SUPREME COURT OF QUEENSLAND

CITATION:	*Walker v Symonds & Anor* [2014] QCA 148
PARTIES:	**TANYA JANE WALKER** (applicant/appellant) **v** **MICHAEL SYMONDS** (first respondent) **ALLIANZ AUSTRALIA INSURANCE LIMITED** ABN 15 000 122 850 (second respondent)
FILE NO/S:	Appeal No 12312 of 2013 DC No 1425 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2014
JUDGES:	Holmes JA and Atkinson and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave is granted to appeal.** **2. The appeal is allowed.** **3. The judgment given below is set aside.** **4. The proceeding is remitted to the District Court for determination of all issues of liability and quantum.** **5. The parties must provide to the Registrar written submissions as to costs within two weeks of the delivery of this judgment.**
CATCHWORDS:	TORTS – NEGLIGENCE – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO LOOK OUT – PEDESTRIAN ACCIDENTS – where the appellant seeks leave to appeal a judgment dismissing her claim for personal injuries caused when she came into collision with a car – where the only witnesses, the appellant and the respondent, gave conflicting accounts of the collision – where the trial judge accepted the respondent's version of events – whether the primary judge gave proper reasons supporting the findings of fact made – whether a new trial should be ordered *Tep v ATS Australasian Technical Services Pty Ltd* [2013] QCA 180, cited

COUNSEL: M E Eliadis for the applicant
S C Williams QC, with M Liddy, for the respondents

SOLICITORS: Shine Lawyers for the applicant
Sciaccas Lawyers & Consultants for the respondents

[1] **HOLMES JA & ATKINSON J:** We agree with the orders proposed by Dalton J and with her Honour's reasons for setting aside the judgment below. We would add that in our view the trial judge's finding, made on the basis of the respondent's version of events, that the latter was not liable to any extent for the accident was not tenable. On the respondent's own evidence he failed to keep a proper lookout; had he done so he would have seen that the appellant might well be about to cross his path, and could have taken steps to avoid her. However any determination of liability and quantum must now depend on findings of fact properly made by a trial judge on the whole of evidence before that judge.

[2] **DALTON J:** The appellant seeks leave to appeal a judgment in the District Court dismissing her claim for personal injuries caused when she came into collision with a car. In my opinion leave ought to be given to appeal. In my view the judgment below does not contain proper reasons supporting the findings of fact made and on my analysis of the evidence below, there is sufficient doubt as to the judge's findings that the respondent did not breach a duty of care to the appellant and that any breach did not cause her injuries. That is the leave question is essentially determined by my view of the merits of the appeal proper.

[3] The only witnesses to the collision were the appellant and the respondent. The primary judge found that they both did their best to be honest in giving their evidence although, at least in one respect, he found that the appellant was mistaken in her evidence. The facts of the matter need to be canvassed in some detail.

[4] The accident occurred at around 6.00 am. The appellant was jogging and the respondent was driving to work. They were both travelling in the same direction on Marsden Street, Kallangur, the appellant on the footpath. Both intended to turn left, into Ann Street, at an intersection where there was a roundabout. Both did turn left, and the collision occurred quite close to the corner.

[5] The respondent's evidence was that he saw the appellant on the footpath near the corner when he was some 30-50 metres from the intersection. He did not see her again until after the collision. The respondent's evidence was that he was concerned to look to his right because the view in that direction was obscured by a high fence.

[6] The appellant turned left at the corner and moved to a ramp in the footpath. She intended to cross Ann Street. The respondent intended to turn into Ann Street and travel along it. The ramp was about 10 metres from the corner. It was a gently sloping part of the footpath which led to the bitumen roadway. Opposite it was a similar ramp leading onto a wide concrete median strip. The two ramps were designed to allow pedestrian access across Ann Street at that point. They formed a distinct crossing point, though obviously short of a zebra crossing.

[7] The appellant said she saw the respondent's car at the corner. It was stopped. Her evidence was that she looked to see if the respondent's indicator was on, but it was

not. She also said that she looked to see whether the tyres of the respondent's vehicle were turned as if he was going left. She said they were not; they faced as though he was going straight ahead. She said it was her habit to look at the direction car wheels were facing, as well as looking at whether or not indicators were on. She said this was borne of experience when riding bicycles on the road because drivers do not always indicate their intention to turn. The appellant gave some detail in her evidence about this, both initially and when she was recalled for cross-examination, so that what might seem an unusually detailed and perhaps elaborated piece of evidence does sit within that context.

[8] The appellant's evidence was that having checked these things she moved off at a very slow jog across Ann Street, via the ramp. She took three or four steps and came into collision with the side mirror of the respondent's car. The respondent's car was a big SUV type of utility, it had a longer bonnet than a normal car.

[9] The respondent's evidence was that he always turned left at this intersection on his way to work and that he never had any intention but to turn left at the intersection. He said his car was virtually stopped at the corner before he proceeded left into Ann Street. His evidence was that he did put his indicator on, and that he did not see the appellant until after the collision.

[10] The appellant said that after the accident she said to the respondent, "You didn't have your indicator on," and the respondent did not say anything responsive to that, although he did otherwise assist her. The appellant had to be recalled so that counsel for the respondent could put to her that when she said to the respondent that his indicator was not on, he replied to her that it was. She denied this. When the respondent gave evidence he did not say that a conversation like that put in cross-examination occurred, but said that he could not remember any conversation about the indicator.

[11] The respondent's evidence was that the appellant apologised for running into his car several – perhaps eight or ten – times after the accident. The appellant denied that she apologised.

[12] Had the respondent looked at the Ann Street footpath as he turned left he would have seen the appellant on the footpath, probably on the ramp, facing, and apparently preparing to cross, Ann Street. There is no doubt she was not looking at the respondent's car, and he must also have seen this, had he looked. The respondent's evidence was that he did not look at the footpath once he turned the corner. He looked only at the road on which he was travelling.

[13] Having recorded his view that both the appellant and respondent seemed honest in giving their evidence, the trial judge was faced with a considerable conflict in the evidence. He began to resolve it by determining that, objectively, there was no doubt that the respondent was intending to turn left at all material times, so that the wheels of his vehicle would not have been as the appellant described them, but would have been angled to turn left. The primary judge concluded that the appellant was mistaken as to her evidence about the wheels. That seems a sustainable enough line of reasoning. However, the primary judge continues:

> "[12] … Those findings having been made, I have to say I have had grave doubts about the essentials of the plaintiff's evidence. I have set forth above the essentials of that evidence,

> along with the essentials of the first defendant's evidence. I have also set forth a reason why in spite of her honesty the plaintiff's evidence is implausible [in relation to the angle of the wheel]. Indeed, I think she is mistaken. In the end, I accept the essentials of the first defendant's evidence in relation to liability and I reject the plaintiff's evidence where it is in conflict with the evidence of the first defendant.
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> [13] I include in that finding a finding that the first defendant's version of the conversation between him and the plaintiff after the collision should be accepted in preference to the version of the plaintiff. This means that the first defendant did apply his indicator and that for whatever reason the plaintiff did not take heed of it. …"

[14] The judge had accurately recited the facts of the matter prior to these findings. As to the respondent's failure to give evidence in terms of the *Browne v Dunn* questioning outlined at paragraph [10] above, the primary judge noted this as an "inconsistency" but concluded that it had not caused him to doubt the respondent's version of events – [8] judgment. There is no reason given for this conclusion.

[15] In my opinion, adequate reasons are given for the finding that the appellant was mistaken about the angle of the wheels of the respondent's car, but the remainder of the judge's conclusions as to the facts of the matter are not explained by proper reasons. There is nothing in the judgment which reveals why the judge took the view he did of the contested parts of the evidence: whether the indicator was on; whether the appellant asserted to the respondent that the indicator was not on; what response, if any, was made to any such assertion, and whether an apology was made. There is nothing to show what the judge's thinking was in rejecting one part of the evidence and preferring another. The fact that the appellant was mistaken about one matter does not mean she was necessarily mistaken about all these matters. The reasons for thinking the appellant was mistaken about the direction of the wheels are not reasons which apply to the other topics of contention. The thinking of the trial judge in relation to his discounting the respondent's not giving evidence in terms of the *Browne v Dunn* cross-examination at [14] is not revealed.

[16] Regrettably, I do not believe that this Court can determine matters of contention which bear upon the liability on appeal. A reading of the transcript of the trial seems to show that the appellant gave evidence in very dogmatic terms. She said that she remembered the indicator was not on "like it was yesterday" – t 1-26. Similarly she averred that she would "swear black and blue, your Honour, that his indicator wasn't on" – t 7-6. Such certainty might give a primary judge an assurance that the witness was reliable. On the other hand, it might be regarded as an indication that a witness has very much convinced themselves of a position after the fact. In contrast, the respondent almost did not mention the fact that he had his indicator on in his evidence-in-chief. He did so only when his counsel returned repeatedly to the topic. Mistakenly, he put the site of the accident much further down Ann Street than the actual site of the accident. The site he asserted would have strengthened the case against him on liability as it would allow more time and opportunity for him to have seen the appellant. After his counsel put specifically to the appellant (recalled for the purpose) that there had been a conversation in which he had asserted he had indicated his intention to turn, the respondent gave evidence that he could not recall whether there was such a conversation. One view is that the

respondent was tentative and uncertain about relevant matters. On the other hand, a judge listening to his evidence might have concluded that in fact the respondent was simply being very careful, honest and scrupulously fair in his evidence. Assessment of matters such as this cannot be made by an appellate Court. We are in no position to determine whether the respondent's indicator was on, whether there was a conversation about it, or whether an apology was made. There must be a new trial.

[17] The new trial ought to be as to quantum and liability. The primary judge assessed quantum in this matter on a hypothetical basis, notwithstanding his findings on liability. In circumstances where there must be a new trial on liability, it may be that this Court lacks power to do anything other than order a retrial on quantum.[1] In any event issues of credit arise as to both the liability and quantum aspects of the case. The appellant's case as to quantum was somewhat unusual. She claimed damages for economic loss. Her case was not that she was prevented from working in her usual occupation, but that had it not been for the accident, she would have qualified as a personal trainer and worked part-time in addition to her normal job with the Defence forces. There were real questions as to her ability to do so, and her ability to do so to the extent she swore that she hoped to do so. As well, there were questions as to her level of disability. She claimed *Griffiths v Kerkemeyer* damages on the basis that she could not perform normal household tasks, although the evidence was that she could, and did, participate in marathon running and other very strenuous physical exercise. Questions of credit may well arise in the assessment of these quantum issues which might be taken into account on liability issues. It is preferable that there be one determination, and consistent credit findings as to all matters in issue between the parties. It is also preferable that the trial be conducted before a judge of the District Court who has not already expressed a view as to the parties' credit.

[18] I would give leave to appeal, allow the appeal, set aside the judgment below and order that the proceeding be remitted to the District Court for determination of all issues of liability and quantum. The parties should be heard as to costs. I would order that written submissions be provided to the Registrar within two weeks of the delivery of this judgment.

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1 *Tep v ATS Australasian Technical Services Pty Ltd* [2013] QCA 180, [28] ff.