SUPREME COURT OF QUEENSLAND

CITATION:	*Geary v REJV Services Pty Ltd & Ors* [2012] QCA 238
PARTIES:	**JAMES LEONARD GEARY** (appellant) **v** **REJV SERVICES PTY LTD** ACN 081 482 457 (first respondent) **ZINIFEX CENTURY LIMITED** ACN 006 670 300 (second respondent) **BRADKEN RESOURCES PTY LIMITED** ACN 098 300 988 (third respondent) **UNITED GROUP RESOURCES (SERVICES) LIMITED** ACN 010 045 299 (fourth respondent)
FILE NO/S:	Appeal No 489 of 2012 SC No 212 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	4 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2012
JUDGES:	Chief Justice, Muir and White JJA Separate reasons for judgment of each member of the Court, Chief Justice and Muir JA concurring as to the orders made, White JA dissenting
ORDERS:	**1. The appeal be dismissed.** **2. The appellant pay the respondents' costs of and incidental to the appeal, to be assessed on the standard basis.**
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 respondents admitted liability and question at trial was quantum – where appellant injured in workplace – where trial

judge held pre-existing degenerative spinal injury of appellant was symptomatic at time of accident – whether trial judge's finding that the pre-existing condition was symptomatic was open on the evidence

Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited

COUNSEL: R Douglas SC, with A Moon, for the appellant
G Crowe SC , with S Deaves, for the respondents

SOLICITORS: Connolly Suthers Lawyers for the appellant
DibbsBarker for the respondents

[1] **CHIEF JUSTICE**: The appellant brought a claim for damages for personal injuries sustained on 17 August 2005 because of the negligence of the respondents in the course of the appellant's employment. Employed by the first respondent, the appellant was the driver of a dump truck at a mining operation. When a co-employee dumped a rock of huge proportion into the appellant's truck, the appellant, who had been in the operator's compartment, was knocked about and suffered an injury to his lumber spine. There was no issue in the proceeding about that, and liability in negligence was admitted. The issue on appeal was whether by the time of the accident, the appellant's degenerative spine had become symptomatic. The trial Judge's conclusion that it had meant the damages were substantially less than would otherwise have been awarded.

[2] The evidence relied on by the Judge for his critical conclusion was rather limited, and bears close analysis now on appeal.

[3] The learned Judge accepted evidence from a general practitioner, Dr David Alan Wallace, of that doctor's "clear recollection" of the appellant's having told him that the appellant had suffered back injuries which he attributed to playing rugby league football (as if of persisting practical significance), and referred also (though weighing less with His Honour) to a report to the doctor from a physiotherapist Ms Hooper of the appellant's reports to her of "no previous low back conditions other than minor sports related minor muscular events while he was playing professional football".

[4] The appellant denied in his evidence having suffered any back problems other than immediately following a work incident in 1985 (presently uncontroversial). The Judge rejected that denial, which His Honour characterized as "misleading". He held that the appellant "attempted to downplay or minimise the problems he had with his low back prior to the incident at the mine with a view to maximizing his recovery in this action".

[5] It should be noted His Honour approached the credibility issue with great care. There was no blanket rejection of the evidence of the appellant. Major parts were accepted (as to the post-incident work history for example), and where evidence was rejected, reasons were carefully assigned.

[6] Three orthopaedic surgeons gave evidence, Doctors Morgan, McPhee and Malcolm Wallace. They accepted that the appellant suffered degenerative lumber disease pre-

dating the subject incident. The question was whether it had previously been symptomatic, as the evidence from the general practitioner Dr David Alan Wallace and the physiotherapist Ms Hooper may have suggested. The three specialists made their assessments on the basis of the appellant's own personal report to them, that the condition had not been symptomatic prior to the instant incident.

[7] If he had not proceeded on the basis of those specialists' assessments, the Judge would have calculated damages at a higher level: he would not, for example, have discounted past economic loss to the extent which he did, he would have allowed more in relation to future economic loss, and he would have set general damages at a higher level. (Counsel for the appellant provided suggested revised assessments.)

[8] In the event, the Judge awarded damages of $380,349.38, leading to judgment of $367,449.13 against the employer, the first respondent (after allowing for the refund of workers compensation benefits), and $380,349.38 against each of the other respondents. (Liability had been admitted, and contribution proceedings among the respondents had been resolved.)

[9] The two grounds of appeal which were the focus of the appeal as it developed were, in condensed form, these:

1. that the finding that the pre-existing degenerative lumber condition was symptomatic at the time of the subject incident was not open; and
2. that the extent of the appellant's use of alcohol after the incident, as found by the Judge, would have occurred anyway because of the appellant's pre-accident habits, a finding said not to be open.

[10] The remaining grounds of appeal concern the impact on the assessment of damages of the Judge's findings on those two matters.

Whether pre-existing degenerative change was symptomatic by the time of the accident, or not

[11] The appellant contends that the Judge's finding was not supported by the evidence.

[12] Counsel for the appellant first referred to various denials by the appellant: that he had experienced ongoing back problems, that he had received medical treatment for such problems, that he had represented to Ms Hooper (the physiotherapist) having suffered muscular problems in his back through sport, that he had received physiotherapy or massage therapy for such problems, and that he had told Dr David Wallace (the general practitioner) that he had suffered lower back injuries as a result of his football.

[13] An immediate response is to point to the Judge's rejection of the credibility of the appellant in various respects, for reasons comprehensively expressed by the Judge, leading to the Judge's general observation that he "should be cautious when considering his (the appellant's) evidence". This is a case where the trial Judge's credit assessment was substantially informed by his having seen and heard the witness.

[14] The appellant essentially complained about the Judge's reliance on the evidence of the general practitioner Dr David Alan Wallace and, to a lesser extent, that of the physiotherapist Ms Hooper.

[15] As to Dr David Alan Wallace, Counsel submitted that the Judge relied on "a perfunctory unrecorded conversation with the appellant, at a time when the latter was in distress with pain, and in circumstances where Dr Alan Wallace 'volunteered' the attribution of some pain to the football career."

[16] The especially relevant evidence from Dr David Alan Wallace occurred during cross-examination at the trial:

> "Yes, could you take us to where in your notes you recorded the fact that Mr Geary told you that he had suffered injuries to his lower back or problems with his lower back whilst playing rugby?-- I didn't record them in my notes. However, I clearly recalled it on conversation.
>
> Do you recall that he told you that he had a back injury in 2005 while shovelling? Oh, sorry, I'm sorry. I'm – forgive – in 1985 while shovelling?-- I don't specifically recall that, no.
>
> No. And when you say he told you he had problems with his back playing rugby what were they?-- The conversation took place – I asked him had he previously – and I recall this case quite clearly because of other – other factors surrounding it, in particular how – how distressed Mr Geary was. But I asked him he – had he had previous injuries and he said 'Yes' and – and I volunteered to him because of the size and shape – shape of him was – was that playing rugby and he said, 'Yes'. We moved on from that point, the context being that I was trying to get him back to work. He was going there and there – there seemed no need to inquire further. However, I'm – I clearly recall the conversation about rugby concerning this man.
>
> Yes. So you asked him if he had any injuries when he played rugby?—Yes.
>
> And they were your-----?-- No back injuries and he said he had back injuries, yes.
>
> Yes. Did you restrict it to the lower back or also-----?-- No, I did not restrict it to the lower back but my clear recollection was that these were – these were at the lumbar spine.
>
> Well just explain to me how – if you didn't restrict your question----?-- Mmm.
>
> ----to the lumbar spine, how do you know the answer related to the lumbar spine----?-- I told you my----
>
> ----and not – sorry and let me----?-- ----clear – no, no, Mr Moon. I didn't tell you that I – I told you my clear impression was that this related to – to his lumbar spine. I'm telling you the truth. I – if you're asking me did I conduct a forensic inquiry as to where the back pain – I did not do so.
>
> No, what I'm asking you is this and I'm not – not for a moment doubting you're not telling this as you recall it, Doctor. What I'm asking you is this. Did you ask him if he'd suffered any injuries to his back when he played – his back and I use the word 'back'----?-- Yes.

----when he played rugby?-- Yes.

And he said he did?-- Yes.

[17] In her report to Dr Wallace of 29 September 2005, Ms Hooper referred to the previous sport injuries as follows:

> "Thank you for referring Mr Geary to Physionorth for treatment. Mr Geary initially presented on 20/09/2005 with severe low back pain after an injury at work. Lenny's problem began after a 56 tonne rock fell into the back of the truck he was operating, causing severe jarring of his spine. His injury occurred on 17/08/2005 and he received one physio assessment and a review physio treatment in the second week post injury, his workcover claim was then not accepted.
>
> Lenny reports no previous low back conditions, other than minor sports related minor muscular events while he was playing professional football."

[18] There is other relevant evidence. The orthopaedic surgeon Dr Malcolm Wallace said he would have expected symptoms (by the time of this incident) from the "old healed compression fracture at the upper end plate of L4" – unrelated to the instant injury. His evidence was that injury would have been symptomatic, "causative of symptoms of pain". The doctor later said that the appellant "may have" experienced symptoms from the "three levels of degenerative changes in his lumbar spine" which pre-dated the immediate incident.

[19] It is significant that the Judge rejected – as not deserving of credit – the appellant's evidence that he was not suffering back symptoms prior to this incident. The appellant conceded he received treatment for rugby injuries over the years, but not in relation to the lower back; "usually it's the top – top back – top of my shoulders and neck…". His Honour did not accept that as creditworthy. It was, he said, "misleading", coming from a claimant determined to maximize his award, and about whose evidence the court should be generally "cautious".

[20] Counsel for the appellant pointed out that defence Counsel had not directly put to the appellant at the trial that he was suffering lower back pain immediately prior to this incident. But absent instructions there was direct evidence he was, Counsel could not properly have done so: it had to be left for inferences to be drawn from facts emerging from the cross-examiner's exploration of the other relevant circumstances.

[21] His Honour rejected as "misleading" the appellant's evidence he did not suffer injuries prior to the instant problem (save for the irrelevant 1985 injury). The Judge expressed general reservations about the appellant's credibility. It is undoubted the appellant suffered prior injury productive of degeneration. His Honour was entitled to conclude, notwithstanding the appellant's denials (which he found not credible), that his condition was by the time of this incident symptomatic, "to some extent" as found by the Judge (para [68] reasons).

[22] The learned Judge embarked upon an apparently meticulous examination of the issues bearing on the credibility of the appellant's claims. That is abundantly apparent from his comprehensively expressed reasons for judgment. Of course there is a degree of sparseness about the evidence extracted above, but it was nevertheless

in my view sufficient to found the conclusions which, in that context, His Honour drew. They could not be described as "glaringly improbable", or as being "inconsistent with facts incontrovertibly established" (*Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479). The reasons for judgment exhibit a careful and compassionate approach by His Honour to the assessment of the creditworthiness of the appellant's evidence. He was entitled to rely on the evidence extracted above for the conclusions which he drew, and which are now challenged, and it cannot be said that the Judge "palpably misused his advantage" in reaching those conclusions. They were carefully drawn and found an adequate foundation in the evidence.

Whether an established lifestyle, or the injuries, led to increased alcohol consumption

[23] The learned Judge held that the appellant's increased consumption of alcohol in recent years could be attributed partly to his life habits, and not his accident disability; and that his emotional state and overuse of alcohol would have deteriorated, although not so suddenly, over the 6.3 years preceding the trial irrespective of injuries he sustained.

[24] The appellant contends that there was no evidence to support those findings.

[25] The Judge analysed the evidence as follows:

> "[38] The plaintiff was asked questions concerning his consumption of alcohol both before the subject incident and after. The significance of this will emerge later when the psychiatric evidence is considered. The issue emerged in the context of a report given by Dr Leong where Dr Leong reported the plaintiff admitting to consuming 10 to 16 schooners of XXXX Gold per day. The plaintiff denied consuming that quantity of alcohol day in day out and at times gave slightly varying estimates of his intake. He did admit that he may have told Dr Leong that he drank 10 to 16 schooners on a "big day" or on weekends. In his pre-employment application made to the first defendant (before the accident) the plaintiff admitted to drinking between four and six alcoholic drinks per day. He certainly admitted to spending more time in hotels subsequent to the accident because he was not as busy as he used to be. Generally his evidence was however more or less consistent. He admitted that at the end of sustained periods working at the mines, when he returned to his home for his rostered days off, he would "go on a bit of a bender" where he would consume a considerable quantity of alcohol while on the first day or so and rostered off. His evidence was that this would help him regain a normal sleeping pattern particularly if he had been working night shifts. In re-examination he admitted to drinking between four and five schooners per day when working and between 10 and 16 schooners per day on weekends." (footnotes omitted).

[26] Having discussed the evidence given by the psychiatrist witnesses, His Honour then expressed these conclusions:

> "[63] In view of the plaintiff's long history as an adult of working in hotels, of his history of drink driving offences and of the evidence he gave or admitted to from time to time of his routine alcohol consumption before the accident, I find that it is likely that before the accident the plaintiff had formed habits that meant that routine and not insignificant consumption of alcohol was a part of his life. In those circumstances the increased consumption of alcohol that is apparent in recent years can be attributed partly to the habits of life (and would have happened anyway) and also to the circumstance that the plaintiff may have found that he has more time on his hands since his injury as he said. Further, I find that the frustrations the plaintiff has experienced because of his pain and disability may also have partly contributed to his increased use of alcohol. Further, although I am not prepared to find that the plaintiff suffers from the psychiatric impairment diagnosed by Dr Likely, I do find that the plaintiff's pain and suffering and loss of amenities of life have been affected adversely because of his frustrations and unhappiness caused by the physical effects of the injury, the effects upon his capacity to earn income and the restrictions imposed upon him in enjoying life."

[27] I respectfully accept that as a balanced distillation of views reasonably open on the evidence given. (At the hearing of the appeal, this issue on the appeal was not the subject of any substantial oral submission.)

Conclusion

[28] The challenged factual conclusions were sufficiently supported by evidence. Because those conclusions are unassailable, so is the assessment, because the challenge to the assessment depended on the vulnerability of those conclusions.

Orders

[29] The appeal should therefore be dismissed, and the appellant should be ordered to pay the respondents' costs of and incidental to the appeal, to be assessed on the standard basis.

[30] **MUIR JA**: I agree that the appeal should be dismissed with costs for the reasons given by the Chief Justice.

[31] **WHITE JA:** I have read the reasons of the Chief Justice where the essential facts are set out and need not repeat them. An important question for this appeal is whether there was evidence to support the primary judge's finding that the appellant had ongoing back problems which were symptomatic up until the date of the subject injury. I differ from the Chief Justice and Muir JA about that issue and will state my reasons for doing so.

[32] It was uncontroversial that CT scans taken within a month of the work related injury on 17 August 2005 demonstrated degenerative lumbar disease at three levels which predated the injury sustained at work.

Analysis of the relevant evidence

[33] The appellant contends that the evidence adduced at the trial could not support the following central finding by the primary judge:

1. "[35] I have already mentioned that the plaintiff in his evidence, while admitting to the back injury in 1985, swore that subsequent to his recovery from that he had no problems with his back until the subject accident. He maintained that in evidence before me and, as I will mention later, told that to the specialist doctors who examined him for the purposes of preparing reports for the Court. However, there is evidence of the plaintiff making admissions to the contrary soon after subsequent [sic] to the accident. The plaintiff had consulted Dr David Allan Wallace (a general practitioner) on the 19th of September 2005 [the subject injury occurred on 17 August 2005] and subsequently. Subsequently Dr Wallace provided a report to WorkCover dated 1 June 2006. In the report Dr Wallace recorded that Mr Geary had sustained a number of previous back injuries which in likelihood related in a large part to his time as a rugby league footballer. I understand the comment in the written report to concern a revelation made by the plaintiff to Dr Wallace on 19 September 2005 and to his recollection of what the plaintiff told him. In evidence Dr Wallace said that he had a clear recollection of the plaintiff telling him that he had suffered back injuries which he attributed to playing rugby league football. I accept the evidence of Dr Wallace. There is also a suggestive comment in a letter written by the physiotherapist, Melissa Hooper, to Dr Wallace on 29 September 2005 where she reports that the plaintiff reported 'no previous low back conditions other than minor sports related minor muscular events whilst he was playing professional football'."[1]

And

> "[49] I have already said I accept the evidence of Dr Allan Wallace that the plaintiff told him that he had pain or symptoms with his back from time to time which the plaintiff attributed to playing rugby league football. The consequence [of] accepting that evidence is that the plaintiff gave misleading evidence before me when he denied any back problems other than that immediately following the 1985 work incident. The view I take of the plaintiff is that he attempted to downplay or minimise the problems he had with his low back prior to the incident at the mine with a view to maximising his recovery in this action. ..."[2]

[34] The orthopaedic specialists advanced their opinions on the basis that the appellant was asymptomatic prior to the subject accident. Of this the primary judge said:

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[1] AR 908.
[2] AR 911.

> “[58] The difficulty is that all three doctors reported upon the assumption that the plaintiff did not have any symptoms between 1985 and the accident. I have found to the contrary. This creates some difficulties ultimately in the assessment of damages because that will have to be made on a basis not consistent with the assumptions of fact made by the experts when they reported. On a question of the orthopaedic injury there is no doubt, indeed it is conceded by the defendants, that the plaintiff did suffer injury. The plaintiff’s account, to the extent to which I accept him (and in some respects he is corroborated by witnesses) is that he has suffered pain of a greater intensity and greater frequency than he suffered before the accident. Nevertheless on the findings of fact that I have made he had a significant back condition described as a multi level degenerative back disease which was symptomatic at the time of the accident and probably progressive. On the view of the evidence I take I consider I am entitled to approach the assessment of damages on a basis that the proportion of the plaintiff’s post-accident impairment assessed by the doctors attributable to the pre-existing back disease was greater than the doctors considered and it was likely that, by the time of the accident or shortly after, he would have begun to suffer restrictions in working in employment of the nature he described.”[3]

[35] The appellant himself denied that he had a significant back condition which was symptomatic prior to and up until the time of the subject accident. The evidence, such as it was, was that after the 1985 back strain at work, for which he was off work for two to three weeks, the appellant continued to play rugby league football for more than 10 years; was in full employment; and did not seek any medical treatment for any back symptoms. Mr R J Douglas SC for the appellant submitted that it was never put to the appellant by the defence that he had symptoms after the twisting incident in 1985 and before the date of the subject accident. However, defence counsel had asked the appellant to revisit the evidence given in evidence-in-chief that he “didn’t think” he had any back pain in that period. The appellant accepted that he had had all sorts of “…bruises and muscles and everything else” [4] as a consequence of playing professional football but nothing that had kept him from working.

[36] The primary judge might well have concluded that the skirmishing between the appellant and defence counsel during cross-examination made the appellant look somewhat evasive on this topic as this passage would demonstrate: “Haven’t you had back pain whilst playing professional rugby league?” to which the appellant responded, “No”. After further questioning about sports related injuries the appellant added:

> “But nothing that ever kept me from working. Nothing that ever kept me from going back and playing again the next week, not unless I broke a bone.”

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3 AR 914.

4 AR 182.

Defence counsel said: "I didn't ask you that. Have you had low back pain whilst playing-----?" To which the appellant responded:

> "I just answered the question. I've got no idea – you know, I've played A grade football since I was 16 year old. I get – I started getting paid professionally at 19 year old and you want me to remember every game? Every little scratch, bruise and injury I've had?"[5]

[37] Defence counsel suggested that when receiving treatment from a physiotherapist (Melissa Hooper) in September 2005 the appellant had told her that he had suffered minor sports related muscular events in his lumbar spine whilst playing professional football. The appellant said that he did not recall although he did tell the physiotherapist that he had had many injuries from playing sport. The appellant agreed that he had received physiotherapy and massage treatment after games but denied that it was for low back pain – only for the top of his shoulders and neck. Ms Hooper's report to Dr Allan Wallace, general practitioner, was admitted as part of exhibit 22:

> "[The appellant] reports no previous low back conditions, other than minor sports related minor muscular events while he was playing professional football".[6]

[38] Defence counsel then raised with the appellant his visits to Dr Allan Wallace, whom he saw on a number of occasions. The appellant asserted that he told Dr Wallace that he had no previous *bony* injuries to his spine because that was the enquiry made of him by Dr Wallace. He denied discussing with Dr Wallace that he had suffered lower back injuries while playing football as a young man.

[39] Dr Wallace examined the appellant for WorkCover and reported on 1 June 2006 under the heading:

> "**Relationship of work-related condition(s) to any pre-existing condition(s).**
>
> Mr Geary had clearly sustained a number of previous back injuries and has sustained subsequent mild spinal stenosis. These likely relate in large part to his time a [sic] rugby footballer."[7]

[40] In oral evidence Dr Wallace was asked if he could recall the appellant discussing with him that he had suffered from lower back pain or injuries as a result of playing rugby. Dr Wallace did. In cross-examination he admitted that he did not record in his notes that the appellant had told him that he had suffered injuries to his lower back or had experienced problems whilst playing rugby, however: "I clearly recalled it on conversation."[8] He did not recall that the appellant had told him that he had sustained a back injury while shovelling in 1985. When asked about the conversation concerning lower back pain associated with playing rugby, Dr Wallace answered:

> "The conversation took place – in asked him had he previously – and I recall this case quite clearly because of other – other factors surrounding it, and in particular how – how distressed Mr Geary was. But I asked him he – had he had previous injuries and he said "Yes"

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5 AR 182-183.

6 AR 709.

7 AR 731.

8 AR 265.

> and – and I volunteered to him because of the size and shape – shape of him was – was that playing rugby and he said, "Yes". We moved on from that point, the context being that I was trying to get him back to work. He was going there and there – there seemed no need to inquire further. However, I'm – I clearly recall the conversation about rugby concerning this man."[9]

[41] Dr Wallace maintained that he had asked the appellant if he had back injuries when he played rugby and the appellant agreed that he did. Dr Wallace said he did not restrict the question to the lower back but his clear recollection was that they were at the lumbar spine. Trial counsel for the appellant asked Dr Wallace how he could be confident that the complaints did relate to the lumbar spine since he had not so restricted his question. Dr Wallace responded:

> "I didn't tell you that I – I told you my clear impression was that this related to – to his lumbar spine. I'm telling you the truth. I – if you're asking me did I conduct a forensic inquiry as to where the back pain – I did not do so."[10]

[42] Counsel then established that Dr Wallace recalled asking the appellant if he had suffered any injuries to his back, without being specific, when he played rugby and that he said he did. Dr Wallace did not ask how bad those injuries were. Dr Wallace explained that because the CT scan showed a spinal stenosis which was not an injury which could have arisen over a short period he was curious to ascertain its cause:

> "And I then – I then drew the conclusion that these were likely to have arisen from his time playing rugby but there is a – a finding, an objective finding on his CT scan which led me to ask that question."[11]

[43] Dr Wallace's medical notes which were in evidence in exhibit 22 included the following for Dr Wallace's consultation for 19 September 2005:

> "Note CT early spinal stenosis
> No previous injury of spine
> Likley [sic] back injury when playing football as a young man …
> Note Spinal stenosis, mild, likely unrelated
> Note old fracture of L4"[12]

The primary judge accepted Dr Wallace's account of his conversation with the appellant as he was entitled to do, but there was good reason, as the above extracts of evidence demonstrate, for not embracing it too enthusiastically.

[44] The defence called Ms Donna Halls who had been in a relationship with the appellant for nine months prior to him sustaining his injury. The purpose of her evidence was to establish the appellant's heavy use of alcohol and propensity for violence after the injury and its link to his pre-injury conduct. Mr Douglas submitted that Ms Halls gave no evidence of the appellant suffering back pain prior to his work injury in August 2005. There are two things to say about that submission. Ms Halls was not asked if she had observed the appellant experiencing

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[9] AR 265.
[10] AR 266.
[11] AR 266.
[12] AR 689.

lower back symptoms prior to his injury. The second point is that Ms Halls and the appellant lived in different towns and only commenced residing together the weekend after the appellant's injury, so that she had limited opportunity for observing any restriction in movement or complaint prior to the injury.[13]

[45] The primary judge found that the appellant was a person who was untruthful if it suited him citing his failure to mention the 1985 back injury (which was accepted as having resolved years prior to the subject injury) when applying for work with the first defendant and failing to mention the subject injury when applying for employment after this injury. The primary judge expressed sympathy with the appellant's concern that he may not have obtained work if he had disclosed his injury but, nonetheless, regarded that conduct as a reason for being cautious about accepting his evidence. His Honour clearly was entitled to do this.

[46] Nevertheless, the primary judge appears to have accepted the appellant's account of his extensive recreational activities prior to his injury in respect of which he was not challenged:

> "The plaintiff's evidence was that at the time of the accident he still remained physically active. He said that he had had a 21 foot fishing boat, that he played golf, and that he engaged in the recreational activities available at the mine site when he worked on roster including playing volleyball, indoor cricket, bowls and football or touch football."[14]

His Honour makes no comment as to how engaging in these activities could be reconciled with a man suffering back pain from "a significant back condition". Nor does his Honour actually grapple with the unchallenged evidence that the appellant engaged in the heavy driving required in his employment prior to injury without any documented complaint or oral evidence of observation of restrictions. It might be expected that if his Honour concluded that the appellant suppressed or did not speak of the symptoms, being concerned for his job, he would have made that observation.

[47] The appellant contends that the proper inferences to be drawn from the evidence adduced at the trial are that the appellant, up to the time of the work injury in August 2005:

> "● was a healthy, fit and active man.
>
> ● who, as part of his historical activity regime, had put his body through the rigors of a professional rugby league career from age 19 (1983) to age 34 (199[8]).
>
> ● who from time to time during that career had sustained the common muscular injuries associated with such a pastime which, in turn, required immediate massage and like treatment.
>
> ● but had suffered no lumbar (or other) injury which had ever precluded him from continuing that career or any independent work career.
>
> ● and no injury which persisted symptomatically other than transiently, nor was symptomatic in his lumbar spine or otherwise.

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13 AR 281.

14 Reasons [12].

- this was certainly the case following cessation of his football career in 199[8] and unequivocally up to the time of and immediately prior to the incident in question in 2005."[15]

[48] Contrary to the primary judge's contention that the appellant had "a significant back condition described as a multi level degenerative back disease …"[16], the orthopaedic specialists did not so describe it. Dr Malcolm Wallace, called by the appellant at trial, described the x-ray of the appellant's lumbar spine on 25 August 2005 as showing "[n]o significant abnormality" and the CT scan of his lumbar spine carried out on 7 September 2005 as revealing "… a disc bulge at L4/5 and L3/4. There is a comment o[f] radiological stenosis but there is in reality no significant neural compression."[17] The x-ray of 15 March 2006 revealed "an old compression fracture at L4 with minimal compression but there is no other significant abnormality."[18]

[49] Dr David Morgan prepared reports for the defence and said of the radiological evidence that he had not had an opportunity to review the radiographs that were commented on by Dr McPhee but had viewed those of the lumbar spine performed on 6 December 2007. He reported:

> "These films demonstrated very minor anterior degenerative spurs at a few lumbar levels. The disc spaces all appear to be preserved. There was no evidence of any single fracture. No other abnormality could be identified."[19]

[50] Dr Bruce McPhee reported on 1 February 2007 that the x-rays of the lumbar spine taken on 7 September 2005 were within normal limits for the appellant's age. He noted that the CT scan carried out on 7 September 2005 was reported to show marked annular bulging at the L3/4 level with early narrowing of the spinal canal.

> "Similar bulging at L4/5 effaces the thecal sac. An old compression fracture of the upper end plate of L4 is reported (although not evident on x-rays). There is a small focal left paracentral protrusion of the lumbosacrol disc which is not compromising any neurological structures."[20]

Dr McPhee described this radiological evidence as demonstrating degenerative change in the three lower discs of the lumbar spine which had predated the onset of the work related symptoms. In his report of 3 November 2010 Dr McPhee described it as "moderately advanced degeneration in the lower lumbar spine".[21]

Discussion

[51] In a case in which assessing the credibility of a witness or witnesses is pivotal it is necessary to be mindful of the functions and limitations on an appellate court. As was discussed by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*[22] the nature of the statutory appeal, being a re-hearing, is "on the record". Such a procedure shapes the requirements and limitations of the appeal. Those limitations include the

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15 Appellant's outline of submissions pp 4-5.
16 Reasons [58].
17 AR 423.
18 AR 427.
19 AR 651.
20 AR 678.
21 AR 684.
22 [2003] HCA 22; (2003) 214 CLR 118 at [22]; 125 and following.

disadvantage that the appellate court has when compared with the trial judge, in evaluating witness credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share.[23] Their Honours said:

> "Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'."[24]

[52] Their Honours referred to *Jones v Hyde*[25]; *Abalos v Australian Postal Commission*[26] and *Devries v Australian National Railways Commission*[27] which reminded intermediate appellate courts of their limitations compared with the position of the trial judge. However, their Honours emphasised that the legislation establishing the right to appeal requires an appellate court to conduct the appeal by way of re-hearing:

> "If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute."[28]

And:

> "… the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings."[29]

[53] Their Honours noted:

> "Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances [as when they give their testimony]. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."[30]

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[23] At [23]; 126.
[24] At [25]; 126-127.
[25] (1989) 63 ALJR 349 at 351-352.
[26] (1990) 171 CLR 167 at 179.
[27] (1993) 177 CLR 472 at 479.
[28] At [27]; 127-128.
[29] At [28]; 128.
[30] At [31]; 129.

[54] However, as McHugh J observed in *Fox v Percy*[31], there must be something in the trial judge's findings which points "decisively and not merely persuasively to error on the part of the trial judge in acting on his or her impressions of the witness or witnesses."

[55] I am troubled by the primary judge's robust and positive conclusion that the appellant did suffer symptoms in his back prior to sustaining his work injury in August 2005 which were so debilitating that:

> "… by the time of the accident or shortly after, he would have begun to suffer restrictions in working in employment of the nature he described."[32]

[56] Later, when assessing damages, his Honour seemed to have modified this conclusion about the nature of the pre-injury symptoms but not that the degenerative condition was significant when assessing damages:

> "… there are at least two hypothetical issues. One involves an assessment of what would have been the plaintiff's work history and capacity to continue working in the industry as a truck driver but for the accident involving an assessment of the significant back condition that was to some extent symptomatic and probably progressive as I find the facts."[33]

Subsequently his Honour said:

> "In other words, it is more likely than not that even though the plaintiff's back condition was symptomatic, as I find it to be, at the time of the accident, the likelihood is that he would have been able to continue in employment for the last 6.3 years. This finding of likelihood however does not equate to certainty in my mind. There is a significant chance that the plaintiff would have been compromised in his capacity to work some time after the incident and before now resulting in a loss of capacity to work and income."[34]

[57] When his Honour mentioned, in the passage quoted above from [58] of his reasons, that the appellant would have begun to suffer restrictions in working in employment "of the nature he described", I infer that his Honour was there referring to the appellant's description of his post-injury symptoms for he described none pre-injury apart from some aches and pains associated with playing football many years prior and then, only with respect of his shoulders and neck. Similarly, I am unclear as to what evidence of the appellant his Honour is referring when he said:

> "The plaintiff's account, to the extent to which I accept him (and in some respects he is corroborated by witnesses) is that he has suffered pain of a greater intensity and greater frequency than he suffered before the accident."[35]

[58] To base this expansive conclusion on Dr Allan Wallace's evidence and Ms Hooper's report does seem to give that body of evidence more work to do than it can reasonably bear. Against that evidence the fact that there was no pre-injury complaint of back pain after the 1985 incident in medical or work records or in oral

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31 At [90]; 147.
32 Reasons [58].
33 Reasons [68].
34 Reasons [69].
35 Reasons [58].

testimony needed to be weighed. The defence appears to have carried out very extensive investigations about the appellant before and after the injury including general practitioner records, WorkCover records and tax returns. It might be supposed that if there were anything to be found in those sources the defence would have done so.

[59] Notwithstanding the conclusion that the appellant was generally untruthful where his interests were concerned unless corroborated, I consider that the primary judge was in error in positively concluding that the appellant was symptomatic prior to injury such that he would have been likely to have been virtually unemployable by trial. I have concluded, despite his Honour's very careful and comprehensive reasons, that he was not justified in making the strong findings that he did about the appellant's pre-trial back symptoms.

Assessment of damages

[60] The primary judge allowed $50,000 as damages for pain and suffering and loss of the amenities of life. As the evidence revealed, the appellant suffered greatly from the loss of his capacity to work hard physically. He had no other skills to exploit. His quality of life had seriously deteriorated and he did not, apparently, find other compensations. The range contended for was $70,000 by the appellant and $40,000 by the defence. In view of my conclusion about the back symptoms, although they were likely to have interfered with his enjoyment of the physical activities he did, they would likely have emerged more gradually. However, with his degenerative condition, regard must be had to the possibility of a non-compensable incident aggravating and making that disease symptomatic earlier. Balancing those matters, I would vary the award under this head and would allow $60,000. Interest should be awarded at two per cent for 6.3 years on $30,000 to reflect past suffering.

[61] The primary judge discounted the appellant's past economic loss by 80 per cent to reflect his findings about symptoms. In light of my conclusion that the extent and quality of the evidence did not support findings that the appellant would likely have been in the same state without the August 2005 injury, that discount is not maintainable. A modest percentage discount to accommodate the possibility that the appellant may have had to take reduced work during that period of say 10 per cent would have been supportable. I would increase the amount for past economic loss from $70,000 to $114,075, an amount of $44,075.[36]

[62] The calculation of the appellant's future economic loss involved an acceptance that the appellant would be in much the same condition as he was at trial absent the injury. It was accepted at trial that the appellant had a post-injury residual earning capacity of $800 net per week. The expert orthopaedic opinion (which proceeded on the basis that the appellant was asymptomatic prior to injury) varied as to the impact of the appellant's spinal degeneration on his future working life absent the 2005 injury. Dr Bruce McPhee opined that the symptoms may have emerged within five to 15 years. However, if the appellant had suffered some pre-accident lumbar symptoms, then within 10 years. Dr McPhee emphasised the unscientific nature of the estimate.

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[36] Past potential earnings of $1,500 per week for 6.3 years, reduced by 10 per cent, is a total of $442,260. Further reduced by actual earnings taken from the submissions below (AR 386), this calculates to $114,075 of past economic loss.

[63] Dr David Morgan measured the appellant's whole of person function as reduced by six per cent, two to three per cent of which was referable to pre-existing degeneration. In his report of 2 November 2010 Dr Morgan opined:

> "It is probable that he does suffer with a constitutional lumbar spinal malady. That condition pre dated the accident which occurred in August, 2005.
>
> It is probable that the subject work accident aggravated that condition and has contributed in some manner to his ongoing clinical circumstance. Some part of his current circumstance relates to the antecedent disease, while the remaining part can be linked with the subject accident."[37]

In response to the solicitor's question,

> "Had the incident not occurred, within what period of time referable to the date of the incident would the plaintiff have acquired his current level of incapacity and work restriction as a result of any pre-existing lumbar spine condition?"

Dr Morgan responded:

> "It is difficult to be precise in answering this question. He could theoretically have continued for a protracted period with nothing more than relatively minor discomfort. The subject accident therefore has contributed in a significant manner in altering his future employment prospects."[38]

[64] Dr Wallace concluded that in his assessment the appellant suffered a five to eight per cent impairment of the whole person on a standard adopted by the AMA fifth edition. Had the appellant had a prior history of back pain after the 1985 incident and before the subject injury, he concluded that the work related incident had aggravated his underlying condition attributing 50 per cent to the pre-existing disease and 50 per cent to the effects of the work incident.

[65] Future economic loss needed to be assessed on the basis of the loss of a chance to remain in full paying employment to age 67. The primary judge made findings about what he described as the appellant's "emotional issues" and his excessive use of alcohol caused in part by his frustration and unhappiness deriving from his work related injury. His Honour concluded that these would have emerged more gradually without the injury but, having assessed the appellant's past conduct, he concluded that those issues would, nonetheless, absent the injury, have been similar as symptoms of his degenerative condition increased. His Honour was entitled to reach that conclusion.

[66] The primary judge assessed loss of earning capacity in the future in the sum of $200,000. That figure reflected a notional loss of earning capacity for a notional working life to age 67 at approximately $300 net per week.

[67] The appellant has submitted, conservatively, on a net loss of $900 per week, which ignored any employment advancement, and taking the appellant to age 62 rather than age 67, adopting a 30 per cent discount for all contingencies, an assessment of future economic loss of $350,000.

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37 AR 669.

38 AR 674.

[68] In my view, the primary judge was not entitled to conclude that the appellant was experiencing symptoms from a significant degenerative back disease prior to the subject injury, so that his discounting was excessive and the figure proposed by the appellant on appeal should be preferred.

[69] In summary I would vary the appellant's damages as follows:

General damages $60,000	$60,000.00
Interest at two per cent for 6.3 years on $30,000	$3,780.00
*Special damages	$7,609.99
*Out of pocket special damages	$3,470.00
*Interest at five per cent for 6.3 years	$1,093.05
*Tax on workers' compensation benefits	$2,176.00
Past loss of earning capacity $114,075.00 less workers compensation benefits of $63,350.29	$50,724.71
Interest at five per cent for 6.3 years	$15,978.28
Lost past superannuation benefits at nine per cent on $114,075.00	$10,266.75
Future loss of earning capacity	$350,000.00
Future superannuation entitlement at nine per cent	$31,500.00
TOTAL * Unchanged	$536,598.78

[70] As noted below, there are four defendants. The first defendant was the employer. The appellant was obliged to refund from his award of damages Workers' Compensation benefits in the amount of $12,900.25. Accordingly, judgment against the first defendant should be reduced by the amount of the refund to the sum of $523,698.53. Judgment against each of the other defendants should be in the amount of $536,598.78.

[71] The orders I would make are:

1. Allow the appeal.
2. Vary the judgment below as follows:
   (i) Judgment for the appellant against the first defendant in the sum of $523,698.53;
   (ii) Judgment against each of the second, third and fourth defendants in the sum of $536,598.78.
3. The respondent pay the appellant's costs of the appeal.
4. Submissions to be made about the costs of the trial.