SUPREME COURT OF QUEENSLAND

CITATION:	*Suncorp Metway Insurance Ltd v Kilner* [2013] QCA 42
PARTIES:	**SUNCORP METWAY INSURANCE LIMITED** ABN 83 075 695 966 (appellant) **v** **KEITH WARREN KILNER** (respondent) **DONALD ROBERT TURNER** (not a party to the appeal)
FILE NO/S:	Appeal No 8940 of 2012 DC No 1542 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2013
JUDGES:	Muir, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal be allowed.** **2. The judgment at first instance be set aside.** **3. The respondent pay the appellant's costs of this appeal.** **4. The matter be remitted to the District Court for retrial.** **5. The costs of the first trial abide the result of the new trial.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where respondent claimed damages for negligence following a motor vehicle accident – where primary judge gave judgment for respondent – where respondent had a number of pre-existing medical conditions – where respondent gave false or misleading statements regarding his weight, medical history, criminal history, consumption of alcohol and post accident work – where primary judge

considered respondent a credible witness with his evidence being unreliable rather than untruthful – where primary judge preferred evidence of respondent's experts over appellant's experts– where primary judge's reasons did not discuss inconsistencies in the evidence and why the evidence of one expert was to be preferred over the other – whether reasons were adequate

Appeal Costs Fund Act 1973 (Qld)

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 74 ALJR 405; [2000] HCA 1, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
SS Hontestroom v SS Sagaporack [1927] AC 37, cited

COUNSEL: W Sofronoff QC SG, with W Campbell, for the appellant
R Douglas SC for the respondent

SOLICITORS: Bray Lawyers for the appellant
Shine Lawyers for the respondent

[1] **MUIR JA: Introduction** The respondent was aged 50 when he sustained soft tissue injuries to his neck and right shoulder and an injury to the retropatellar surface of his right knee in a motor vehicle accident on 12 March 2009. The respondent claimed that, as a result of his injuries, he suffered from major depression and an adjustment disorder with anxiety and depressed mood.

[2] The respondent sued the appellant in the District Court claiming damages for negligence. After a trial, in which only quantum was in issue, the primary judge gave judgment for the respondent in the sum of $396,795.74. The appellant appealed against the judgment on eight grounds, not including sub-grounds, but the grounds relied on on the hearing of the appeal, broadly stated, were that the primary judge failed:

- to give adequate reasons for his decision preferring the evidence of the medical practitioners called by the respondent over the evidence of those called by the appellant; and
- to give adequate reasons for his finding and, in particular, the evidence bearing on the credibility of the respondent.

[3] Before considering the arguments advanced by the parties, it is useful to outline the relevant evidence.

The respondent's work history and physical condition

[4] The respondent had a certificate as a fitter and turner. He had previously worked as a welder. At the time of the accident, he was employed by PBL Trailers as a tyre fitter. He had a reasonably consistent work history. His health, however, was singularly bad. Dr Ringrose, a consultant physician, in a report dated 1 August 2012, summarised his diagnosis of the respondent as follows:

"**Diagnosis**

1. Severe cirrhosis of the liver resulting in gross enlargement of the spleen, portal hypertension (associated with varices)
2. Severe chronic obstructive pulmonary disease
3. Morbid obesity
4. Thrombocytopenia secondary to hypersplensim
5. Episode of acute renal failure
6. Alcoholism
7. 40 pack year history of smoking"

[5] Dr Ringrose explained that "40 pack year" was shorthand for the smoking of the equivalent of a packet of cigarettes a day for 40 years. Dr Ringrose said that an ultrasound of the respondent's liver on 17 September 2010 showed a nodular liver with a very large spleen. He noted:

> "The nodular liver is consistent with cirrhosis. Cirrhosis of the liver causes scarring of the liver and the scar tissue impairs the passage of blood in the veins through the liver. This results in varicose veins being formed particularly in the stomach and the back pressure on the portal vein results in a marked enlargement of the spleen as commented on above."

[6] Dr Ringrose's report referred to medical records which revealed that in 2006 consideration was given to assessing the respondent's suitability for a liver transplantation, but he failed to attend four appointments in that regard. Dr Ringrose's opinion was that the respondent, because of the "absolute contraindications" of active alcohol abuse and advanced cardiopulmonary disease and the "relative contraindications" of "severe obesity and medical noncompliance", would never be a candidate for liver transplantation.

[7] In Dr Ringrose's opinion, the respondent's disabilities reduced his life expectancy from a statistically derived figure of 32.16 years by between 20 to 25 years. He observed:

> "You will realise it is impossible to be precise in this matter but it is not unreasonable in my opinion to suggest the above. He is at significant risk of major haemorrhage as a result of his varices and large spleen and such a haemorrhage may well be fatal. He is also at significant risk of portal encephalopathy which is brain damage secondary to the liver failure.
>
> Added to that is the fact that he has severe lung disease. Even if he were to cease smoking now **his pulmonary disease will be a major factor in his remaining life with significant deterioration inevitable**." (Emphasis added)

[8] Commenting on the respondent's ability to work, Dr Ringrose said:

> "Given the outline of his current condition above, it is my opinion that [the respondent's] condition precludes him from ever working again. He has major medical problems which are ongoing. Even if he were [able] to successfully obtain employment, there is no doubt his ability to perform would be severely curtailed by his current condition and I do not think his employment would continue."

[9] The report refers to liver function tests between 17 February 2003 and 20 July 2010 which showed abnormal function "and significant elevations of liver enzymes released from dying liver cells in response to alcohol intake". Dr Ringrose explained:

> "For example on 20 July 2010, the GGT enzyme was 566 (normal range 5 - 50)
>
> Note: These show ongoing severe hepatic damage secondary to the consumption of alcohol which will lead to further damage to the liver and increasing cirrhosis of the liver."

The expert orthopaedic evidence

[10] Dr Pentis, orthopaedic surgeon, was called in the respondent's case. Another orthopaedic surgeon, Dr McPhee, was called in the appellant's case. Reports of Dr Pentis dated 15 July 2010, 24 August 2010 and 28 June 2012 were tendered.

[11] In the last report, Dr Pentis concluded that the respondent has "sustained soft tissue musculo-ligamentous injuries and aggravated degenerative problems in the cervical region of the spine". He assessed the respondent's residual impairment in this regard:

> "… as a pre-existing 3-5% cervical whole person impairment due to the degeneration evident on imaging. Super-imposed upon this a further 6-7% cervical whole person impairment due to the restricted, guarded range of movement that he exhibits."

[12] Dr Pentis concluded that there was a pre-existing degeneration in the right knee which was aggravated by the accident:

> "... causing chondral damage to the retropatellar surface and to the chondral surfaces as well as the medial ligament region of his knee."

[13] Dr Pentis referred to a twisting of the knee after the accident which "caused further problems". He considered that he probably had "degenerative menisci" which could have been aggravated by the accident and the subsequent twisting. He assessed "a combined impairment" in the knee amounting to a "12-15% whole person impairment … a third, at least [of which] was due to the effects of the … accident".

[14] Dr Pentis' opinion in respect of the shoulder injury was that there was a "combination of degeneration, rotator cuff degeneration [and] degeneration in the AC joint … [all of which were] aggravated … in the accident [leaving the respondent] with a residual impairment … [amounting to] a 7.5-10% total whole person impairment", a third of which was attributable to the accident.

[15] Dr McPhee's conclusions in his 15 November 2010 report in respect of the three injuries were:

- a neck/spinal injury which, given the extent of degeneration at the time of the accident, did not exceed a whole of person impairment of five per cent;
- because of matters discussed later, the impairment from the accident combined with pre-existing impairment was five per cent of the right upper limb or three per cent of the individual as a whole; and
- also, for reasons discussed later, there was "no material evidence of any ongoing incapacity relating to the knee up until a later unrelated domestic incident on 21st August 2009". The respondent's restriction of flexion of the right knee did not "qualify for a permanent impairment".

The psychiatric evidence

[16] Dr Lotz, psychiatrist, gave evidence in the respondent's case and his reports dated 9 July 2010 and 7 November 2011 were tendered. In the first report, Dr Lotz diagnosed "a Major Depressive Disorder … compounded by an Alcohol Abuse Disorder". Dr Lotz commented:

> "Unfortunately due to his Alcohol Abuse it is difficult to ascertain specifically what is related to his Major Depression and what is as a result of his Alcohol Abuse."

[17] Significantly, Dr Lotz, relying on the history given to him by the respondent, regarded the alcohol abuse as a post-accident phenomenon.

[18] Prior to his first report, Dr Lotz interviewed the respondent for an hour. He recorded that:

- at the time of the accident the respondent was working as a welder;
- the respondent was drinking up to two to three litres of homemade spirits a day, whereas his "previous pattern [was to drink on] Friday and Saturday nights only";
- the respondent "has gained weight from the use of alcohol";
- the respondent was fit and active prior to the accident, in contrast to now letting himself go; and
- the respondent continues to smoke cigarettes but only when given them as he cannot afford to buy them.

[19] Dr Lotz did not change his diagnosis in his second report, in which he observed:

> "[The respondent] states that he does not use alcohol anymore. Shortly after the accident for a period of time he was abusing home made spirits up to one litre a day. This has now ceased. He denies the use of any illicit drugs, and smokes less than ten home rolled cigarettes daily.
>
> ...
>
> It appears he had put on weight since my previous assessment, which may have been related to the excess alcohol use prior to his cessation currently."

[20] Dr Lotz assessed the respondent's permanent impairment at 19 per cent.

[21] Dr De Leacy, psychiatrist, was called in the appellant's case. His diagnosis in his report dated 6 October 2010 was an adjustment disorder with anxiety and depressed mood. He assessed the respondent's permanent impairment at between 5-7 per cent. Dr De Leacy thought it "quite likely that the symptoms reported are consistent with the accident". In oral evidence, after being informed of further details of the respondent's background and medical condition, Dr De Leacy changed his opinion to a five per cent permanent impairment.

The attack on the respondent's credit

[22] The appellant raised the following matters with a view to demonstrating that the respondent was singularly lacking in credibility.

The evidence of the respondent's weight

[23] The respondent gave evidence to the effect that he weighed "around 90, 95 kilos" at the time of the accident. He deduced this, it would seem, because he was then wearing size 107 jeans. However, records in evidence showed that on many dates between 18 November 2008 and 24 June 2011 the respondent's weight was recorded at 130 kg or over or that he was described as "obese" or "morbidly obese".

[24] In August 2003 and June 2006 respectively, he weighed 119 kg and 108 kg. He weighed 138 kg on 16 March 2009, four days after the accident. Dr Pentis noted in his 15 July 2010 report that the respondent was "overweight but fit". Dr De Leacy, who saw him on 30 September 2010, described him as "markedly overweight". Dr McPhee described him, in his report dated 15 November 2010, as "overweight".

[25] The primary judge implicitly rejected the respondent's evidence of his weight at the time of the accident, but considered that the evidence was unreliable rather than untruthful.

False or misleading statements to medical practitioners

[26] It may be reasonably inferred that the respondent was aware that, before and after the accident, he was suffering from many serious, incurable and life-threatening conditions. Nevertheless, in July 2010 he told Dr Lotz that he had no medical or surgical history and was fit and active. The respondent did not correct these falsehoods when he saw Dr Lotz again in October 2011. Maintaining his claim that the accident was the cause of his mental and psychological problems, he told the doctor that he had "intrusive headaches". He did not tell the doctor that he had been hospitalised for four weeks in May and June 2011, initially with cellulitis in his left leg and then for treatment in a renal unit for haemodialysis as a consequence of a kidney failure.

[27] The respondent told Dr Lotz in October 2011 that he had been unable to drive a motor vehicle since the accident. He omitted to tell the doctor that he had been convicted on 19 October 2010 of unlicensed driving and had been disqualified from driving.

[28] The respondent told Dr De Leacy on 30 September 2010 that he had surrendered his licence. He also falsely told him that he had a reasonable driving record and no

criminal record. The respondent could not have believed this. He had a number of convictions in New Zealand between April 1978 and May 1989 for traffic related offences (including two offences of driving whilst over the prescribed blood alcohol level) and dishonesty offences (receiving property and theft). In Queensland, the respondent had committed a number of traffic related and other offences including driving whilst disqualified, dangerous operation of a motor vehicle with a circumstance of aggravation, using a number plate recorded as cancelled, lost, stolen or destroyed, and breach of a suspended sentence. He had been in prison both in New Zealand and Queensland.

[29] He also told Dr De Leacy that before the accident he was always a happy-go-lucky individual but that since his injuries he had become withdrawn and did not socialise. As was the case with Dr Lotz, the respondent did not disclose the nature and extent of his medical history or his many grave afflictions.

[30] The respondent told another medical practitioner, Dr Dillon, who examined him on 14 May 2009, that he had been in good health at the time of the accident. The respondent did report an operation to repair his right shoulder in 1979 and a hernia repair. Dr Dillon recorded that the respondent's weight was 133.1 kg. He noted that although the respondent was "vocal in his complaints" when moving his neck and head through a routine range of movements, "[w]hen distracted … the neck rotation and lateral flexion movements were almost full in both directions". Dr Dillon considered that the right knee injury had "effectively … resolved".

[31] Dr McPhee also concluded that the respondent was less than frank about his medical history and that he exaggerated the extent of his shoulder impairment. He said, "The restriction of movements [of the right shoulder] in both planes is voluntary". Dr McPhee observed that the respondent "reluctantly acknowledged … a significant subsequent injury to his right knee" and that there was "no material evidence of any ongoing right knee injury between the … accident … and the subsequent domestic twisting injury in August 2009".

The evidence of the respondent's consumption of alcohol

[32] Dr Ringrose's evidence established that the respondent had sustained liver damage from excessive consumption of alcohol before and after the accident. Notwithstanding this uncontested evidence, the primary judge "[accepted] the [respondent's] evidence that he has ceased consumption of alcohol".

[33] In his oral evidence given in August 2012, the respondent said that he had given up drinking two years ago. The last liver function test relied on by Dr Ringrose was on 20 July 2010. Caboolture Hospital records of 19 February 2011 record that the respondent "states [that he] has been shivering [and] [h]as had 12 stubbies this [afternoon]".

[34] On 30 September 2010, the respondent told Dr De Leacy that "he does not drink alcohol now because he cannot afford to but he will have a drink if someone offers him one". Dr Lotz, however, was told a few months earlier, on 2 July 2010, that he has "taken to abusing alcohol, and drinks up to two to three litres of home made spirits on a daily basis". On 17 October 2011, Dr Lotz was told by the respondent that he "does not use alcohol anymore".

Statements by the respondent about post accident work

[35] The respondent asserted that he had been unable to work and had not worked since the accident. There was, however, a substantial body of evidence to the contrary.

[36] A record of the Caboolture Hospital Emergency Department dated 18 November 2008 stated, "[w]orks in markets (selling tools)". The respondent told Dr Dillon on 14 May 2009 that, "he has been unable to do his weekend work of selling items at Sunday markets". This suggested the continuation of a pre-accident activity. He told his general practitioner, Dr Psaltis, on 6 September 2010 that he has "been continuing to work including with asbestos". Caboolture Hospital records of 13 September 2010 note that the respondent "works as a welder" and that his work took him to "rural places". Caboolture Hospital records of 17 September 2010 state that the respondent was "given a medical certificate for his work".

[37] The respondent was the sole registered owner of the business name "Wheels 4 U" from 1998 to April 2012. The business was listed in the computer records of PBL Trailers as a supplier. During a job capacity assessment by Centrelink on 8 October 2010, the respondent said that he was "in the process of establishing a business but [that] his partner… Ted… was doing the physical tasks". The respondent said in cross-examination that he had set the business up for his neighbour. He explained the hospital records referring to the markets as references to the sale by him over five non-consecutive Sundays of tools, including welding gear, which he owned.

[38] Dr De Leacy observed on 30 September 2010 that the respondent was "wearing a hat and a fluorescent upper garment like the type workmen wear". In cross-examination the respondent explained this choice of apparel on the basis that he did not "feel safe walking across the streets". Although he told Dr De Leacy that he was "frightened in motor vehicles" and Dr Lotz that "he hate[d] being in a car", he is not recorded as having said anything about a fear of crossing roads.

The primary judge's findings

[39] The primary judge found the respondent to be a credible witness. He said in this regard:

> "[52] In my opinion the weight issue is an example of the [respondent] being unreliable rather than untruthful. In my opinion the [respondent] honestly thought he weighed lighter at the time of the accident than he actually did. His belief seemed to be justified by the fact that he could fit into a particular size pair of pants. That may have been an unwarranted assumption on his part.
>
> [53] In my opinion on some occasions the [respondent] may have misunderstood or been misunderstood when he has tried to express himself. I am mindful of his criminal history. I am mindful he appears to have told Dr. De Leacy he had no criminal history. However, that does not cause me to reject the [respondent's] evidence. The [respondent] impressed me as a person who could be quite nervous and not at ease

> depending on the circumstances. I consider when he was examined by Dr. McPhee that would not have been a settled experience for the [respondent]. The [respondent's] response to questions asked about his mood and depression persuade me he is genuinely ill. I am satisfied the [respondent] has told the court the truth."

[40] The primary judge explained his preference for the evidence of Dr Lotz over that of Dr De Leacy and for the evidence of Dr Pentis over that of Dr McPhee as follows:

> "[54] Therefore, I accept the evidence of Dr Lotz a consultant psychiatrist who saw the [respondent] on 2 July 2010 and again on 17 October 2011 that the [respondent] is suffering by reason of the accident major depression and alcohol abuse disorder (in remission). I accept Dr Lotz's psychiatric impairment rating scale at 19 per cent. I accept Dr Lotz's evidence that the [respondent] should seek treatment from both a psychologist and psychiatrist. Even Dr De Leacy a consultant psychiatrist diagnosed the [respondent] as suffering an adjustment disorder with anxiety and depressed mood. However I am not persuaded that the [respondent's] permanent impairment rating is as low as Dr De Leacy states at 7 per cent. In Dr Lotz's earlier report he envisaged 12 months of treatment on average one session per fortnight by either a psychologist and psychiatrist at an average cost of $300 per session. At the time of his first report Dr Lotz thought that the [respondent] would not be able to return to work for at least 12 months and not before significant psychiatric and psychological treatment. However, in Dr. Lotz's second report he states, and I accept, that the prognosis for the [respondent] is unfavourable because the [respondent] is reluctant to want to engage with either a psychologist or a psychiatrist. I find on account of the [respondent's] psychiatric injuries he could not sustain employment for remuneration.
>
> [55] However the [respondent's] problems are not limited to psychiatric problems. He also has orthopaedic injuries caused by the accident. Because I accept the [respondent's] evidence I accept he is continuing to suffer symptoms in the neck, shoulder and knee caused by the accident. Also because I accept the [respondent's] evidence I prefer the evidence of Dr Pentis an orthopaedic surgeon to that of Dr McPhee another orthopaedic surgeon. I find the [respondent] in relation to his neck has superimposed on his pre-existing condition of his neck a further 6-7 per cent cervical whole person impairment caused by the accident. Further I find while he has currently a 12 to 15 per cent whole person impairment in relation to his right knee one third of that is due to the accident. Finally in relation to his right shoulder I find he has a 7.5-10 per cent whole person impairment and one third to a half is due to the accident."

Consideration of ground 1

[41] Even if it was open to the primary judge to conclude that the respondent was a truthful witness, it was not open on the evidence for him to conclude that the respondent was a reliable witness and that Dr Lotz's opinions had been given with due regard to the material facts relevant to the formation of such opinions. If the primary judge did equate truthfulness with accuracy and reliability, which seems likely, he erred.

[42] Dr Lotz was not told by the respondent, prior to his first report, of his remarkable medical history, including his history of obesity and hospitalisation. He was told by the respondent that he was in good health. Before his second report, Dr Lotz was provided with a statutory declaration by the respondent in which the respondent stated without elaboration:

> "1. Prior to the motor vehicle incident on 12 March 2009, I suffered from the following medical conditions:
>
> (a) Hepatitis C;
>
> (b) Liver problems;
>
> (c) Chronic Obstructive Pulmonary Disease; and
>
> (d) Hernia.
>
> 2. Following the motor vehicle incident on 12 March 2009, I suffered from:
>
> (a) Liver problems;
>
> (b) Kidney problems; and
>
> (c) Chronic Obstructive Pulmonary Disease."

[43] Dr Lotz concluded, on the basis of what the respondent told him, that he commenced drinking to excess after the accident. He appeared to be unaware of the deterioration in the respondent's condition resulting from his alcohol consumption prior to the accident.

[44] Dr Lotz disregarded the respondent's Hepatitis C because it had been successfully treated. He did not give consideration to the state of the respondent's liver and its related symptoms because of the respondent's remarkable claim that he was in good health. Nor did he have regard to the respondent's lung problems and their affects. Dr Lotz's focus was "predominantly on [the respondent's] psychiatric condition following the motor vehicle accident, not specifically to how he was functioning prior" to it. He did not form a view about the respondent's likely mental state prior to the accident in order to determine what change to it, if any, had been caused by the accident and the injuries resulting from it.

[45] Like Dr Lotz, Dr De Leacy was unaware of the respondent's medical history, as reported by Dr Ringrose, when he gave his report. Dr De Leacy, unlike Dr Lotz, did take the respondent's medical history into account and, having done so, changed his opinion. That opinion, however, was still based on acceptance of the respondent's factual assertions, except where contradicted by the factual matters recorded in Dr Ringrose's opinion.

[46] It is apparent from the above discussion, that it was illogical for the primary judge to accept the evidence of Dr Lotz over that of Dr De Leacy because he was satisfied of the respondent's truthfulness. Both psychiatrists accepted the accuracy of the history given to them by the respondent except that Dr De Leacy, for the purpose of giving his oral evidence, took into account the respondent's condition as reported by Dr Ringrose, about which there was no factual dispute. The choice of which evidence was to be accepted thus depended on an assessment of the relative merits of the professional opinions of the two psychiatrists. This exercise was not undertaken.

[47] It was also illogical for the primary judge to prefer Dr Pentis' evidence for essentially the same reasons. Both Dr Pentis and Dr McPhee accepted that the respondent had soft tissue musculo-ligamentous injuries with pre-accident spinal degeneration. They differed as to its severity. They had been told substantially the same things by the respondent. Dr McPhee's conclusions in relation to the shoulder injury were more affected by observations of the respondent under examination than those of Dr Pentis. Dr McPhee was also seemingly more concerned than Dr Pentis to weigh the symptoms reported by the respondent against objective fact.

[48] Dr McPhee's opinions were supported by Dr Dillon's observations and opinions. But the issue is not whether Dr McPhee's evidence should have been preferred; it is whether it was open to the primary judge to prefer the evidence of Dr Pentis merely because he accepted that the respondent was not untruthful.

[49] The primary judge's reasons do not explain what it was that the respondent said in evidence or to the expert witnesses which made him prefer Dr Pentis' opinion to Dr McPhee's about the soft tissue injuries. Such an explanation was required because, on the face of it, there was nothing about the respondent's instructions to the doctors which could cause the evidence of one to be preferred over the other. As for the knee injury, even if the primary judge accepted the respondent's assertions that he experienced some pain or other symptoms prior to the twisting incident, it was incumbent on the primary judge to state this and to explain why Dr Pentis' opinion was to be preferred. Dr McPhee's opinion was formed after an examination of the respondent. It was supported by Dr Dillon's evidence and was consistent with the medical records. An x-ray after the accident revealed no problem other than calcification "presumably from past soft tissue trauma". The respondent's hospital chart showed normal power in both knees.

[50] Relevant to the extent of the explanation required was Dr McPhee's opinion that the respondent only "reluctantly" conceded the existence of his subsequent twisting of the knee and that he probably failed to disclose it to Dr Pentis on his first examination. The later twisting was not mentioned in Dr Pentis' first report even though it is an obviously relevant matter which was discussed in Dr Pentis' third report.

[51] The above discussion demonstrates that the primary judge failed to sufficiently explain the reasons for his conclusion that the evidence of Drs Pentis and Lotz was to be preferred to that of Drs McPhee and De Leacy. It also shows that the primary judge erred in that he "has failed to use or has palpably misused his advantage"[1] in seeing witnesses and assessing their evidence. The judgment must be set aside and a re-trial ordered. The parties did not suggest that any other course was open should the appellant's arguments succeed.

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1 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

Consideration of ground 2

[52] Because of the foregoing conclusion, it is not strictly necessary to address the question of adequacy of reasons in relation to the finding that the respondent "told the court the truth". There is an obvious overlap between this ground and ground 1. The matter was fully argued, however, and I consider it desirable that it be dealt with.

[53] The primary judge's finding was preceded by the observation, "The [respondent's] response to questions asked about his mood and depression persuade me he is genuinely ill". It was implicit in the statement that the judge accepted that the respondent was not fabricating his evidence in relation to his present mental condition. There was however no real issue about this. The critical question in relation to the respondent's present mental condition was the extent, if at all, to which it had been caused by the accident.

[54] As appears from the earlier discussion, a great many matters strongly supported the conclusion that, not only was the respondent a singularly unreliable witness, he had been untruthful in order to advance his interests in relation to the litigation. The most obvious examples of this are his attempts to have the psychiatrists believe that he enjoyed robust good health at the time of the accident.

[55] The statements recorded in medical records are difficult to reconcile with the respondent's claims that he was unable to work and did not work after the accident. The respondent's evidence about his weight at the time of the accident is also unlikely to be true. The primary judge found it to be unreliable.

[56] The primary judge referred to only a few matters to justify his findings of credibility. One is that it may have been an unwarranted assumption by the respondent that he weighed 90 to 95 kgs because he could fit into jeans of a particular size. Another is that the respondent "may have misunderstood or been misunderstood when he has tried to express himself". Why such misunderstandings may have occurred only on some occasions was not explained. No witness was asked or said anything about the respondent's clarity of expression or lack thereof. If medical practitioners and/or medical staff misunderstood what the respondent was saying about his working after the accident, there was a surprising consistency in their mistaken understandings.

[57] The content of the expert reports and the oral evidence of the experts did not suggest that the respondent was backward in informing the experts of matters which he thought might support his claim or that he had difficulty in making himself understood in this regard.

[58] These observations are relevant to the primary judge's conclusion that the respondent did not have "a settled experience" when examined by Dr McPhee. How he arrived at that understanding was not explained. Nor was how his being unsettled would cause him to be untruthful and deceitful to Dr McPhee. As was quite apparent, he had also been untruthful to both psychiatrists. The primary judge did not seem to regard the respondent's experience with them as unsettled. He did not comment on Dr Dillon's observations which provided support for Dr McPhee's view that the respondent was exaggerating his pain and restricted arm and neck movements. His Honour mentioned Dr McPhee's observations concerning the respondent's voluntary restrictions of some of his movements without comment.

[59] The primary judge was entitled to take the view that the respondent's credibility was not destroyed merely because he told Dr De Leacy he had no criminal history. However, that was a relatively minor matter which the primary judge was required to take into account, together with:

- the fact that the criminal history included dishonesty offences and others which tended to show a disregard of social norms;
- the weight evidence;
- the work history evidence;
- the evidence of Dr McPhee and Dr Dillon of a deliberate exaggeration of symptoms; and
- in particular, the evidence of false statements and omissions in the respondent's dealings with medical practitioners.

[60] A judge's reasons for accepting or rejecting a witness' credibility are often difficult to articulate. In some circumstances it may be sufficient for the judge to state that his conclusion is based on the witness' demeanour.[2] But where, as is the case here, there is a wealth of objective evidence which strongly supports the conclusion that the witness is unreliable and untruthful in many material aspects, it is incumbent on the judge to explain, with some care, how the objective indicators of untruthfulness and unreliability have been overcome. At the very least, the judge must be seen to have considered the matters supporting a favourable credit finding against the cumulative weight of the evidence casting doubt on the witness' credibility. This the primary judge failed to do.

[61] Counsel for the respondent relied on cases such as *Fox v Percy*,[3] which discussed the constraints on intermediate appellate courts in interfering with trial judge's findings on credit. He submitted that it could be seen from the reasons that the primary judge had paid careful attention to the evidence, the issues and the appellant's credit arguments. He discussed the evidence relating to post accident work issues and the respondent's weight, the respondents pre and post accident health and his examination by Dr McPhee. References were made to passages in the reasons which demonstrated that the primary judge had paid attention to the respondent's demeanour.

[62] It was submitted that it was understandable that the primary judge would prefer the evidence of the medical experts who assessed disability on the basis of the evidence accepted by the primary judge (that is, the evidence of the respondent). Finally, it was submitted that the task of evaluating credit was quintessentially the role of a trial judge and that he had undertaken it with care.

[63] Many of these submissions may be accepted, but the respondent's argument failed to confront the arguments advanced by the appellant and discussed above.

Conclusion

[64] In my view, this is a clear case for the grating of a certificate under the *Appeal Costs Fund Act* and the respondent should apply promptly for a certificate.

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2 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 417.

3 (2003) 214 CLR 118.

[65] For the above reasons, I would order that:

1. Appeal be allowed.

2. The judgment at first instance be set aside.

3. The respondent pay the appellant's costs of this appeal.

4. The matter be remitted to the District Court for retrial.

5. The costs of the first trial abide the result of the new trial.

[66] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the orders proposed by his Honour.

[67] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.