SUPREME COURT OF QUEENSLAND

CITATION:	*RACQ Insurance Limited v Brennan* [2013] QCA 150
PARTIES:	**RACQ INSURANCE LIMITED** ABN 50 009 704 152 (appellant) **v** **KERRY SUZANNE BRENNAN** (respondent)
FILE NO/S:	Appeal No 558 of 2013 DC No 3 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	14 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2013
JUDGES:	Chief Justice and Muir JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondent's costs, to be assessed on the standard basis.** **3. Parties' rights are reserved to seek an alternate order in relation to costs. Should such an order be sought, it should be the subject of written submissions to be furnished within seven days.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – DAMAGES EXCESSIVE – the respondent was a pedestrian injured by a motor vehicle – the respondent was awarded $528,925.56 in damages at first instance, which included $411,000 for future economic loss – the appellant contended that the damages awarded, particularly in respect of future economic loss, were manifestly excessive – the appellant disputed the trial judge's assessment of the respondent's employment prospects but for the accident – the appellant argued that the trial judge's attribution of the respondent's shoulder impairment to the accident was not reasonably open on the evidence – whether the trial judge had failed to use or palpably misused his advantage as a trial

judge – whether the trial judge's estimate of lost weekly earnings was a wholly erroneous estimate of the damage suffered – whether the assessment of damages in relation to reduced earning capacity was manifestly excessive

Civil Liability Act 2003 (Qld), s 55

Browne v Dunn (1894) 6 R (HL) 67, cited
Gamser v Nominal Defendant (1977) 136 CLR 145; [1977] HCA 7, cited
Miller v Jennings (1954) 92 CLR 190; [1954] HCA 65, cited
Robert Bax and Associates v Cavenham Pty Ltd [2013] 1 Qd R 476; [2012] QCA 177, considered
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, considered

COUNSEL: K Wilson SC, with G O'Driscoll, for the appellant
G F Crow SC, with P T Cullinane, for the respondent

SOLICITORS: Quinlan Miller & Treston for the appellant
Macrossan & Amiet for the respondent

[1] **CHIEF JUSTICE:** The respondent, then aged 32 years, was injured on 14 April 2009 in Mackay. She was a pedestrian on a marked crossing. A motor vehicle collided with her. The learned primary Judge awarded her $528,925.56 damages, which included a component of $411,000 for future economic loss. The appellant contends that is a manifestly excessive allowance, and that $100,000 only should have been allowed. There were other challenges in the notice of appeal, but they were not pursued.

[2] The learned Judge found that the respondent was subject to a "significant" impact. She had been propelled seven to ten metres before landing on the bitumen. He found that she suffered injuries to her neck, shoulder, hip and head, and a "significant" psychiatric condition. She was unable to return to her work as a locomotive driver at the Proserpine Sugar Mill until late June 2009.

[3] In the 2011-2012 year, the respondent was earning about $800 net per week from that seasonal work. Following the accident, she needed substantial assistance with her work, partly because of her emotional difficulties. She was the fortunate beneficiary of assistance from her sister, who carried out one-quarter of her work for her, and the Mill's traffic officer Mr Davis, who rearranged the crews in order to accommodate her. That assistance and her own determination to continue at work meant that she retained her employment.

[4] The respondent's ambition had been to work as a locomotive driver at QR National or Pacific National or in the mining industry, where substantially higher income could be earned. Mr Davis described her as a "very able" and "excellent" locomotive driver. The Judge found that because of residual disabilities, she would be unlikely to realise that ambition.

[5] The Judge had evidence before him of the net weekly earnings of Sharon Nicholls, who pre-accident was the respondent's "driver's assistant", working as at trial as a locomotive driver at Port Hedland ($3,600 per week), and Madonna McLean, a dump truck driver at Burton Coal Mine ($1,800 per week). Allowing for the

feature that he was dealing with the loss of a chance, the Judge calculated the component for future economic loss at $500 per week over 30 years of a normal working life remaining for the respondent. That computed to $411,000.

[6] The appellant contends that the Judge thereby "allowed for a more than doubling of her pre-accident earnings and allowed it for the whole of her working life to retirement". The appellant relied, in writing, on the respondent's failure to seek the higher paying work prior to the accident, and the absence of evidence of any disability caused by the accident which would have prevented her carrying out such higher paying work. In oral submissions, Mr Wilson SC referred also to the issues whether the higher paying work would have been available to the respondent, and whether she would have been prepared to leave her home town, Mackay, to pursue it.

[7] His Honour found that because of her accident-occasioned injury and consequent disability, the respondent lost "a significant chance of pursuing the types of careers pursued by the witnesses McLean and Nicholls".

[8] The dominant shoulder injury caused a six per cent permanent impairment of the left upper limb, the left hip injury a five per cent impairment of the left lower limb, and the cervical spine injury a five per cent whole person impairment. On the evidence of the orthopaedic surgeon Dr Cook, which was accepted by the Judge, that aggregated to an 11 per cent whole of person impairment. The psychological condition itself accounted for a five to six per cent whole person impairment. The Judge found that overall, the respondent suffered from a 15 to 20 per cent whole of person impairment, which is obviously substantial when one comes to assess capacity to engage in physical activity such as climbing onto, driving, and climbing down from, a railway locomotive, and associated tasks.

[9] The principal thrust of the appellant's challenge in the written material focused on the left shoulder injury. Counsel for the appellant essentially contended that the Judge's finding that the shoulder impairment was caused by the accident was not reasonably open: the difficulties with the shoulder were explained by degenerative change which preceded the accident.

[10] His Honour referred to the respondent's "complaints of shoulder pain immediately after the accident", which gained some support from family members, and "to some extent" from physiotherapy records. In relation to a suggestion the respondent spoke too generally, the Judge records that the respondent "spoke of pain all down the left side after the accident and frequently of pain extending from her neck down to the mid-bicep on the left side", which to the respondent would have embraced the shoulder. The symptoms of the shoulder degeneration did not "overtake the accident caused symptoms" and added little to the respondent's overall disability.

[11] The respondent was cross-examined at the trial as to what she said to various doctors at various times. Dr Gibberd, an orthopaedic surgeon, first saw the respondent two years four months after the accident. In his report, he says that the respondent told him that she did not experience shoulder pain until six months before his examination of her. Under cross-examination, the respondent denied having said that (transcript p 1-26). Counsel for the appellant relied, in the context of *Browne v Dunn* (1894) 6 R (HL) 67, on the respondent's Counsel's failure to put to Dr Gibberd that the respondent did not tell him that her shoulder pain first came on only six months before the examination.

[12] The primary Judge considered that the respondent was "an honest witness doing her best to give an accurate account of herself". The denial, he said, "came after a number of questions where the (respondent) had responded saying that she couldn't remember the detail of what she had said to Dr Gibberd" and that it was, in the Judge's estimation, "a denial [borne] of her frustration with the process rather than a wish to mislead". He therefore did not think that it was "a matter that impacts significantly on her credit".

[13] I accept the response from Counsel for the respondent, that there was little point in suggesting to Dr Gibberd that he was mistaken in his report, in circumstances where the respondent could not herself recall precisely what she said to the doctor, and where the Judge did not rely on her denial, on the basis that it was borne of frustration rather than reliable recollection.

[14] The respondent gave consistent oral evidence of experiencing shoulder pain as from the time of the accident. See the transcript at pp 1-12, 1-13, 1-16, 1-31, 1-32, 1-38, 1-40, 1-43. That is also consistent with her "quantum statement" (paras 17, 29, 30, 31, 32).

[15] The Judge took the view that the respondent's own evidence in this regard gained significant support from the evidence of her family and workmates. Her mother in particular gave evidence of the respondent's complaining of "severe shoulder and neck pain" on the day of the accident (transcript p 1-118), and said that she was "pretty sure" that her daughter complained of shoulder pain in the year following the accident (transcript p 1-119). The respondent's mother was challenged in cross-examination because she did not mention shoulder pain in a written statement she prepared in support of an application for funding for certain therapy. The mother explained that as having been an oversight. The Judge was entitled to take the view that the evidence of the mother supported the respondent's having complained of shoulder pain following the accident.

[16] The Judge also referred to evidence from the orthopaedic surgeons, preferring the evidence of Dr Cook over that of Dr Gibberd. One may start however with the report of 1 April 2011 from the respondent's treating general practitioner Dr Kangru, in which the doctor refers to left shoulder problems "originating from a traffic accident in 2009". Dr Cook referred in his evidence to the physiotherapy body chart diagram (p 402) prepared on 16 April 2009 – two days after the accident, with shading indicating pain complained of in areas including the left shoulder. According to Dr Cook, the respondent told him "she had been having left shoulder pain virtually from the time of her injury" (transcript p 1-58).

[17] Dr Cook accepted that an activity in May 2011, where the respondent climbed into a higher than usual locomotive, "could" have activated the underlying degenerative condition of the shoulder, but plainly accepted as genuine the respondent's claim of pain from the time of the accident, referable to soft tissue injury and not to activation of pre-existing degenerative change.

[18] As I have said, the learned Judge rejected Dr Gibberd's view that "the left shoulder is not attributable to the accident". In rejecting Dr Gibberd's evidence generally, the Judge relied on a number of circumstances, all reasonably available to him: Dr Gibberd's view that the shoulder symptoms commenced late (contrary to other evidence the Judge accepted); that the doctor's approach was coloured by the

arguably irrelevant consideration that the respondent had early in the piece consulted a solicitor, a course which the doctor described as "not usual behaviour" (a surprising approach, where she had sustained substantial injury where a vehicle collided with her as a pedestrian); that the doctor characterized the impact as "low level and unlikely to cause significant injury" (where the respondent had suffered head injury and been propelled a not insubstantial distance through the air landing on the bitumen); and that the doctor assumed the respondent would not experience future difficulty because a cane train rides "smoothly", which ordinary experience of life might suggest is at least a rather unworldly generalization.

[19] Finally in relation to the medical evidence, mention should be made of the evidence of the consultant occupational physician Dr Brandt. Counsel for the appellant referred in their written outline (paras 21-32) to various aspects of the evidence of Dr Brandt, but none of them militated against the reasonableness of the Judge's reliance on the evidence of the respondent and Dr Cook especially.

[20] Mr Wilson relied on the Judge's failure to explain why he rejected Dr Brandt's conclusions where they differed from Dr Cook's. He implicitly did reject any such contrary view. He was alive to Dr Brandt's evidence: he referred to it at p 8 of his reasons for judgment. The judgment is not vulnerable because of the absence of more detailed explanation.

[21] The evidence of the respondent and Dr Cook, on which His Honour relied, was obviously not "glaringly improbable". In relying on that evidence (and the other supporting evidence), the Judge did not "fail to use or palpably misuse his advantage" as trial Judge, or act on evidence which was "inconsistent with facts incontrovertibly established by the evidence". See *Robert Bax and Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476, 497, where Muir JA summarized the effect of the applicable High Court authorities.

[22] Neither could it be said that the assessment of damages in relation to reduced earning capacity was manifestly excessive, allowing for the extent of the respondent's whole of person incapacity, and the consequent frustration of her ambition to take on the more lucrative driving work. The Judge adopted a weekly loss ($500) which, taken with her residual earning capacity ($800), left her earning approximately 36 per cent of the earnings achieved by her former subordinate co-employee Ms Nicholls ($3,600). That appropriately respected the feature that His Honour was evaluating the lost chance, and the uncertainties necessarily attending that.

[23] Mr Wilson submitted there was inadequate evidence the higher paying work would be available. Counsel for the appellant at the trial actually conceded (transcript p 1-9) "there is the availability of employment in the mines". Ms Nicholls gave evidence of "a big demand" (p1-62). There was evidence from Mr Saunders that the mining companies took on women drivers, and even inexperienced operators. Mr Wilson suggested the respondent may not have wanted to leave her parents and Mackay, but significantly, trial Counsel conceded (p 146) that the respondent had been away from home for 20 years. In response to Mr Wilson's contention that the respondent had not sought the higher paying work, Mr Crow SC (for the respondent) pointed to her evidence of making relevant approaches both before and after the accident (p 1-47).

[24] Mr Wilson criticized the reasons for failure to set out the assumptions and methodology (s 55 *Civil Liability Act* 2003) behind the Judge's selection of a loss of $500 per week. It is plain from his reasons that he was comparing the respondent's situation with that of Ms Nicholls and Ms McLean, making adjustments to reflect the valuation of the chance. The Judge has done the best he could in an inherently uncertain area. To have pretended to greater precision would have been both inappropriate and artificial.

[25] It should in any event be remembered that an appeal court will be "particularly slow to reverse the trial judge on a question of the amount of damages". Acknowledging that this primary Judge proceeded on a factual basis reasonably open, then proceeding to the next issue, on no view could this particular component be described as "a wholly erroneous estimate of the damage suffered", the criterion to be drawn from *Gamser v Nominal Defendant* (1977) 136 CLR 145, 148 per Gibbs J (quoting from *Miller v Jennings* (1954) 92 CLR 190, 195-6).

[26] I have not relied on the even more rigorous standards, "out of all reason", "wholly disproportionate to the circumstances", to which Aickin J, producing the major judgment, referred (pp 158, 160), with the emphatic approbation of Barwick CJ (p 146) and, probably also, the support of Stephen J (p 149). It may be that that approach must now be read in the context of later expositions as in *Warren v Coombes* (1979) 142 CLR 531.

[27] I would order that the appeal be dismissed, and that the appellant pay the respondent's costs, to be assessed on the standard basis. I would reserve the parties' right to seek an alternate order in relation to costs, and that should such an order be sought, it should be the subject of written submissions to be furnished within seven days.

[28] **MUIR JA**: I agree with the reasons of the Chief Justice and the orders he proposes.

[29] **MULLINS J:** I agree with the Chief Justice.