SUPREME COURT OF QUEENSLAND

CITATION:	*Morris v Warrian & Anor* [2003] QCA 396
PARTIES:	**GRAHAM DARRELL MORRIS** (plaintiff/respondent) **v** **KENNETH BRIAN WARRIAN** (first defendant/first appellant) **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (second defendant/second appellant)
FILE NOS:	Appeal No 2608 of 2003 DC No 15 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal Personal Injury – Liability and Quantum
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2003
JUDGES:	McMurdo P, Muir and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – ROAD ACCIDENT CASES – ACTIONS FOR NEGLIGENCE – Evidence – Onus of Proof and Sufficiency of Evidence – where the plaintiff/respondent was injured in a motor vehicle collision – where the primary judge found the first defendant/appellant liable for the collision and awarded damages in favour of the plaintiff/respondent – where the appellants appealed against liability – whether the evidence supported the primary judge's findings on liability APPEAL AND NEW TRIAL – EXCESSIVE OR INADEQUATE DAMAGES – EXCESSIVE DAMAGES – appeal against the quantum of damages – whether the quantum of general damages and future economic loss awarded was excessive *Baird v Roberts* [1977] 2 NSWLR 389, cited *Dessent v Commonwealth of Australia* (1977) 13 ALR 437, applied *Fink v Fink* (1946) 74 CLR 127, cited

State of New South Wales v Moss [2000] NSWCA 133, 24 May 2000, cited

COUNSEL: A M Daubney SC for the appellants
J J Clifford QC for the respondent

SOLICITORS: Grant & Simpson for the appellants
Macrossan & Amiet for the respondent

[1] **MCMURDO P:** I agree that the appeal should be dismissed with costs for the reasons given by Muir J.

[2] **MUIR J:** The appellants/first and second defendants appeal against a judgment of the District Court on 20 March 2003 in favour of the plaintiff/respondent in a personal injuries action concerning injuries sustained by the respondent in a motor vehicle accident.

[3] The appeal seeks to disturb the learned primary judge's findings on both liability and quantum.

The events giving rise to the respondent's claim

[4] The accident occurred at about 6.50 am on a straight level stretch of Paradise Street, Mackay when a Harley Davidson motor cycle ridden by the respondent collided with the rear of a Toyota Hilux utility driven by the first appellant. Paradise Street, at the location of the accident, is straight and flat.

The pleadings

[5] The respondent's pleaded case was that the accident was caused by the first appellant when the respondent, who, riding his motor cycle behind the Toyota, proceeded to overtake to the right after the Toyota veered to the left and collided with it when it turned, without warning, to the right.

[6] The appellants' pleaded case was that the motor cycle, seemingly for no reason, ran into the rear of the Toyota which was being driven "in a straight line at a speed of approximately 25 to 30 kilometres per hour".

The cases as presented

[7] The respondent's case, consistently with his pleading, was that the Toyota, which he recognised as one belonging to Keogh's Hire, veered to the left as if the driver was intending to park at the premises of Keogh's Hire, located a short distance further along the road on the line of travel. The respondent then accelerated slightly with a view to overtaking to the right and the first appellant, without using his indicators, suddenly swung to the right as if to park on the other side of the road.

[8] The first appellant's oral evidence was to the effect he veered slightly to the left to avoid a fire hydrant which protruded above the surface of the roadway and veered back to the right again once he had passed it. He said that before veering left he noticed the motor cycle "fairly close" behind him and that when he went to the left, the motor cycle also did so. He concluded that the motor cycle was going to overtake on the left. The collision occurred just after he resumed his previous line of travel.

[9] In a statutory declaration sworn on 25 September 2000 the first appellant declared that: as he was travelling in a straight line at 25 to 30 kilometres an hour he saw the lights of a motor cycle come up behind him; it appeared as if it was going to overtake to his left; it veered right as if to overtake on his right and then ran into the centre rear of the Toyota. That version made no mention of any deviation from the Toyota's general line of travel.

[10] In a version of the accident given to police after the accident, the first appellant said –

> "I was driving south on Paradise Street. I started to move to the left a fraction. I saw the bike behind me. It appeared it was going to overtake me on the left hand side so I moved back onto the road, only to see him moving over the right side to overtake me. I stayed on the road and he ran into me. I was going to turn further down the road."

[11] Neither of these earlier accounts of the accident made mention of the existence of a hydrant.

[12] Asked in cross-examination if he was "particularly keeping an eye on" the motor cycle before moving back to the right after passing the hydrant, he said "No, I didn't, I just concentrated on going ahead".

The primary judge's findings on liability

[13] The primary judge's findings on the cause of the accident may be summarised as follows. The first appellant, travelling slowly along Paradise Street, moved to his left to avoid the hydrant. As the Toyota veered to the left, the respondent, who had been intending to overtake, accelerated to overtake to the right. The first appellant, who had seen the bike move slightly to the left, possibly just following the Toyota's line of travel, formed the view that the respondent was overtaking to his left. He then veered to the right which brought him into the path of the respondent. As the first appellant turned to the right he failed to keep the motor cycle under observation or to signal his intention to change course. The movement of the Toyota to the left, coupled with its slow speed, was "virtually an invitation to the (respondent) to overtake to (the) right".

[14] The following passage from the reasons encapsulates the primary judge's findings on liability –

> "The plaintiff after following the utility deliberately accelerated with a view to overtaking the defendant's vehicle. One would not expect someone in his position to do that without having a clear path available for that overtaking manoeuvre, and on the defendant's evidence there was such a path available, as a result of his move to the left. But the defendant, having by his behaviour effectively invited the plaintiff to overtake, and being aware that the plaintiff was beginning to overtake him (*I infer as a result of hearing the sound of the bike accelerating*) then moved his vehicle into the plaintiff's path. In my opinion a reasonable person in the position of the defendant would have anticipated that the plaintiff was taking that path, and the defendant would have seen the plaintiff was taking that path if he had been keeping the plaintiff properly under

> observation. In circumstances where he had invited an overtaking manoeuvre from the motor cycle and where he has become aware that the motor cycle was beginning to overtake, for him to move his vehicle to the right without first checking that it was safe for him to do so, that is that such a move to the right would not place him in the path of the plaintiff, was in my opinion negligence on the part of the defendant. The negligence consisted of failing to keep a proper lookout to ascertain the actual whereabouts of the plaintiff and on which side he was overtaking, and driving without due care and attention, and moving his vehicle to the right in the road into the path of another vehicle without prior warning of his intention to do so." (emphasis supplied)

[15] The appellants' principal challenge to the findings on liability was based on the finding, emphasised in the passage from the reasons quoted above, that the first appellant was aware that the respondent was beginning to overtake from hearing the sound of the bike accelerating. In the preceding paragraph of his reasons his Honour had also expressed the conclusion that the first appellant heard the respondent begin to overtake. It was argued that it was not open to the primary judge to make findings on the basis that the first respondent heard the motor cycle accelerating in the absence of any evidence about the noise made by the motor cycle or what was heard or able to be heard by the first appellant at relevant times.

[16] It may be accepted that, normally, it would be impermissible for a tribunal to use as an integral part of its reasoning in determining a proceeding, a finding on a fact which was not in issue between the parties without affording the parties the opportunity of making submissions in relation to it.

[17] But the appellants' difficulty is that the first appellant's own evidence established not only that he was aware of the presence of the motor cycle at the time of his manoeuvre to the right but that he believed it to be commencing to overtake. The fact that the primary judge chose to attribute that state of knowledge to the use of one of the first appellant's senses rather than another does not seem to me to have any particular relevance. The critical finding is that the first appellant was aware of the presence and intention of the respondent, not the means by which the first appellant gained such awareness.

[18] The other ground of challenge was that the respondent succeeded on a basis which was not within the respondent's pleaded case and was not the subject of evidence. The point is that the respondent pleaded that the accident occurred when the Toyota turned right in front of the motor cycle. That was also the evidence given by the respondent. The primary judge rejected that part of the respondent's evidence, relying, in part, on the evidence of a bystander.

[19] The negligent acts and omissions found by the primary judge, however, were within the scope of the respondent's pleaded case. It alleged failure to keep a proper look out, failing to indicate and failing to use due care and attention. It was based also on a veering of the Toyota to the left and a turn to the right without indication. The primary judge found that the movement to the right was far less extreme than that alleged but that hardly produces the result that the facts found are outside the pleading. The pleadings plainly joined issue on the question of the line of travel of the Toyota immediately preceding the accident. The greater, normally, includes the

lesser and the findings establishing liability are based, for the most part, on the first appellant's own evidence. Those findings sit comfortably within the bounds of the issues litigated on trial.

[20] For these reasons, the appeal against the findings on liability fails.

The quantum appeal

[21] The primary judge awarded damages of $124,633 including $32,000 under the heading "Pain, suffering and loss of amenities" and $75,000 for "Future economic loss".

[22] The general damages award is challenged on the basis that it is excessive. This, it is said, may be seen from the fact that the respondent's principal injuries were soft tissue injuries and bruising and that the amount of permanent disability was described by an orthopaedic surgeon as "minimal" and "as giving rise only to minor limitations".

[23] In findings which were unchallenged, the primary judge found that the respondent, who was 39 years of age at the time of trial, suffered "an extensive soft tissue injury to the right side lower abdomen and right hip involving fat necrosis and haematoma, some damage to the nerve in the right thigh and also an injury to the right sacro-iliac joint". It was found that the injuries, particularly that to the joint, would cause the respondent indefinite "continuous though varying pain" which would be aggravated by work. It was found also that the injuries had "significant adverse affect on (the respondent's) recreational activities, and his enjoyment of life generally".

[24] In *Dessent v Commonwealth of Australia*,[1] Barwick CJ observed –

> "The discretion in assessing damages is extremely wide and its exercise by the primary judge to whom it is committed is entitled to respect. The appellate court's function is not to undertake itself the exercise of that discretion unless it is first convinced of error in its exercise by the trial judge."

[25] Although his Honour was a dissentient in that case, there is nothing in the reasons of the majority which casts doubt on the validity of the proposition just quoted.

[26] The primary judge, having heard the respondent's evidence and that of the medical practitioners, was in a far better position than an appellate court to evaluate the extent to which the injuries adversely impacted on the respondent for relevant purposes. It has not been shown that his Honour failed to avail himself of that advantage or that the assessment falls outside the range of his Honour's wide discretion.

[27] The assessment of future economic loss was attacked on the grounds that:

(a) No basis was stated for the finding that there was "some reasonable chance that" the respondent would not, because of his pain, continue in his present type of employment until age 65;

(b) In relation to a related finding that "it is quite possible that the [respondent] will decide he is unable to continue to work at the current level even if his condition does not deteriorate to that point,

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1 (1977) 13 ALR 437 at 442

> and I think the probability that the [respondent] will at some stage either move to a less strenuous job or stop work completely is higher than that, with the probability no doubt increasing as time passes," it is submitted that there was no evidence as to employment alternatives and no basis for the implied assumption that a move to a "less strenuous job" would result in a diminution of income for the plaintiff. Furthermore, it is submitted that the primary Judge's conclusion that if the respondent was unable to work as a diesel fitter "he would then be simply a non skilled person with a disability, and would be likely to have difficulty finding suitable employment" is not supported by the evidence and contrary to the primary judge's previous findings with respect to the respondents' qualifications and experience in his trade.

[28] The primary judge, as he was entitled to do, accepted the evidence of the respondent that after that accident he gave up more highly paid work in the workshop[2] because he was unable to manage the more physically demanding work in that area, but that he was able to manage field work, to which he was transferred at his request. There was evidence that since the accident the respondent's work performance had deteriorated to the extent that it was causing his supervisor concern. The respondent gave evidence of the aggravation to his injuries caused by the field work and expressed the view that he may not be able to continue with that work for more than eight to 10 years. He described pain and discomfort on a daily basis. One of the medical witnesses gave evidence to the effect that the ability of a person in the position of the respondent to continue with heavy work depended on that persons pain threshold. Consequently, the finding that there was "some reasonable chance" that the respondent would not continue in his current employment for the whole of his working life was amply supported by the evidence.

[29] There was evidence that a loss of the field work would mean a loss of a $75 a week allowance which went with it. There was evidence also that there was good job security in that area by virtue of difficulties experienced by the employer in obtaining suitable people to do the work. That provided some evidence that such work was likely to be more remunerative than unskilled employment. The respondent was earning $36,000 to $37,000 net per annum as a diesel fitter engaged in field work. If he was unable to continue to do the work and had to find unskilled employment within his restricted physical capacities, one would think it tolerably plain that he would suffer a material drop in income.

[30] The reasons state that the award of $75,000 "represents only 15 percent of the present value of (25 years) earnings at the respondent's current rate of remuneration" and that "perhaps $10,000 of this figure represents the loss of opportunity to do more remunerative work." The point of the observation seems to be to demonstrate that the award, when considered in the light of the respondent's likely earnings (had the accident not happened over his expected working life), was relatively modest and unlikely to exceed earnings likely to be lost through the respondent's injuries.

[31] No doubt it was desirable that appropriate evidence be placed before the primary judge as to likely levels of earnings in classes of unskilled employment suited to the

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2 The work was more highly paid because it offered more opportunities for overtime.

respondent. Nevertheless the existence of potential damage from a loss of income earning capacity was established and in those circumstances the primary judge was entitled to make the best estimate he could in the circumstances.[3]

[32] Having regard to the principles discussed earlier, the appellants, in my view, have not succeeded in demonstrating any error in principle on the part of the primary judge.

Conclusion

[33] I would dismiss the appeal with costs.

[34] **HOLMES J:** I agree with the reasons for judgment of Muir J and the order he proposes.

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[3] *Fink v Fink* (1946) 74 CLR 127 at 143, *State of New South v Moss* [2000] NSWCA 133 paras 72-76 inclusive and *Baird v Roberts* [1977] 2 NSWLR 389 at 398.