SUPREME COURT OF QUEENSLAND

CITATION:	*AAI Limited & Anor v Miles* [2014] QCA 22
PARTIES:	**AAI LIMITED** ABN 48 005 297 807 **(formerly SUNCORP METWAY INSURANCE LIMITED)** (first appellant) **BROCK GARRICK WILLIAMS** (second appellant) **v** **TERENCE PHILLIP MILES** (respondent)
FILE NO/S:	Appeal No 6588 of 2013 SC No 162 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2013
JUDGES:	Fraser JA and Gotterson JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where the respondent was struck by a motor vehicle in the carpark of a tavern after he had been drinking alcohol at the tavern – whether the respondent's intoxication contributed to the injury suffered by him – whether by standing near the motor vehicle the respondent failed to take precautions against the risk of being struck by the motor vehicle when it moved from a stationary position *Civil Liability Act* 2003 (Qld), s 47 *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited
COUNSEL:	R D Green for the appellants J A Griffin QC, with K F Boulton, for the respondent
SOLICITORS:	Messrs Gray Lawyers for the appellants Hunter Solicitors for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the order proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the order proposed by Boddice J and the reasons given by his Honour.

[3] **BODDICE J:** On 21 June 2013, the trial judge gave judgment for the respondent in his claim against the appellants for damages for loss and damage occasioned as a consequence of personal injuries sustained by him on 14 January 2006 when he was struck by a motor vehicle driven by the second appellant. The trial judge ordered the first appellant pay the respondent the agreed damages of $750,000. The trial judge found there should not be any apportionment for contributory negligence.

[4] The appellants appeal the decision of the trial judge. The only issue on the appeal is contributory negligence. The appellants contend the trial judge's conclusion in respect of contributory negligence was contrary to and against the weight of the evidence.

The incident

[5] On the evening of 14 January 2006, the respondent, his brother, Troy,[1] and a friend, Kenny, attended a birthday party at the Robina Tavern on the Gold Coast. Each consumed a significant quantity of alcohol throughout the evening.

[6] Just before midnight, Troy and Kenny left the Tavern and walked through the carpark. The respondent followed shortly after. At that time, the second appellant was driving a 1996 green Ford Festiva motor vehicle through the carpark. He was accompanied by his girlfriend, Shari, her brother Matthew and his friend Sam. They were intending to purchase alcohol from the bottle shop adjacent to the Tavern.

[7] As the vehicle travelled through the carpark, an exchange occurred between Troy and Kenny, and the occupants of the motor vehicle. Words were spoken, and Troy spat into the motor vehicle. The respondent was not standing with Troy and Kenny at that time. He was a distance away, but heard an exchange of words. The motor vehicle then travelled towards the bottle shop.

[8] Shortly thereafter, the motor vehicle re-emerged onto the driveway of the bottle shop. It stopped at a point near where the bottle shop driveway intersects with the western driveway of the Tavern carpark. The closest exit was Cheltenham Drive. The second appellant had entered the carpark from Cheltenham Drive, and was intending to exit the same way.

[9] Words were exchanged between the occupants of the car and the respondent. Troy and Kenny were also in the vicinity. At one point a glass was thrown into the vehicle. Shortly thereafter, the vehicle accelerated forward striking the respondent. The vehicle drove over the respondent's legs, fracturing his left leg and right ankle.

Pleadings

[10] Relevantly, for present purposes, the appellants pleaded that prior to the incident the respondent stood close to and in front of the stationary motor vehicle, in its path of

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[1] The trial judge referred to most witnesses by their first name; that terminology is again adopted for ease of reference.

travel. The respondent remained there despite the second appellant advising the respondent to move from the vehicle's path of travel so that he could drive away. In response to that request, either the respondent or the two males accompanying him advised the second appellant to remove himself from the vehicle and physically confront them. Troy then physically assaulted the second appellant, punching him through the driver's side window. The respondent, or one of the males accompanying him, also threw a glass through the driver's side window, striking one of the second appellant's fingers and wounding him.

[11] The appellants further pleaded the respondent placed his hands on the bonnet or the windscreen saying to the second appellant words to the effect that he was not going anywhere. The second appellant, fearful for the physical safety of himself and his companions, caused the vehicle to be driven forward in an endeavour to remove all of them from proximity to the group. In doing so, a tyre of the vehicle passed over the respondent's foot or ankle due to the respondent having placed himself and remaining in front of or in close proximity to that vehicle.

[12] The appellants pleaded that by reason of the respondent's actions, there was no causal connection between any breach of duty by the second appellant and the respondent's injury and damage, or alternatively, the second appellant ought not to have liability for harm imposed upon him, or the respondent as a matter of policy ought not to be entitled to recover on account of the breach of duty.

[13] Alternatively, the appellants alleged, pursuant to s 47 of the *Civil Liability Act*, the respondent contributed to any breach of duty by the second appellant by reason of his intoxication, or, alternatively, contributed to his injuries and damages by reason of his intoxication when a reasonable person in his position would not have done so. In the further alternative, the appellant alleged the respondent contributed to his injuries and damage by acting in a manner that no reasonable person would have or by placing himself and remaining in the path of or in close proximity of the vehicle having observed and heard the conduct of the second appellant and the respondent's companions.

Evidence

[14] There were two issues in respect of contributory negligence. First, the respondent's intoxication. Second, the respondent's position and conduct immediately prior to the incident. On the first, the evidence was in short compass. On the second issue, seven witnesses gave evidence.

Alcohol

[15] The respondent gave evidence he had drunk two schooners of full strength beer over an hour from about 2.30 pm that afternoon at the Broadbeach Hotel. He had no further alcohol until his arrival at the Tavern about 7.00 pm that evening. There, he drank up to eight schooners of full strength beer between 7.00 pm and 11.00 pm. He also consumed some snack food. He left the Tavern shortly after last drinks were called at about 11.45 pm. He was not "too impaired" by the alcohol at that time.

[16] Dr Mahoney gave evidence that most people metabolise alcohol at a rate of 0.02 per cent per hour. If the respondent's body was eliminating alcohol at the rate of 0.02 per cent per hour, his blood alcohol concentration at or about the time of the incident was about 0.04 per cent. Such a reading was a low reading. It was unlikely such a reading would impair the ability of an individual to make decisions to any great extent.

Position and conduct

[17] The respondent gave evidence that as the vehicle travelled along the bottle shop driveway, the occupants called out to him. He told the driver to continue driving out of the carpark. The occupants of the vehicle then started yelling in Troy's direction. Troy approached the vehicle and the respondent told him to stop. The respondent said at that point he was standing in the western driveway near where it met the bottle shop driveway about two to three metres away from the motor vehicle which was stationary. He was close to the traffic island that forms the northern border of the bottle shop driveway. He was not in the direct path of the motor vehicle. He estimated that from the driver's perspective he was in front of the right hand side of the vehicle, and to the right at close to a 45 degree angle.

[18] Troy gave evidence that shortly prior to the incident the respondent was standing approximately one and a half to two metres away from the motor vehicle near the traffic island forming the northern border of the bottle shop driveway. The vehicle suddenly "revved" before moving forward, knocking the respondent over. The vehicle passed over him and turned the corner into the western driveway before travelling towards the Tavern. Troy did not notice any other people in the vicinity at that time.

[19] Kenny gave evidence the vehicle was "revving" as it drove off. It turned right and struck the respondent who was standing at the corner where the driveway from the bottle shop met the western driveway. There were no other vehicles in the driveway and there was no reason the vehicle could not have reversed and driven out the other way. There was also no reason the vehicle could not have turned left and driven out of the Cheltenham Drive exit.

[20] The second appellant gave evidence that after the earlier altercation with Troy and Kenny, in which one of the men spat into the vehicle, he drove the vehicle along the bottle shop driveway intending to leave via the Cheltenham Drive exit. He stopped the vehicle as one of the two men was standing on the gutter line about five or six metres from his window. Words were exchanged and shortly thereafter the respondent emerged from the bushes. The respondent stopped in front of the car in line with where the second appellant was seated. A second man ran around to the driver's side window. The respondent then placed his hands face down on the bonnet, banging it three or four times and demanded he get out of the car.

[21] The second appellant told the respondent he should leave the road, two or three times. He then told the respondent he was going and revved the vehicle two or three times. The respondent did not move from his position at the bonnet of the car. At that point, the second man threw three or four punches to the right side of the second appellant's head through the driver's side window. A glass was also thrown through the window, cutting the second appellant's hand. The second appellant warned the respondent once more he was going to drive. The respondent again told him to get out of the car. The second appellant then drove off.

[22] The second appellant said he realised he had run over the legs of the respondent but did not stop his vehicle. He drove to the Mudgeeraba Police Station. As that station was closed, the second appellant then drove to Shari's parents' home and telephoned 000. During that conversation the second appellant said the person he had run over had "jumped in front, 2 jumped in front of my car and like there was

another guy over throwing bottles in my window when I had to take off coz we were going to get the shit beaten out of us …".[2] The second appellant accepted in evidence the description of the respondent jumping in front of the vehicle was incorrect. The respondent had stayed in front of the vehicle the whole time.

[23] Shari gave evidence that after the spitting incident, she moved from the front seat to the back seat. Her brother replaced her in the front seat. As the vehicle exited the bottle shop driveway they were confronted by three men. One stood in front of the driver's side, roughly above the headlights, with his hands face down on the bonnet of the car. Another man was standing to the side of the car. The third man was standing in the middle of the pathway leading to the exit out on Cheltenham Drive. The man at the front of the car yelled they should get out. The second appellant repeatedly yelled the man should move as they were going to go. A glass then came through the driver's window. Shari did not recall seeing any punching. The second appellant then "revved" the vehicle and drove off striking the person who had been standing in front of the vehicle. They left via the Cheltenham Drive exit.

[24] Matthew gave evidence that after the spitting incident, the second appellant wanted to have a look at the person who had spat into the vehicle. He stopped in the driveway leading from bottle shop and spoke to one of the men. At that point, the respondent stood in front of the driver's side of the bonnet with his hands on the bonnet. He demanded they get out of the vehicle. Matthew and the second appellant demanded he get out of the way. A glass was then thrown through the window. He told the second appellant they had to get out of there. The second appellant revved the vehicle before he pulled away. The respondent went up over the bonnet and down the driver's side of the car. The vehicle then left the carpark via the Cheltenham Drive exit.

[25] Two witnesses unrelated to either the respondent's group or the second appellant's group also gave evidence. Christina Schestakov gave evidence of having observed the incident in the carpark. She had been at the same birthday party at the Tavern. She drank no more than four drinks of vodka with a mixer. She left the party at about 11.30 pm with a friend, Melissa Hargraves. She recalled the vehicle was travelling in the opposite direction to that recorded by the other witnesses. She gave evidence she was about five to ten metres away from the vehicle, standing in the bottle shop driveway. There were around eight people in total in the vicinity who had come from the same party. The other people were not in close proximity to the vehicle.

[26] Christina said the vehicle drove very slowly with its occupants yelling abuse and swear words at the respondent, who was standing very close to the front driver's side corner of the vehicle. She did not recall if the vehicle ever came to a stop. The vehicle then accelerated suddenly and jolted forward. The respondent was tapping on the vehicle, screaming as if he was in pain. He was asking it to stop. The tapping on the windscreen was for a split second, "as he was being hit by the car". She accepted the tapping may have been on the bonnet area. She estimated that at the time the respondent was struck, there was another person approximately one metre away from the respondent.

[27] Melissa provided a statement to police on the night in question. That statement was recorded in the policeman's notebook, and tendered as an exhibit at the trial. Her

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[2] RB 5.

version described the incident as having happened fast. She saw two males yelling and swearing out the window, and two other males two metres to the side yelling back. She then saw the car move forward. It went over a bump and then took off quickly. At that point, she realised a person had been struck.

Trial judge's findings

[28] The trial judge found the variations in the versions given by each witness not surprising as the events unfolded quickly, and some of the witnesses were affected by alcohol. The trial judge also noted it was some seven years after the incident when the witnesses were giving evidence at trial.

[29] The trial judge found that shortly prior to the collision, Troy spat into the vehicle being driven by the second appellant. The respondent was not present at that time but observed the altercation. He walked down the driveway and said something in an effort to have his friends desist contact with the vehicle. The respondent stopped in a position in the driveway to the front right-hand side of the stationary vehicle, about two metres from the vehicle. The respondent was not touching the vehicle, and was not shouting at the occupants of the vehicle to "get out of the car". He also was not using his body to stop the motor vehicle before it moved off. No warning was given before the respondent heard the vehicle "rev", and suddenly move forward. Any contact between the respondent and the vehicle was as a result of the respondent not being able to get out of its path after the vehicle moved suddenly without changing direction.

[30] The trial judge also found the second appellant had a choice as to the direction he drove. There were no other motor vehicles in the driveway at the time, and there were no people other than the respondent, his brother and friend in close proximity to the motor vehicle. None of these people were in a position that impeded the path the motor vehicle had to take to leave the carpark, or to reverse and take another path. The second appellant was intending to take the Cheltenham Drive exit but instead steered the motor vehicle away from that exit. There were other possible paths for the motor vehicle to take when it moved off. The second appellant failed to steer the sedan away from the respondent.

[31] The trial judge found the second appellant's operation of the vehicle was not reasonable, and he breached the duty of care owed to the respondent. Whatever the situation, the second appellant's reaction in driving the vehicle so that it struck the respondent, of whose presence he was aware, could not in any way be characterised as reasonable or excused by the agony of the moment. The second appellant and his fellow passengers had the protection of being in a motor vehicle. It was common knowledge a motor vehicle striking a pedestrian can cause significant injury. The second appellant could easily have avoided the respondent by steering the motor vehicle away from the respondent and taking an alternate path.

[32] In respect of contributory negligence, the trial judge found the respondent was not affected by the alcohol he had consumed that evening to the extent his capacity to exercise proper care and control for his own safety was impaired. Accordingly, the appellants were unable to avail themselves of s 47 of the Act. The trial judge also found there was no basis for a finding of contributory negligence otherwise in relation to the question of intoxication.

[33] In relation to the remaining basis for contributory negligence, the trial judge noted any finding of contributory negligence was dependent upon a finding in favour of

the appellants that the respondent was directly in front of and abutting the motor vehicle when it moved off. The trial judge found otherwise. The trial judge found the first appellant failed to steer the vehicle away from the respondent, thereby striking him. A pedestrian who was not in front of a motor vehicle that had its engine running while stationary in a carpark would not expect the vehicle to be driven into him. There was no basis for an apportionment against the respondent for contributory negligence.

Appellants' submissions

[34] The appellants submitted the trial judge's ultimate finding in relation to contributory negligence was contrary to and against the weight of the evidence in that the inferences drawn from the facts as found by the trial judge were not proper inferences. Central to this submission was a challenge to the trial judge's rejection of the evidence of Shari, a witness who was not affected by alcohol.

[35] Shari was accepted by the trial judge in relation to the earlier "spitting" incident, and as to a glass being thrown into the vehicle shortly prior to the collision with the respondent, but was rejected in relation to her account of the collision on the basis she was mistaken. The trial judge found she was upset or hysterical by this time. The appellants contended Shari was in a position to see the events, and to hear what was said by the second appellant by way of warning.

[36] To reject her version of the later events because she was hysterical or was mistaken was an irrational manner of reasoning. Her evidence was corroborative of the evidence of the second appellant and Matthew on critical issues. The trial judge also failed to have regard to the glass throwing incident in assessing Shari's credit, and in making the ultimate findings, and failed to take into account the fact the group in the motor vehicle travelled immediately to the nearest police station to report the incident, subsequently telephoned 000, and waited for police.

[37] The rejection of this evidence was significant. If Shari's evidence as to the giving of a warning by the second appellant, and as to the location of the respondent with his hands on the bonnet of the motor vehicle had been accepted by the trial judge, the only inference available was that a reasonable person in the position of the respondent would not have remained proximate to the front of the vehicle such as to support a finding of contributory negligence.

[38] The appellants also challenged the findings of the trial judge as to the risk had the second appellant reversed his vehicle, or sought to travel an alternate path of egress in order to leave the confronting situation, and as to the proximity and position of the respondent and his intentions in taking up that position. The finding the respondent was not affected by alcohol was also not reasonably open. The respondent had consumed enough alcohol to indicate he was more impaired than he would have been had he not consumed alcohol.

Respondent's submissions

[39] The respondent submitted no proper basis has been identified for overturning the findings of the trial judge, who had the benefit of seeing and observing the witnesses. It was a matter for the trial judge which witnesses were accepted as to credit. Each of the findings was open on the evidence.

Applicable principles

[40] The appellants accept that in order to succeed they must establish the relevant findings on key issues favourable to the respondent were "glaringly improbable" or "contrary to compelling inferences".

[41] The relevant test is enunciated in the joint reasons of the majority, in *Fox v Percy*.[3] Gleeson CJ, Gummow J and Kirby J 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'…
>
> After *Warren v Coombes*, a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not."

Discussion

[42] In undertaking a review of the evidence and findings, it is significant to note the appellants do not challenge the trial judge's findings of a breach of duty on the part of the second appellant. Those findings were based on conclusions of fact as to the position of the respondent immediately prior to the collision, as to his conduct leading up to the collision, and as to the available options to the second appellant by way of egress from the scene. A consideration of the findings made by the trial judge in respect of contributory negligence must be undertaken against that background.

[43] The findings in respect of breach of duty were: the respondent stopped in a position not directly in front of the motor vehicle, but at an angle to the front right hand side of the stationary motor vehicle and about two metres from that vehicle; the respondent was not participating with the two other males in shouting abuse at the occupants of the motor vehicle, and did not throw a glass or see it thrown; the respondent did not hear any warning directed at him before he heard the motor vehicle "rev" and suddenly move off; the respondent was not touching the motor vehicle before it moved and hit him; the respondent was not shouting at the occupants of the vehicle to "get out of the car" or the like; the respondent was not using his body to stop the motor vehicle before it moved of; any contact between the respondent and the motor vehicle was as a result of the respondent not being able to get out of the path of the motor vehicle as it suddenly moved off without changing the direction from which its wheels were turned; there were no other motor vehicles in the driveway at the time of the incident; neither the respondent nor the other two males were in a position that impeded the path the motor vehicle had to take to leave the carpark via the Cheltenham Drive exit, or to reverse and take another path to the eastern side of the carpark; there were other possible paths for the motor vehicle to take when it moved off; the second appellant failed to steer the vehicle away from the respondent.

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3 (2003) 214 CLR 118 at 126-127 [25]-[26].

[44] The appellants' challenge to the trial judge's findings in relation to contributory negligence fails to have regard to those important findings of fact in relation to a breach of duty, which is not itself the subject of appeal. Those findings of fact, as to the position of the respondent prior to the collision, as to his conduct, and as to there being alternate paths of egress available to the second appellant, amply support the conclusion there was nothing in the respondent's position or conduct which would justify a finding of contributory negligence.

[45] The findings of the trial judge as to the position of the respondent prior to the motor vehicle moving forward were critical to any finding of contributory negligence. The primary allegation in support of the plea of contributory negligence in respect of the position of the respondent was that he had placed himself and remained in the path of or in very close proximity to the motor vehicle. Once it was found, as it was open to the trial judge to find, that the respondent had not placed himself in that position there was no basis for a finding of contributory negligence.

[46] The allegations in respect of alternate paths of egress, the proximity and position of the respondent and the respondent's intent in taking up that position were all dependent upon an acceptance of an allegation that the respondent had placed himself in the path of the vehicle and remained in that position or in close proximity to the vehicle. The trial judge did not accept that allegation.

[47] A review of the evidence given at trial supports the trial judge's findings on these crucial issues. They are not glaringly improbable, or contrary to compelling inferences. The respondent gave clear cogent evidence of his position and actions, which was supported in material ways by Ms Schestakov's evidence which positioned him away from being in front of the vehicle, and did not have him banging the bonnet of that vehicle. The fact that that witness had the car facing in the wrong direction did not necessarily adversely impact on her evidence. It was open to the trial judge to accept that was an error.

[48] The evidence of Shari in respect of the collision was properly open to be rejected, notwithstanding the acceptance of her evidence as to the events of the earlier altercation. An acceptance of Shari's evidence in respect of the spitting incident did not mean the trial judge must accept her evidence in respect of the later incident. There were, as the trial judge found, good reasons to question her reliability as to the position of the respondent in the moments before impact. She was by now in the back seat. She was scared, upset and "did panic". Against that background, to characterise her evidence as mistaken because she was emotionally upset was not an irrational manner of reasoning for the trial judge. Further, she had a person standing in the middle of the path to the exit out of Cheltenham Drive which was not consistent with the other evidence accepted by the trial judge, and inconsistently had the vehicle leaving that exit.

[49] The submission the trial judge failed to take into account the fact the occupants of the vehicle had immediately contacted police in respect of the incident is also without substance. That evidence could hardly have outweighed a proper assessment of the reliability of the version given by Shari. Travelling to the police station was consistent with having struck the respondent with the motor vehicle, regardless of his position prior to the collision. It was not necessarily only consistent with the version of events proffered by the occupants of the motor vehicle. The trial judge preferred and accepted the respondent's evidence as to his position prior to the vehicle moving forward. That evidence was supported by the evidence of Ms Schestakov, the independent female witness.

[50] It was also properly open to the trial judge to reject the evidence of the second appellant, and Matthew. They had, as the trial judge found, wrongly included the respondent as a party to the abuse emanating from his brother and friend. That was a significant factor, justifying a rejection of their evidence as to the position in which they said the respondent was standing prior to the vehicle proceeding forward, and as to his actions at the time.

[51] The appellants also relied upon the ingestion of alcohol as a basis for a finding of contributory negligence. The trial judge found the respondent was not affected by the alcohol he had drunk that evening, to the extent that his capacity to exercise proper care and control for his own safety was impaired, and that there was therefore no basis for applying s 47 of the Act to the respondent. That finding is not the subject of appeal by the appellants.

[52] A review of the evidence reveals the trial judge's acceptance of the respondent's evidence as to the alcohol he had consumed that evening was plainly open on the evidence. The trial judge had the opportunity to assess the respondent's frankness about the amount of alcohol consumed that day. The medical evidence accepted by the trial judge supported a finding that having regard to the consumption at the time of the incident, the respondent's blood concentration was about 0.04 percent, a "low reading". Far from being "glaringly improbable", such findings are entirely consistent with the evidence.

Conclusions

[53] The trial judge's reasons reveal a careful consideration of the evidence of each of the witnesses who were able to give a version as to the circumstances leading up to the incident, and of the incident itself. The judgment carefully considered the positions of those witnesses, and other factors relevant to a determination of whether those witnesses ought to be considered reliable and credible.

[54] A consideration of the evidence and of the judgment does not support a conclusion the findings were not reasonably open on the evidence. The trial judge had the opportunity to see and assess the witnesses. The conclusions reached are not glaringly improbable, and not contrary to appropriate inferences available to be drawn by a trial judge having the benefit of seeing and observing the witnesses.

Orders

[55] I would dismiss the appeal, with costs.