SUPREME COURT OF QUEENSLAND

CITATION:	*Allianz Australia Insurance Ltd v Swainson* [2011] QCA 179
PARTIES:	**ALLIANZ AUSTRALIA INSURANCE LTD** ACN 000 122 850 (appellant) **v** **GLENN SWAINSON** (respondent)
FILE NO/S:	Appeal No 11840 of 2010 DC No 199 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	Judgment delivered on 21 June 2011 Further Orders delivered 29 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Fraser JA, Ann Lyons and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
FURTHER ORDERS:	**1. Vary paragraph 1 of the judgment below by substituting the amount of $106,541.85 for the amount of $160,103.34;** **2. The respondent is to pay one quarter of the appellant's costs of the appeal to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant challenged the trial judge's findings on liability and contributory negligence – where the appellant succeeded in relation to contributory negligence only – where contributory negligence occupied a small proportion of the parties' written submissions and oral arguments – where the respondent argued the appellant should pay half of his costs of the appeal – where the appellant argued the respondent should pay its costs of the appeal – whether costs of the appeal should be awarded in favour of either party *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1), r 766(1)(d)

Alborn & Ors v Stephens & Ors [2010] QCA 58, considered
Daly v D A Manufacturing Co P/L & Anor [2003] QCA 331, considered
Sequel Drill & Blast P/L v Whitsunday Crushers P/L (No 2) [2009] QCA 239, considered
Whiting v Somerset Regional Council (No 2) [2010] QSC 329, considered

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: McInnes Wilson for the appellant
Shine Lawyers for the respondent

[1] **FRASER JA:** In this appeal, the appellant insurer challenged orders made in the District Court awarding damages in favour of the plaintiff for personal injuries caused by the first defendant's negligent driving. On 21 June 2011, the Court allowed the insurer's appeal.[1] The Court rejected the insurer's challenge to the trial judge's finding that the first defendant was negligent but adjusted the apportionment of the plaintiff's damages for his contributory negligence from 40 per cent to 60 per cent. The parties were directed to lodge written submissions within 14 days as to the consequential orders that should be made to give effect to the Court's reasons.

[2] Neither party challenged the trial judge's assessment of the plaintiff's damages at $266,354.63 (inclusive of interest). The parties agreed that the judgment sum of $160,103.34 should be varied to give effect to the revised apportionment of 60 per cent by substituting the amount of $106,541.85. The insurer acknowledged that the plaintiff remained entitled to costs of the proceedings below on an indemnity basis because the varied judgment sum remained "no less favourable than [his] offer to settle".[2]

[3] The issue concerns the costs of the appeal. The insurer contended that the plaintiff ought to pay its costs of the appeal on the standard basis in accordance with what was said to be a general rule that, except in "special circumstances", costs follow the event.[3] The plaintiff argued that most of the parties' energies were devoted to the question of the first defendant's negligence, and that as the insurer was unsuccessful in this aspect of the appeal, it should pay half of the plaintiff's costs. As to that, the insurer argued that: although it did not ultimately succeed on the issue of negligence, it did not engage in any misconduct or unreasonable behaviour and advanced substantial and proper grounds of appeal; contributory negligence could not be considered properly without regard to the issue of negligence; the plaintiff did not make any concessions with respect to contributory negligence at any time, making the appeal necessary; and the increase in the plaintiff's liability for contributory negligence was substantial. In these circumstances, the insurer contended that the discretion to deprive a successful party of its costs or some part of its costs should not be exercised.

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1 [2011] QCA 136.
2 *Uniform Civil Procedure Rules* 1999 (Qld), r 360(1).
3 The insurer referred to *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1).

[4] The decisions cited by the insurer[4] for its argument that costs should follow the event except in "special circumstances" did not support that proposition, but the general proposition did derive support from another authority cited by the insurer, McMurdo J's statement in *Whiting v Somerset Regional Council (No 2)*[5] that "[o]rdinarily the fact that a successful plaintiff or applicant fails on particular arguments does not mean that he should be deprived of some of its costs or require an apportionment of costs between issues." The same general principle was expressed in somewhat less emphatic terms by Muir JA in *Alborn & Ors v Stephens & Ors*:[6]

> "The usual rule is that the costs of a proceeding follow the event. [*Uniform Civil Procedure Rules* 1999 (Qld), r 681 and *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] to [70].] The 'event' is not to be determined merely by reference to the judgment or order obtained by the plaintiff or appellant, but is to be determined by reference to 'the events or issues, if more than one, arising in the proceedings'. [*Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No. 3)* [2003] 1 Qd R 26 at 60; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608 at 615; and *Byrns v Davie* [1991] 2 VR 568 at 570, 571.] However, a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs. [*Waterman v Gerling (Costs)* [2005] NSWSC 1111; *Todrell Pty Ltd v Finch (No 2)* [2007] QSC 386.]"

[5] A similar approach was adopted in relation to costs of an appeal in *Sequel Drill & Blast P/L v Whitsunday Crushers P/L (No 2)*:[7]

> "Rule 681(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') provides that costs of a proceeding are in the discretion of the Court but follow the event unless the Court orders otherwise. The rule which specifically relates to appeals is r 766(1)(d), which simply provides that the Court of Appeal 'may make the order as to the whole or part of the costs of an appeal it considers appropriate'. Although r 766(1)(d) does not express the general principle under which a successful appellant is usually given costs in its favour, that general principle remains applicable. In *Oshlack v Richmond River Council* (1998) 193 CLR 72, which concerned a provision conferring a discretionary power to award costs in general terms, McHugh J explained why a successful party is usually given costs:
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> '[67] The expression the "usual order as to costs" embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is granted in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an

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4 *Pertzel v Qld Paulownia Forests Ltd & Anor* [2008] QCA 344; *Willett & Anor v Futcher* [2004] QCA 64; *Daly v D A Manufacturing Co P/L & Anor* [2003] QCA 331; *Ballesteros v Chidlow & Anor* [2006] QCA 368.

5 [2010] QSC 329 at [3]. See also the decisions by McMurdo J to similar effect referred to in *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QCA 164 at [8].

6 [2010] QCA 58 at [7]-[8].

7 [2009] QCA 239 at [3]-[4].

> unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party [*Latoudis* (1990) 170 CLR 534 at 543, per Mason CJ: at 562-563, per Toohey J; at 566-567, per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ]. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.
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> [68] As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice.'
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> The application of the general principle may lead to costs orders which reflect different results on separate events or issues, unless the Court considers that some other order is more appropriate: see *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2003] 1 Qd R 26 at [84], per McPherson JA."

[6] None of the cases I have mentioned are sufficiently analogous to this case to provide direct assistance in deciding the appropriate costs order here, but *Daly v D A Manufacturing Co P/L & Anor*[8] may be seen as a relevant example of a case in which the results on issues were taken into account in deciding the appropriate order as to costs of an appeal. In that case the costs which a respondent/plaintiff was ordered to pay to an appellant/defendant were limited to the costs of the successful appeal on quantum where the defendant had also unsuccessfully appealed on liability and contributory negligence. If a similar approach were adopted here, the insurer might be given its costs of the issue of contributory negligence but otherwise deprived of costs.

[7] There is, however, no sufficient ground for ordering the insurer to pay any part of the plaintiff's costs. The insurer was required to appeal to vindicate its entitlement to a more generous apportionment and its success in that respect was not insignificant. The Court's reasons for judgment in the appeal also demonstrate that the insurer had reasonable grounds for challenging the finding of negligence, even though it lost on that issue.

[8] On the other hand, the insurer's success on contributory negligence was not complete. It sought a more generous apportionment in its favour than it obtained,

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8 [2003] QCA 331.

presumably with a view to revision of the indemnity costs order made by the trial judge. Furthermore, the plaintiff did not act unreasonably in opposing the insurer's appeal on contributory negligence, as is demonstrated by the fact that the insurer did not obtain an apportionment as generous as that which it sought. Those considerations may not of themselves justify a limitation upon the costs order in favour of the insurer, but to them must be added the consideration that the plaintiff was the successful party in the insurer's appeal on the negligence issue. That was the more substantial issue. A relatively small proportion of the parties' written submissions and oral arguments were devoted to the issue of contributory negligence. Whilst there is some merit in the insurer's argument that it is artificial to divorce the issue of contributory negligence from the issue of the first defendant's negligence, and although the issue of contributory negligence could not be resolved without a full appreciation of the facts underlying the finding of negligence, the appeal on the issue of contributory negligence could have been resolved satisfactorily with reference only to the trial judge's very extensive discussion of the evidence and detailed findings of fact. Some additional reference to the evidence would not have been inappropriate, but the insurer's unsuccessful appeal on the negligence issue required a full record of the trial and it required the parties to embark upon a substantially more extensive examination of the evidence in preparing for and arguing the appeal than otherwise would have been required. Compared to many other appeals, this appeal was not complex and the hearing was conducted with commendable efficiency. Even so, the importance of the appeal for the parties and its complexity was substantially increased by the insurer's challenge to the finding of negligence. The plaintiff's success on that issue should be taken into account in its favour in determining the appropriate costs order.

[9] In these circumstances, and adopting a necessarily broad approach, I would allow the insurer one quarter of its costs of the appeal.

Orders

[10] I consider that the appropriate orders are:

1. Vary paragraph 1 of the judgment below by substituting the amount of $106,541.85 for the amount of $160,103.34;

2. The respondent is to pay one quarter of the appellant's costs of the appeal to be assessed on the standard basis.

[11] **ANN LYONS J:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.

[12] **MARTIN J:** I agree with the reasons given by Fraser JA, and with the orders he proposes.