SUPREME COURT OF QUEENSLAND

CITATION:	*Hering v Martin & Anor* [2004] QCA 70
PARTIES:	**MANFRED KARL HERING** (plaintiff/appellant) v **GARRY THOMAS MARTIN** (first defendant) **SUNCORP GENERAL INSURANCE LIMITED** ACN 075 695 966 (second defendant/respondent)
FILE NO/S:	Appeal No 7206 of 2003 DC No 242 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Liability Only
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	19 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2004
JUDGES:	Davies and Williams JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellant to pay respondent's costs of the appeal to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – PARTICULAR CASES – where injury arose from motor vehicle accident – where there were no other witnesses other than the parties involved – where expert evidence was given as to the likely sequence of events – where trial judge was unable to conclude which party's case was more probable *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842, cited *Devries v Australian National Railways Commission* (1993) 177 CLR 472, cited *Fox v Percy* (2003) 77 ALJR 989, cited

Nesterczuk v Mortimore (1965) 115 CLR 140, cited

COUNSEL:	R W Trotter for the appellant S C Williams QC, with P W Hackett, for the respondent
SOLICITORS:	Schultz Toomey O'Brien Lawyers (Mooloolaba) for the appellant Quinlan Miller & Treston for the respondent

[1] **DAVIES JA:** I agree with the reasons for judgment of McMurdo J and with the orders he proposes.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McMurdo J and there is nothing I wish to add thereto. The appeal should be dismissed with costs to be assessed.

[3] **McMURDO J:** On 11 May 1997, the appellant was driving home along Stanley River Road, Maleny, when his car collided with a tractor travelling in the opposite direction. He was injured in the collision and sued the tractor's driver, Mr Martin, and his insurer, the present respondent, in the District Court. Quantum was admitted in the sum of $110,000. Each driver claimed that the collision was caused by the other's driving partly on his incorrect side of the road. The trial judge felt unable to conclude that one version was more probable than the other, and so he held that the appellant had not proved his case and his claim should be dismissed. The appellant seeks orders to set that aside and for judgment in the admitted sum.

[4] The determination of the question of negligence effectively turned upon whether the appellant proved that, more probably than not, the tractor was partly on its wrong side of the road. No one other than the two drivers saw this collision occur. Each of them was adamant that no part of his vehicle crossed the pair of white lines which divided the road. The trial judge found the plaintiff's evidence on some matters of detail to be less probable than that of the defendant. His Honour found the appellant reconstructed his account "to a significant extent", and "particularly of what occurred after impact". Mr Martin was found to be "impressive and careful" and "reliable and consistent" as a witness leading his Honour to say that he was not "prepared to reject his evidence or to conclude that I prefer the plaintiff's evidence to his". The case was tried in July 2003, which was more than six years from the collision. That passage of time was one matter which left his Honour in a position in which he felt "unable to make any positive finding as to where the initial impact occurred" with the result that the appellant had failed to discharge his onus.

[5] This appeal then challenges the correctness of the trial judge's assessment of the credibility of these two witnesses. The appellant's argument accepts this, but it is said that the trial judge's conclusion is "glaringly improbable" and is inconsistent with the "incontrovertible evidence".[1]

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[1] *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479; *Fox v Percy* (2003) 77 ALJR 989 at 994

[6] Each side called evidence from an engineer who expressed opinions as to what could or could not be made of photographs of the damage to the vehicles and of the various marks on or near the road in the vicinity of where the collision occurred. The photographs were taken by one or other of the parties within a day or two of the accident. His Honour described the photographs as being potentially misleading, as each of the experts had accepted, because what was depicted depended upon things such as perspective and light conditions.

[7] The appellant's case is that there were certain incontrovertible facts which effectively compelled a conclusion that the collision occurred on his side of the road. Firstly, it is said that the photographs of skid marks, taken together with evidence given by each of the experts, required that conclusion. Secondly, the evidence of markings just off the tractor's side of the road are said to be inconsistent with Mr Martin's evidence.

[8] As to the skid marks, the photographs showed three sets of marks. The first were three marks on the appellant's side of the road; the second were on the other side and further along the road in the appellant's direction of travel; and the third were further along the road again but on the appellant's side. The expert called by the appellant said that the first set of marks, if made by the same vehicle, were made as the vehicle was travelling with a clockwise yaw, resulting from a very significant force upon it. As this first set of marks was entirely upon the appellant's correct side, it followed in this expert's view that the initial impact was upon that side. In the appellant's submission, there was common ground amongst the experts in relation to the significance of this first set of marks, and it was said that his Honour misunderstood the experts' evidence at least in this respect. That submission does not fairly describe the evidence of the respondent's expert, because at no time did he accept the essential premise that each of the skid marks in this first set were caused by the same vehicle. He appears to have agreed that if they were the marks of the one vehicle, they would indicate a clockwise yaw motion following a collision. But at no time did he accept the underlying premise of the other expert's view. His Honour was not obliged to accept that premise, because it was not so unlikely that one or more of the skid marks in this first set had been caused by another vehicle at another time. There was evidence that this stretch of road had seen a number of serious accidents and the particular bend in the road made it not unlikely that another vehicle had left one or more of these marks. The shortcomings of these photographs from which the experts had to work made it more difficult to say that the marks must have been caused by the appellant's car. It is wrong then to say that the experts agreed that the first set of skid marks showed that the appellant's car went into this clockwise yaw on his side of the road, or more generally, that that is where the collision occurred.

[9] The appellant placed particular reliance upon photographs showing a mark left by a tyre on the grassy verge of the tractor's side of the road. The experts agreed that this mark was caused by the tractor under the force of the impact. Having regard to the width of the tractor, the width of the road and the location of this mark just off the road, it is said that the tractor could not have swerved to the left from a point on its correct side, as Mr Martin had described. His Honour thought that "the objective facts" made it more probable that the tractor did turn at the last moment than that, as the appellant had said, the tractor retained its line prior to the impact. Again, the difficulty with this submission is that it relies on the evidence of experts who are

reconstructing from photographs which they agreed could be misleading. Still the point has some force because the photographs do suggest that it was unlikely that Mr Martin had both driven on his correct side and swerved appreciably before the collision. This suggests an inaccuracy in Mr Martin's evidence, but not necessarily as to his evidence as to the critical matter, which was whether he was on his correct side. The trial judge did not accept the entirety of Mr Martin's evidence: for example he accepted the evidence of a witness who had passed the tractor just before this accident who said that the tractor was partly on its wrong side of the road. This was inconsistent with Mr Martin's evidence that he always drove on the correct side and with his left wheels slightly off the road. The evidence as to this mark left by the tractor did not make Mr Martin's evidence as a whole inherently improbable, nor did it require the conclusion, taken with other evidence, that the collision occurred on the appellant's side.

[10] Other criticisms are made on Mr Martin's evidence in the extensive written submissions for the appellant as to certain details of Mr Martin's evidence. For example, there are references to apparent inconsistencies between his evidence at the trial and one or more statements which he had previously made. At least most of these criticisms were points reasonably made to the trial judge but, taken as a whole, they do not show that his Honour's conclusion was glaringly improbable or that he misused the advantage he had as the trial judge in assessing the appellant's credibility. Ultimately the appellant's arguments show that the case could have been decided differently, but that is not a basis for setting aside this judgment.

[11] It is a relatively unusual case where a trial judge is unable to conclude which of the respective cases is the more probable but his Honour's reasons show why it was his view that, like *Nesterczuk v Mortimore* (1965) 115 CLR 140, this was such a case. Ultimately, the result is not glaringly improbable, and nor is it inconsistent with facts incontrovertibly established. In my view the appeal should be dismissed and the appellant should pay the respondent's costs of the appeal to be assessed.