SUPREME COURT OF QUEENSLAND

CITATION:	*McIntosh v Hazel* [2003] QCA 569
PARTIES:	**KEVIN MCINTOSH** (plaintiff/appellant) **v** **IAN HAZEL** (defendant/respondent)
FILE NO/S:	Appeal No 3512 of 2003 SC No 9205 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Liability Only
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 November 2003
CORAM:	McMurdo P, McPherson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE - PROOF OF NEGLIGENCE – SUFFICIENCY OF EVIDENCE - where appellant alleged disclosure of lump to and failure to treat of tumour by respondent doctor – whether trial judge's finding that the appellant failed to prove disclosure of lump to the respondent was against the evidence TORTS – NEGLIGENCE – PROOF OF NEGLIGENCE – WEIGHT AND CREDIBILITY OF EVIDENCE – where trial judge made findings of fact based on credibility of witnesses – whether error in trial judge's findings *Fox v Percy* (2003) 197 ALR 201, considered
COUNSEL:	D Kelly for the appellant S C Williams QC, with M J Burns, for the respondent
SOLICITORS:	Ehrich Monahan & Tisdall for the appellant Tress Cocks & Maddox for the respondent

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

[2] **McPHERSON JA:** The appeal should be dismissed for the reasons given by Mullins J, with which I agree.

[3] **MULLINS J:** The appellant appeals against the dismissal of his claim by a Judge of the Trial Division after a trial which took place between 26 and 28 February 2003.

[4] The appellant commenced the proceeding against the respondent on 2 February 2001, claiming damages for personal injuries and other loss and damage suffered by the appellant on 1 September 1999 due to the negligence and/or breach of statutory duty and/or breach of contract by the respondent.

[5] The respondent was at all relevant times a medical practitioner operating his practice at Woodridge. Paragraphs 3 and 4 of the amended statement of claim set out the conduct of the respondent which the appellant alleged gave rise to the breach of the duty owed to the appellant by the respondent or the breach of contract by the respondent:

> "3. On or about 3 February 1998 and/or on or about 12 February 1998 the Plaintiff:
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> (a) presented at the Practice of the Defendant complaining of a football shaped lump approximately 2 ½ x 1 ½ inches that had appeared in the inside of his left thigh ("the lump");
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> (b) was told by the Defendant that it was fatty tissue and was of no concern;
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> (c) accepted this explanation;
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> (d) was prescribed no treatment in relation to the mass by the Defendant;
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> (e) was not referred by the Defendant for any exploration of the lump by any other specialist medical practitioner.
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> 4. On or about 6 April 1998 and/or 2 May 1998 and/or 3 October 1998 the Plaintiff:
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> (a) presented at the Practice complaining to the Defendant that the lump had grown to approximately twice its size since first complained of to the Defendant;
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> (b) was again told by the Defendant that it was fatty tissue and it was of no concern;
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> (c) accepted this explanation;
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> (d) was prescribed no treatment in relation to the lump by the Defendant;
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> (e) was not referred by the Defendant for any exploration of the lump by any other specialist medical practitioner."

[6] Although three alternative dates are alleged for the second consultation pleaded in paragraph 4 of the amended statement of claim, the appellant's evidence was that the second consultation took place in late October 1998.

[7] When the appellant mentioned the lump to rheumatologist, Dr Devereaux, whom he was consulting on 9 August 1999, investigations where put in train that lead to the excision of the lump 6 weeks later. The lump was a myxoid liposarcoma which had grown to encase the femoral artery and vein, so that the femoral vessels where resected and reconstructed. In late July 2000, following complications relating to the surgery, the appellant's left lower leg was amputated.

Decision of the trial judge

[8] The reliability of the appellant's account of the February 1998 consultation with the respondent was in issue.

[9] The learned trial judge summarised the appellant's evidence of his consultation with the respondent in February 1998 and of his other consultations with the defendant and Dr Devereaux until August 1999.

[10] Although the learned trial judge observed that the appellant presented in the witness box as an "easy-going man, generally given to candour" and found that the appellant was the kind of man to have complained of a lump with the characteristics he thought he disclosed in early February 1998, the learned trial judge concluded at paras [22] and [23] of the reasons:

> "But his ability to recall events in 1998 is poor – witness the forgotten examination by Dr Devereaux; and, in important respects, his recollection is inconsistent with established facts, especially concerning the February and October consultations.
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> In all the circumstances, I am not satisfied that, more probably than not, his recollection of the critical February 1998 consultation is reliable."

Issue on appeal

[11] The main issue on the appeal was whether the learned trial judge's finding that the appellant failed to prove that he had made a disclosure of the lump in his left side to the respondent in February 1998 (which can be restated as a finding that the appellant did not disclose that lump to the respondent in February 1998) was against the evidence.

[12] A subsidiary issue on the appeal was whether or not this finding of the learned trial judge was based to any substantial degree on the credibility or demeanour of the appellant or the respondent.

Relevant findings of fact

[13] The learned trial judge's summary of the evidence of the critical consultations given by the appellant is found at paras [4] to [6] of the reasons:

> "[4] According to the plaintiff, on a day in 1998, while standing in the shower, he detected a lump on the inside of his left thigh, shaped like a football, about 2½ inches long and about 1½ inches wide. About a week later, in "early February", he consulted the defendant. He did not attend to ask about the lump, which was not causing discomfort. Rather, he said in his evidence-in-chief, he was there "about my rheumatoid arthritis because sometimes I get scrips off" the defendant for that ailment. Generally, he got his prescriptions for his rheumatoid arthritis and diabetes at the Princess Alexandra Hospital; occasionally the defendant was the prescribing doctor.
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> [5] While there for the prescription, he happened, he said, to ask the defendant, "Can you have a look at this? What is it?", indicating the lump. On his account, the defendant asked him to "stand up" and, after feeling the inside of the leg, said: "It's only fatty tissue: nothing to worry about".
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> [6] The plaintiff maintains that the lump had doubled in size by "late" October 1998, when he saw the defendant for the primary purpose of having it further investigated. The plaintiff says that he told the defendant that the lump was "getting a lot bigger", that the defendant felt it and said, "Don't worry about it. It's only fatty tissue," and that he again "accepted" that diagnosis and assurance."

[14] The respondent had no notes of consultations with the appellant before mid-February 1998, as it was common ground that those records of the respondent had been destroyed by fire. The respondent did not recall having seen the appellant in February 1998, but records of the Health Insurance Commission showed that the appellant consulted the respondent on 3 and 12 February 1998. The learned trial judge found that those consultations concerned an assessment of the heart, not a prescription. This conclusion was based on the fact that there was produced in evidence as Exhibit 31 a statement of account to the appellant from the Sunnybank Cardiopulmonary Diagnostic Service for a service performed on 11 February 1998 described as "Exercise ECG". The statement of account stated that the referring doctor was the respondent and the referral date was 3 February 1998. The learned trial judge therefore found that the consultation on 12 February 1998 "very likely concerned the test results". The learned trial judge therefore made the express finding that "the notion that either February consultation was to obtain a scrip seems mistaken".

[15] The learned trial judge set out another indication which he found of the appellant's recollection of events in 1998 not being accurate at paras [11] to [14] of the reasons:

> "[11] Dr Devereaux once used to treat the plaintiff at the Princess Alexandra Hospital Rheumatology Clinic. On 6 April 1998, on

> the defendant's referral, Dr Devereaux first saw him as a private patient. Treating him as a new patient, Dr Devereaux re-took medical and social histories. And he performed a "complete examination".
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> [12] The plaintiff stripped to his underpants for the assessment. Dr Devereaux weighed him. He assessed the extent of loss of shoulder rotation. He detected a loss of extension to both elbows, synovitis at both wrists, irritable hips, quadriceps wasting, effusions and crepitus affecting both knees, and synovitis of joints of the feet. The examination involved the plaintiff's lying on his back as each leg was rotated, Dr Devereaux holding the lower part. Wasting in the thigh muscle above the knees was visible. An abdominal examination involved palpation to detect "reasonable masses": none was found.
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> [13] The plaintiff recounted his medical history, which included: gastritis, treated with antibiotics; iron deficiency associated with diarrhoea; diabetes, controlled by medication; sleep apnoea, controlled with a positive pressure mask; impotence reviewed by a urologist; and atypical chest pain, the subject of a "recent normal stress test" (Ex 37 – no doubt a reference to the 11 February assessment). But although Dr Devereaux had asked the plaintiff to reveal "exactly what problems and what difficulties … he was having", no mention was made of a lump near the thigh. Nor did Dr Devereaux see such a thing.
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> [14] The plaintiff can recall nothing of this thorough examination.

[16] The learned trial judge made the following observations on the appellant's failure to mention the lump to Dr Devereaux from 6 April 1998 until August 1999:

> "[15] Accepting that he did see Dr Devereaux for that examination within two months or so of the occasion on which he says he disclosed the lump to the defendant, the plaintiff explains the omission to mention the lump on the basis that he had recently been assured by the defendant that it was of no concern.
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> [16] Not for another 16 months did the plaintiff tell Dr Devereaux of the lump. In the meantime, he saw Dr Devereaux at least another five times: on 16 July, 7 September and 7 December 1998, and 8 February and 10 May 1999."

[17] The learned trial judge also found that the appellant's account of his "late" October 1998 consultation with the respondent which he stated related specifically to the growing lump was not accurate either. The analysis of the evidence on this aspect is found at paras [18] to [21] of the reasons:

"[18] The defendant's concise, contemporaneous notes disclose that he saw the plaintiff on 6 April 1998 about blood sugar level monitoring. On 2 May, the plaintiff presented with an upper respiratory tract infection. An attendance on 3 October concerned a bunion on the foot; the plaintiff sought an exemption from wearing safety boots at work. These things are disclosed in the defendant's records (Ex 36). Those notes also reveal that the defendant saw the plaintiff on three occasions towards the end of October 1998. But the notes do not accord with the plaintiff's memory of the claimed "late" October inquiry about the lump.

[19] The notes reveal the following encounters towards the end of 1998. A long consultation on 24 October concerned an ingrown nail in the right little toe. A section of the nail was removed, a dressing supplied, and antibiotics prescribed. Two days later, the plaintiff was complaining of soreness in the toe. Under local anaesthetic, an incision resulted in removal of ungual fold. Next day, the wound was cleaned, an oral antibiotic prescribed, and the plaintiff asked to come back in a week. When he did return – on 21 December – he complained of a small cyst near the inner aspect of the right testicle. A left knee effusion associated with the rheumatoid arthritis was also observed.

[20] In short, contrary to his testimony, the plaintiff did not see the defendant to discuss the lump. He was at the surgery in October, and in December, for other reasons.

[21] The defendant's notes of the 1998 consultations contain no reference to a complaint about, or an observation of, the lump that was the tumour. And if that lump – which the plaintiff says was by late October large and still growing – had been mentioned, or seen by the defendant, it would, I am persuaded, have been recorded, as was the testicular cyst mentioned in December. Two things in particular point to that conclusion. First, the kind of notes kept suggest as much. Secondly, the defendant is sure that he would not have dismissed as mere "fatty tissue" a lump of the size, firm consistency and intra-muscular location of that which the plaintiff says was disclosed. Having seen and heard him explain why, his confidence in that respect does not strike me as very likely to be misplaced."

Characterisation of the critical finding

[18] It is apparent from the above findings of fact made by the learned trial judge that the critical finding that the appellant did not disclose the lump to the respondent in a February 1998 consultation was made after an evaluation of the evidence of both the appellant and the respondent in the context of the manner in which each gave his oral evidence. It suffices to refer to the conclusion in para 21 of the reasons which shows that the learned trial judge was impressed with the evidence of the

respondent as to what his approach was in examining a patient who presented with a lump such as a lipoma. (A submission was made by Mr Dan Kelly of counsel on behalf of the appellant that little weight should have been given to this evidence of the respondent about his practice, as he had never seen before a lump with the features which the appellant recalled that his lump had in February 1998. The point, however, of the respondent's evidence was not what his practice was in relation to a specific lump of that nature, but what his usual practice was when dealing with a lump such as a lipoma.)

[19] There is no basis, whatsoever, for the contention advanced on behalf of the appellant, relying on *Warren v Coombes* (1979) 142 CLR 531, 551, that this Court is in as good a position as the learned trial judge to decide whether or not the recollection of the appellant as to the critical February 1998 consultation was reliable.

Whether the critical finding was against the weight of the evidence

[20] The decision in *Warren v Coombes* (1979) 142 CLR 531 is described in *Fox v Percy* (2003) 197 ALR 201, 208, 209 [25] and [27] as illustrating the obligation of the appellate court. The respondent relied on the decisions of the High Court in *Abalos v Australian Postal Commission* (1990) 171 CLR 167 and *Devries v Australian National Railways Commission* (1993) 177 CLR 472 which confirmed the need of the appellate court to respect the decisions of a trial judge, particularly where the decision might be affected by the impression of the trial judge about the credibility of witnesses who appeared before the trial judge. Observations on how these approaches are reconciled were made in the joint judgment of Gleeson CJ and Gummow and Kirby JJ in *Fox v Percy* (2003) 197 ALR 201, 209:

> "**[28]** Over more than a century, this court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.
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> **[29]** That this is so is demonstrated in several recent decisions of this court. In some, quite rare, cases, although the facts fall short of being 'incontrovertible', an appellate conclusion may be reached that the decision at trial is 'glaringly improbable' or 'contrary to compelling inferences' in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must 'not shrink from giving effect to' its own conclusion. Finality in litigation is highly desirable

> Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation in reminders of the general advantages of the trial over the appellate process." *(footnotes omitted)*

[21] One of the matters on which great weight was placed by the appellant's counsel in submitting that the learned trial judge had failed to take into account evidence that was favourable to the appellant in assessing the accuracy of his recollection about what happened in February 1998 was that the appellant in his evidence was able to identify the date of the February consultation in which he said he showed the lump to the respondent as being before he started work at Stowe. The appellant commenced work at Stowe on 19 February 1998 after a considerable period of being out of work. It was submitted that as the appellant's commencement of work at Stowe was a significant event in the appellant's life, his evidence on the timing of the consultation with the respondent in relation to this event was supportive of his recollection of what happened at that consultation. The learned trial judge did not mention this aspect of the appellant's evidence in the reasons.

[22] Although the work start date of 19 February 1998 is a date verifiable by other evidence, there is nothing in the appellant's evidence to link what he said occurred at his consultation with the respondent in February 1998 about the lump with commencement of this employment by the appellant. This evidence of fixing the relevant consultation by reference to the work start date is another way of expressing the appellant's evidence about the timing of his consultation with the respondent. It does not have significance as being supportive of what happened at one of the consultations by the appellant with the respondent in February 1998.

[23] Another matter relied on by the appellant as being against the learned trial judge's critical finding is that the respondent conceded in cross-examination that it was possible, but "highly unlikely" that the appellant may have mentioned the lump in his left thigh to the respondent during one of the February consultations. The learned trial judge's findings were on the basis that the respondent had no independent recollection of the consultations with the appellant in February which were verified by the records of the Health Insurance Commission. The concession, which was highly qualified, was properly made in the absence of any notes to which the respondent could refer. The significance of the concession depended on the other evidence about what was likely to have occurred at those consultations in February. This is what the learned trial judge dealt with at length in his reasons.

[24] One of the matters which the learned trial judge relied on to make the critical finding was that the appellant could recall nothing of the thorough examination which he underwent with Dr Devereaux on 6 April 1998. It is submitted that the learned trial judge wrongly took into account the appellant's failure to recall the complete examination undertaken of him by Dr Devereaux on 6 April 1998. The basis of that submission is that it is put that the applicant did recall some aspects of the examination, though not all of them.

[25] The appellant consulted Dr Devereaux on 6 April 1998 on a referral from the respondent. That consultation was the first occasion on which the appellant had

seen Dr Devereaux as a private patient. Dr Devereaux could remember having seen the appellant previously at the rheumatology clinic at the Princess Alexandra Hospital. Dr Devereaux reported to the respondent on the examination that took place on 6 April 1998 by letter of that date (Exhibit 37). Dr Devereaux stated in evidence that he retook a history of the appellant on this occasion and performed a complete examination. Dr Devereaux described what the complete examination involved, by referring to his notes.

[26] The appellant was cross-examined on the detail of the taking of the social history by Dr Devereaux and what Dr Devereaux stated was comprised in the medical examination. Although there were some aspects of that medical examination that the appellant conceded occurred, most of the responses of the appellant were that he did not tell Dr Devereaux particular things which Dr Devereaux had recorded in his notes or that he did not recall aspects of the examination which Dr Devereaux stated occurred. A review of the evidence given by the appellant shows that the appellant did not have a true recollection of what was described by Dr Devereaux as a complete medical examination. There is no basis for attacking the conclusion of the learned trial judge that the appellant failed to recollect this thorough examination.

[27] It was common ground that the appellant did not mention the lump to Dr Devereaux during the examination on 6 April 1998. It is submitted on behalf of the appellant that the learned trial judge placed too much reliance on the appellant's failure to mention the lump at this consultation. Although the learned trial judge referred in the reasons to the failure of the appellant to mention the lump to Dr Devereaux from 6 April 1998 until he ultimately did on 9 August 1999, the learned trial judge referred in the reasons to the appellant's explanation for failing to do so on 6 April 1998. The learned trial judge's critical finding was made on the basis of his conclusion about the appellant's recollection of events in 1998, rather than by placing reliance on the appellant's failure to mention the lump to Dr Devereaux.

[28] Even taking into account each piece of evidence which the appellant now relies on to attack the learned trial judge's critical finding, the appellant falls far short of showing that this was a case where the learned trial judge's critical finding was "glaringly improbable" or "contrary to compelling inferences".

Other matters

[29] One of the grounds of appeal was that the learned trial judge erred by taking into account a hypothesis that the appellant had communicated his complaint to another doctor in 1998, when there was no evidence to support that hypothesis. This ground of appeal relates to para [26] of the reasons which provides:

> "[26] Finally, the plaintiff associates the initial disclosure of the lump with an attendance to get a scrip. In 1998, he was commonly obtaining his prescriptions at the Princess Alexandra Hospital. There is, I suppose, a chance that a disclosure of the kind he has come to consider he made to the defendant may, at some stage, have been communicated to one of the several other doctors who prescribed his medication throughout 1998. However that may be, as he has failed to prove that he made such a disclosure to the defendant in February 1998, his claim fails."

> This hypothesis was not part of the reasons by which the learned trial judge reached the critical finding. The learned trial judge was merely speculating on how the appellant whom he had found given to candour could have been mistaken about his recollection.

[30] As the appellant has been unsuccessful in appealing against the learned trial judge's critical finding, it is unnecessary for any other findings to be made in relation to the other liability and the quantum issues that arose between the appellant and the respondent at the trial.

[31] It follows that the appeal should be dismissed with costs.