SUPREME COURT OF QUEENSLAND

CITATION:	*Wilson v Tomley & Anor* [2004] QCA 332
PARTIES:	**ROBERT NOEL WILSON** (plaintiff/appellant) **v** **DENNIS TOMLEY** (first defendant/first respondent) **ALLIANZ AUSTRALIA INSURANCE LIMITED** ACN 000 122 850 (second defendant/second respondent)
FILE NO/S:	Appeal No 3263 of 2004 DC No 754 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2004
JUDGES:	Williams JA and Helman and Dutney 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 – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – PRINCIPLES AND MODE OF APPORTIONMENT – Road Accident – Whether the trial judge erred in his finding of facts that led to an assessment of contributory negligence TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – ACTIONS FOR NEGLIGENCE – APPORTIONMENT OF DAMAGES – INTERSECTION AND JUNCTION ACCIDENTS – Whether the trial judge erred in his finding of facts that led to an assessment of contributory negligence
COUNSEL:	Mr J W Lee for the appellant Mr R J Lynch for the respondents
SOLICITORS:	Keith Scott & Associates for the appellant McInnes Wilson for the respondents

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Helman J and I agree with all that he has said therein. The appeal should be dismissed with costs.

[2] **HELMAN J:** The plaintiff is dissatisfied with the results of the trial of his claim, which took place on 15 and 16 March 2004 in the District Court at Brisbane. The claim arose from a collision between a motor car the plaintiff was driving and a utility truck driven by the first defendant and insured by the second defendant. The plaintiff claimed damages for negligence. He suffered personal injuries as a result of the collision, the damages for which the learned trial judge assessed at $128,805.93. His Honour found the first defendant had been negligent. Judgment was, however, entered on 16 March 2004 for the plaintiff against the second defendant for only $32,201.48 because his Honour found that the plaintiff had been guilty of contributory negligence he assessed at 75 per cent. It is his Honour's finding of facts that led to that assessment of contributory negligence that brings the plaintiff to this court. It is asserted on his behalf that that assessment should be set aside and judgment entered for the plaintiff for the $128,805.93; but no challenge was made on behalf of the plaintiff to the apportionment if this court is not persuaded that his Honour's finding of the facts in question should not be set aside.

[3] Before his Honour there were three witnesses to the collision: the plaintiff, the first defendant, and another driver called for the defendants, Mr Damian Devine. They each gave an account of the collision and the events immediately preceding and after it. It occurred on the morning of 31 May 2001 at the intersection of Wickham Terrace, College Road, and Gregory Terrace, Brisbane. The intersection was controlled by traffic lights. The first defendant was travelling in an easterly direction in College Road towards the intersection and proceeded onto it. Mr Devine was travelling in the same direction but some distance back from the first defendant. The plaintiff was travelling in the opposite direction to that of the first defendant: he came from Wickham Terrace and then turned to his right across the first defendant's path, intending to travel into Gregory Terrace. The collision then occurred.

[4] His Honour found that the first defendant saw a car turn across his path before the plaintiff's did, but failed to keep a proper lookout and to brake in a timely way once he realised that traffic was turning across his path. He was, his Honour found, travelling at a speed that would have allowed him to brake earlier if he had been keeping a proper lookout. His Honour assessed the plaintiff's contributory negligence as he did because he found that the plaintiff was faced with a green traffic light only, and not, as the plaintiff swore, a green light and a green turn-right arrow. Had that been the true state of the lights, the unchallenged evidence as to the sequence of lights at the intersection showed that the first defendant would have been facing a red light as he proceeded through the intersection. The first defendant swore that the light facing him was green and his Honour accepted that as correct, noting Mr Devine's evidence that the light facing the first defendant was green turning yellow as the first defendant's vehicle approached them. (The light I have referred to as yellow was also described as 'orange' and 'amber'. I have followed the description in exhibit 1 before his Honour, which gives the traffic signal timing sequence for the intersection on 31 May 2001.)

[5] On behalf of the plaintiff Mr Lee advanced a quite elaborate argument to the effect that his Honour's assessment of the facts was wrong in that it rested on

demonstrably unreliable evidence given by the first defendant and Mr Devine, the latter in particular. The evidence of both the first defendant and Mr Devine was internally inconsistent and the evidence of the first defendant was inconsistent with that of Mr Devine, Mr Lee argued.

[6] In his argument Mr Lee laid particular emphasis on discrepancies between an account given by Mr Devine in a written statement 'taken', as it is headed, on 1 July 2002 but signed on 19 February 2003 (exhibit 16) and the evidence he gave at the trial as to the lane he had been travelling in before the collision, that in which the first defendant was travelling, the point of impact on the plaintiff's car, and whether he saw any vehicle turn right before the plaintiff did. Those discrepancies demonstrated that Mr Devine was an 'unreliable historian', Mr Lee suggested. The first defendant gave evidence that he saw a vehicle go past him on his right after the collision whereas in a previous statement he said two vehicles had. But on the central issue in the case, the state of the traffic lights immediately before the collision, each of the first defendant and Mr Devine had been consistent in his account, although there was an obvious minor discrepancy between the two accounts: the first defendant said green facing him and Mr Devine said green turning yellow. That discrepancy did not assist the plaintiff's case because in either event the plaintiff would have had been facing a green light only and not a green light and a green turn-right arrow.

[7] His Honour was clearly alive to the inadequacies relied on on behalf of the plaintiff, but nonetheless found that he accepted the first defendant's case on the central issue. His Honour dealt with those matters in paragraphs 4, 5, 6, and 7 of his reasons:

> 4) The version of the Plaintiff was that he was executing a right turn on a green arrow having followed two other vehicles which were executing a similar manoeuvre. According to the Plaintiff the vehicles had been waiting for a green arrow to turn. The sequence of lights at the intersection is not in dispute. Exhibit 1 shows that if the Plaintiff was turning on a green arrow then the First Defendant was facing a red light. Prior to facing a green arrow there is a green light for vehicles travelling east and west. There is a red arrow for six seconds whilst both lights are green then the red arrow is off for six seconds whilst both directions face green and then the traffic travelling east face an amber light and then a red light. During that latter phase the traffic travelling east including those turning right face a green light. The Plaintiff's case is that it was only when the green arrow showed that he executed the turn. He said that a vehicle has stopped at the stop line when the vehicles turned right.
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> 5) The version given by the First Defendant was that he was travelling in the left hand lane. There is also an exit lane for vehicles leaving College Road to turn left into Gregory Terrace. As he approached the lights travelling about 50 km per hour he observed a vehicle turn across his path. This caused him to say that he 'would have reduced his speed' and that he 'maintained his speed if not de-accelerate'. He applied

his brakes when he saw the Plaintiff's vehicle. He said in cross examination that he 'observed straight down the road'. He said that he did not see the vehicle turning until he was about 10 metres from the stop bar or line. He conceded that as it was two years ago he 'had to work it out'. The First Defendant was attempting to remember but one had the distinct feeling that he was reconstructing some of his evidence.

6) The defence called Damian Devine. In his evidence, Mr. Devine conceded that he had made several mistakes in his statement (Exhibit 16). He said in his statement that the First Defendant collided with the Plaintiff's vehicle on the right side of the latter vehicle. That was clearly wrong on the facts and he admitted same. He also had himself travelling in the left lane in his statement whereas at trial he said he was in the right hand lane. Finally, in statement he stated that he saw some vehicles turn right before the Plaintiff's vehicle but at trial said that he did not see those vehicles. Mr. Devine had not read his statement since providing the corrected version in February 2003. In his statement Mr. Devine stated that the First Defendant's utility was in the right hand lane when in fact at trial he said it was travelling on his left side some 25-30 metres ahead. The lights he said were green turning orange as the First Defendant's vehicle approached them. Mr. Devine slowed down as the lights changed to amber. After the accident he turned left across the left hand lane to park his vehicle. In contradiction to the First Defendant's evidence, Mr. Devine said that there was no vehicle travelling through the intersection after the accident. He was able to park his vehicle on a traffic island as the vehicle in the left lane did not come right up to the stop bar and secondly the lights were red by then and traffic had stopped. The movements of his vehicle was more likely to have occurred in the manner which he stated, I find, if the light sequence was as he described it. There was no need to slow down unless the lights were changing from amber to red. As the First Defendant's vehicle was some 25-30 metres ahead, no inference can be drawn that the First Defendant went through a red light. Consistent with the lights then turning red, Mr. Devine was able to go across the left lane and park his vehicle on the traffic island.

7) A) All three witnesses were honest but mistaken in some aspects of their recollections.

B) The independent witness provides some support for the First Defendant's case that the lights were green as he approached the intersection. I accept their evidence in this respect.

C) The Plaintiff, given the light sequence, turned with the other vehicles when the traffic turning right faced a

green light only. In those circumstances there is a high onus on the turning vehicle to keep a proper lookout.

D) The Plaintiff turned believing that by following the other cars he was entitled to turn but he failed to keep a proper lookout. I find he was mistaken when he said that he faced a green arrow. The green arrow showed only when the light was red for eastbound traffic. At the time that the other cars in front of the Plaintiff moved, I find that the eastbound traffic were facing a green light.

E) The First Defendant saw a car turn across his path but failed to keep a proper look out and to brake in a timely way once he realised that traffic was turning across his path. He was travelling at a speed which would have allowed him to brake earlier if he had been keeping a proper lookout.

F) The Plaintiff must accept the major part of the liability for this accident.

It seems clear that when his Honour said 'east' in the antepenultimate sentence in paragraph 4 he meant 'west'.

[8] His Honour's responsibility was to find the facts of the case as best he could on the evidence before him. Each witness was endeavouring to recount to a court what he had seen of a brief incident that had occurred nearly three years before he was called upon to do so. Discrepancies of the kind referred to by Mr Lee are to be expected in such cases, but in the result his Honour found that notwithstanding those discrepancies he could safely act upon the evidence of the first defendant and Mr Devine on the central issue. There was no error of principle in such an approach proceeding as it did from a process of sifting the evidence on the central issue from that on marginal issues. I am therefore not persuaded that any error has been demonstrated in his Honour's assessment of the evidence. I should dismiss the appeal with costs.

[9] **DUTNEY J:** I have read the reasons for judgement of Helman J. I agree with the order he proposes for the reasons he has set out.