SUPREME COURT OF QUEENSLAND

CITATION:	*Bond v Cerruto & Ors* [2003] QCA 219
PARTIES:	**LEESA MAREE BOND** (plaintiff/appellant) **v** **JOHN MICHAEL CERRUTO** (first defendant) **ARTHUR JOSEPH PALK** (second defendant/first respondent) **COLES MYER LTD** (third defendant/second respondent) **NOMINAL DEFENDANT (QUEENSLAND)** (defendant by election/third respondent) **STATE OF QUEENSLAND** (fifth defendant) **THE COUNCIL OF THE SHIRE OF PINE RIVERS** (fourth defendant) **FAI GENERAL INSURANCE COMPANY LIMITED** ACN 000 327 855 (defendant by election)
FILE NO/S:	Appeal No 3631 of 2002 SC No 8760 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2003
JUDGES:	McPherson and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – STATEMENT OF REASONS FOR DECISION – where appellant complains that learned trial judge's judgment was fatally flawed due to the failure to give sufficient reasons – where judgment did not make reference to credibility of first respondent or appellant's witnesses – where respondent conceded that if it was found that the appellant could not

understand from the learned trial judge's reasons why she had not succeeded appellate court intervention may be appropriate – whether learned trial judge failed to express sufficient reasons for judgment

TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – ACTIONS FOR NEGLIGENCE – EVIDENCE – ONUS OF PROOF AND SUFFICIENCY OF EVIDENCE – where appellant gave inconsistent account of incident in workers' compensation claim forms to the account she gave in evidence – where appellant failed to explain why she gave critically different accounts – where onus of proof on appellant – whether appellant's evidence failed to persuade on the balance of probabilities

Evidence Act 1977 (Qld), s 79, s101

Beale v Government Insurance Officer of New South Wales (NSW) (1997) 48 NSWLR 430, cited
Cochrane v Hannaford [1999] NSWCA 371, referred to

COUNSEL: R Trotter for the appellant
G Mullins for the respondents

SOLICITORS: Richardson McGhie for the appellant
McInnes Wilson for the respondents

[1] **McPHERSON JA:** The question that arose on the trial of this action for damages arising out of a motor vehicle collision on the highway turned on findings with respect to credibility and fact. The learned trial judge, for reasons which he gave, did not accept the plaintiff's account of the incident as pleaded and given in evidence at the trial. There were prior written statements from her which were inconsistent with her testimony. His Honour was entitled to reject her evidence, and to do so despite some other contemporaneous accounts given to relatives or friends that coincided with that testimony.

[2] The result was that the plaintiff's case at trial failed to come up to proof. She carried the onus, and the judge was entitled, if not bound, to dismiss her claim without having to scrutinise the defendant's case or to make findings about his evidence. The plaintiff could not succeed on the weaknesses, if any, in the defendant's case but only on the strength of her own, which his Honour found she had failed to establish.

[3] I agree with the reasons of Jerrard JA for dismissing this appeal with costs.

[4] **JERRARD JA:** On 22 November 1993 at about 7.15 a.m. a motor vehicle driven by the appellant/plaintiff, ("Ms Bond") collided with the rear of a motor vehicle driven by the respondent/second defendant ("Mr Palk"). Mr Palk's vehicle in turn collided with the vehicle in front of him driven by the first defendant ("Mr Cerruto"), and Ms Bond suffered musculo ligamentous injury to the cervical and lumbar spine. She also suffered from a mild to moderate psychological disorder as a result of the incident. On 25 March 2002 her claim for damages against Mr Cerruto, Mr Palk, and other defendants was dismissed with costs. She has appealed against that judgment, arguing that the findings of fact of the learned trial judge are

erroneous and otherwise flawed, and that the judgment itself was fatally flawed by a failure to give sufficient reasons for the decision adverse to her.

The Plaintiff's Account(s)

[5] Ms Bond's primary claim was against Mr Palk and his employer, the respondent/third defendant. Those two defendants and the respondent/defendant by election were the only respondent parties to the appeal. Ms Bond's case at trial was based on her evidence that immediately prior to the collision between her vehicle and Mr Palk's, his vehicle had been travelling on the Bruce Highway on the outskirts of Brisbane, in the left hand southbound lane in which the traffic had slowed. Mr Palk then "barged" into Ms Bond's lane and between Ms Bond and the car then immediately preceding hers, which on the evidence would have been Mr Cerruto's. Ms Bond's case was that Mr Palk's "barging in" left at most one car length between herself and Mr Palk when he entered her lane. Mr Palk then braked, and despite Ms Bond's attempt to take appropriate evasive action, the front of her car collided with the rear of his. Her case against Mr Palk was that his driving, with its combination of abrupt lane changing and sudden braking, had deprived her of stopping distance between the two vehicles.

[6] Ms Bond's evidence in cross examination included her agreement that she had no doubt Mr Palk that had pulled in front of her, had shortened her braking distance, and caused her to crash into him; and that she had always known that Mr Palk was "at fault" for the fact of the collision. She had believed Mr Palk was the cause of the collision from the moment it occurred, and since then had never had any doubt as to that, or ever changed her belief. She was accordingly cross examined about the contents of three documents completed by her within three weeks of the collision. The first topic of cross examination was an application for Workers' Compensation completed by her, and dated 8 December 1993, in which she responded to the question appearing on the form "How did the injury occur?" with the written answer: "A motor vehicle accident on the highway, I rode (sic) my car off. Everyone stopped suddenly". In response to a further question of the form, namely "Was any person to blame for the injury?", she ticked the "No" box.

[7] She made a second application for Workers' Compensation dated 14 December 1993, in which when asked "How the incident occurred?" she wrote "A person about three cars in front stopped suddenly." To the next question "The cause of the incident (in your opinion)" she wrote in answer: "I don't know exactly. There was stopped traffic ahead". Asked if she was taking legal action against anyone as a result of the incident, she wrote "Not yet".

[8] When cross examined about those answers she said she supplied them because she had been told "in no uncertain terms" by the police officer who attended the collision that she was to blame for the accident. Although she knew she was not, she had always been led to believe that "if you are last in line you are to blame"; and she had the view confirmed by having that police officer "continually over and over again" tell her that Mr Palk was not to blame. This was despite her having told the police officer that Mr Palk had barged in as described.

[9] She was not in fact cross examined about a third document completed by her on 23 November 1993, and which was admitted by consent without cross examination on the basis that her answers about its contents would be the same. That document, an

insurance claim form, described her as having "braked as soon as I could, and then veered right"; and it contained the question "Who in your opinion was responsible for this accident?" She wrote "Someone a few cars in front stopped suddenly. Then we all ran into each other when I stopped I hoped out and John Cerruto the man in the third car in front said that to me, when I asked what happened, he said it happens all the time everyone braked suddenly (he said)".

[10] The respondent's counsel put to Ms Bond that her view, that the collision was the fault of others and not herself, had developed later than the moment of the actual collision itself, and at the earliest over the ensuing "next few days". In response, Ms Bond called evidence of her prior consistent accounts of the collision. These were given by her husband, her stepson and her sister. Her now husband's evidence (they were not married then) is that on the "day of the accident", or perhaps "two days later or shortly afterwards", Ms Bond had given him an account of it which he described in evidence, and which was consistent with her evidence in chief. He also described having visited the accident scene with her on 24 November 1993, and having observed skid marks of some six to ten metres in length with "crash debris". These had been swept off the side of the road, and were strewn "down the side of the skid marks with a concentration…..at the southern end". Her step daughter's evidence was that on the day of the accident Ms Bond had given an account of it described by the step daughter, and likewise consistent with Ms Bond's evidence in chief. Finally, Ms Bond's sister gave evidence of having spoken with Ms Bond on the day of the accident, of her having been upset that the "police man who turned up was not interested in what happened", and "how a car has come across in front of her and the brake lights came on causing her to slam on her brakes, and it was like a concertina effect with a few cars in front." Both the step daughter and Ms Bond's sister agreed that they had been first asked only very recently to recall those conversations occurring in 1993. On the other hand, her husband had been asked about the topic by Ms Bond's solicitors some years earlier, but said he was not particularly surprised when he saw "just recently" an "insurance claim form" in which Ms Bond had said no one was to blame.

Mr Palk's Account (In Evidence)

[11] Mr Palk's description in evidence was that his car had been travelling in the right hand south bound lane for between one and two kilometres before Ms Bond's vehicle drove into the back of his. That occurred when he was just coming up to an over pass, saw brake lights ahead go on, so applied his brakes and "was slowing down coming to a stop" when he saw in his rear vision mirror another car approaching his under "full brakes", which then struck his vehicle and pushed his vehicle into Mr Cerruto's. He got out of his car, and walked back to the plaintiff's, established that she was "all right", and swore that in conversation "she said that she hadn't seen the cars braking ahead of hers because she was adjusting her radio." He also swore that he had told the police officer who arrived at the scene that Ms Bond had told him she had been "fiddling" with her radio.

Evidence from the Police

[12] Police officers Edward Josey and Alan Joicey were called as witnesses. Sergeant Josey had attended the accident scene, but had no recollection whatsoever in 2002 of the event. Nor did Senior Constable Joicey who had attended with him. The reports they then completed were put in evidence, and those contained no reference

to either Mr Palk having said that Ms Bond had said she was doing anything with her radio, nor any reference to Ms Bond having said Mr Palk had "cut in" on her. However, while there was a record of what both Mr Cerruto and Mr Palk had said, the transcript of an apparently taped conversation with Ms Bond was not attached to those reports, and although originally existing had been lost. An Incident Description report apparently completed that day recorded that (Mr Cerruto's vehicle) was:

> "Driving south, vehicle had to slow, (Mr Palk's) vehicle was also slowing in time when (Ms Bond's vehicle) hit (Mr Palk's vehicle) in the rear causing it to collide with the rear of (Mr Cerruto's vehicle)."

What those police records did confirm was that Ms Bond was proceeded against on a charge that at 7.10 a.m. on 22 November 1993, she had driven a motor vehicle without due care and attention in breach of s 17 of the *Traffic Act* 1949 (Qld). It is plain that the charge was intended to describe her driving immediately before the collision. Ms Bond accepted in cross examination that she had been summonsed to attend the Petrie Magistrates Court in February of 1994, and had been convicted of that offence. She described having not attended the court because, she thought now, she had been too sick at the time.

The Evidence in Toto

[13] The actual evidence led to support the plaintiff's case against the various defendants, and particularly Mr Palk, was very limited. There was the plaintiff's own evidence, bolstered as to her credibility by the evidence of her prior statements consistent with that testimony. Telling against that account were her own statements in writing inconsistent[1] with anyone else being to blame for her collision, and written by her in November and December 1993, the fact of her conviction for having driven at that relevant time without due care and attention;[2] and the evidence of Mr Palk.

Mr Palk's other Account

[14] Mr Palk's pleadings implied, and his answers to Interrogatories explicitly asserted, that his vehicle was stationary when Ms Bond's car collided with his. In evidence he said his vehicle was perhaps still moving, and readily admitted that he had changed at the trial his account of what his vehicle was doing when the collision occurred, and changed it because he realised that the police reports prepared at the time quoted him as having said his vehicle was still moving.

[15] That change of account, and how the trial judge dealt with it and Mr Palk's evidence, was central to the appeal. It was **not** submitted that Ms Bond's evidence was necessarily accurate if the court accepted that Mr Palk's car was still moving when the plaintiff's car hit it. What was submitted was that the trial judge should have, and did not, make adverse findings about Mr Palk's credit, and that those

---

1 Section 101 of the *Evidence Act* makes both her prior inconsistent and prior consistent statements admissible as evidence of the facts asserted by Ms Bond in those statements.

2 Section 79 of the *Evidence Act* 1977 (Qld) makes that conviction evidence that she committed that offence, and until she proved to the contrary that conviction meant she committed the acts and possessed the state of mind, necessary at law to constitute the offence of driving without due care and attention at that time.

findings should have been weighed against the matters not favouring acceptance of Ms Bond's evidence.

[16] Ms Bond's very experienced counsel frankly submitted that her legal team had taken the view prior to the trial that she would be unable to establish by her own evidence that Mr Palk had changed lanes and caused the accident in the way she was expected to describe. However, the decision had been taken to proceed and to attack Mr Palk's credit by proving on the basis of the police report, which would be exhibited and by cross examination upon it, that Mr Palk had inaccurately asserted in his Answers to Interrogatories that his car was stationary when Ms Bond's collided with it. Mr Palk had claimed to have been stationary for two seconds. Counsel's forensic goal was to so discredit Mr Palk that the court would declare a preference for and accept Ms Bond's account.

[17] As counsel for Ms Bond probably anticipated, counsel for Mr Palk put more than once when cross examining Ms Bond what was then counsel's case, namely that Ms Bond drove into the rear of a stationary vehicle, and that she had not seen that the traffic had "stopped" because she was "fiddling" with her car radio. As it turned out, some of the expected sting of the cross examination of Mr Palk was lost when he very readily acknowledged his change of account to one in which his vehicle was perhaps still moving, and likewise conceded that he was saying this for the first time, and had previously and quite often said differently.

[18] At the end of the day the point upon which Ms Bond's counsel hoped to rely, to carry her over the line, was one going only to Mr Palk's credit. The account he had previously and repeatedly given was not **necessarily** inconsistent with the plaintiff's claim that he had suddenly cut in, since Mr Palk might have done that and then brought his car to a stop by very hard braking and before the plaintiff collided with him. Likewise it was not necessarily consistent with the plaintiff's version that Mr Palk's car was moving when hers collided with it. Accordingly, a decision that Mr Palk's accounts of events were unreliable because of their variety would not establish that Ms Bond's account in the witness box was accurate or reliable.

The Judgment under Appeal

[19] The reserved judgment of the learned trial judge described firstly the general circumstances of the collision, and then Ms Bond's case. It described the fact that neither police officer attending at the scene had any recollection of the incident, the loss of the transcript of the tape of the conversation between one officer and Ms Bond, and the content of a statement by Mr Cerruto which had been admitted into evidence. The judge declared he was not prepared to act on the contentious aspects of that statement in the absence of cross examination. The judge also declared he was not prepared to find that the plaintiff had been distracted immediately prior to the collision by reason of her making adjustments to the radio in her vehicle. Nor did he think that any inference could safely be drawn from the skid marks and debris seen by Ms Bond and her husband "a day or so" (actually two days) after the accident. Although Ms Bond's counsel complained that inferences should have been drawn from those skid marks and crash debris, in fact they really establish very little and nothing inconsistent with either the plaintiff or Mr Palk's various versions of events. His Honour's non reliance on contentious parts of Mr Cerruto's statement actually benefited the plaintiff, as did his rejection of some evidence that Sergeant Josey gave, namely that had Ms Bond told him that Mr Palk's car had

moved quickly from the left hand to the right hand lane immediately prior to the collision, that asserted fact would have been evident in the sketch drawn and the other material which had survived. That ruling benefited Ms Bond as well.

[20] The learned judge then repeated Ms Bond's account in evidence and the supportive accounts of her husband and stepson. The judge then described the contents of the Workers' Compensation claim forms completed on 8 December and 14 December 1993, and the motor vehicle insurance claim form dated 23 November 1993. He then remarked:

> "If the accident occurred as the plaintiff contends, it is surprising that the forms do not give that account. In fact the answers appear inconsistent with the version that the plaintiff gave in evidence".

[21] I respectfully express agreement with both of those conclusions. With due respect to the submissions made on the appeal by counsel for Ms Bond, it is difficult how either of those conclusions could be avoided.

[22] The learned judge then described Ms Bond's account of how she had accused Mr Palk immediately after the accident of having "just cut her off", and Mr Palk's denial that Ms Bond had said that. The learned judge also described Ms Bond's evidence that each of Mr Palk, Mr Cerruto, and "the police officer", had said at various times at the scene that Ms Bond was to blame because she was "the last in the line", and that that was why she did not nominate any other person as being responsible for the accident when completing those various forms.

[23] The judgment then records that while the judge accepted that Ms Bond was upset by the accident and had suffered an adverse psychological reaction, she had impressed the judge as a person who would stand up for herself. Accordingly, the judge found her explanation for the contents of those forms "not particularly satisfactory".

[24] The judge then expressed his conclusion that in the circumstances he was not prepared to conclude that Mr Palk's vehicle moved out of the left hand lane immediately prior to the collision. That finding was the critical one that the plaintiff needed to establish liability. The judge went on to hold that probability was that there was a general slowing down of vehicles in both lanes, and that Mr Palk's vehicle was already ahead of hers and that her action therefore failed.

[25] As Ms Bond's counsel complains, those reasons for judgment omit entirely any reference to Mr Palk's change of his account of what his vehicle was doing when collided with, and any assessment of his credibility. They also omit any reference to the judge's view of the plaintiff's witnesses to her prior consistent statement. Counsel submits that the omission of those matters should result in a finding that the judge failed to express sufficient reasons for judgment. As refined in a supplementary submission, counsel complained of a failure to explain the basis of "a crucial finding of fact"[3]. He submitted that because of this asserted failure to provide sufficient reasons, the appellant/plaintiff was likely to have a real sense of grievance, resulting from her inability to know or understand why the decision against her was made.[4] Counsel for the respondent accepted that if it could legitimately be said that Ms Bond would necessarily fail to understand from the

---

[3] See *Misfud v Campbell* (1991) 21 NSWLR 725 at 728, citing McHugh JA (as he then was) in *Soulemeizis v Dudley (Holdings)* Pty Ltd (1987) 10 NSWLR 247 at 281.

[4] *Beale v Government Insurance Officer* (NSW) (1997) 25 MVR 373 at 383.

judge's reasons why she lost, it might be appropriate for this court to intervene[5], but submitted it would be quite clear to Ms Bond why her litigation failed.

[26] The judgment under appeal would have been fuller had Mr Palk's credit been assessed, and that of Ms Bond's husband, sister, and stepson. Doing that, and weighing the respective degrees of credibility which could be given to the evidence of those witnesses, would make no difference at all to the clarity of the reason the plaintiff's action failed. It failed because she has given inconsistent accounts over time of why the collision happened, and her written accounts made very soon after it included specific exoneration of any other driver as the cause. The judge did not accept that her explanation for those written accounts was a satisfactory one, and I respectfully agree with that conclusion too. Once that conclusion is reached, then on the very limited evidence led, the plaintiff's case must have failed. No matter how credible her other witnesses were, what she told them in blaming Mr Palk was completely at odds with what she wrote. Her oral accounts were not made true simply because they were given, and she did not give any satisfactory reason for her written accounts. She bore the onus of proof, and her evidence failed to persuade on the balance of probabilities because she had written critically different accounts and not explained why.

[27] In those circumstances Ms Bond could not fail to understand why she lost. It was because of what she wrote in those forms, and the reasons for judgment of the learned trial judge, while economic, make that unmistakeable. It follows that despite the prodigious and carefully argued efforts of her counsel, and his exhaustive analysis of the evidence, her appeal on that ground must fail.

[28] The plaintiff's appeal on the ground of wrong findings of fact also fails. There are two principal matters the subject of complaint. One is that the judge erred in describing Mr Bond's evidence as being that "there was about 'a cars length' between the two vehicles with (sic) which the second defendant moved." (His Honour meant "within"). Counsel complains that Ms Bond had said there was a gap of five car lengths between her car and Mr Cerruto's, when Mr Palk moved into that gap. There is really no inconsistency between that evidence and the description by the judge, which for all practical purposes quotes Ms Bond's evidence described in paragraph 2 herein.

[29] The other complaint is of misdescription of the momentum of Mr Cerruto's vehicle when Mr Palk's car hit it. The judgment records that Mr Cerruto's car was "also slowing down", whereas counsel contends Mr Cerruto's car was stationary at that moment. A number of submissions were developed upon the basis of that asserted error. In fact Mr Palk described in evidence that Mr Cerruto's car was "braking fairly heavily" (AR 100), apparently at the moment Mr Palk collided with that vehicle, and Mr Cerruto's statement also implies his car was still moving (AR 233). It follows that neither of these asserted errors is established as an error, and if they were, that would have no significance to the matters on which the case was decided.

[30] I would order that the appeal be dismissed with costs to be assessed on the standard basis.

[31] **PHILIPPIDES J:** I agree with the reasons of Jerrard JA and with the order proposed.

---

5 See *Cochrane v Hannaford* (1999) NSW CA 371.