PARTIES:	DARWIN CITY COUNCIL AND GLEN McDONNELL AND NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NOS:	AP30 of 1997 and AP2 of 1998
DELIVERED:	23 October 1998
HEARING DATES:	24, 25 and 26 August 1998
JUDGMENT OF:	GALLOP ACJ, ANGEL & BAILEY JJ

CATCHWORDS:

Procedure – Pleadings – Statutory bar to plaintiff's claim – Onus on defendant to plead any statutory bar to a cause of action

Motor Accidents (Compensation) Act 1979 (NT) s5.

Wickham v Tacey (1985) 83 FLR 327 overruled.

Statutes – Acts of Parliament – Interpretation – *Motor Accidents (Compensation) Act 1979* (NT) – Abolition of action for damages – "accident" – Whether relevant that defendants not being parties to, connected or interested in, the compensation fund

Motor Accidents (Compensation) Act 1979 (NT) ss5 and 6.

Pritchard v Racecage Pty Ltd & Ors (1997) 142 ALR 527 distinguished.

Statutes – Acts of Parliament – Interpretation – *Motor Accidents (Compensation) Act 1979* (NT) – Abolition of action for damages - "accident" – "occurrence" – Whether Act contemplates more than one occurrence

Motor Accidents (Compensation) Act 1979 (NT) s5.
Motor Vehicles Act 1949 (NT) s5.

Statutes - Acts of Parliament – Interpretation – *Motor Accidents (Compensation) Act 1979* (NT) – Abolition of action for damages – "accident" – "public street" – "any street, road, lane, thoroughfare, footpath or place open to, or used by the public"- Whether "open to, or used by, the public" qualifies "place" or "street, road, lane, thoroughfare, footpath or place"

Motor Accidents (Compensation) Act 1979 (NT) s5.
Motor Vehicles Act 1949 (NT) s5.

Statutes – Acts of Parliament – Interpretation – *Motor Accidents (Compensation) Act 1979* (NT) – Abolition of action for damages – "accident" – "public street" – "any street, road, lane, thoroughfare, footpath or place open to, or used by the public" – Whether place "open" to the public

Motor Accidents (Compensation) Act 1979 (NT) s5.
Motor Vehicles Act 1949 (NT) s5.

Chellingworth v Territory Insurance Office (1984) 29 NTR 15 distinguished.

Statutes – Acts of Parliament – Interpretation – *Motor Vehicles Act 1949* (NT) – "entrance driveway" – Must involve a construction of some sort

Statutes – Acts of Parliament – Interpretation – *Motor Accidents (Compensation) Act 1979* (NT) – Abolition of action for damages "accident" – "public street" – Whether *de minimis non curat lex* applies – Act operates with respect to defined geographical areas

Motor Accidents (Compensation) Act 1979 (NT) s5.
Motor Vehicles Act 1949 (NT) s5.

Statutes – Acts of Parliament – Interpretation – Particular words and phrases – Specific interpretations – "occurrence" – "street, road, lane, thoroughfare, footpath or place" – "open to, or used by the public" – "entrance driveway"

Motor Accidents (Compensation) Act 1979 (NT) s5.
Motor Vehicles Act 1949 (NT) s5.

REPRESENTATION:

Counsel:

Appellant:	Mr T Anderson QC
First Respondent:	Mr I Nosworthy
Second Respondent:	Mr S Walsh QC and Ms R Webb

Solicitors:

Appellant:	Ward Keller
First Respondent:	Hunt & Hunt
Second Respondent:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID Number:	ang98010
Number of pages:	14

ang98010

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

Nos. AP30 of 1997 and AP2 of 1998

BETWEEN:

DARWIN CITY COUNCIL
First Appellant

AND:

GLEN McDONNELL
First Respondent

AND:

NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

CORAM: GALLOP ACJ, ANGEL & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 23 October 1998)

THE COURT:

On 4 December 1997, Mildren J, in an action for damages for personal injuries alleged to have been suffered by the plaintiff, the first respondent, as a consequence of a negligence and breach of duty of the Darwin City Council and the Northern Territory of Australia, entered judgment for 70% of the

plaintiff's damages to be assessed against the Darwin City Council and dismissed the plaintiff's claim against the Northern Territory of Australia. The learned trial judge held that the plaintiff's claims were not barred by s5 of the *Motor Accidents (Compensation) Act,* that the Darwin City Council had been negligent, that the plaintiff's own negligence had contributed to his injuries and that the Northern Territory of Australia had not been negligent.

In this Court the Darwin City Council challenges the judgment against it seeking dismissal of the plaintiff's claim, or alternatively, a variation of the contribution of the plaintiff. It also seeks to have the Northern Territory of Australia held liable to the plaintiff and an order fixing contribution as between itself and the Northern Territory of Australia for the plaintiff's damages. The plaintiff complains of the dismissal of his claim against the Northern Territory of Australia and also the finding against him of contributory negligence. He seeks judgment against both the Darwin City Council and the Northern Territory of Australia for all his damages.

Both the Darwin City Council and the Northern Territory of Australia contend – contrary to the decision of the learned trial judge – that the plaintiff's action is barred by s5 of the *Motor Accidents (Compensation) Act* and alternatively, that the learned trial judge ought to have found the plaintiff was solely responsible for his injuries. The Northern Territory of Australia also seeks an order that it is entitled to full indemnity from the Darwin City Council.

There was some discussion as to whether the parties required leave to appeal. The judgment of the learned trial judge was expressed to be interlocutory in so far as judgment was entered for the plaintiff against the Darwin City Council for 70% of the plaintiff's damages to be assessed. The dismissal of the plaintiff's claim against the Northern Territory of Australia was not so expressed. We propose to treat both appeals as on foot as if any necessary leave were granted. The issues raised by the parties are interwoven and it is convenient to proceed as if all parties have fully and properly constituted their appeals.

The accident giving rise to the plaintiff's claim occurred on 6 September 1987 when the plaintiff was fourteen years of age. He was riding a motor cycle along a track on vacant Crown land situated east of the eastern end of Verburg Court, a dead end street in Stuart Park, an inner suburb of Darwin. Verburg Court ran in roughly an east west direction. At its western end it formed a T-junction with Nudl Street. The northern side of Verburg Court consisted of house blocks. The southern side consisted of a single allotment upon which was situated the Stuart Park Primary School. The plaintiff with his parents and elder brother Shane lived on the fifth block from the eastern end of Verburg Court. The eastern end of Verburg Court terminated at the western boundary of a large area of vacant Crown land under the control of the Northern Territory of Australia. Verburg Court was in the care, control and management of the Council. Verburg Court had a bituminised surface approximately 7 metres wide, on each side of which was a kerb and gutter. There was a foot path approximately 5 metres wide on either side. At the

eastern end of Verburg Court the bituminised surface stopped approximately 1.2 metres short of the western boundary of the vacant Crown land. There was no kerb or gutter or foot path at the eastern end of Verburg Court.

In January 1986 the Darwin City Council erected a fence and gate at the eastern end of Verburg Court. The fence, constructed from ARMCO-type railing ran north south with an opening approximately 3½ metres wide permitting passage between Verburg Court and the vacant Crown land. Both the northern and southern portions of the fence contained a sleeve which held in place an unpainted steel pipe approximately 5 centimetres in diameter. The pipe, which acted as a gate, was designed to be slid into a sleeve attached to the western side of the northern portion of the fence. A similar sleeve was provided on the western side of the southern portion of the fence to enable the pipe to be slid into a closed position. There was no locking device. The pipe could be readily slid open or closed by anyone who cared to do so. The southern end of the gate was roughly aligned to the southern curb of Verburg Court. The northern end of the gate was roughly aligned to the middle of the bituminised road surface of Verburg Court. There were no signs of any kind attached to the gate or to the fence.

On the day in question the plaintiff was riding his motor cycle in a westerly direction along a track on the vacant Crown land towards the gateway. Somebody unknown had placed the pipe in a closed position. The track ran from the gate some 100 metres or more in to the vacant Crown land where a BMX track had been constructed by the Darwin City Council some time

previously. The plaintiff did not see the steel pipe in time to avoid it and collided with it at a speed probably somewhere between 40 and 60kph. As a result of striking the pipe the plaintiff sustained severe injuries and is now quadriplegic. After striking the pipe the plaintiff came to rest between 1.6 metres and 2.8 metres west of the pipe on Verburg Court.

In complete answer to the plaintiff's claims the defendants rely on s5 of the *Motor Accidents (Compensation) Act* which relevantly provided:

> "5. ABOLITION OF CERTAIN COMMON LAW RIGHTS
>
> No action for damages shall lie in the Territory in respect of the death of or injury to a resident of the Territory in or as a result of an accident that occurred in the Territory.".

Section 4 of the *Motor Accidents (Compensation) Act* defined "accident" thus:

> "Accident" means –
>
> (a) in relation to the Territory – an occurrence -
>
> (i) on a public street, as defined in the *Motor Vehicles Act*, caused by or arising out of the use of a motor vehicle;
> .....
>
> occurring on or after 1 July 1979, and which results in the death of or injury to a person;".

S5 of the *Motor Vehicles Act* at the time of the accident, provided as follows:

> " 'public street' means any street, road, lane, thoroughfare,

footpath or place open to, or used by, the public ……. , but does not include –

(a) an entrance driveway;

(b) a road, or part of a road, that is closed under the *Control of Roads Act* or under the *Local Government Act*; or

(c) a street, road, lane, thoroughfare, footpath, or other place, under construction.”.

The parties dispute as to whether or not there was an accident on a public street as defined in the *Motor Vehicles Act*.

By Notice of Contention the plaintiff contends that the accident giving rise to his injuries occurred on an “entrance driveway” for the purposes of the *Motor Vehicles Act* and at a place which was not “open”, and thus not a “public street” as defined in the *Motor Vehicles Act*.

The plaintiff says the occurrence did not occur on a public street, first because the land in question was not a “street, road, etc … or place open to, or used by the public”; and secondly that in any event the “occurrence” occurred on or in an “entrance driveway”.

It was undisputed that the pipe constituting the gate was .64 metres at one end and 1.16 metres at the other end west of the surveyed boundary between Verburg Court and the vacant Crown land.

The defendants' submissions raise a number of issues.

Whether under s5 of the *Motor Accidents (Compensation) Act,* there had been an "accident", depends upon whether there was "an occurrence –

> (i) on a public street, as defined in the *Motor Vehicles Act* caused by or arising out of use of a motor vehicle … which resulted in ….. injury" to the plaintiff.

As to "occurrence", Mildren J (at AB553-554) said as follows:

> " The first question is, what is the 'occurrence' which gave rise to the plaintiff's injuries? Is the 'occurrence' the moment the plaintiff struck the gate, or does it extend beyond that? This is of considerable importance, because the 'occurrence' must be on a 'public street'.
>
> In my opinion, the noun 'occurrence' must be given its ordinary English meaning. The Oxford English Dictionary, Vol X, 2nd Edn., defines it as 'that which occurs or is met with or presents itself; an event, incident': see also the Shorter Oxford English Dictionary. The Macquarie Dictionary similarly defines it as 'something that occurs; an event or incident'. An 'occurrence' is not necessarily limited to a single moment of time or to a single place. The legislation refers to 'an injury … as a result of an accident' …, but is the occurrence to be divorced from its causes or are all the causes part of the occurrence? On the one hand, it could be said that the causes of the plaintiff's injuries included the erection of the gate, the failure to put signs on or near the gate, the design of the gate, the act of some unknown person in closing the gate, the failure of the plaintiff to see the gate as he approached it, and the plaintiff's speed, all of which culminated in the striking of the gate. Mr Walsh QC submitted, and I think correctly, that the plaintiff's injuries were sustained as a result of a number of 'occurrences', and that so long as one or more of these occurrences occurred on a 'public street', as defined, the plaintiff's action must fail. Therefore it is sufficient if the track along which the plaintiff was riding immediately before the impact is a public street; similarly if the gate itself was on a public

> street. Mr Riley QC, for the plaintiff, submitted that the 'occurrence' in this case was confined to the moment the plaintiff's chin struck the gate, but I do not accept this. First, an 'occurrence' does not have to be an act of negligence, although it may be. The *Motor Accidents (Compensation) Act* provides for a 'no-fault' compensation scheme. There is therefore no necessary connection between negligent occurrences and those which are not. Secondly, the occurrence must be related to the injury, in the sense that the injury is a result of it, or caused by it. In my opinion, this means only that there must be a causal connection between the occurrence and the injury for it to be legally relevant; the test of causation is the same test for these purposes as that in *March v E & M H Stramere Pty Ltd* (1990-91) 171 CLR 506, esp at 515-519 per Mason CJ; at 522-524 per Deane J. What is a cause is a question of fact by applying common sense to the factual circumstances. In this case, the evidence is that the gate in its closed position was visible for (sic) about 33 metres away. In those circumstances, the fact that the plaintiff failed to see the gate, and stop accordingly, (whether negligently or not), is as a matter of fact and common sense, a cause of his injuries. It is therefore necessary to consider whether the track was a public street and if not, whether the gate was on land which was a public street.".

We note the words "an occurrence … which resulted in … injury". The Act contemplates but one occurrence. We are of the view that Mildren J erred in rejecting the plaintiff's submission that the relevant occurrence was confined to the plaintiff striking the pipe. We think the *locus* of the occurrence was at the pipe and that consideration of the nature and actual use of the vacant Crown land was irrelevant. The question is whether the locus of the occurrence was a place open to the public not whether the vacant Crown land was used by the public.

For the avoidance of doubt in future cases, we add that because we are satisfied on the facts of the present case that the relevant occurrence occurred when the plaintiff struck the pipe, it does not necessarily follow that the point

of impact in a motor vehicle accident will always define the location of an occurrence for the purposes of the *Motor Accidents (Compensation) Act*. Each case needs to be considered in the light of the particular circumstances. It may well be that a situation could arise where a relevant occurrence occurs on a public street but a resulting injury is suffered at some location other than a public street. An example might be where a driver loses control on a public street and sustains injury when his vehicle leaves the street and collides with something adjacent to, but not on a public street.

As to the definition of "public street" as defined in the *Motor Vehicles Act*; we are of the opinion -

(i) the words "open to, or used by, the public" qualify the words "street", "road", "lane", "thoroughfare", "footpath" or "place";

(ii) the word "place" is not to be read *ejusdem generis* with the preceding words;

(iii) the words "open to" in relation to the words "street" and "road" and "place" do not mean open as opposed to closed under the *Control of Roads Act* or the *Local Government Act,* but rather places where the public can go;

(iv) that portion of Verburg Court east of the pipe was a place to which the public could physically go as of right, ie. it was a

> place open to the public. We think the question of actual use of the vacant Crown land is otiose.

We are of this opinion because the pipe was not locked or secured and could be readily removed by anyone who cared to move it; and even when erected it permitted pedestrians to pass through, ie. it only prevented the passage of vehicles.

Furthermore there was evidence that the vacant Crown land could be and was entered from public roads other than Verburg Court. The plaintiff's brother Shane used to traverse the land to go to and from work. The BMX track users and others could (and did) traverse the gateway from both east and west. The BMX track facility was available for public use, as was access via the gate and that portion of Verburg Court east of the pipe.

In this context, while it is strictly unnecessary to consider whether the vacant Crown land fell within the definition of "public street", we do not agree with the conclusion of Mildren J that the track upon which the plaintiff was riding immediately before the accident was not a public street, as defined. Mildren J found that at the time of the accident there were no restrictions of any kind placed by the owner of the land which limited access to only a particular class or description of persons. His Honour did not consider that was sufficient alone to establish that the track was a public street.

Mildren J applied the test enunciated by O'Leary J in *Chellingworth v Territory Insurance Office* (1984) 29 NTR 15 at 19-20 and held that such use of the track as was established by the evidence did not amount to a *real* use by the public as the public. While such a finding may be open to doubt on the available evidence, we also consider that his Honour's approach overlooks the status of the relevant land in *Chellingworth,* supra. There, O'Leary J was concerned with an Air Force Reserve used periodically as a demolition range, that is for the destruction of dangerous explosive substances. There was no doubt that the relevant land was a prohibited area, which in no sense could be said to be "open" to the public. Accordingly, O'Leary J was required to examine whether the land was "used by" the public in terms of the definition of public street. This situation may be contrasted with the track on the vacant Crown land in the present case. The track led to a BMX track constructed by the Darwin City Council for public use. This, together with the evidence as to actual use of the BMX track, evidence as to use of the Crown land for other purposes by members of the public and the absence of any restriction on the public's access to the land generally, is sufficient to establish that the track was as a minimum "open to" the public, quite aside from whether it was also "used by" the public, as defined.

It was argued that the pipe was erected on the boundary of Verburg Court and the vacant Crown land. The close proximity of the pipe to the actual boundary between Verburg Court and the vacant Crown land coupled with the

intention of the Council to erect the pole on the boundary and a like intention of the Northern Territory of Australia gave rise to a situation where the principle of *de minimis non curat lex* was said to apply. This argument should be rejected. The *Motor Accidents (Compensation) Act* operates with respect to defined geographical areas, ie, public streets, as defined. The location of the accident or occurrence in the present case was Verburg Court, ie, at the pipe. Verburg Court was a place open to, or used by, the public and where the *Motor Accidents (Compensation) Act* operated. At all events there was no evidence of the intention of the Council or of the intention or knowledge of the Northern Territory of Australia as to the placement or even existence of the pipe, let alone any danger it posed when closed. The submission has no factual foundation.

The definition of "public street" excludes an "entrance driveway". It was submitted that the accident site was an entrance driveway to the vacant Crown land. Mildren J dealt with this topic (at AB555-557) and concluded "that the land where the gate was positioned was not on (sic) an 'entrance driveway' ". We agree with the learned trial judge that the location of the accident was not an "entrance driveway". There was no constructed crossover from the carriageway of Verburg Court to the vacant Crown land. In our view whatever else may be comprehended by the expression "entrance driveway", it involves a construction of some sort. Here the eastern end of the carriageway of Verburg Court was the western boundary of the Crown land. As already

observed, there was no gutter, kerb or foot path at the eastern end of Verburg Court.

In *Wickham v Tacey* (1985) 83 FLR 327 at 330, O'Leary CJ held that it is for a plaintiff to plead and prove at trial matters that place the plaintiff outside the ambit of s5 of the *Motor Accidents (Compensation) Act*. Mildren J (at AB558-59) doubted the correctness of that decision. The decision is in our opinion erroneous. Section 5 of the *Motor Accidents (Compensation Act)* is a bar to certain common law damages claims for personal injury. It is for a defendant to plead any statutory bar to a cause of action, not for a plaintiff to anticipate and avoid the plea in a Statement of Claim. He or she who alleges must prove. It was for each defendant to prove facts to bring the matter within the purview of the statutory bar.

With reference to *Pritchard v Racecage Pty Ltd & Ors* (1997) 142 ALR 527, it was argued that the present accident, being a one vehicle accident, and the defendants not being parties to or in any way relevantly connected or interested in the compensation fund under the *Motor Accidents (Compensation) Act,* (via a s6 indemnity), that Act did not apply to the accident. We can not accept this argument. All that is relevant is whether the plaintiff's claims fall within s5 of the *Motor Accidents (Compensation) Act*. Here they do. The plaintiff's claims should have been dismissed as barred by the Act.

Having reached this conclusion, it is not necessary to consider the issues of negligence and contributory negligence.

The Darwin City Council's appeal is allowed.

The judgment against it in favour of the plaintiff is set aside.

The plaintiff's claim against the Darwin City Council is dismissed.

The appeals of the Darwin City Council and the plaintiff against the dismissal of the plaintiff's claim against the Northern Territory of Australia are dismissed.

The Northern Territory of Australia's claim for an order of indemnity against the Darwin City Council is dismissed.

We shall hear the parties as to costs.