SUPREME COURT OF QUEENSLAND

CITATION:	*McChesney v Singh & Ors* [2004] QCA 217
PARTIES:	**TONI ANNE McCHESNEY (by her litigation guardian JANICE ANNE McCHESNEY)** (plaintiff/respondent) **v** **MUKHTIAR SINGH** (first defendant) **PETER AARON HOPKINS** (second defendant) **SUNCORP INSURANCE & FINANCE** (third defendant) **SUNCORP GENERAL INSURANCE LIMITED** ACN 075 695 966 (fourth defendant/appellant) **FAI GENERAL INSURANCE COMPANY LIMITED** ACN 000 327 855 (fifth defendant)
FILE NO/S:	Appeal No 11991 of 2003 SC No 8851 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2004
JUDGES:	Jerrard JA, Atkinson and Philippides JJ Judgment of the Court
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF THE WHOLE ACTION – WHERE MONEY PAID INTO COURT OR OFFER OF COMPRIMISE MADE – OFFER OF COMPROMISE MADE - where appellant made an offer to settle that was not accepted by the respondent and the respondent obtained a judgment that was not more favourable than the offer to settle - where costs awarded to respondent - whether the learned primary judge erred in the exercise of his discretion pursuant to r 361(2) *Uniform Civil Procedure Rules* 1999 (Qld) in finding that there were circumstances

which justified departure from r 361(2)(b) - whether respondent had an informed opportunity to assess the chances of either side doing better than the offer to settle - where offer to settle evaluated in the light of circumstances existing at time of the offer

Uniform Civil Procedure Rules 1999 (Qld), r 361

Campbell v Jones [2002] QCA 332; [2003] 1 Qd R 630, cited
Castro v Hillery [2002] QCA 359; [2003] 1 Qd R 651, applied
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24, cited
Morgan v Johnson (1998) 44 NSWLR 578, considered

COUNSEL: S C Williams QC, with M J Burns, for the appellant
M Grant-Taylor SC, with C Heyworth-Smith, for the respondent

SOLICITORS: Quinlan Miller & Treston for the appellant
Murphy Schmidt for the respondent

[1] **THE COURT:**

Background

[2] This is an appeal against an order made at first instance that the appellant pay the respondent's costs of and incidental to the proceeding to be assessed on the standard basis.

[3] On 7 October 2002 judgment was given in the amount of $1,885,276 in favour of the respondent in an action for damages for personal injuries sustained in a motor vehicle accident. Certain remaining issues were left for further hearing on 18 March 2003. That culminated in orders being made on 4 April 2003 that the judgment sum be increased to $1,918,215.75 and that the appellant pay, in addition to the judgment sum, the amount of $119,830 as management fees. The total amount awarded to the respondent was therefore $2,038,045.75. The issue of costs was deferred, pending an appeal by the respondent against the damages awarded. On 14 November 2003 the Court of Appeal dismissed that appeal.

The Decision as to Costs

[4] On 17 December 2003, his Honour heard submissions as to costs. Relevant to this issue was the fact that on 21 September 2001 the appellant had made a formal Offer to Settle the proceedings in the sum of $2,500,000, exclusive of rehabilitation expenses. This amounted to a net offer to settle in the sum of $2,654,289.18. It was thus not in dispute that the respondent had obtained a judgment that was "not more favourable to the respondent than the offer to settle", invoking r 361 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the *UCPR*).

[5] Before the learned trial judge it was argued by the appellant, as it was argued before this court, that the appropriate order for costs was one that:

(a) the appellant pay the respondent's costs of and incidental to the proceedings, calculated on the standard basis, up to and including 21 September 2001; and
(b) the respondent pay the appellant's costs of and incidental to the proceeding, calculated on the standard basis, from 22 September 2001.

[6] The learned trial judge rejected those submissions, and instead in the exercise of his discretion under r 361 ordered that the appellant pay the respondent's costs of and incidental to the proceeding to be assessed on the standard basis. It is appropriate to set out his Honour's reasoning in some detail. His Honour stated:

> "Three particular aspects of the reasons of judgment of 7 October 2002 were focused on by the defendant. The first was that there had been a substantial reduction on the gratuitous assistance claim. It was accepted by the defendant that the finding was not premised on dishonesty by family witnesses although a claim was made that it was exaggerated. However, both the number of hours per week and the rate per hour at which services were to be charged were reduced by me.
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> …
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> The second and third matters were concerned with the component for ongoing care which was hotly disputed at the trial.
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> Aspects of charging for commercial care, including some of the fundamental issues about what was reasonably necessary in the process of delivering such care, were called into question. The view taken by me in that regard was a significant factor in substantially reducing the amount claimed by the plaintiff under that heading. One other aspect was whether the number of hours of care being funded by the defendant in the pre-trial period under its obligation under the *Motor Accident Insurance Act* was actually being provided. There was surveillance evidence on that issue.
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> The surveillance was conducted after the offer was made, its existence was not disclosed to the plaintiff before the trial since an order was obtained from an applications Judge relieving the defendant of the obligation to make disclosure. The validity of the conclusions to be drawn from the surveillance evidence were vigorously contested at the trial. Given the focus on the issue at trial it was necessary for findings to be made on it. The finding was that the evidence of the carer was unreliable on the issue; paragraph 41. However, that finding was only one factor among several contributing to a finding as to the number of hours of care and the hourly value of care that was reasonably necessary; paragraphs 37 and 38 relate to this.

Mr Grant-Taylor also makes the point that there was evidence from an officer of Suncorp that an assessment had been made at the level of care being offered by its officers in this regard as well. But in any event, the fact that there was surveillance evidence was not an operating factor at the time the offer was made.

It was common ground that it was incumbent upon the plaintiff's legal advisers to make a realistic assessment of the claim in deciding whether an offer made pre-trial should be accepted. It was submitted that the plaintiff's case was based on a gross exaggeration of the need for care. It should be said at the outset that the case is not one where the plaintiff was personally responsible for the ambit of the claim proving to be wider than justified. The plaintiff was a significantly brain-damaged person. It is not in the same category as a case where the plaintiff has concealed the true state of health in the broad sense and the surveillance evidence discovers facts otherwise peculiarly within the plaintiff's knowledge tending to disprove the claim.

A major part of the discrepancy was concerned with an argument about the proper extent of what might be charged as part of necessary care. In the way in which the issue arose it was, in my experience, a novel point. There was no reference to similar cases in argument.

To the extent that surveillance evidence is one factor in testing the validity of the propositions advanced by the parties I have already noted that it was unknown to the plaintiff at the commencement of the trial that there was such evidence. The defendant's submissions suggested that the plaintiff's parents and/or legal adviser should have played a role in checking to see that what was being paid for by the defendant was in fact provided …

It is not a case where there is any evidence that they should have had suspicions about the matter in my view. It would have been impractical and, in my view, unproductive to attempt to obtain a reliable account from the plaintiff herself as to what hours were actually being performed. Further, the primary responsibility once the request for care is made lies upon the defendant to provide an appropriate level of care.

In the circumstances, I do not accept the maintenance of the plaintiff's position in this regard lacked a proper reason. It was based on the fact that an agency engaged by the defendant was providing services of the kind delivered by the caring profession pursuant to the defendant's obligation under the Act. In the absence of evidence causing alarm bells to ring there was no onus upon the plaintiff or her advisers to carry out their own surveillance. …

While there is some force in the defendant's submissions that some of the components relied on by the plaintiff proved to be

> unrealistically high the surveillance evidence was a new factor relied on by the defendant. While the approach taken in the reasons for judgment gives it secondary rather than primary significance in resolving the issue it was nevertheless a new element capable of having an effect upon a consideration of the adequacy of the offer.
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> I do not consider that it is a proper approach where that is the case to analyse whether an offer made without that information was reasonable on the basis of the different view of the facts then available to the parties. A passage from the judgment of Justice Williams in *Castro v Hillery* (2002) QCA 359, particularly paragraphs 72 and 75, supports this approach."

The grounds of appeal

[7] The appellant contended that the learned trial judge failed properly to take into consideration that the offer had not been bettered by the assessment of damages. It was submitted that the appellant ought not bear the responsibility and costs for the faults which, it was said, were entirely "on the respondent's side of the record." In this regard it was contended that the respondent's litigation guardian, and other witnesses on her side of the record, had participated in a gross exaggeration of the care claim and that the respondent's legal advisers had not critically analysed those claims when an inquiry would have detected the exaggerations.

[8] An additional ground raised was that the learned trial judge had misdirected himself in holding that the surveillance evidence was a "new factor" and a "new element capable of having an effect upon a consideration of the adequacy of the offer", it being contended that the surveillance evidence did no more than confirm the respondent's physical care needs as then indicated by the respondent's witnesses, Dr Hopkins and Ms Christensen.

[9] It was a further ground of appeal that the learned trial judge's finding that the instant case was "not a case where there [was] any evidence that they (the parents and legal advisers) should have had suspicions" about the extent to which care had in fact been provided to the respondent was "untenable, unsustainable and plainly wrong". It was argued that the learned trial judge failed to appreciate that the respondent's account would have afforded grounds for such a suspicion and, further, that the learned trial judge failed to take into account that the respondent's parents, including the respondent's mother (and litigation guardian), gave evidence which established that the gratuitous care claims were quite unsustainable.

[10] It was in addition contended that the learned trial judge acted on incorrect principles in concluding that the absence of personal responsibility by the brain-damaged respondent for the ambit of the exaggerated care claims was a relevant factor in the determination of the exercise of his discretion. It was said that the learned trial judge underestimated the capacity of the respondent to critically appraise the formal offer to settle that had been made by the appellant.

The relevant principles

[11] Rule 361 of the *UCPR* relevantly provides:

"361(1) This rule applies if -

(a) the defendant makes an offer to settle that is not accepted by the plaintiff and the plaintiff obtains a judgment that is not more favourable to the plaintiff than the offer to settle; and
(b) the court is satisfied that the defendant was at all material times willing and able to carry out what was proposed in the offer.

(2) Unless a party shows another order for costs is appropriate in the circumstances, the court must -

(a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer to settle; and
(b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer to settle."

[12] Pursuant to r 361 of the *UCPR* the trial judge's discretion is enlivened when "a party shows that another order for costs is appropriate in the circumstances." In *Castro v Hillery* [2003] 1 Qd R 651, the Court of Appeal in considering the considerations relevant to the exercise of the discretion emphasised the need to consider whether the recipient of the offer has had an informed opportunity to assess the chances of either side doing better than the offer.[1] This is to be assessed in the light of the circumstances as they existed at the time of the offer.[2]

[13] The appellant placed reliance on *Morgan v Johnson* (1998) 44 NSWLR 578, where the Court of Appeal of New South Wales had regard to the principles applicable to the exercise of the discretion under the analogous costs provisions of the *District Court Rules* 1973 (NSW), which mandated a consequence for not accepting an offer more favourable than the judgment awarded, "unless the Court otherwise ordered". At 581-582 the Court set out the following principles as guiding the exercise of the discretion under the New South Wales rules:

(1) The purpose of the rule is to encourage the proper compromise of litigation, in the private interests of individual litigants and the public interest of the prompt and economical disposal of litigation;
(2) The aim is to oblige the offeree to give serious thought to the risk involved in non-acceptance;
(3) The prima facie consequence of non-acceptance will be that the rule will be enforced against the non-accepting party. This is because, from the time of non-acceptance "notionally the real cause and occasion of the litigation is the attitude adopted by [the party] which has rejected the compromise".
(4) Lying behind the rule is the common knowledge that "litigation is inescapably chancy". For this reason, the ordinary provision is expected to apply in the ordinary case. The mere fact that it was reasonable for the litigant to take the view that he or she did in rejecting the offer is not enough to displace the rule.

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1 *Campbell v Jones* [2003] 1 Qd R 630 at 647-648.
2 *Castro v Hillery*.

Was the discretion properly exercised?

[14] In considering whether the learned trial judge erred in the exercise of his discretion, it must be borne in mind that an appellate court may not overturn a judicial decision solely on the basis of the appellate court's mere preference for a different result.[3]

[15] We are unable to accept the appellant's contention that the learned trial judge erred in regarding the surveillance evidence as a "new element capable of having an effect upon a consideration of the adequacy of the offer." It was contended that apart from its existence as a fact, that evidence did nothing more than confirm the medical evidence in terms of the respondent's true commercial care needs and confirm what her litigation guardian and other gratuitous care providers must have already known as to the substantial degree to which their claims for gratuitous care had been overstated. This however obscures the significance of the surveillance evidence.

[16] The surveillance which the appellant caused to be conducted for three weeks in November and December 2001 and in April 2002 resulted in the appellant becoming aware by December 2001 that a Mr Butler, who was virtually the sole carer of the respondent, had been engaging in grossly overstating the care which he had been providing to the respondent. It also led to the appellant becoming aware that the extent of the commercial care in fact being provided was not the claimed 38 hours per week, but instead in the vicinity of 15 hours per week.

[17] It is clear that the offer of 21 September 2001 had been made and considered on the common assumption that the respondent's existing need for paid commercial care was reflected in the 38 hours per week care then being provided and paid for by the appellant. On that basis, the offer made was a serious one requiring careful consideration. The respondent was only likely to better it if the respondent received significantly more for gratuitous care than that which was reflected in the offer, or if the respondent received an additional allowance for pregnancy and a child. His Honour in fact found that a future pregnancy was a predicted and probable occurrence. On the basis of the 38 hours per week figure, combined with an additional allowance for the contingency of pregnancy, the respondent could reasonably have expected to have bettered the offer.

[18] Notwithstanding that the appellant had discovered the deception by Mr Butler, it continued to make payments for commercial care in accordance with the false claims generated by Mr Butler, and went so far as to pay even greater claims for commercial care which the appellant also knew to be falsely generated by Mr Butler. In addition, on 6 June 2002, the appellant obtained an order permitting non disclosure to the respondent's legal representatives of the video evidence it had obtained which revealed the deception. The purpose of so concealing the video evidence, and indeed of engaging in the conduct of continuing to pay the inflated commercial care claims, was not to lay a trap for a malingering claimant, but simply to conceal Mr Butler's deception from the representatives of the respondent. Of course had the appellant ceased to make payments in accordance with the inflated claims of Mr Butler, the respondent's representatives were likely to have been alerted to the true state of affairs as to the hours of paid commercial care being provided.

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3 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 47- 48.

[19] The appellant's conduct therefore had the effect of encouraging the respondent's representatives to continue with the litigation on the basis of the false assumption as to the commercial care being provided. Had the knowledge that the respondent was receiving far less than 38 hours commercial care been disclosed to the respondent's legal representatives prior to trial, a trial would have been far less likely. The appellant's forensic choice, in not telling the respondent's legal guardian of the amount of commercial care actually being received and meeting the respondent's apparent need, tilted the matter in favour of a trial eventuating in which the appellant would only then reveal the real facts.

[20] While there is some merit in the argument that some doubts as to the quantum of the commercial care being rendered may have arisen if the respondent's representatives had inquired into and examined matters more closely, including the respondent's account, their conduct must be viewed in the light of the assurance arising from the appellant's ongoing payments which were to all intents and purposes made in accordance with the appellant's own established standard procedures for assessment of the respondent's needs. It is also true that an element of the respondent's case involved unsustainable claims for gratuitous care. However, those matters do not detract from the fact that the appellant's conduct outlined above placed it in a position where the matter was more likely than not to proceed to trial. In the circumstances of that conduct, which was unusual to say the least, it is difficult to escape the view that "the real cause occasioning the litigation" was the ongoing attitude and conduct adopted by the appellant rather than the respondent's initial rejection of the offer. The appellant cannot expect that a trial thus encouraged by it should be at the respondent's expense, particularly where the respondent still came (in the judgment sum) reasonably close to the offer actually made on different facts then commonly assumed by both sides.

[21] In the circumstances of this case, we consider that the order made by the learned trial judge was within the exercise of his discretion and reached in accordance with the applicable principles. We would accordingly dismiss the appeal with costs.