SUPREME COURT OF QUEENSLAND

CITATION:	*Richards v The Sandy Cape Deep Sea Fishing Club Inc* [2003] QCA 30
PARTIES:	**FRANCIS WHITFORD RICHARDS** (plaintiff/respondent) **v** **THE SANDY CAPE DEEP SEA FISHING CLUB INC** (defendant/appellant)
FILE NO/S:	Appeal No 2756 of 2002 DC No 41 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Liability & Quantum
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	14 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2002
JUDGES:	McMurdo P, Williams JA and Dutney J Joint reasons for judgment of McMurdo P and Dutney J; separate reasons for judgment of Williams JA dissenting in part
ORDERS:	**1. Appeal allowed to the extent of setting aside judgment in favour of the respondent in the sum of $253,327.05 and substituting a judgment in favour of the respondent in the sum of $224,362.05.** **2. Allow the parties seven days in which to make submissions as to costs of both the appeal and the trial.**
CATCHWORDS:	TORTS – NEGLIGENCE – ACTIONS FOR NEGLIGENCE – EVIDENCE – OTHER MATTERS – where trial judge found negligence – whether trial judge was entitled to find facts upon which the finding of negligence was based TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ACTS OR OMISSIONS – VICARIOUS LIABILITY – INJURIES TO PASSENGERS – GENERALLY – whether the trial judge erred in assessment of quantum awarded to respondent – whether the trial judge's quantum for future economic loss, part economic loss and gratuitous care was manifestly excessive – where appellant seeks to overturn the trial judge's finding in some aspect of

the trial judge's assessment of damages

Evidence Act 1974 (Qld), s 92

Abalos v Australian Postal Commission (1990) 171 CLR 167, referred to
Griffith v Kerkemeyer (1977) 139 CLR 161, followed
Horne v State of Queensland (1995) Aust Torts Reports 81-343, considered
Van Gervan v Fenton (1991-1992) 175 CLR 327, followed

COUNSEL: S C Williams QC, with M J Burns, for the appellant
R C Morton for the respondent

SOLICITORS: McCullough Robertson for the appellant
Morton & Morton for the respondent

[1] **McMURDO P AND DUTNEY J:** On 6 February, 1999 the respondent was a passenger on *The Sandy Cape I* a boat owned by the appellant, a fishing club of which he was a member. The boat was skippered by Graham Habler. The boat capsized crossing the Breaksea Spit off the northern tip of Fraser Island at about 7:15am on that morning. The boat was endeavouring to enter the open sea through what was believed by Mr Habler to be the "One Mile Crossing" when it was struck by two abnormally large waves which swamped it and caused it to roll over. Apart from Mr Habler and the respondent there were six other passengers, two of whom died as a consequence of the mishap.

[2] On 26 February, 2002 judgment was given in favour of the respondent for $253,327.05 in his claim for predominantly psychiatric injury arising from the capsize and the subsequent period of exposure in the water. Rescue was not effected until about 24 hours after the capsize.

[3] Liability and quantum were both in issue in the trial and both have been argued on this appeal.

[4] The trial judge concluded that Mr Habler, for whom the appellant was vicariously liable, was negligent in a number of respects. First, he failed to keep a proper lookout by which his Honour meant that he failed to properly assess the conditions before attempting to cross the bar when with a proper assessment Mr Habler would have realised that there were 2.5 to 5 metre waves at the bar. As a corollary his Honour concluded that Mr Habler should not have been attempting to cross the spit through the One Mile Crossing rather than the Four Mile Crossing. As the names imply, the One Mile Crossing commences about one mile north of Sandy Cape and the Four Mile Crossing about four miles north. However, the One Mile Crossing takes a dog leg north part way through the spit and actually enters the open sea at about the same place as the Four Mile Crossing. The advantage of the latter is that it cuts directly across the spit and allows a skipper a view of the open water and the bar before commencing the crossing. In the case of the One Mile Crossing that view is obscured until just before the boat commences crossing the bar. His Honour found that had Mr Habler had the better view offered by the Four Mile Crossing he would have realised the conditions on the bar were unsafe.

[5] The trial judge supported these conclusions by finding that on the day of the capsize Mr Habler took *The Sandy Cape I* to the usual entrance of the One Mile Crossing. He found the entrance closed by a sandbar which had not been there on his previous visit in November although this was not a surprising event. Mr Habler looked around and saw another channel and having paused for a while to observe he proceeded up it. Ultimately, the trial judge found that it was most likely that the crossing was actually attempted at a point closer to the north tip of Fraser Island than Mr Habler believed. In this way the trial judge explained the evidence that the boat had been sheltered in calm water and light winds before reaching the bar on the seaward side of the crossing. The trial judge also concluded that this was the probable explanation for no one on board appreciating the size of the sea at the end of the channel until it was too late.

[6] The trial judge found that Mr Habler committed the boat to going up a channel which was largely unexplored by him. His Honour also found that the vessel was struck by two large waves which came close together but not as closely as the defence submitted. This was significant because of a finding that the scuppers at the rear of the boat were blocked by two fuel cans. The trial judge made reference to an earlier incident involving the same boat and skipper in 1997 when it was struck by two large waves close together while crossing the bar at the One Mile but suffered no adverse consequence because the scuppers adequately drained the water. His Honour then concluded that had the scuppers not been obstructed there was at least some chance of the water from the first wave being cleared before the second wave struck.

[7] The trial judge found that it was negligent on the part of Mr Habler to attempt the crossing while the scuppers were blocked.

[8] Some other matters of peripheral relevance to the decision were referred to but they are of no moment to this appeal.

[9] In making his findings the trial judge was particularly influenced by the evidence contained in a statement of a Mr Maslyn. Mr Maslyn did not give evidence. His statement was admitted pursuant to s 92 of the *Evidence Act* 1974. Mr Maslyn was the operator of a charter boat, the *Hombre,* a 15 metre fibreglass monohull launch which was in the area on the same morning the *Sandy Cape I* capsized. His vessel entered the open sea through the Four Mile Crossing where Mr Maslyn claimed to have observed waves of 2.5 to 5 metres breaking on the bar.

[10] The appellant's primary submission is that the findings of the trial judge were against the weight of the evidence. With the exception of the trial judge's finding that the crossing was actually attempted closer to the tip of Fraser Island than the One Mile Crossing for which the appellant submitted there was no evidentiary support, the appellant concedes that there was a scintilla of evidence to support each of the other findings. The appellant submits, however, that the findings were not in truth open to the primary judge because the evidence relied on was heavily outweighed by inherently probable direct evidence which ought to have been accepted in preference to the evidence the trial judge accepted and which would have resulted in a different outcome in the trial.

[11] Apart from the respondent and Mr Habler only one of the surviving passengers from the *Sandy Cape I,* a Mr Ludlow, gave evidence. Oral evidence was also given by a

Mr Burgess, the operator of a charter boat, *Tasman Venture II,* which was inside the Breaksea Spit on the morning of the capsize. Mr Cumerford, the former secretary of the appellant and a passenger on the *Sandy Cape I* at the time of the 1997 incident to which I have referred gave evidence. Mr Cumerford was also the author of a number of safety recommendations presented to a meeting of the appellant's members in September 1997 after the earlier incident. These recommendations included crossing the Breaksea Spit at the Four Mile rather than the One Mile. Mr Habler was also in attendance at that meeting. Evidence was also given by a meteorologist in relation to observations made of conditions from the Sandy Cape lighthouse and a naval architect who gave evidence about the effectiveness of scuppers and freeing ports.

[12] The general principle to be applied is found in this passage from Lord Sumner in *S.S. Hontrestroom v S.S. Sagaporack*[1] where he pointed out that:

> "not to have seen the witnesses puts the appellant judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and on their own view of the probabilities of the case. The course of the trial and the whole substance of the judgement must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgement the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

[13] This passage was set out in full in the judgment of McHugh J in *Abalos v Australian Postal Commission*[2] at 178 following which his Honour said:

> "Consequently, where a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion': *Watt or Thomas v Thomas*[3] ."

[14] We did not understand Mr Williams QC for the appellant to be questioning any of these principles but rather criticising the paucity of evidence to support the findings and the trial judge's reliance on the statement of Mr Maslyn who he had neither seen nor heard and in relation to whom his Honour had no advantage.

[15] The appellant's attack commenced with the evidence of Burgess. Mr Burgess gave evidence that he had last looked at the bar on the One Mile Crossing four to five years before trial. He had in fact never crossed it. He used the Four Mile Crossing.

---

[1] [1927] AC 37 at p 47.
[2] (1990) 171 CLR 167. See also *Devries v Australian National Railways Commission* (1992-1993) 177 CLR 472.
[3] [1947] AC 484 at p 488.

On the day of the capsize he was to have taken out a charter but because of a wind strength he estimated at 25 to 30 knots at Rooney Point about 12 miles in the lee of the island he elected to stay inside.

[16] Burgess' evidence, which the trial judge accepted, was submitted to be in conflict with the evidence of those on the *Sandy Cape I* being the plaintiff, Ludlow and Habler, to the effect that conditions in the lee of Fraser Island were very calm and with the recordings made by the lighthouse at Sandy Cape. These readings showed winds from 8 kph at 6:00 am to 15 kph at 9:00 am with wave heights from 0.1m to 0.5m and swells below 2m. Although the conditions on the Breaksea Spit and the One Mile Crossing in particular were not visible from the lighthouse the lighthouse was exposed to the sea to the south-east. The *Sandy Cape I* had travelled past Rooney Point to get to the bar.

[17] In light of this conflicting evidence the appellant argues that the trial judge could not place reliance on the evidence of Burgess as to the conditions and ought to have found that Burgess was simply wrong.

[18] The second area where it was submitted that the trial judge accepted evidence which lacked credibility in the light of the whole of the evidence was in relation to Maslyn's statement in which it was said that there were consistent 2.5m waves on the crossing and sometimes up to 5m. Again, the appellant relies on the witnesses who were actually on the boat to contradict the evidence in Maslyn's statement and demonstrate that it was inherently unreliable.

[19] The evidence of Mr Habler was as follows:

> Before you go on to that can I ask you what sea conditions you encountered as you were traversing the bar, crossing the bar? – - Quite calm.
> Is there anything to concern you about the sea conditions? – - No.
> All right. And you came, I think you said to a large sand bank? – - Yes.
> What did you do when you saw that? - – Well, I slowed with intentions of turning west to go around the inside of the sand bank and proceed up towards the Three Mile gutter but while I was going slow looking out east, I saw what appeared to be quite a deep clear gutter to the south of the sand bank going out to the open sea.
> What occurred then? – - I stayed there for, I don't know, possibly 5 minutes, just idling very slow, watching to make sure there was no large waves breaking across the mouth of the gutter. Did not see anything, no white water at all across the mouth of the gutter. So then I proceeded out in the direction – - out along that gutter.
> At what speed, do you remember? – - Only fast idle for probably 5, maybe a little over 5 knots.
> You proceed out towards the mouth of that gutter. Can I ask you this: had the usual route not been blocked by a sand bank, where would it emerge? – - It emerged into the mouth of the gutter commonly known as the Three Mile – well, some call it Four Mile but Three Mile gutter.
> Going back then, you were in this – - your path is blocked and you decide, -after waiting some time, to proceed down a different gutter. What occurred then? – - Well, we had no problem. There was the

> normal three or four waves probably 4 foot, 4 foot 6 high on the outside edge of the bar at the mouth of the gutter. We crossed them no trouble at all. And there was nothing ahead, seas were very calm. All I can recall is two waves probably 30 feet apart and about 18 inches high.
> Yes, go on? – Half a metre and in an instant – I have no idea why I didn't see anything form, but the next thing they were about 8 feet high and the nearest one within a couple of metres of the bow of the boat and they had sheer walls.
> And what happened? – - Well, they – the first one crashed into the square on to the nose of the boat and I believe pushed us backwards and pushing the motors under water which drown stalled one motor, the starboard motor.
> Yes? – - I recall glancing over the side off the flybridge and seeing quite a lot of water possibly half – possibly half a metre of water on the deck. Before I had a chance to do anything, I thought of trying to select neutral to restart the motor but before I could do that, the second wave crashed into us,, definitely pushed us backwards and stalled the second motor, which left us, just floundering in what was reasonably calm water. Then once the second wave had gone ---
> Then what happened? – - Within a couple of seconds the boat started to lean to starboard and it capsized.

[20] Mr Habler conceded in cross-examinaion that 18 inch waves do not ordinarily turn into 8 foot waves in an instant and that he may have looked away from the waves to speak to one of the men on board for "a second or two".

[21] The plaintiff gave a slightly different version:

> Tell his Honour what happened as you went to cross the bar? – - Well, when we stopped, it appeared to be quite calm and the weather didn't seem to be against us because we were right inside clear of the island because we were in the one mile we were the closest point to the island and we were the most protected. We started to – it looked perfectly okay to go out on the one mile. As we went out, the waves did get bigger and then we apparently went up a blind alley. I don't know whether the tide was high or low. Some of the banks were almost exposed and we came up an alley and we couldn't turn around to go back so I think we probably had missed the one mile. If we did, it was a lot smaller than I recall. And we saw an opening – we waited until the waves – we realised we were in strife then. We saw – we waited till the waves flattened out and then we gunned it and made a break for it and just as we were going over what obviously turned out to be a sandy patch, the waves rose up in front of us.

[22] Later, in cross examination, the respondent said:

> It wasn't until you'd actually finished crossing the bar, as it were, right at the very end of the bar that two waves rose in quick succession and almost without warning? – - Yes, but we actually stopped about three hundred yards from that point and realised we had a problem when we saw the waves breaking over the bar, but the channel we were in was too narrow to turn and we were committed

> and we sat there and just watched the waves for a while to try and make a decision on which way to go. It would have been too dangerous to turn around with the waves coming at us.

[23] Mr Ludlow was unconcerned about the crossing in his evidence in chief. He thought it looked very much like other times he attempted the crossing and it did not seem very wild. Mr Ludlow was at the rear of the boat behind the flybridge at the relevant times.

[24] In cross-examination Mr Ludlow gave evidence of somewhat rougher conditions after the capsize. While they were in the water he agreed that the boat was being pounded into the sand by the waves so that as waves came the boat was hitting the bottom. The waves were described as being 3 to 4 metres. They were not in the gutter at that time but actually on the bar.

[25] Bearing in mind the conditions described by Ludlow after the capsize and the description of the bar conditions by the respondent as the *Sandy Cape I* attempted the crossing it appears to me that there was evidence which the trial judge could use for the purpose of satisfying himself that the conditions described by Maslyn fairly represented the conditions at about the time of the capsize. Having regard to the proximity of the respective openings of the One Mile and the Four Mile to the sea, the conditions observed by Mr Maslyn were at about the same location as the capsize took place. From the evidence by Mr Ludlow of the fact that after the capsize the boat was on the sand bar and the evidence of the respondent that when he jumped off the boat he was in waist deep water it would not seem to be a large step to conclude that the waves that caused the capsize rose up on the sand bar in sufficient proximity to the *Sandy Cape I* to cause what followed.

[26] Having regard to the principles applicable we are not prepared to disturb the trial judge's finding in relation to the conditions on the bar and the wisdom of Mr Habler attempting to cross it. The evidence of the respondent that the conditions on the bar were observable 300 yards from the crossing contrasted with Mr Habler's evidence that he could see nothing unusual or alarming entitled the trial judge, on the view he took of the evidence, to find that Mr Habler was not keeping a proper lookout.

[27] In addition to the evidence to which we have referred, the trial judge was entitled to take into account the evidence of Cumerford and Burgess in relation to the wisdom of attempting the One Mile Crossing rather than the Four Mile Crossing especially where their exit points to the sea were approximately the same but the latter did not provide as clear a view of the conditions as the former until the boat was well into the gutter.

[28] It follows that the finding of negligence was one which was open to the trial judge. Having regard to the evidentiary conflicts between those witnesses the trial judge had the opportunity to observe and the relevance of his assessment of those witnesses to the acceptance or otherwise of Maslyn's statement the finding of negligence ought not to be disturbed.

[29] In view of the fact that the decision below can be supported by the evidence to which we have referred it is unnecessary to consider the other arguments raised by counsel about the strength of the evidence on the other issues.

Quantum

[30] The appellant also seeks to disturb three aspects of the trial judge's assessment of quantum. These are the assessments of past and future economic loss and the assessment of future gratuitous care.

[31] The trial judge assessed past economic loss at a rate of $500 net per week for all but 10 weeks of the period from May 2000 to trial and discounted the calculated sum of $68,500 to $65,000 for contingencies.

[32] The evidence accepted by the trial judge was that but for the incident the respondent would have commenced work in May 1999 as a commission salesman of home renovations for a person named Cranch. Mr Cranch gave evidence that a salesman could earn up to $100,000 per year. The respondent did not want to work that hard. He was 55 at trial. His Honour found that the respondent would work one month on and one month off thus placing the gross earnings in the order of $50,000 per year. From this would have to be deducted expenses such as rent in South East Queensland because the respondent intended to continue his permanent residence in Howard and other travelling and miscellaneous expenses. To arrive at a figure of $500 net per week a gross sum of $32,760 per annum is required. The allowance for expenses was thus $17,240 or $331 per week. This is on the basis of expenses being incurred over the full year. Limited to the period during which the trial judge found the respondent would have worked the allowance for expenses is actually $662 per week.

[33] The position was somewhat complicated by the fact that Mr Cranch ceased his business in November 2000. Thereafter the respondent would have sought other work. The primary judge thought he would have found work quickly and earned at least the same amount of $500 per week after a delay of 10 weeks.

[34] In our view the discount on past economic loss which the trial judge made was within the range on the basis of his findings of fact during the period the respondent would have worked for Mr Cranch. Bearing in mind that the respondent was only proposing to work half a year, the loss after Mr Cranch ceased business (equating to $1000 net per working week) was more than twice the respondent's pre-accident net earnings from a similar line of work. In those circumstances it seems to us that the amount awarded is manifestly excessive for the 15 month period from November 2000 until trial. The amount allowed during this period after taking into account the 10 weeks between jobs would be about $25,000. We would reduce the damages awarded under this head by a further $10,000 to take account of the possibility of the respondent not being as well rewarded by the alternative employment as he would have been with Mr Cranch. Interest on that amount over the 15 months between the time the plaintiff would have ceased to work for Mr Cranch and the trial would be $625 at the 5% on which the trial judge calculated interest. We would reduce the award for past economic loss from $65,000 to $55,000 and the relevant interest award from $9,200 to $8,575.

[35] The trial judge awarded the respondent $80,000 for future economic loss. That sum equates to $500 per week for about 3 years. His Honour based this award on the assessment of the pre-accident earning capacity of the respondent and Dr Mulholland's prognosis for his psychiatric condition. In our view there is no basis for interference in the trial judge's selection of 3 years as a nominal period of commercial unemployability for assessing what is, in reality, a global sum.

Although the judge found the respondent probably would be able to earn future income, there remained the possibility on the evidence that he may not recover sufficiently to re-enter the workforce for much longer than three years, or at all. These possibilities had to be provided in the award for future economic loss. In view of our conclusion concerning the suitability of the starting figure of $500, however, it seems to us that a similar reduction is warranted in the amount of future economic loss as was made in relation to post Cranch past economic loss. This amounts to 20% or $16,000. We would reduce the award for future economic loss from $80,000 to $64,000.

[36] The award for superannuation, assessed at nine per cent of the past and future economic loss, now $119,000, needs to be reduced from $13,050 to $10,710.

[37] The complaint about the assessment for past and future gratuitous care relates to an allowance of $12,700 for past and $15,000 for future assistance including, in part, what was described as telephone counselling by a Ms Allan. Ms Allan was the respondent's former partner and a trained nurse but not a qualified counsellor. This counselling is in addition to an agreed sum of $12,000 allowed for future consultations with Dr Cameron, a psychiatrist. The appellant submits that the allowance of the additional sum for Ms Allan is not shown to be necessary or beneficial over and above the consultations with Dr Cameron. The counselling as described by Ms Allan was not psychological or psychiatric counselling, but rather was in the nature of reassurance that the respondent could meet approaching commitments outside the home and reminding him of medical appointments, medication, and the position of items in his home and to pay accounts on time. Ms Allan often rendered this assistance by telephone when she was living interstate. The respondent did not need such reassurance, reminders or assistance before the incident.

[38] The trial judge had "no hesitation at all" in accepting Ms Allan's quantification of the assistance provided by her and accepted her evidence generally.

[39] Since the telephone services provided by Ms Allan were initiated by the respondent and seem to have been rendered necessary by the respondent's general bewilderment with post incident life there seems to us to be a clear distinction between the services for which the respondent was compensated by the trial judge and those rejected as not proven to be necessary in *Horne v State of Queensland*.[4] The services appear on the evidence to be different in type from those provided by a medical practitioner and consequently the trial judge was justified in treating them as being in addition to and not overlapping with the counselling to be provided by Dr Cameron. Having regard to his Honour's findings on the relevant factual issues it was open to him to award the amount he did consistent with the well-established principles in *Griffith v Kerkemeyer*[5] and *Van Gervan v Fenton*.[6]

[40] In the result we would allow the appeal to the extent of setting aside the judgment in favour of the respondent in the sum of $253,327.05 and substituting a judgment in favour of the respondent in the sum of $224,362.05. We would also allow the

[4] (1995) Aust Torts Reports 81-343
[5] (1977) 139 CLR 161, 173-4, 178-9, 192-3
[6] (1991-1992) 175 CLR 327, 331-338

parties seven days in which to make submissions as to costs of both the appeal and the trial.

[41] **WILLIAMS JA:** I have had the advantage of reading the joint reasons for judgment of the President and Dutney J wherein facts relevant to the issue of negligence are set out.

[42] The critical findings of fact made by the learned trial judge are to be found in the following extract from his reasons:

> "In my view, it has been proven that Mr Habler … failed to keep a proper lookout in relation to the swell conditions. In saying this, I am influenced certainly to a large extent by the statement of Mr Maslyn and indeed by the plaintiff's evidence … at least of his observations from when they were stationary. … I think it also has been proved that Mr Habler failed to stop for an adequate time to assess the swell conditions to determine the most appropriate and safe way of crossing through Breaksea Spit.
>
> I am satisfied that it was not prudent to attempt to cross the bar at Breaksea Spit when, as I am prepared to find, Mr Habler should have seen or at least realised that the waves at the mouth and at the far end of the channel were between three to five metres. I am satisfied that it was not prudent for the skipper of the vessel to attempt to cross where he did rather than take the simple expedient of travelling to the Four Mile and crossing there.
>
> I am satisfied that it was, in all the circumstances, imprudent also to go into the unknown channel and attempt to cross through that channel when the course might have been followed of going to the Four Mile".

[43] Those findings are clearly based on certain passages in the evidence of the respondent, who was a reasonably experienced seaman. It is not irrelevant to note that he served in the Australian Navy for some 10 years during which he made some 11 trips on *HMAS Sydney* to Vietnam, and also served on the *Perth* and the *Vendetta*. As a member of the appellant club the respondent had made some 19 separate deep-sea fishing trips, most on the *Sandy Cape I*, and most involving crossing the bar at Breaksea Spit.

[44] On the occasion in question, after leaving Fraser Island, where the party had made a brief stop prior to moving towards the bar, the respondent got up on the flybridge with Habler. From there he would have had the same visibility as Habler of prevailing conditions.

[45] The following passage from the respondent's evidence-in-chief is particularly relevant to the findings of fact made by the learned trial judge quoted above:

> "Well, when we stopped, it appeared to be quite calm and the weather didn't seem to be against us because we were right inside clear of the island because we were in the One Mile we were the closest point to the island and we were the most protected. We started to – it looked perfectly okay to go out on the One Mile. As we went out, the waves did get bigger and then we apparently went

> up a blind alley. I don't know whether the tide was high or low. Some of the banks were almost exposed and we came up an alley and we couldn't turn around to go back; so I think we probably had missed the One Mile. If we did, it was a lot smaller than I recall. And we saw an opening – we waited until the waves – we realised we were in strife then. We saw – we waited till the waves flattened out and then gunned it and made a break for it and just as we were going over, what obviously turned out to be a sandy patch, the waves rose up in front of us."

[46] That must be read with the following passage from the respondent's evidence under cross-examination:

> "… we actually stopped about 300 yards from that point and realised we had a problem when we saw the waves breaking over the bar, but the channel we were in was too narrow to turn and we were committed. We sat there and just watched the waves for a while to try and make a decision on which way to go. It would have been too dangerous to turn around with the waves coming at us".

[47] The argument for the appellant on appeal centred on two findings (or observations) made by the learned trial judge in his reasons, each of which it was claimed was central to his ultimate conclusion that Habler was negligent in attempting to cross the bar when and where he did.

[48] As is notorious, channels through a bar change regularly because of prevailing weather conditions. In this instance, as Habler's evidence demonstrated, the One Mile channel had changed from that which existed in November '98 when Habler had last used it. Against that background it was not surprising that in positioning that channel on the various maps in evidence there was some variation as between the witnesses. The first passage challenged by the appellant was that where the learned trial judge said:

> "It seems to me that it was most likely that the crossing was actually attempted at a point closer to the north tip of Fraser Island than Mr Habler believes. That would be consistent with the plaintiff's evidence and, I believe, with some of the other evidence."

[49] Taken in isolation it could be said that the learned trial judge was not justified in positioning the spot where the incident occurred otherwise than in accordance with the actual evidence. But what was of critical importance was the evidence as to sea conditions, rather than evidence establishing precisely where the crossing was attempted. For that reason the contention of the appellant that the learned trial judge erred in making that statement does not necessarily mean that the ultimate finding of negligence must be overturned.

[50] Of somewhat more significance is the second passage challenged, that in which the learned trial judge said he was "influenced certainly to a large extent by the statement of Mr Maslyn". The submission on behalf of the appellant was that Maslyn's statement was deserving of little or no weight because he was not available to be cross-examined, and his statement primarily related to his crossing of the Four Mile at least an hour earlier than the attempt by the *Sandy Cape I* to cross the One Mile. There is force in that submission, but when the reasons for judgment are analysed it does appear that the critical findings quoted above are

based on an acceptance of the respondent's evidence quoted above. Despite the language used by the learned trial judge the evidence of Maslyn was not critical to his ultimate finding.

[51] One can see a strong correlation between the evidence of the respondent quoted above and what I have referred to as the critical findings of fact made by the learned trial judge. Having regard to the whole of the evidence I am satisfied that there was no reason why the learned trial judge was not entitled to accept the passages in question from the respondent's evidence (they were quoted in the reasons for judgment) and, once that stage is reached, it cannot be said that the ultimate findings in question were not supported by evidence.

[52] Given the whole of the evidence it is true to say that minds could differ as to whether or not the respondent succeeded in establishing negligence. There is much to support the proposition that the three witnesses who were on the boat at the material time (including the respondent) considered that the sea conditions were such as to enable the crossing to be made safely and that the cause of the tragedy was the boat being swamped by two large rogue waves which suddenly confronted it as it passed through the mouth of the channel. But equally, given the passages quoted, it was open to the learned trial judge to make the findings which he did and there is no basis for an appellant court interfering with that conclusion.

[53] In those circumstances it is unnecessary to deal with the question whether there was negligence in having the scuppers blocked by fuel cans at the time the waves hit. I would, however, observe that, whilst it is not clear that the learned trial judge found actual negligence based on the positioning of the EPIRB, I am satisfied that it was placed in a reasonable position and that there was no negligence in that regard.

[54] It follows that the finding of liability must stand.

[55] The appellant also contended that the learned trial judge erred in the assessment of quantum. In addition to the submission that the total award was manifestly excessive, particular submissions were made that there were errors in the assessment for past and future economic loss and past and future gratuitous care and assistance.

[56] The respondent was not working at the time he sustained his injuries in February 1999. He had since leaving school worked in a variety of occupations. After leaving the Navy he had a number of jobs before in about 1981 forming a company which carried out renovation work in the building industry. That business ceased when the company was wound up in 1998. He had not worked for remuneration from then until the incident in February 1999. His evidence was that he would have a break until about May 1999 when he intended working for a friend, Cranch, who operated a somewhat similar business to that which he had conducted from 1981 to 1998. But the respondent's evidence was that he did not intend to work full time – he had no wish to work as hard in the future as he had in the past.

[57] As a result of his ordeal (he was in the water for more than 24 hours before being rescued) the respondent suffered mainly psychiatric and psychological injuries. The psychiatrists (Dr Mulholland and Dr Cameron) were both in agreement that his psychiatric condition was such that he was unemployable from the date of the incident to trial in February 2002. The learned trial judge preferred the evidence of

Dr Mulholland who said in evidence that the respondent should recover his pre-accident earning capacity within a "few years". The learned trial judge selected a period of three years for future economic loss, and in the circumstances it cannot be said that he erred in so doing.

[58] As the respondent was not working at the time he sustained his injury it was not strictly a situation where past economic loss was recoverable as a specific head of damages. It was, in my view, a situation where the respondent's pre-accident earning capacity was destroyed for a period of about six years, a period commencing from about May 1999. On that basis a global amount should be assessed for economic loss covering both the pre-trial and the post-trial period. But the actual assessment thereof would be difficult.

[59] The President and Dutney J in their joint judgment have addressed the problem by making a more significant discounting to cover contingencies than was allowed by the learned trial judge in calculating both past and future economic loss. Given the difficulties in assessing past and future economic loss on the basis I would prefer, I would not dissent from the approach proposed by the President and Dutney J. The amounts they propose in total broadly equate the sort of figure one would arrive at by using my preferred approach. In the circumstances I will adopt the figures the President and Dutney J have arrived at for past and future economic loss, and loss of superannuation benefit.

[60] That leaves for consideration the issue of gratuitous care.

[61] The claim here is for services allegedly rendered to the respondent by a Ms Allan. The respondent met her in about 1972 and from soon thereafter they lived in a defacto relationship. They were partners in the building business which operated between 1981 and 1998. Towards the end of that period their relationship was "rocky", and it would appear that there had been a separation as at the time of the incident giving rise to these proceedings. Ms Allan was a qualified nurse and there is no doubt that for at least some short period after the incident she rendered nursing type services to the respondent at his home. At the time of trial she was residing in a small house on the jointly owned property at Howard; the respondent was living in a larger house on that property. For a period after the accident she had returned to Wollongong where the parties had resided during much of their relationship.

[62] Much of the claim for gratuitous services relates to lengthy periods she spent on the telephone talking to the respondent and allegedly "counselling" him. The claim for past gratuitous services (as set out in Exhibit 35) was for a total of $12,757.50. The learned trial judge allowed $12,700.00 with interest amounting to $1,905.00.

[63] That exhibit breaks the claim down into three heads. Firstly, for the period of 2.5 weeks immediately after the accident where it was alleged eight hours assistance per day was given. The evidence would generally support that claim. The amount claimed of $10.50 per hour is not unreasonable.

[64] The second item is telephone counselling over a period of 96 weeks at one hour per day, a total of 672 hours. Then, thirdly there is a claim for one hour a day for 57 weeks "on site" assistance. The learned trial judge in his reasons merely said:

> "So far as past care is concerned, I have no hesitation at all in accepting both Ms Allan's and the plaintiff's evidence as to the

> extent of the assistance which Ms Allan has rendered to the plaintiff".

[65] There is no evidence to suggest that from a medical point of view the telephone counselling was of material benefit to the respondent. The evidence as to the one hour per day "on site" assistance is also extremely vague, and there is nothing to suggest that it was of specific benefit to the respondent.

[66] There was also a claim for future gratuitous services amounting to seven hours per week totalling (after discounting) $30,355.00. Again the evidence appears to suggest that this was assistance in the nature of counselling. In that regard the learned trial judge said:

> "So far as future care is concerned, it seems to me that there is an ongoing need for future treatment of the plaintiff. Again, I accept essentially, as I have made clear, Ms Allan's and the plaintiff's evidence. It seems to me that that need will continue for some time in the future and I propose to allow future treatment in the sum of $15,000.00".

[67] It should be noted that that $15,000.00 was in addition to $12,000.00 for future treatment referred to by the psychiatrists.

[68] The evidence does not support the allowance of an additional $15,000.00 for gratuitous services to be rendered by Ms Allan. There is nothing to indicate that her counselling would be other than ordinary communication between former defacto partners who had remained close friends. There is nothing in the medical evidence to suggest that such "counselling" would be of benefit to the respondent given his condition.

[69] In the circumstances I would disallow all but the claim for the initial period of 2.5 weeks at eight hours per day, a total of 144 hours; that gives a figure of $1,512.00. Using the same formula as the learned trial judge did for calculating interest, I would allow interest on that amount in the sum of $227.00.

[70] Those alterations would have the effect of reducing the total award of damages to $196,496.05.

[71] I would allow the appeal to the extent of setting aside the judgment in favour of the respondent in the sum of $253,327.05 and substituting a judgment in favour of the respondent in the sum of $196,496.05. I agree with the order proposed by the President and Dutney J on the issue of costs.