SUPREME COURT OF QUEENSLAND

CITATION:	*Long v Munckton & Anor* [2003] QCA 115
PARTIES:	**HELEN MAREE LONG** (plaintiff/applicant) **v** **FRED MUNCKTON** (first defendant/first respondent) **ROMAN CATHOLIC TRUST CORPORATION FOR THE DIOCESE OF ROCKHAMPTON** (second defendant/second respondent)
FILE NO/S:	Appeal No10965 of 2002 DC No 60 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	18 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2003
JUDGES:	McPherson and Davies JJA, and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**Dismiss the application**
CATCHWORDS:	APPEAL & NEW TRIAL – PRACTICE & PRCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – s 118 DCA application for leave to appeal – question on appeal one of fact – whether obvious error made by trial judge – hearing of application not to be rehearsal for appeal
COUNSEL:	Dr K E Tronc for the appellant M T Brady for the first respondent R W Morgan for the second respondent
SOLICITORS:	V A J Byrne & Co for the applicant Deacons for the first respondent Heiser Bayly & Mortensen for the second respondent

McPHERSON JA: The plaintiff, then a 16-year-old girl attending the second defendant's school, was injured on 5th July 1997 when she was struck in the eye by a tennis ball hit

by one of the other students, a Mr Zroph who, with the plaintiff, was engaged in tennis practice.

The incident took place during school hours in the course of tennis coaching, which was an elective school subject, being conducted by the first defendant, who is a person of accomplishments in this field having some 25 years of experience as a tennis coach.

In relation to the first defendant he appears to have been engaged as an independent contractor. He was, however, paid a small fee by each of the students receiving instruction.

The trial in the District Court occupied some seven days in all, after which the Judge in a reserved judgment assessed the quantum of the plaintiff's claim at $31,466, but gave judgment for the defendants. Because of the amount involved in the proceedings the plaintiff requires leave from this Court to appeal under s 118 of the District Court Act.

As well as that, the application for leave was filed some 30 or so days late, for reasons which personally I do not find entirely persuasive as establishing a claim for an extension of time. But the fate of that part of the application does not depend on reaching a conclusion with respect to that issue.

On the occasion in question the students were under the second defendant's instruction practising their forehand drives by

bouncing the ball, in what is called a bounce serve or underarm serve, and then hitting it across the net to a player in the opposite court. It was a ball struck in this way by Zroph that hit the plaintiff in the eye.

She was, at that time, herself about to hit a ball in his direction but was hit in the eye before she could do so. His evidence that he did not hit the ball hard was not contradicted and the Judge accepted it. It may be inferred that the plaintiff's attention was directed to what she was doing and that she did not notice the ball coming in her direction.

Various particulars of negligence were given and amended or added to in the course of the trial. One was that there should not have been more than four players on the court at the time when the practice was proceeding.

His Honour found that at the time there were not more than four players on the court who were engaged in the practice or training routine. There may have been other players present on the court or it surrounds at the time waiting their turn to practise, but not, his Honour found, in an excessive number in the sense of making it difficult for the players to see the ball coming.

Another particular alleged was that the players were not explicitly instructed that there was not to be more than one ball in play at any one time. However, whether or not such an

instruction was given, each of the players, including the plaintiff, who were engaged in practising at the time, said they knew not to have more than one ball in play and would not intentionally have caused that to happen.

In his final address at the trial, counsel for the plaintiff raised for the first time what appears to me to have been a further allegation that there should not have been more than one ball on the court at all. In the absence of evidence about it, his Honour considered it was "problematic" whether this would in fact have prevented the injury. But, in any event, he considered it would not have been a reasonable response to what was proved to be only a "medium level risk activity".

In 25 years of tennis coaching the second defendant had encountered only two previous injuries, neither of which had taken place in this way.

His Honour also rejected the allegation that servers should have been instructed to nominate the receiver of the ball by shouting his or her name before hitting the ball, which the Judge found on the evidence would have been productive of more, rather than less, risk of confusion.

He also considered that the level of supervision was adequate. The first defendant was supervising children on the adjoining court and was able from there to keep an eye on the more experienced 16-year-old tennis players practising on the

plaintiff's court. In any event, it is a little difficult to see how the second defendant's presence on the plaintiff's court could have succeeded in preventing what happened on this occasion when Mr Zroph struck the ball. The same, it seems to me, is true of the plaintiff's allegation of inadequate teacher supervision by the second defendant.

In addition to those issues of fact, the plaintiff has submitted that the Judge erred in law in failing to give effect to what is said to have been the decision in Introvigne v. The Commonwealth (1982) 150 CLR 258. It has recently been reconsidered in Samin and Rich v. Queensland [2003] HCA 4 (February 6, 2003), which gives no encouragement to the notion that the second defendant here would be liable to the plaintiff for breach of any non-delegable duty.

As to the plaintiff's reliance on the Workplace Health and Safety Act 1995 and of the provisions of the Regulation of 1997, it is enough here to say that a student being taught at a school is not providing but receiving services or a service from a school authority and the teachers who provide them with education.

In my opinion, it was fairly open to his Honour on the evidence and the allegations before him at the trial to arrive at the conclusions he did, and there is no sufficient, or indeed any, basis for disturbing those findings.

I have considered the facts and issues perhaps in greater detail than is common in applications of this kind. Section 118 of the District Court Act confers a complete discretion on this Court to decide whether or not to give leave to appeal. Nothing can or should be allowed to fetter that judicial discretion.

At the same time, however, it is apparent from the very presence of the statutory requirement that leave to appeal be obtained that the legislature did not intend that appeals from the District Court at this monetary level should be brought to

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Where the question said to be at issue in the proposed appeal is simply one offfact I would ordinarily expect the matter to be one in which, at the very least, some obvious error had been made before such leave was granted. By "obvious", I mean that the error should ordinarily be readily apparent from a reading offthe reasons for judgments and the written outlines accompanying the application, together with such additional assistance as the Court may require or derive from hearing oral submissions from counsel on one or both sides.

The hearing offthe application is not meant to be rehearsal for the appeal or occasion on which full argument on appeal will ordinarily be needed, or heard from counsel on either side.

The present application is, I regret to say, very far from satisfying those requirements. The written outline is some 49 pages long. It is not paginated, or paragraph numbered. This is in complete defiance offthe published Practice Directions offthe Court offAppeal, which I notice are dismissed by the plaintiff's solicitors in a letter to the Registry as requiring no more than a "preferable" 10 page maximum.

The explanation put forward for this peremptory disregard offthe Court's Directions is said to be "the large numbers offerrors offfact and law on the part offthe trial Judge". To the contrary, the learned Judge's reasons in this case are, in my opinion, careful and clearly expressed, in stark contrast to plaintiff's counsel's written outline. In trying to contend with those completely unfocused written submissions, the first defendant accurately describes them as "generally marked by extravagant language, considerable obscurity and reliance upon assertion", a stricture with which it is impossible to disagree.

In matters such as these counsel coming before this Court are expected to conform to the standards imposed by the directions and practice offthe Court and offthe profession. Iffthey failfto do so, one sanction which the Court will not hesitatefto enforce in future is to reject such submissions out offhand and requirefthem to be submitted in proper and condensed form.

In the result I am, in any event, satisfied that no basis has been shown for granting leave to appeal in this matter. The amount claimed and assessed in the proceedings is small and the issues offfact were, and are simple. The case has already occupied seven days offtrial level, as well as the further time involved in this hearing, and in preparation for it. The amount offcosts consumed, including preparation offvolumes offrecord must be vast, and would exceed by a wide margin any sum that the plaintiff may fairly have hoped to recover in the proceedings. It is a matter for serious regret that she should have been advised to incur, and that the two defendants should have been put to incurring, the additional cost offcoming to this Court.

In the result my view is that the application for leave to appeal should be refused withfcosts.

DAVIES JA: I agree.

WHITE J: I agree also.

McPHERSON JA: The application for leave to appeal is refused withfcosts.
