moynihan AJ agreed, stated that:

> 'Now it seems to me that a plea of inevitable accident must either add something or nothing to a mere denial of negligence. The authorities take the view that it adds something. What is that something? It seems that the defendant undertakes either to show what was the cause of the accident and that the result of that cause was inevitable, or he must show all possible causes, one or other of which produced the effect, and with regard to each of the possible causes, he must show that the result could not have been avoided.'[3]

This articulation of inevitable accident seems no different to there being an absence of fault. Inevitability connotes unavoidability. However, the fact that an accident was unavoidable leads inexorably to the conclusion that there was an absence of fault. This point was made by Lord Greene in *Browne v De Luxe Car Services*[4] when his Lordship said: 'I do not feel myself assisted by considering the meaning of the phrase "inevitable accident".'

My preference is to put the problem in a more simple way: namely, was the driver of the car guilty of negligence?[5] Whatever the law may have been in bygone times, it seems that inevitable accident is unlikely to be a recognised defence to negligence today. This position is implicitly endorsed by Australia's leading tort law academics, as they do not mention inevitable accident when discussing defences to negligence. ▶



Furthermore, it seems that the concept of inevitable accident has no value as a device to guide the enquiry as to fault and is, in fact, likely to generate confusion. In the first place, inevitable accident sits rather uncomfortably with the definition of fault as involving a failure to exercise reasonable care. It encourages the erroneous perception that a defendant can escape liability only so long as there was no scope whatsoever for prophylactic action.

Second, it tends to obscure the fact that the onus of proof is at all times on the plaintiff. In principle, the defendant is never obliged to demonstrate that the accident was inevitable in order to succeed.

Third, the adjective 'inevitable' is ambiguous. In the infinite factual circumstances of the world, it is rarely the case that an event is inevitable. This gives rise to the problem of whether the notion of inevitability is construed strictly or broadly.[6]

INCAPACITATING EVENT

Defendants sometimes deny liability in *prima facie* cases of negligence on the basis that the accident occurred due to an incapacitating event, such as a heart attack, a bee sting, a stroke, a coughing fit and so on. This defence raises a difficult question of principle. On the one hand, the standard of liability for negligence is objective and hence the fact that the defendant had a defective or inferior constitution, or was incapable of living up to the standard of the reasonable person, does not exonerate the defendant. As Kitto J said in *McHale v Watson*:[7]

> 'A defendant does not escape liability by proving that he is abnormal in some respect which reduces his capacity for foresight or prudence.'[8]

On the other hand, it is trite law, when assessing whether the defendant reached the standard set by the reasonable person, to place the reasonable person in the position of the defendant. In other words, the reasonable person is to be clothed with some of the defendant's characteristics.[9] Unfortunately, it is unclear what features are to be attributed to the reasonable person. The authorities on this point are conflicting and discordant.

What seems clear is that defendants will not escape liability if it can be established that, on the balance of probabilities, they knew, or ought to have known, that they should not have been driving because of the possibility of an incapacitating event occurring, or that they did not react in a reasonable way when the event started - for example, by pulling the vehicle over to the side of the road.

Some of the relevant decisions are described below.

Mansfield v Weetabix Ltd[10]

A man drove a 38-tonne truck into the plaintiff's shop, causing extensive damage. The driver died shortly after the accident. The plaintiff sued the truck owner and the personal representative of the driver. The defendants argued that the

driver was not negligent because he had suffered from a hypoglycaemic attack (a disabling state where the brain of a diabetic is starved of glucose) which, unbeknown to him, significantly impaired his ability to drive. The judge at first instance judged the driver's conduct against the reasonable driver who was alert and aware and, accordingly, found him to be negligent. On appeal, Leggatt LJ, with whom Aldous LJ and Sir Patrick Russell agreed, reversed the trial judge's decision, holding that the objective standard should have been modified to take into account the hypoglycaemic attack. When judged against this standard, it was found that the driver was not at fault.

"Why should a pedestrian or another driver be denied compensation because the car with which they collided was incapable of being registered as a result of a technical defect?"

Roberts v Ramsbottom[11]

The plaintiffs were injured when their vehicle was struck by the defendant's car. The defendant had lost control of his car, which crossed on to the wrong side of the road. However, the defendant contended that he was not liable because he had suffered a stroke 20 minutes before the accident. The stroke prevented him from driving properly and from realising that he was not fit to drive. The defendant also contended that he had no warning signs as to the onset of the stroke. Although the trial judge accepted the defendant's version of the facts, he held the defendant liable. His Honour reasoned that, notwithstanding the disabling stroke, the fact that the defendant remained conscious meant that he should be judged against the standard set by the reasonable driver.

Adamson v Motor Vehicle Insurance Trust[12]

The plaintiff, a pedestrian, was injured when hit by a car driven by the defendant. This was a *prima facie* case of negligence, as the defendant was speeding and ignored traffic signals. However, the defendant argued that he was not negligent because his driving was due to a paranoid schizophrenic attack. Wolff SPJ accepted that the attack occurred and that it had rendered the defendant incapable of driving properly. Nevertheless, his honour held the defendant liable and refused to take his insanity into account. The defendant was judged against the standard set by the reasonable (sane) driver.

Leahy v Beaumont[13]

The defendant, Leahy, crashed his car into the plaintiff's shop. The plaintiff sued Leahy and his employer. In defence, it was argued that Leahy had not been negligent because shortly before the accident he suffered from a sudden coughing attack which rendered him unconscious. The trial judge found that although Leahy had indeed been rendered unconscious, he had control over the car for around eight to ten seconds from the time when the coughing attack started. Accordingly, the trial judge found for the plaintiff on the basis that the reasonable person in the position of the defendant would have braked once the seriousness of the attack was realised. An appeal by the defendant was dismissed.

Scholz v Standish[14]

The defendant driver was stung by a bee and, as a result, lost control of the car and crashed it into a tree. The plaintiff, a passenger in the defendant's car, was injured in the crash. The trial judge found that the defendant had not been negligent as she was suddenly incapacitated through no fault of her own. An appeal to the Supreme Court of South Australia was dismissed.

Buckley v Smith Transport Ltd[15]

A collision occurred between a semi-trailer and a sedan as a result of a failure on the part of the truck driver to exercise reasonable care. The defendant company, which owned the semi-trailer, argued that the driver was not negligent because ▶

he was insane and was suffering from the delusion that he did not need to control the truck because his employer was driving it by remote control. The Ontario Court of Appeal accepted this argument and found for the defendant.

Carrier v Bonham[16]

The defendant, who suffered from schizophrenia, tried to commit suicide by stepping in front of a bus driven by the plaintiff. The plaintiff, despite his best efforts, could not avoid hitting the defendant, causing him minor injuries. Subsequently, the plaintiff sued the defendant for negligence, claiming that the defendant's careless act caused him to suffer nervous shock. McGill DCJ held that the defendant was not guilty of negligence because his conduct was not below that of a reasonable person who was afflicted by schizophrenia.[17]

Robinson v Glover[18]

Robinson lost control of his car when he suddenly fainted. As a result, he crashed into Glover's vehicle. It was later discovered that Robinson fainted as a result of an infection. Robinson had been feeling unwell for three days prior to the accident, although he felt better on the day of the accident. At first instance Robinson was found to be negligent, but this decision was reversed on appeal on the basis that he had no warning of the sudden loss of consciousness.

Billy Higgs and Sons Ltd v Baddeley[19]

A driver employed by the appellant was about to overtake the respondent's slow-moving milk-truck. However, as the appellant began to overtake the truck, a foreign object entered his eye causing him severe pain. As a result the driver lost control of his car and crashed into the milk truck. The Court of Appeal accepted this argument and found for the appellant.

THE NOMINAL DEFENDANT AND UNREGISTERABLE MOTOR VEHICLES

In New South Wales, claims against the nominal defendant under the *Motor Accidents Compensation Act* 1999 (NSW) (*MACA*) can be defeated if the motor vehicle in mention was unregisterable.[20] This threshold issue does not arise in any other jurisdiction.

Section 33(1) of the *MACA* provides that claims arising out of accidents involving uninsured motor vehicles may be brought against the nominal defendant. Motor vehicles are defined for the purposes of section 33 in paragraph (5) as:

A motor vehicle:

(a) that is exempt from registration,

(b) that is not exempt from registration and that:

  (i) is required to be registered to enable its lawful use or operation on a road in New South Wales, and

  (ii) immediately before the motor accident occurred, was capable, or would, following the repair of minor defects, have been capable, of being so registered.

Subparagraph (ii) is an extremely unfortunate provision for many reasons. First, it goes far beyond the intent of Parliament. The reincarnation of section 27(5) of the *Motor Accidents Act* 1988 (NSW), it was inserted into that Act by the *Motor Accidents Amendment Act* 1995 (NSW). In the second reading speech to the 1995 Act, the Honourable Jeff Shaw stated:

> 'The CTP Policy of the Motor Accidents Scheme simply are (sic) not, and were (sic) never intended to be, a comprehensive compensation scheme providing substantial damages in all cases of injuries connected in some way to the use of a motor vehicle... [T]he expression "motor vehicle" is widely defined in the Act and covers go-carts and other vehicles, such as forklifts, not normally associated with use on the dedicated public road network. Accidents involving such vehicles have given rise to claims against the nominal defendant under the Motor Accidents Act... It is considered that claims for injury from the use of such vehicles should properly be made under...public liability policies and not against the nominal defendant. It is therefore proposed to limit the types of motor vehicles that can give rise to claims against the nominal defendant. Claims will only be able to be made in respect of vehicles which are capable of and are required to be registered for use on a public road, or are exempt from registration... Vehicles not capable of registration only because of minor defects may still be capable of giving rise to a claim against the nominal defendant. By means of that provision, nominal defendant claims arising from accidents in the use of go-carts and other vehicles not capable of registration will not be maintainable...'[21]

Accordingly, it is clear that Parliament did not intend to prevent people who were injured by unregistered cars with more than minor defects from recovering compensation. Rather, Parliament intended to prevent people from suing the nominal defendant only in cases where the vehicle was not designed for ordinary road use.

Second, the provision is extremely ambiguous. What are minor defects? It is difficult to measure the significance of a defect in purely economic terms, as defects in more exotic vehicles are generally far more expensive to rectify than those in more common vehicles. It is also problematic to construe the issue of defectiveness in functional terms, as it is conceivable that a vehicle may fall well below the required standard for registration but nonetheless be quite suitable for the purpose for which it is used.

Furthermore, is the notion of repair limited to fixing problems that developed after the vehicle was built, such as brake deterioration, or does it extend to changing the vehicle - for example, by installing headlights, taillights and indicators - that differ from its original design?

And where does the onus of proof lie? Does the plaintiff have to disprove the existence of defects or, failing this, that the defects were only minor and that, once repaired, the vehicle was capable of being registered? Or does the burden of establishing otherwise lie with the insurer?

In *Farren Lane v The Nominal Defendant*,[22] it was found that the unregistered vehicle would have been capable of being registered had wiring to the lights and locks to the doors been fixed and the seat belts replaced. These repairs were found to be minor. Thus, the plaintiff succeeded. Had the court found that the requisite repairs were not minor, the plaintiff's claim would have failed, despite the fact that he was a passenger. The driver was clearly negligent. The plaintiff suffered catastrophic brain injury and was unaware of the mechanical state of the vehicle.

Third, questions of fact regarding the nature of the defects may spawn considerable forensic difficulties. For instance, it may often be extremely difficult to determine whether a defect predated the accident or was caused by the accident. Issues such as determining the date that the defect materialised and the cause of the defect are likely to require expensive expert evidence, and divert attention away from the central issue of whether the driver was at fault.

Fourth, the provision is grossly unfair. Why should a pedestrian or another driver be denied compensation because the car with which they collided was incapable of being registered as a result of a technical defect? It is even more extraordinary that, while the pedestrian or driver does not have a cause of action in such a case, they can sue the nominal defendant if the vehicle was unidentified. The whole purpose of having the nominal defendant is to allow injured people to be compensated when they are injured by an uninsured vehicle. Section 33(b)(ii) detracts from this objective.

In light of these problems with section 33(b)(ii), APLA and the Bar Association of New South Wales have written to the Motor Accidents Authority calling for an urgent amendment of the section before further serious miscarriages of justices occur.

CONCLUSION

Unusual defences, such as the ones discussed in this article, are unusual for a good reason. They are unusual because they rest on dubious authority or because the required factual circumstances rarely occur. However, practitioners should be conscious of these defences in order to advise their clients accordingly, and begin the investigations necessary to counter these defences in a timely fashion. PL

Endnotes: **1** G Williams, B Hepple, *Foundations of the Law of Tort*, 2nd ed., Butterworths, London, 1984, p93. See also *The Schwan* [1892] P 419 at 434 per Lopes LJ. **2** [1958] Qd R 1. **3** At 4. **4** [1941] KB 549. **5** At 552. **6** Cf W Stallybrass, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* 7th ed., Sweet & Maxwell, London, 1928, p13. **7** (1966) 115 CLR 119. **8** At 213. **9** J Fleming, *The Law of Torts*, 9th ed., LBC, Sydney, 1998, p119. **10** [1998] 1 WLR 1263. **11** [1980] 1 All ER 7. **12** (1957) 58 WALR 56. **13** (1981) 27 SASR 290. **14** [1961] SASR 123. **15** [1946] 4 DLR 721. **16** Unreported, [2000] QDC 226, 4 August 2000, McGill DCJ. **17** At [47]-[78]. **18** [1952] NZLR 669. **19** [1950] NZLR 695. **20** See *Morgan v The Nominal Defendant* (unreported, NSWDC, 27/6/2001, Christie DCJ); *Applin v The Nominal Defendant* (unreported, NSWDC, 4/8/2003, Sorby DCJ). **21** New South Wales Legislative Council Hansard, 16 November 1995, p3322. **22** Unreported, NSW DC, 24 December 2003, Finnane DCJ.