SUPREME COURT OF QUEENSLAND

CITATION:	*Owbridge v Murphy & Anor* [2002] QCA 197
PARTIES:	**PETER ANDREW OWBRIDGE** (plaintiff/respondent) v **ARTHUR JOHN MURPHY** (first defendant/first appellant) **VACC INSURANCE COMPANY LIMITED** ACN 004 167 953 (second defendant/second appellant)
FILE NO/S:	Appeal No 8821 of 2001 SC No 9259 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2002
JUDGES:	McMurdo P, Davies JA and Fryberg J Separate reasons for judgment of each member of the Court; McMurdo P and Fryberg J concurring as to the orders made, Davies JA dissenting
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDING OF FACT – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – CONTRIBUTORY NEGLIGENCE - where respondent was injured when his motorcycle collided with the first appellant's station wagon – where respondent was travelling at an excessive speed – where first appellant was turning right into his driveway at time accident occurred – where execution of the turn necessitated cutting across respondent's path of travel - where first appellant did not see respondent approaching prior to commencing his turn – where primary judge found that the first appellant, if keeping a proper lookout, should have seen the respondent's motorcycle and aborted the turn – whether the primary judge erred in finding the first appellant negligent – whether the apportionment of negligence was too favourable to the respondent

A V Jennings Construction Pty Ltd v Maumill (1956) 30 ALJR 100, considered
March v Stramare (1991) 171 CLR 506, considered
McPherson v Whitfield [1996] 1 QdR 474, considered
Pennington v Norris (1956) 96 CLR 10, considered

COUNSEL: R J Douglas SC for the appellants
M Grant-Taylor SC for the respondent

SOLICITORS: Gadens Lawyers for the appellants
Murphy Schmidt for the respondent

[1] **McMURDO P:** On 29 October 1997, the respondent/plaintiff was injured when his motorcycle collided with the first appellant/defendant's late model Mitsubishi Verada station wagon. The second appellant/defendant is the first appellant's insurer. The appellants contend that the learned primary judge erred in finding the first appellant negligent and, alternatively, that the plaintiff was more than 40 per cent contributorily negligent, contrary to the findings of the primary judge.

[2] The accident occurred on Buccan Road, Buccan, a semi-rural area in the Waterford/Beenleigh district at about 2.15pm. The plaintiff was riding his motorcycle in a northerly direction with its headlight illuminated; he was familiar with this section of Buccan Road. The first defendant was travelling south and slowed to execute a righthand turn into his driveway. This necessitated cutting across the plaintiff's path of travel. The speed limit was 80 kph. The residences are generally on large allotments and are not visible from the road. There are gaps in the centre line markings to allow drivers to turn across the road into the driveways of the homes. The first appellant's driveway was about 150 metres south of the crest of a hill.

[3] The plaintiff, who was then 19, sustained serious head injuries; his recollection of events on the day of the accident ceased some hours beforehand, so that he was unable to give useful evidence about it.

[4] The first appellant, who was 68 years old, did not see the plaintiff approaching prior to commencing his turn. He had played 18 holes of golf and had a few beers before driving home. There is no suggestion that alcohol had any bearing on the accident. He gave evidence that as he approached the turn to his driveway he was travelling at about 60 kph, signalled his intention to turn right 100 metres beforehand, looked ahead along the road and saw no approaching vehicles. When commencing the turn he was travelling between 5 and 10 kph. He was unaware of the motorcycle until impact. When the nose of his vehicle was in his driveway and he had almost completed the turn there was a sound like an explosion and his vehicle spun around. The motorcycle had struck his station wagon at the front of the left side rear wheel arch.

[5] Mrs Susan Howie's vehicle was following the first appellant's vehicle so that it was not possible for the plaintiff to avoid the first appellant's turning vehicle by veering onto the wrong side of the road.

[6] Her Honour considered the evidence of Mrs Howie, the expert engineering witnesses (Mr King, for the plaintiff, and Mr Chaseling for the appellants), Mrs Askew, who noticed a motorcyclist travelling north on Buccan Road only about 30

seconds before the accident at an estimated speed of 140 or 150 kph, and the 37 metre tyre mark on the road which was consistent with the back wheel of a motorcycle locking and corresponded with wear on the rear tyre of the plaintiff's motorcycle. The judge concluded that on balance the impact speeds of the motorcycle and the first appellant's vehicle were 90 kph and 16 kph per hour respectively. Her Honour accepted Mr King's evidence that the speed of the plaintiff's motorcycle at the point at which the first appellant's vehicle became visible to the plaintiff and he commenced to brake was about 121 kph per hour. Her Honour found Mrs Askew's evidence of some limited assistance in supporting Mr King's estimate of speed, although she treated it with considerable reserve because of the notorious difficulty in making such estimations. Her Honour accepted Mr Chaseling's evidence that the plaintiff could have slowed and avoided the accident had he been travelling at the 80kph speed limit. There was some delay between when the plaintiff was first able to see the Verada and when the skid marks suggest he commenced to brake. The judge was satisfied on balance that the plaintiff saw the Verada but did not brake immediately either because he did not notice the indicator, thought it would turn quickly so that he would not need to alter his course or thought he could go round it.

[7] Her Honour found that the motorcycle was coming into view over the crest of the hill as the first appellant prepared to turn and that Mrs Howie did not see it as her view was obscured by the first appellant's vehicle. Her Honour found that the first appellant, if keeping a proper lookout, should have seen the plaintiff's motorcycle and aborted the turn but that the plaintiff contributed in a substantial degree to the accident because of his excessive speed and failure to react sufficiently quickly to the first appellant's turning vehicle. Her Honour found the plaintiff was 40 per cent and the first appellant 60 per cent responsible for the accident.

[8] The appellants contend that her Honour's finding "that the motorcycle was coming into view over the crest of the hill as [the first appellant] prepared to turn" is against the weight of the evidence.

[9] The judge was not obliged to accept the first appellant's uncontradicted but self-serving evidence, that he looked carefully but did not see the plaintiff's motorcycle. The rejection of that evidence was supported by Dr King's evidence that if, as he calculated, the plaintiff were travelling at 121 kph when his motorcycle initially became visible to the first appellant, then the plaintiff was visible to him for about three seconds before he crossed the centre line to turn; this was sufficient time to allow the first appellant to stop and delay his turn until it was safe to continue. It is plain from the reasons for judgment that her Honour accepted that evidence, as she was entitled to do. Her Honour gave sound reasons for rejecting Mrs Howie's evidence: Mrs Howie had earlier estimated the plaintiff's speed at 100 kph, gave evidence that it was about 160 kph and conceded in cross-examination that she really had no idea of his speed and that her attention was focussed on the first appellant's vehicle. Although the contrary finding was also open, her Honour was entitled to find "that the motorcycle was coming into view over the crest of the hill as [the first appellant] prepared to turn".

[10] As her Honour rightly recognised, the first appellant's speed significantly contributed to the accident. Her Honour was entitled to find, however, that, had the first appellant been keeping a proper lookout, he would have seen the motorcycle and delayed the turn until it was safe to proceed and that turning across the path of

the plaintiff's motorcycle in these circumstances constituted a breach of his duty of care to the plaintiff and was a continuing cause of the accident: *March v Stramare*.[1]

[11] The next issue is the apportionment of negligence which the appellants contend is too favourable to the plaintiff. Appellate courts are reluctant to interfere with a judge's apportionment of contributory negligence which involves the exercise of a broad discretion and an appellant carries a substantial burden in seeking to alter an apportionment: *McPherson v Whitfield*.[2]

[12] In *A V Jennings Construction Pty Ltd v Maumill*[3] the High Court, in a joint judgment, noted that a finding on the question of apportionment "… is not lightly reviewed by a court of appeal. As Lord Wright observed in *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197, at p 201), it is a finding upon a question 'not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis and of weighing different considerations. It involves an individual choice or discretion as to which there may well be differences of opinion by different minds.' Accordingly re-consideration of the question in the exercise of an appellate jurisdiction is subject to the limitations imposed by the principles which govern all appeals against judgments given in the exercise of discretions, principles which this Court has stated repeatedly in recent cases. Consequently, as Lord Simon remarked in the case just cited at pp 198-199, 'the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, nonetheless has sufficient reason to alter the allocation of blame made by the trial judge.' "

[13] In similar vein, in *Pennington v Norris*[4] the High Court noted that apportionment legislation "… intends to give a very wide discretion to the judge or jury entrusted with the original task of making the apportionment. Much latitude must be allowed to the original tribunal in arriving at a judgment as to what is just and equitable. It is to be expected, therefore, that cases will be rare in which the apportionment made can be successfully challenged."

[14] The learned primary judge gave careful consideration to the issues and on the facts found by her, which were open on the evidence, the plaintiff had right of way and the first appellant created a potentially dangerous situation in turning across the plaintiff's path in circumstances where he should have seen the plaintiff had he been keeping a proper lookout. Whilst the accident could have been avoided had the plaintiff been travelling within the speed limit, and the plaintiff's excessive speed was a significant contributing cause, it would not have been necessary for the plaintiff to take evasive action but for the first appellant's negligence. Whilst other judges may have made an apportionment more favourable to the first appellant, and found the plaintiff equally or even primarily responsible for the accident, I am not persuaded that the apportionment of liability determined by her Honour was so outside a sound exercise of discretion as to justify this Court's interference.

[15] I would dismiss the appeal with costs to be assessed.

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1 (1991) 171 CLR 506, Mason CJ, with whom Gaudron J agreed, at 519; Toohey J at 524-525.
2 [1996] 1 QdR 474, 477.
3 (1956) 30 ALJR 100, 101, 2nd col.
4 (1956) 96 CLR 10, 15-16.

[16] **DAVIES JA:** I have read the reasons for judgment of the President. Conscious as I am of the need to allow a substantial margin of appreciation for trial judges in cases of this kind, I am unable to agree with her Honour's reasons or that this appeal should be dismissed. I would allow the appeal, set aside the judgment imposed by the learned trial judge and give judgment for the plaintiff based upon an apportionment of negligence of one-third to the defendant and two-thirds to the plaintiff. In expressing my reasons for that conclusion I am content to rely upon the findings of fact of the learned trial judge most of which are set out in the reasons of the President and which, accordingly, I will not repeat here except to state what seem to me to be the main relevant facts.

[17] The main facts relevant to the extent to which each of the parties was liable for the accident and the plaintiff's injuries are as follows:

1. when any part of the plaintiff or his motor cycle could have first come into the defendant's vision, the plaintiff was about 140 metres from the defendant and travelling at more than 120 kilometres an hour; that is, if he continued at that speed, he was only four seconds from the point of impact. That speed was more than 50 per cent higher than the legal limit in that area.
2. He was then coming over the crest of a hill so that, at that point, only the top of his helmet would have been visible although, at the speed he was travelling, it would have been only an instant before the whole of his motor cycle would have been within the defendant's vision.
3. At that point the defendant, it seems, was travelling at no more than about 10 kilometres per hour, having signalled his intention to turn right into his driveway. Once he commenced his turn, according to one of the experts, it would have taken between two and three seconds, accelerating to about 15 kilometres per hour, as her Honour found he did, for him to clear the oncoming lane, that is the lane in which the plaintiff was riding.
4. By the time the collision occurred, part of the defendant's vehicle was already in his driveway.

[18] Calculations of speed and distance, such as these, even where, as here, they are the result of analysis of experts, are necessarily approximate only. What they do show, however, is that, because of the plaintiff's grossly excessive speed, the defendant would have had only a couple of seconds, before he commenced to turn across the centre of the road, in which to see the plaintiff and appreciate that he was travelling so fast that it was unsafe for the defendant to commence to turn.

[19] The negligence which the learned trial judge found against the defendant was a failure to see the plaintiff's motor cycle and to appreciate its speed; and consequently to have aborted his turn. There was no finding against him that, having committed himself to turn, he did not clear the oncoming lane sufficiently quickly. The negligence which she found against the plaintiff was travelling at an excessive speed and failing to react sufficiently quickly to the turning vehicle ahead of him.

[20] Had the plaintiff been travelling within the speed limit he could easily have seen that the defendant's vehicle was turning or was about to turn (its right hand trafficator was operating) in sufficient time to have avoided the collision. However he continued for about another 100 metres without braking after he first could have seen the defendant's vehicle. On the other hand the defendant could not reasonably have appreciated, when he first saw the plaintiff's motor cycle, 140 metres away,

that it was travelling so fast. So his negligence was, in substance, in commencing his turn without first seeing the plaintiff and ensuring that he was travelling sufficiently slowly so as not to be a danger.

[21] Given that, when the collision occurred, the defendant's vehicle was partly in his driveway, he must have had only a second or two, before he committed his car to a turn, in which to see the motor cycle and appreciate that its speed was so fast as to pose a danger. Only then could he have appreciated that to continue with his turn might be dangerous.

[22] It follows from this analysis, in my opinion, that it was the plaintiff's grossly excessive speed which created the dangerous situation. When one adds to that his failure to brake for 100 metres after he first ought to have seen the defendant turning or about to turn, I think that substantially the greater proportion of the blame must be borne by the plaintiff.

[23] Accordingly with great respect to her Honour the learned trial judge, I think that her apportionment of negligence was so far outside the range of what was, in the circumstances, a reasonable apportionment that it should be set aside and, in lieu, that negligence be apportioned as to two-thirds to the plaintiff and one-third to the defendant.

[24] **FRYBERG J:** For the reasons given by President, I agree with the other members of the Court that the finding of negligence on the part of the first defendant was correct.

[25] Whether the process of apportionment by a trial judge is properly described as an act of judgment (a description I would favour) or an exercise of discretion, the relevant principles which govern review by an appellate court are not in doubt. They are referred to in the President’s reasons for judgment, and I need not repeat them.

[26] Those principles have particular weight in motor vehicle accident cases, where usually events happen very quickly and the reliability of eyewitness accounts is often fallible. In such circumstances, the weight to be given to such accounts is very much a matter for the trial judge. Even when a fact has been found on the balance of probabilities, the judge’s assessment of the witnesses can affect the importance and complexity of the reasoning and conclusions founded upon that fact. Appellate courts need to be wary of drawing inferences not drawn by the primary judge in such cases.

[27] I agree with Davies JA that calculations of speed and distance, even when the result of analysis by experts, are necessarily approximate only. The chance of error in such analyses is magnified when one of the participants has no recollection of the events, as was the case here. Relevant facts may easily have passed unremarked by others. Nothing can be done about that problem; but its existence must be remembered when examining the experts’ reasoning and when drawing inferences from their conclusions. Expert reports can sometimes create a misleading sense of certainty. In cases such as this, a trial judge has particular advantages in assessing them.

[28] The overwhelming aspect of the plaintiff’s contributory negligence was his speed. From the expert evidence, it can be determined that the plaintiff failed to brake for

about three seconds (100 metres) after he could have seen the defendant's vehicle. I would be very wary of drawing an inference of contributory negligence from this fact. The evidence that he was speeding, however, was overwhelming. A finding of contributory negligence was inevitable.

[29] Apportionment depended very much upon the trial judge's exercise of judgment and assessment of witnesses (including expert witnesses). Reasonable minds could assess the plaintiff's contribution at different levels within a wide range - anywhere from perhaps 30 per cent to 80 per cent. In my judgment, it is not possible to say that her Honour erred.

[30] I agree generally with the President's reasons on this aspect of the case.

[31] The appeal should be dismissed with costs to be assessed.