# SUPREME COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Horne v Cranney & Ors t/as Gilshenan & Luton Lawyers* [2011] QCA 149 |
| PARTIES: | **COLIN JAMES HORNE**<br>(applicant)<br>**v**<br>**GLEN MICHEAL CRANNEY, DAVID PAUL ALAN DAVIES, PAUL DOMINIC LUTON, DAVID NEWTON MAHER, PAUL DAVID MCCOWAN, MICHAEL PATRICK QUINN, CECILY MAY TUCKER and WILLIAM JOHN WEIR trading as GILSHENAN & LUTON LAWYERS**<br>(respondents) |
| FILE NOS: | Appeal No 310 of 2011<br>DC No 2283 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Civil) |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 24 June 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 20 June 2011 |
| JUDGES: | Chief Justice and Margaret Wilson AJA and Mullins J<br>Judgment of the Court |
| ORDERS: | **1. That leave to appeal be refused.**<br>**2. That the applicant pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.** |
| CATCHWORDS: | PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – DAMAGES – where applicant was injured by stepping into hole in the road at the airport – where applicant's solicitors failed to commence a proceeding for negligence within time – where trial judge had assessed damages the applicant would have recovered at approximately $180,000 and concluded that the applicant's prospect of obtaining such damages was one-third and accordingly gave judgment for approximately $60,000 – whether the trial judge erred in setting the prospect of success as one-third – whether the trial judge erred by allowing for the prospect of a finding of contributory negligence – |

whether the trial judge attributed sufficient weight to the expense of elimination of the hazard

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – BY LEAVE OF THE COURT – GENERALLY – where trial judge had assessed damages the applicant would have recovered at approximately $140,000 with interest of approximately $40,000 – where trial judge concluded that the applicant's prospect of obtaining such damages was one-third and accordingly gave judgment for approximately $60,000, later amended to $61,601.56 – where the final judgment excluding interest was $47,701.56 – where the applicant has a right of appeal only if the judgment amount at least equalled the amount of the Magistrates Court's jurisdictional limit of $50,000 – whether interest should be included in determining whether that jurisdictional limit was reached – whether leave should be granted

*District Court of Queensland Act* 1967 (Qld), s 118(2), s 118(3)

*Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* (2001) 206 CLR 512; [2001] HCA 29, considered
*Campbell v Turner & Ors (No 2)* [2007] QSC 362, considered
*Johnson v Perez* (1988) 166 CLR 351; [1988] HCA 64, cited
*Wyong Shire Council v Shirt* (1980) 146 CLR 40; [1980] HCA 12, cited

COUNSEL: C J Fitzpatrick for the applicant
R B Dickson for the respondents

SOLICITORS: Aitken Wilson Lawyers for the applicant
Jensen McConaghy Solicitors for the respondents

[1] **THE COURT**: The applicant claimed in the District Court damages for the negligence of his former solicitors. They had failed to commence a proceeding, within time, for damages for negligence against Brisbane Airport Corporation. The applicant was injured when he stepped into a hole on a piece of roadway while waiting in the taxi queue at the airport. He was a taxi driver. The learned Judge assessed the damages the applicant would have recovered, had the proceeding been properly brought and pursued, in the amount of $138,171.67, together with interest in the amount of $41,451.50. His Honour concluded that the applicant's prospect of obtaining a judgment in that amount was, however, of the order of one-third. He accordingly gave judgment for the applicant for $60,000, being one-third of the approximate total of those amounts, that is, $180,000, though that was later amended to the amount of $61,601.56. Excluding the interest, the amount of the applicant's final judgment was $47,701.56.

[2] The applicant has a right of appeal only if the amount of the judgment given in the District Court at least equalled the amount of the Magistrates Court's jurisdictional

upper limit (s 118(2) *District Court of Queensland Act* 1967). Mr Dickson, who appeared for the respondents, referred to *Campbell v Turner & Ors (No 2)* [2007] QSC 362, paras 7 and 9 for a submission that one should exclude any amount awarded for interest in determining whether that jurisdictional limit (relevantly $50,000) was reached. Mr Fitzpatrick, who appeared for the applicant, submitted, on the other hand, that the "amount" of the judgment, as referred to in s 118(2), was in this case $61,601.56, and that that amount should not be reduced, when approaching s 118(2), to exclude any interest. In a case like this, if a grant of leave is necessary (s 118(3)), the court would tend to focus on the question whether there is any real doubt about the correctness of the primary judgment, which is the same question as would engage the court if hearing an appeal as such. Because of our conclusion on that matter, there is no need to determine definitively in this case the issue whether one should exclude interest in calculating the amount of the judgment for the purpose of s 118(2).

[3] The applicant accepts that the learned Judge addressed the relevant question, that is, "whether or not the cause of action would have yielded a judgment or a settlement and, if so, how much the plaintiff would have received and when" (*Johnson v Perez* (1988) 166 CLR 351, 371). The applicant's challenge relates to His Honour's conclusion that the applicant's chance of success was "about" one-third. Counsel for the applicant submitted that the Judge should have assessed a fifty per cent chance, because there were equal chances the claim would have succeeded or failed.

[4] In a careful and comprehensive set of reasons for judgment, the learned Judge was apparently substantially influenced by this feature in setting the chance of success at one-third: that although the dappled light and presence of leaves somewhat obscured the hole in the road, there was the prospect that a reasonable person keeping the usual lookout would nevertheless have seen it and avoided it, rendered the contrary risk "slight". The Judge took into account dicta in the High Court as to the need to walk on public pavements with care, as for example in *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512, 639.

[5] Mr Fitzpatrick submitted that the Judge erred in allowing for the prospect of a finding of contributory negligence. But the approach counselled by cases like *Ghantous* warranted his doing so. The Judge did not directly make a finding of contributory negligence, as if the case against the airport company had proceeded to trial, but he allowed for that in his assessment of prospects, and that was appropriate.

[6] Mr Fitzpatrick submitted that the Judge misapplied the approach militated by *Wyong Shire Council v Shirt* (1980) 146 CLR 40, because he attributed insufficient weight to "the slight expense to BAC in eliminating the hazard". We are not satisfied of that. The Judge carried out a "balancing exercise". He had with apparent care allowed for all relevant considerations. We find it difficult to conclude that he erred in that evaluative process, and in particular, that in setting the prospect of success at one-third rather than one-half, he erred so as to warrant appellate correction.

[7] There was reference before us to His Honour's mention of the airport corporation's rejection of overtures for settlement, made after the limitation period had expired. But the Judge was aware of that timing, and he made reference to the applicant's own evidence of his attitude to settlement and extent of reliance on his solicitor's advice. We do not consider it established that the Judge erred in relation to that aspect of the matter.

[8] No challenge to the Judge's computation of loss was pursued.

[9] The assessment of prospects in a "loss of chance" case is quintessentially evaluative and therefore not readily susceptible of challenge, absent some clear error, and there is none here.

[10] There is no reason to doubt the correctness of the primary judgment.

[11] There will be orders that leave to appeal be refused, and that the applicant pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.