

SUPREME COURT OF QUEENSLAND

CITATION: *Walker v Jones* [2002] QSC 177

PARTIES: **GREGORY CHARLES WALKER**
(plaintiff)
v
ALLAN JONES
(defendant)

FILE NO: 3995 of 2001

DIVISION: Trial

PROCEEDING: Civil

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 June 2002

DELIVERED AT: Brisbane

HEARING DATE: 7 and 11 June 2002

JUDGE: Muir J

CATCHWORDS: NEGLIGENCE – PERSONAL INJURIES –
PRELIMINARY ISSUES - where question of date of alleged
incident to be tried and determined separately from question
of liability and damages

COUNSEL: T Taylor for the plaintiff
J Kimmins for the defendant

SOLICITORS: Delaneys Lawyers for the plaintiff
McCullough Robertson for the defendant

The issue for determination

- [1] The plaintiff in this action alleges that he was injured on or about Saturday 3 May 1998 when thrown from a ski tube towed by a motorboat driven by the defendant, his brother-in-law. The defendant does not deny that there was an incident of the nature of that described by the plaintiff but asserts that it took place either in December 1997 or prior to May 1998. The timing of the incident is of critical importance because the claim, having been filed on 3 May 2001, will be statute barred if the incident occurred prior to 4 May 1998.
- [2] One might think that the issues in a trial such as this are in relatively short compass, but the parties persuaded a deputy registrar to make an order, by consent, that –

“The question of the date of the alleged water skiing incident which gives rise to these proceedings, be tried and determined separately from the question of liability and damages ...”.

- [3] That is the question I am required to determine.

Background narrative

- [4] It is common ground between the parties that the plaintiff’s mother died in the Gumnut Court Buderim home of the defendant and his wife on 8 May 1998. Residing in the house at the time were Allan Jones (the defendant), his wife, their three children (Christie, Aaron and Daniel), the plaintiff, his wife and their two children and Mr Kevin Walker (the plaintiff’s brother). The evidence also establishes that the funeral of the late Mrs Jones took place on 12 May 1998 and that, prior to the funeral, the plaintiff who, together with his family had returned to his Tallebudgera home the previous day, sought medical attention for acute neck pain.
- [5] The plaintiff had done some tiling work in his kitchen on 11 May and associated the pain with that work. He saw his general practitioner in relation to symptoms of neck pain on 20 May and 24 July 1998 without mentioning the water skiing accident or associating his injury with it. He commenced seeing another medical practitioner in November 1998 about his neck problems and did not mention the water skiing incident to him either. The plaintiff also saw an orthopaedic surgeon about his neck pain in June 1998. He told him that he had suffered no trauma to his neck or shoulders but that he had previously worked as a tiler. The plaintiff said that it was not until he had a scan which revealed a collapsed disc and he was told by a surgeon that the injury would have resulted from a severe impact that he associated his neck problems with the skiing incident. He said that his wife was with him at the time of the discussion with the surgeon and it was she who thought of the skiing incident. This consultation was in about October 1999.
- [6] On 22 May 2001, the defendant submitted a claim form to his insurers. In the form he referred to the plaintiff’s allegation that the incident took place on 5 May 1998 (that was the date on which the incident was alleged to have occurred in the statement of claim. The statement of claim was amended to change 5 May to 3 May on the first day of the trial). The claim form stated –
- “I do not have an exact date which the alleged incident occurred, however I am of the opinion the incident occurred in mid-April 1998. The reason I am of this opinion is that my mother in law passed away on 8 May 1998.
- In the week leading up to my mother in law becoming deceased she was resident in my house and both myself and my wife were caring for her.
- I am firmly of the opinion that there is no way I would have been out driving my boat at the time alleged ...”.
- [7] The claim form stated that Aaron and Christie were witnesses to the incident.

- [8] The late Mrs Betty Walker was diagnosed as suffering from a terminal illness when admitted to the Nambour Hospital on 2 April 1998. She remained in hospital until 9 April when she went to stay with the defendant. She was readmitted on 11 April and discharged on 19 April. She was re-admitted again on 20 April and discharged for the last time on 29 April. She was thus in hospital for about 24 days in the course of the month.

The collateral issue of the duration of the plaintiff's family's stay with the defendant and his family

- [9] As well as the differences in recollections concerning the date of the incident, there are differences in recollection about the length of time prior to the death of the late Mrs Jones that the plaintiff and his family stayed with the defendant's family. The plaintiff and his wife are adamant that as soon as they heard of Mrs Betty Walker's terminal illness they decided to stay with the Joneses to be near her during her last days. Their recollection is that they put that plan into effect in early April and remained with the Joneses until Monday 11 May when they returned home.
- [10] Mr Kevin Walker, the plaintiff's brother, said that he stayed with the Joneses for about a month prior to his mother's death and that his brother and his family were staying in the house at the time. Whilst I consider Mr Walker to be a thoughtful and honest witness, I formed the impression that his recall of matters such as that under discussion was likely to be imperfect.
- [11] Mrs Jones was adamant that the plaintiff's family came to stay on Saturday, 2 May and that much of that day was spent in moving Mrs Betty Walker's belongings from Aaron's room to her and the defendant's room. She recalls the plaintiff and the defendant going to the hostel in which Mrs Betty Walker had been staying and collecting some items of furniture to place in her new bedroom. Her recollection is that when the plaintiff and his family came to the Jones's residence they intended staying only for the weekend but after Mrs Betty Walker fell into a coma on the evening of Saturday 2 May, they decided to stay. Consequent on that decision, she recalls the plaintiff returning to the Gold Coast on Sunday, 4 May to collect some clothes and taking Aaron with him. Her recollection accords with that of the defendant, Aaron, Christie and Mrs Deverson as well as that of the defendant's mother, Mrs Norma Jones.
- [12] Aaron Jones gave evidence of the trip to the Gold Coast. He said that, in the course of it, he and the plaintiff watered some marijuana plants which the plaintiff had growing at his home. I do not consider it likely that Mr Aaron Jones concocted this version of events and his evidence of the trip to the plaintiff's home receives corroboration from Mrs Deverson who has no direct interest in the outcome of the proceedings. I also thought that Mrs Norma Jones's professed recollection of the trip to the Gold Coast, which I will discuss shortly, was convincing.
- [13] Mrs Deverson, Mrs Betty Walker's sister, was a frequent visitor to the Buderim house in the weeks prior to her sister's death. She stayed at the house from 29 April 1998 until her sister's death. She left the house on Saturday, 2 May, intending to be

away for the weekend but after receiving a telephone call from Mrs Jones she returned late on the same day. Her recollection is that the plaintiff's family arrived to stay at Buderim after she departed on the Saturday. She recalls the plaintiff and Aaron going to the Gold Coast on Sunday, 3 May in order to get some clothing for a more extended stay.

- [14] Mrs Norma Jones, who was a very frequent visitor to her son's house during the time in question, recalls the plaintiff and his family coming to stay on about Saturday, 2 May and Aaron's trip to the plaintiff's home the following day. I formed a favourable impression of the reliability of her evidence.

The evidence in relation to the skiing incident

- [15] The plaintiff says that a few days before his mother's death he was sitting in the lounge room at Buderim when his sister asked him if he wanted to go water skiing with the defendant. The defendant then urged him to do so, suggesting that it would be good for the children. He said that he took his two children separately in a car and that the defendant took the boat with Aaron. His recollection is that Christie was not a member of the ski party.
- [16] Mrs Walker's recollection is that she was present when the defendant asked the plaintiff if he would go water skiing and suggested that it would be good for the children. She said the conversation took place just outside the main bedroom which was near the lounge/dining room area. She is confident that the incident happened on 3 May because she relates it to the sleepless night experienced by her in looking after Mrs Betty Walker on the Saturday. She said that she and Christie had stayed up all night and were, in consequence, both very tired the next morning.
- [17] The plaintiff's version of events receives some support from Mr Kevin Walker's evidence. He said that about a week before the funeral, the defendant's wife and Mrs Deverson asked him a couple of times to go skiing and he declined. That was the extent of his recollection. He did not see anybody depart with the boat in order to go skiing and gave no evidence of any conversations or observations concerning the incident.
- [18] The defendant has no actual recollection of the timing of the incident. His belief that the incident did not occur in the days immediately preceding Mrs Betty Walker's death is based on his business and credit card records which disclose no purchase of fuel for his boat during this period. He asserted that it was his invariable practice to fill the boat immediately prior to using it.
- [19] Mrs Jones, Aaron and Christie Jones also gave evidence that there was no use of the ski boat at about the time alleged. They, like Mr Jones, think that such an expedition would have been rather improbable having regard to the family's expectation of Mrs Betty Jones's imminent death and their desire to be with her.

- [20] Christie Jones and Aaron Jones both recall witnessing an incident such as that alleged at an earlier time which they are unable to identify with precision.
- [21] I thought this evidence quite damaging to the plaintiff's case. Christie Jones impressed me as having an actual recollection of a skiing incident and I thought it unlikely from her evidence and from the evidence of other witnesses that she would have gone on a skiing excursion on or immediately after 3 May. She and her brother were both credible witnesses.
- [22] On 6 March 2000, Mrs Deverson wrote a reference for the plaintiff in connection with his prospective appearance the following day in the Magistrates Court to answer charges of possession and production of dangerous drugs. In the reference she wrote –
- “Greg was injured during one of the extremely brief respite times just days prior to his mother's death approximately 18 months ago. The injury to his neck required surgery because the accident resulted in chronic, extreme pain and an ongoing debilitating damage limiting the use of his arm.”
- [23] The plaintiff relied on this evidence as corroboration for his version of events. In my view, the reference does not provide a great deal of support to the plaintiff. It is plain that the plaintiff himself did not connect the skiing accident with his symptoms until about October 1999. Mrs Deverson could have had no reason to do so either.
- [24] I consider it probable that the reference to an injury days prior to the plaintiff's mother's death was a repetition of something Mrs Deverson had been told by the plaintiff or his wife. She said that when writing the reference she had not attempted to give any particular thought to the timing of the plaintiff's accident and the circumstances in the Buderim household leading up to her sister's death. I accept her evidence in this regard. She impressed me as a person who was likely to be both thoughtful and objective in her approach to giving her evidence.
- [25] Mrs Deverson can recall no use of the boat between 4 and 11 May. Her description of the circumstances prevailing in the defendant's household at the time tends to support the conclusion that such an excursion was unlikely. Her evidence in this regard receives support from that of Mrs Norma Jones. She recalls spending most of Sunday, 3 May at her son's house and has no recollection of the defendant's boat being taken out on that day and between that day and the date of Mrs Betty Walker's death.

Findings

- [26] I find that the plaintiff and his family did not stay with the defendant and his family for some weeks as the plaintiff alleges. If the plaintiff's account in this regard had been correct, I would have thought it likely that some corroborative evidence could have been called. The fact that Mrs Betty Walker was in hospital for most of April

does not support the plaintiff's version of events either. The evidence does not give a flavour of frequent visits to the hospital by the plaintiff and his family during their Buderim stay.

- [27] The question of the duration of the stay by the plaintiff and his family at Buderim does not, of itself, resolve the question I am required to determine. However, the finding I have made against the plaintiff does cast doubt on the reliability of his and Mrs Walker's evidence. I find that the plaintiff probably did return to his home in company with Aaron Jones on 3 May. It follows from that finding that I do not accept the account of the plaintiff and his wife that the skiing incident took place on Sunday, 3 May. I accept that the plaintiff and, in particular, Mrs Walker, have a genuine belief that the plaintiff's skiing accident occurred on that day, but their respective beliefs are based on a process of reconstruction engaged in by them and the weight of evidence does not support their recollections.
- [28] I formed the view that the plaintiff's recollection was not as reliable as that of most of the other witnesses and that his interest in the outcome of proceedings has eroded what objectivity he might otherwise have had.
- [29] For the above reasons, I am not persuaded that the plaintiff was injured when thrown from the ski tube towed by a motorboat driven by the defendant between 3 May 1998 and 8 May 1998 inclusive.
- [30] I will hear submissions as to the appropriate orders to be made and as to costs.