

SUPREME COURT OF QUEENSLAND

CITATION: *Brown v Daniels & Anor (No 2)* [2018] QSC 232

PARTIES: **SHAYNE MAXWELL BROWN**
(plaintiff)
v
JAY LESLIE DANIELS
(first defendant)
RACQ INSURANCE LTD ABN 50 009 704 152
(second defendant)

FILE NO: Rock No 826 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 10 October 2018

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Davis J

ORDER: **1. The second defendant pay the plaintiff's costs of the proceeding assessed on the indemnity basis but excluding any fees or expenses paid to Dr Kahler and any costs associated with obtaining or leading evidence of Dr Kahler which was either admitted into evidence, or proposed to be admitted into evidence.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN THE STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS GENERALLY – where the plaintiff was successful in the primary judgment – where the second defendant concedes indemnity costs ought be ordered – whether the plaintiff ought recover the costs of an expert's evidence where that evidence was deemed inadmissible

Brown v Daniels & Anor [2018] QSC 209
Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2) [2013] QSC 271, followed

COUNSEL: A R Philp QC with S Deaves for the plaintiff
M Grant-Taylor QC with C K George for the second defendant

SOLICITORS: V A J Byrne & Co for the plaintiff
Quinlan Miller & Treston for the second defendant

- [1] The plaintiff sued the defendants for damages for personal injuries suffered in an accident on 12 February 2013 near Ubobo. On 14 September 2018 I found for the plaintiff and awarded damages in the sum of \$2,098,590.33.¹ On the same day I ordered the parties to file and deliver written submissions on costs and further ordered that costs would be decided without oral argument.
- [2] Written submissions have now been delivered. For the reasons which follow I will order that the second defendant pay the plaintiff's costs of the proceedings on the indemnity basis except those costs associated with the evidence of a witness in the case who was to be called to give expert evidence, an engineer, Dr Kahler.
- [3] Before the trial various offers were exchanged, the details of which do not matter as the defendant concedes, rightly and properly, that the plaintiff should be awarded costs assessed on the indemnity basis. The defendant though submits that the plaintiff should not recover his costs associated with the evidence of Dr Kahler. While the plaintiff concedes that he should not recover all the costs associated with Dr Kahler's evidence, he submits that he should receive a proportion of those costs.
- [4] Dr Kahler is an engineer. He was retained by the plaintiff to investigate the accident and express opinions as to matters relevant to its cause. He did so and his opinions were the subject of a report which, in redacted form, became an exhibit in the trial.² The defendant³ obtained its own report from a Dr Carnavas. In due course the two experts conferred and produced a joint report.
- [5] Dr Carnavas' report was the defendant's fall-back position. The defendant's primary position was that Dr Kahler's opinion was inadmissible and so was Dr Carnavas'. If, however, Dr Kahler's opinions were ruled admissible, then it would follow that Dr Carnavas' opinions would be admissible and the defendant would seek to rely upon Dr Carnavas' evidence.
- [6] Upon objection being taken to the evidence of Dr Kahler, significant concessions were made by the plaintiff. Most of the remaining evidence to which objection was taken was ruled inadmissible.⁴ In the end Dr Kahler's report, heavily redacted, was admitted into evidence. What remained after concessions and rulings were, in the main, photographs of the scene and the vehicles, and observations of physical features such as

¹ *Brown v Daniels & Anor* [2018] QSC 209.

² Exhibit 22.

³ A reference to the second defendant; the first defendant did not participate in the trial.

⁴ Primary judgment at [30]–[47].

the location of damage and measurement of distances between relevant points at the scene. Importantly, nothing of the nature of an expert opinion of Dr Kahler was admitted.

- [7] Upon the rulings being made, the defendant abandoned reliance upon Dr Carnavas' report. Neither Dr Carnavas' report nor the joint report came into evidence. Dr Kahler was not required for cross-examination.
- [8] The redacted report contained relevant evidence which featured in the judgment.⁵ As well as photographs and measurements of the scene, there was a recording taken by Dr Kahler of him driving through the accident scene to recreate the view that those involved in the accident would have had from various points.⁶
- [9] The plaintiff submits that Dr Kahler's costs of travelling to Rockhampton for the trial should be recoverable because the defendant did not indicate until day 2 of the trial that he was not required for cross-examination. That indication though was given immediately upon me ruling that most of Dr Kahler's evidence was not admissible. It was not until then that Dr Kahler's report, or what was left of it, ceased to be contentious.
- [10] It is true, as the plaintiff submits, that parts of the report were admitted, as was the drive-through footage, and that evidence was of some significant value in the plaintiff's case.
- [11] The approach of the defendant to the costs submissions can be seen to be both conservative and reasonable. The defendant has clearly been put to significant expense in retaining Dr Carnavas, obtaining his report, having Dr Carnavas engage in a conference with Dr Kahler, and having Dr Carnavas participate in the preparation of the joint report. All of that expense was unnecessarily incurred in responding to Dr Kahler's report, the vast majority of which was, with respect, obviously inadmissible. The defendant could not be criticised for obtaining the report of Dr Carnavas as the plaintiff sought to rely on the evidence of Dr Kahler. The defendant does not seek to recover Dr Carnavas' costs from the plaintiff. The defendant only seeks to avoid paying the costs associated with Dr Kahler.
- [12] One possible approach is to disallow only costs associated with that part of Dr Kahler's evidence which was inadmissible. In that case it would be necessary to make some allowance for the costs thrown away on Dr Carnavas. Little would be achieved by such a course except to condemn the parties to a complicated, and therefore potentially expensive, assessment of costs. In all the circumstances a proper balance is reached by denying the plaintiff all the costs associated with obtaining evidence from Dr Kahler, including the evidence such as the drive through footage, which was admitted.

⁵ Primary judgment at [5], [7], [9], [41], [78].

⁶ Exhibit 16.

- [13] The plaintiff seeks an order for costs “of and incidental to” the proceedings. For the reasons explained by Jackson J in *Mio Art Pty Ltd v Macequest Pty Ltd & Ors (No 2)*,⁷ it is not appropriate to include those words in the costs order.
- [14] The order on costs is that:
1. The second defendant pay the plaintiff’s costs of the proceeding assessed on the indemnity basis but excluding any fees or expenses paid to Dr Kahler and any costs associated with obtaining or leading evidence of Dr Kahler which was either admitted into evidence, or proposed to be admitted into evidence.

⁷ [2013] QSC 271 at [5]–[22].