SUPREME COURT OF QUEENSLAND

CITATION:	*Boyce v Deem & Anor* [2003] QCA 403
PARTIES:	**CAMERON JAMES BOYCE** (plaintiff/respondent) **v** **BARRY COLE DEEM** (first defendant/first appellant) **SUNCORP METWAY INSURANCE LIMITED** ACN 075 695 966 (second defendant/second appellant)
FILE NOS:	Appeal No 3 of 2003 SC No 4884 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2003
JUDGES:	McMurdo P, Jerrard JA and Muir J Separate reasons for each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – PRINCIPLES AND MODE OF APPORTIONMENT – where the respondent was riding a motorcycle that collided with a truck driven by the first appellant – where the trial judge found the first appellant 85% liable for the collision and the respondent 15% liable on the basis of contributory negligence – whether in the circumstances the respondent's liability should be greater than 15% *Traffic Regulations* 1962 (Qld), reg 34(F)(2) *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, cited *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, applied *Sibley v Kais* (1967) 118 CLR 424, referred to
COUNSEL:	K S Howe for the appellants

P J Goodwin for the respondent

SOLICITORS: Walsh Halligan Douglas for the appellants
Murphy Schmidt for the respondent

[1] **McMURDO P:** I agree with Muir J that the appeal should be dismissed with costs for the reasons he gives.

[2] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment and order proposed by Muir J.

[3] **MUIR J:** The appellants are the defendants in an action brought by the respondent claiming damages for personal injuries when, at about 10 am on 23 August 1999, a motorcycle ridden by him collided with an Isuzu truck driven by the first appellant in the vicinity of the intersection of Donegal Court and Athenree Place, Caloundra.

[4] The learned primary judge found liability in favour of the respondent but found him guilty of contributory negligence and apportioned responsibility 85% to the first appellant and 15% to the respondent. The appeal challenges the apportionment, the appellants arguing that a major share of liability for the accident should be attributed to the respondent.

[5] The respondent, who was 18 years of age at the date of the accident, was on a mail delivery run for Australia Post. He was familiar with the subject location, having delivered mail in the area previously. Immediately prior to the accident, he rode his motorcycle down Athenree Place into Donegal Court, a short street ending in a cul-de-sac, where he made some mail deliveries. The last of those deliveries was to a letter box in Donegal Court close to its intersection with Athenree Place. Having made the delivery, he rode across the footpath in Donegal Court onto the roadway and turned left into Athenree Place where he collided with the first appellant's truck.

[6] Athenree Place is a narrow suburban street without a centre line. At the time of the accident, Mr Forrer, who resided at 22 Athenree Place virtually opposite its intersection with Donegal Court, was in the driveway of his house. He made a number of observations of the incident which were relied on by the primary judge. Of more immediate relevance, however, is the fact that at the time of the accident, two motor vehicles belonging to Mr Forrer were parked in front of his house. One, a Volvo, was parked to the right of the driveway as it is observed from the street with its driver's side tyres on the grass footpath just off the concrete kerb. It projected, according to the primary judge's findings, .9 of a metre onto the roadway. The other, a Daihatsu van, was parked on the road on the other side of the footpath in a roughly similar manner but because of its smaller size and because a little more of it was on the footpath, it protruded into the roadway less than did the Volvo.

[7] As the respondent was riding his motorcycle out of Donegal Court, the first appellant was driving a truck down Athenree Place towards its intersection of Donegal Court, which was on the first appellant's right. The primary judge found that as the first appellant approached the Forrers' residence, he steered the truck to the right to avoid the Daihatsu and "swerved" further to the right to avoid the Volvo. The effect of these manoeuvres, on the primary judge's findings, was to position the driver's side of the truck, not just well over the notional centre line of

Athenree Place, but within .5 to .8 of a metre from the kerb on the Donegal Court side of Athenree Place.

[8] The kerb to kerb width of Athenree Place is 5 metres. It was agreed between the parties that the width of the truck was 2.7 metres, although the primary judge thought it to be "probably less than 2.5 metres". As the Volvo protruded .9 of a metre into the road, in order to pass it with a clearance of .4 of a metre, the right hand side of the truck (assuming a width of 2.7 metres) would have been 1.5 metres over the centre line and one metre from the right hand kerb.

[9] The clearance of .4 of a metre is one selected by the primary judge, presumably on the basis that it allowed an adequate, if not generous, clearance between the Volvo and the off side of the truck.

[10] It was found that the plaintiff's motorcycle was within .5 and .8 of a metre from the kerb on its side of the road as it turned and proceeded into Athenree Place and, by implication, when it struck the front of the driver's side of the truck.

[11] The first appellant admitted that he did not sound the truck's horn but said that he had the respondent under observation as he rode his bike out of Donegal Court, applied his brakes and had virtually stopped when the collision occurred. He was disbelieved. The primary judge found –

> "In my view the probability is that the defendant's attention was distracted by Mr Forrer's parked vehicles straddling the kerb to his left as he drove down Athenree Road. I think the likelihood is that the defendant simply omitted to keep a proper lookout to his right as he approached the T-intersection being more concerned to keep well away from Mr Forrer's parked vehicles the first of which protruded about 0.6 of metre beyond the kerb and the second of which a little further on protruded about 0.9 of a metre. I believe the reason why the defendant did not sound the horn of his truck was that he was simply unaware that the plaintiff was riding out of Donegal Court.
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> The substantial cause of the collision in my view was the failure of the defendant to drive as near as practicable to the left hand side of the carriageway in the direction in which he was travelling … Had he been keeping a proper lookout to his right he would have observed the course taken by the plaintiff, which was readily observed by Mr Forrer just over the road, and should have brought his truck to a halt and/or sounded its horn having regard to its position on the roadway. I find that without good reason he was too far over the centre of the roadway to allow the plaintiff to continue safely on the path he was following.

[12] As well as the apportionment of liability, the appellants challenge the finding that the respondent stopped his motorcycle before entering Athenree Place and his Honour's rejection of the parties' agreed width of the truck of 2.7 metres in favour of 2.5 metres or less. Nothing turns on the latter point as it is plain from the reasons that had his Honour accepted the parties' measurement, the same result would have followed and for essentially the same reasons.

[13] The appellant's contention as to the stopping of the respondent's motorcycle is supported by the weight of evidence, including that of the respondent himself. But a

finding that the respondent "basically stopped" or proceeded slowly out of Donegal Court does not necessitate in the conclusion that the apportionment of liability was erroneous. I will return to that point shortly.

[14] As was said in the judgment of the Court in *Podrebersek v Australian Iron & Steel Pty Ltd* – [1]

> "A finding on a question of apportionment is a finding upon a "question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds": *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201. Such a finding, if made by a judge, is not lightly reviewed."

[15] The judgment explains the task involved in an apportionment of responsibility as follows – [2]

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42–49 and *Broadhurst v Millman* [1976] VR 208 at 219, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination."

[16] The appellants also place reliance on r 34(F)(2) of the *Traffic Regulations* 1962 (Qld) which requires a driver travelling on a road that ends at a T intersection to give way to "all vehicles travelling on the road that continues through the intersection that are approaching, entering or on the intersection". The primary judge took the regulation into account in his reasons. He referred to the discussion in *Sibley v Kais*[3] concerning the role of traffic regulations in the determination of the respective duties of drivers to each other or in respect of themselves. In that case, referring to regulations made pursuant to the *Traffic Act* (1919-1965) (WA) concerning intersections and the right of way rule, the court observed –

> "These regulations in nominating the vehicle which has another vehicle on its right as the give way vehicle are undoubtedly salutary and their breach is deservedly marked with criminal penalties. But they are not definitive of the respective duties of the drivers of such vehicles to each other or in respect of themselves : nor is the breach of such regulations conclusive as to the performance of the duty owed to one another or in respect of themselves. The common-law duty to act reasonably in all the circumstances is paramount. The failure to take reasonable care in given circumstances is not necessarily answered by reliance upon the expected performance by

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1 (1985) 59 ALR 529 at 532.

2 At 532-533. The principles expressed in this passage were applied in the joint judgment in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 311.

3 (1967) 118 CLR 424.

> the driver of the give way vehicle of his obligations under the regulations ; for there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties, whether derived from statutory sources or from the common law. Whether or not in particular circumstances it is reasonable to act upon the assumption that another will act in some particular way, as for example by performing his duty under a regulation, must remain a question of fact to be judged in all the particular circumstances of the case."

[17] The primary judge had regard to these principles and applied them correctly.

[18] The primary judge found that the respondent looked right, then left, then right again before he commenced to make his left hand turn out of Donegal Court. That finding was open on the evidence and is of more importance than the question of whether the appellant stopped his motorcycle. The finding that the respondent kept within .5 to .8 of a metre from the kerb on his left hand side was unchallenged as was the implicit finding that the right hand side of the first appellant's vehicle was within .5 to .8 of a metre from the kerb on the respondent's side of the road. It was common ground that the first respondent failed to sound his horn. The findings that the first respondent omitted to keep a proper lookout being preoccupied with keeping "well away" from the parked vehicles and, by necessary implication, that the first appellant was not driving "as near as practicable to the left hand side of the carriageway in the direction in which he was travelling" were open on the evidence.

[19] The respondent was entitled to conclude, having regard to his speed and the proximity of his motorcycle to the kerb, that the significant threat to his safety was from vehicles approaching from his right and that any danger from the left was minimal. The respondent's evidence was that he did not see the truck until he was virtually on top of it, but his Honour concluded that he may well have noticed the truck but not perceived it as a threat. It was the case also that there was some restriction to the respondent's vision to the left caused by a tree on the footpath and a stop sign. The evidence suggests that there was no comparable restriction to the first appellant's vision seated, as he was, in an elevated position in the truck.

[20] The first appellant was well aware that his truck was occupying most of the incorrect side of the road and that a collision with an oncoming vehicle which might lead to death or serious injury could be avoided only if the driver of that vehicle noticed the truck in sufficient time to stop and if he himself stopped the truck promptly. He was aware also of the location of Donegal Court and that a vehicle turning out of it to the left could come upon the truck very suddenly. Having regard to all of these factors, it would not be appropriate to interfere with the primary judge's apportionment.

[21] I would dismiss the appeal with costs.