SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Munro* [2014] QCA 231
PARTIES:	**STATE OF QUEENSLAND** (applicant) **v** **JOAN MUNRO** (respondent)
FILE NO/S:	Appeal No 1163 of 2014 Appeal No 4335 of 2014 DC No 2326 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2014
JUDGES:	Margaret McMurdo P and Muir JA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal be refused with costs.** **2. The application for leave to appeal against the order made on 17 April 2014 be refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – GENERALLY – where the respondent claimed damages for negligence and/or breach of statutory duty – where the primary judge gave judgment for the respondent plaintiff against the applicant defendant in proceedings in the District Court – where the applicant applied for leave to appeal under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) – where the respondent, then a 50 year old registered nurse, was on the third day of an aggressive behaviour management course – where, when attempting a manoeuvre under instruction, the respondent fell and injured her left hand – where the primary judge found that risk could have been minimised by teaching the different parts of the manoeuvre separately before combining them – where the applicant submits that the

techniques were split up and taught in different parts separately before they were combined – whether the primary judge erred in finding that the applicant failed to separately train the respondent to perform the parts of the manoeuvre before combining them – whether the primary judge erred in finding that the applicant breached its duty of care to the respondent by failing to provide proper training and instruction

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – where the applicant contends that there was no evidence that the alternate technique to learning the manoeuvre would have obviated the respondent's misunderstanding in producing the manoeuvre that resulted in her fall – where causation was not an issue raised at trial – whether the applicant should be permitted to rely on the causation ground when the focus of the argument before the primary judge was whether the applicant's duty of care had been breached – whether the primary judge erred in finding that the breach of duty caused the respondent's injury

EVIDENCE – ADMISSIBILITY AND RELEVANCY – OPINION EVIDENCE – EXPERT OPINION – OTHER CASES – where the primary judge relied on expert evidence as to how the course ought to be conducted – where the applicant submits that the expert was not qualified to give an opinion related to biomechanics or human movement – whether the primary judge erred in admitting and relying upon the evidence of the witness

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the primary judge ordered that the applicant pay the respondent's costs of the action on the Magistrate's Court scale – where the applicant applies for leave to appeal against the costs order – where leave to appeal is refused in the substantive application – whether, given the operation of s 118B of the *District Court of Queensland Act* 1967 (Qld), the Court has power to grant leave to appeal in the costs application

District Court of Queensland Act 1967 (Qld), s 118, s 118A, s 118B
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 292, s 316, s 318B

Amaca Pty Ltd v Booth (2011) 246 CLR 36; [2011] HCA 53, cited
ASIC v Jorgensen & Ors [2009] QCA 20, cited
Bale v Mills (2011) 81 NSWLR 498; [2011] NSWCA 226, cited
Batiste v State of Queensland [2002] 2 Qd R 119; [2001] QCA 275, cited
Browne v Dunn (1893) 6 R 67, considered

Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, considered
Endeavour Foundation v Weaver [2013] QCA 371, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, followed
Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors [2006] QCA 335, cited
Munro v State of Queensland [2014] QDC 3, considered
Munro v State of Queensland (No 2) [2014] QDC 98, considered
Rodgers v Smith [2006] QCA 353, cited
Smith v Ash [2011] 2 Qd R 175; [2010] QCA 112, cited
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; [1985] HCA 28, cited
Virgtel Ltd v Zabusky (No 2) [2009] 2 Qd R 293; [2009] QCA 92, followed
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, considered

COUNSEL: K Holyoak for the applicant
G Cross for the respondent

SOLICITORS: BT Lawyers for the applicant
Colin Patino & Company for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for refusing the application for leave to appeal in CA No 1163 of 2014 (the substantive application) and in CA No 4335 of 2014 (the costs application), with costs. I also agree with Peter Lyons J's additional observations as to the costs application.

[2] As Peter Lyons J explains, the applicant, having been unsuccessful in its substantive application for leave, has no right to apply for leave to appeal as to costs. But even accepting the applicant had a right to apply for leave to appeal as to costs, I would refuse the application for the following reasons. The applicant sought leave to appeal from the primary judge's order that it pay the respondent's costs of the action from 3 June 2013 on the Magistrates Court scale applicable where the amount recovered is more than $50,000.

[3] The applicant contended that, despite the modesty of the discretionary costs order, leave to appeal should be granted as the proposed appeal concerned an important question of law, namely, the correct disposition of costs in light of the interaction between s 292, s 316 and s 318B(3) *Workers' Compensation and Rehabilitation Act* 2003 (Qld).

[4] Under s 292, which is contained in the Act's Ch 5 (Access to damages), pt 6 (Settlement of claims), div 1 (Compulsory conference), the parties to a claim must make and exchange written final offers at the compulsory conference. The respondent's final offer to settle at the compulsory conference on 7 June 2011 was $115,000 while the applicant's was nil.

[5] On 3 June 2013 the respondent served on the applicant an offer to settle for $60,000 clear of the WorkCover refund. That offer was not accepted and expired on 17 June 2013. Accompanying the offer was correspondence advising the applicant of the respondent's reason for making a reduced offer to settle and stating:

> "We note that following the subject injury in which our client sustained both physical and psychological/psychiatric injuries, she faced a very uncertain future, lacking confidence and with physical limitations.
>
> As you are aware our client has managed to obtain and maintain a less physically demanding role which does not require her to manage physically and verbally abusive patients.
>
> The opportunity for the [respondent] to obtain and maintain a less physically demanding role became apparent after the parties completed the exchange of written final offers."

[6] The matter was listed for trial but was adjourned on 19 July 2013, apparently because of this change in circumstance, with the respondent filing an updated statement of loss and damage on 25 July 2013. That trial was adjourned because of the late change in circumstances. On 2 August 2013 the parties settled the quantum of the claim at $60,000. The trial on liability commenced on 25 November 2013 and judgment was given for the respondent on 10 January 2014.

[7] The Act's Ch 5 pt 12 (Costs), div 2 (Costs applying to worker who does not have a terminal condition and has DPI of less than 20 per cent), s 316 relevantly provides:

> "**316 Principles about orders as to costs**
>
> (1) No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding.
>
> (2) If a claimant or an insurer makes a written final offer of settlement that is refused, the court must, in the following circumstances, make the order about costs provided for –
>
> (a) if the court later awards an amount of damages to the worker that is equal to or more than the worker's written final offer – an order that the insurer pay the worker's costs on the standard basis from the day of the written final offer;
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> …
>
> (3) If an award of damages is less than the claimant's written final offer but more than the insurer's written final offer, each party bears the party's own costs."

[8] The Act's Ch 5 pt 12 (Costs), div 3 (Costs generally), s 318 relevantly provides:

> "**318 Costs if proceeding could have been brought in a lower court**
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> (1) If the amount of damages a court awards could have been awarded in a lower court, the court must order any costs in favour of the claimant under the scale of costs applying in the lower court.
>
> (2) This section applies to all claimants."

[9] That division's s 318B (Court may make an alternative order in particular circumstances) relevantly provides:

> "(3) Subsection (4) applies if an award of damages is affected by factors that were not reasonably foreseeable by a party at the time of making or failing to accept a written final offer.
>
> (4) The court may, if satisfied that it is just to do so, make an order for costs under divisions 1, 2 or 2A as if the reference to a written final offer or a failure to accept a written final offer were a reference to a later offer made, or a failure to accept a later offer made, in the light of the factors that became apparent after the parties completed the exchange of written final offers."

[10] It followed that unless the respondent persuaded the judge to make an order for costs under s 318B(3) and (4), the judge was required under s 316(3) to order that each party bears its own costs.

[11] The primary judge determined that the settlement was affected by the respondent's change to her employment and her obtaining paid work which she could manage despite her injuries, in South Australia. This was not reasonably foreseeable by either her or the applicant when she made her written final offer and rejected the respondent's written final offer under s 292 on 7 June 2011. It followed, his Honour reasoned, that s 318B(4) applied.[1] His Honour determined that the question in this case was whether, accepting that ordinarily s 316 would require that there be no order as to costs, it was just in the circumstances pertaining here to have regard to later offers.[2] His Honour noted that it was only close to trial that the applicant recognised that its position on quantum was unrealistic and agreed to compromise quantum in terms of the respondent's offer of 3 June 2013. The Act reflected a legislative policy encouraging parties to make realistic offers of settlement. That policy supported a finding in the present case that it was just to apply s 316(2)(a).[3] Under s 318B(4) the respondent's offer to settle of 3 June 2013 should be treated as the written final offer for the purpose of applying s 316. Invoking s 316(2)(a), the judge ordered that the applicant pay the respondent's costs on the standard basis from the day of that offer, 3 June 2013. As the amount of damages could have been awarded in a lower court, under s 318 the costs must be on the scale applying in the lower court.

[12] Ordinarily, leave to appeal from a modest costs order of this kind would be granted only where there is demonstrated error and to correct a substantial injustice. The applicant has not persuaded me that the primary judge clearly erred, either in his fact finding or in construing the Act. Nor has it demonstrated that the applicant has suffered a substantial injustice warranting this Court's intervention.

[13] For these reasons and those given by Peter Lyons J, I would refuse the application for leave to appeal in CA No 4335 of 2014, with costs.

[14] **MUIR JA: Introduction** On 10 January 2014, the primary judge gave judgment for the respondent plaintiff against the applicant defendant in the agreed sum of $60,000 in proceedings in the District Court in which the respondent claimed damages for negligence and/or breach of statutory duty.

[15] The applicant applies for leave to appeal under s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

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1 *Munro v State of Queensland (No 2)* [2014] QDC 98, [16].

2 Above, [18].

3 Above, [22].

Relevant facts

[16] On 10 February 2010, the respondent, then a 50 year old registered nurse employed by the Logan Hospital, was on the third day of an aggressive behaviour management course at a training centre when, attempting a manoeuvre under instruction, she fell and injured her left hand.

[17] The training room floor was covered with 20 mm thick mats in order to protect against the risk of injury from falls in the course of training. Although the mats had a smooth surface, they were relatively soft and "there was some capacity for a foot to sink into [them]".[4] The primary judge observed:[5]

> "It might be more difficult to slide a foot across such a surface, and there might be a greater risk of the foot dragging or catching on the surface, particularly if a person [was] wearing footwear with a substantial tread on the sole, as the [respondent] was at the time."

[18] The purpose of the course, conducted by Mr Howell with the aid of an assistant, was to provide instruction to course members in relation to the handling of aggressive patients and to teach a defensive technique in that regard. The person employing the technique for self protection ("nurse") when standing in front of an aggressor would have her feet apart with one foot behind the other. The rear foot would be used to stamp on the aggressor's shins. This action was described as a "foot stomp".

[19] The next part of the technique, described as "step and drag", was used to effect the nurse's retreat from the aggressor. Under it, the first movement was to return the striking leg to a position behind the other leg. Mr Howell explained "… the step and drag is basically just walking backwards" but with one foot dragged. The primary judge found that the technique, as explained by Mr Howell, "seemed to involve, at least to some extent, sliding the foot across the surface of the mat rather than lifting it and placing it in the usual way".[6]

[20] Mr Howell gave evidence that the training progressed as follows. The first day was given over to an explanation of procedures and policies in relation to occupational violence prevention management. It involved lectures and PowerPoint presentations. On the second day, there was reinforcement of the matters dealt with on the first day and some supplementation of theory. In the afternoon sessions, there was some demonstration of the defensive technique and a staff member displayed "challenging, difficult, aggressive type behaviour in a work type setting". Participants were encouraged to consider how to handle such situations.

[21] The third day of the course commenced with a small component of theory. After that, the participants moved to the training room. An instructor read out a "safety brief" which provided guidelines in relation to physical training safety. Participants warmed up, walked around on the matted floor and performed a few exercises. The foot stomp technique was explained, as were the circumstances in which it could be used. The technique was demonstrated by Mr Howell with the assistance of the other instructor. Asked "And what are the techniques", Mr Howell answered:

> "So basically, from your stable platform with your shoulder-width, hip-width sort of apart depth of your feet, using that rear leg to strike the subject, putting that rear leg back and then using the rear leg and moving away from the subject while facing them."

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4 *Munro v State of Queensland* [2014] QDC 3 at [8].
5 *Munro v State of Queensland* [2014] QDC 3 at [8].
6 *Munro v State of Queensland* [2014] QDC 3 at [19].

[22] After three or four demonstrations, the participants practised the movements by repeating Mr Howell's movements as he performed them. There was no contact with an instructor or any other person. Participants then proceeded to apply the technique. An instructor held a shin protection pad on which the students, in turn, performed the technique. Referring to Mr Howell, the primary judge said:[7]

> "It appears to follow from his evidence that the participants were taught, and were [practising], the whole manoeuvre at once including moving backwards. There had been a number of dry runs which did not involve making contact with any subject before the individual practice when there was contact with the other instructor. It does not appear that at this stage moving back was [practised]."

[23] After commenting that there was nothing wrong with the "step and drag" technique, "so long as it was taught and practised safely", the primary judge said:[8]

> "If that process had been explained or demonstrated by Mr Howell that could explain why the [respondent] was at the time attempting to step back by sliding her foot across the surface of the mat rather than by lifting it and placing it to the rear, and hence how it came about that the foot that was being slid caught on the matting, causing her to fall. That does strike me as the sort of process which could well cause a person who was trying to move backwards in this way to fall, and on the whole I think that is the most likely explanation of the [respondent's] having fallen. There was no suggestion that there was anything that she could have tripped over, so the only plausible explanation would seem to be that she simply lost her balance while trying to move backwards in this somewhat artificial fashion. It may not matter at the end of the day in terms of causation what was the precise mechanism of the fall." (footnotes omitted)

The primary judge's findings of breach of duty and causation

[24] The primary judge's finding of breach by the applicant of its duty of care is as follows:[9]

> "Inevitably there was some risk of injury from a course of this nature, but the advantages of participation in such a course would ordinarily outweigh the disadvantages of that risk, so that it was not unreasonable to expect employees who were potentially faced with aggressive behaviour to expose themselves to the risks involved in undergoing such a course, provided that reasonable care was taken to minimise those risks. In my opinion however those risks could have been further minimised in the present case by a process of instruction in relation to this technique which involved splitting up the technique and teaching the different parts separately before they were combined, rather than attempting to teach the combined technique of the stomp and then backing away in one process. On the evidence of Mr Turner I accept that it was not reasonable to teach the technique in that way, and I infer that as a result the risk of injury from, relevantly, the participant's falling was increased. That risk could and should have been reasonably reduced by breaking up the teaching of the technique in

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7 *Munro v State of Queensland* [2014] QDC 3 at [12].
8 *Munro v State of Queensland* [2014] QDC 3 at [20].
9 *Munro v State of Queensland* [2014] QDC 3 at [26].

> the way described by Mr Turner, and accordingly it was negligent of the instructor to fail to do so. The [applicant] is liable for that negligence. The employer failed to take reasonable steps to minimise the risk of injury to its employee. There were no relevant countervailing considerations." (footnotes omitted)

[25] Dealing with causation, his Honour said:[10]

> "I also find that the negligence caused the [respondent's] injury. I have explained how I believe the fall came about, essentially because the [respondent] had not achieved a clear understanding of how to do the step and drag, and how to transition from the stomp to the step and drag. This is precisely the difficulty that Mr Turner's proposal would have been likely to avoid. In those circumstances, I consider it reasonable to infer that, had Mr Turner's technique been followed, the [respondent] would probably have coped better with sliding her feet over the matting, and therefore would probably not have fallen."

[26] It is now convenient to consider the proposed grounds of appeal.

Ground 1 – The primary judge erred in finding that the applicant failed to separately train the respondent to perform a "foot stomp" technique and "step and drag" technique before training the respondent to combine those techniques

[27] The applicant submitted that, contrary to the findings of the primary judge in paragraphs [12] and [26] of his reasons, the techniques of "step and drag" and "foot stomp" were split up and taught in different parts separately before they were combined. They were not taught as a combined technique of stomp and then backing away in one process. The participants were taught the component parts before combining them in physical contact.

[28] Paragraph [12] states:

> "It appears to follow from [Mr Howell's] evidence that the participants were taught, and were [practising], the whole manoeuvre at once including moving backwards. There had been a number of dry runs which did not involve making contact with any subject before the individual [practise] when there was contact with the other instructor. It does not appear that at this stage moving back was [practised]."

[29] On the hearing of the application, the Court was taken, at great detail, through the evidence of Mr Howell in relation to what was taught and when, in respect of the techniques. Mr Howell's evidence was far from clear. Counsel for the applicant argued that even Mr Turner, the expert witness called by the respondent, had accepted that, eventually, it was appropriate that the respondent be requested to perform the stomp and step and drag techniques together. Mr Turner, however, was critical of combining the two techniques without rather more practice of each before using the combined techniques on an instructor. As counsel for the respondent submitted, on the first occasion on which the respondent actually used the foot stomp technique, she also attempted the step and drag. The better view of paragraph [26] is that the primary judge is referring to Mr Turner's criticism of this approach instead of the more gradual lead into the combined techniques favoured by Mr Turner.

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10 *Munro v State of Queensland* [2014] QDC 3 at [30].

[30] It is apparent from the reasons that the primary judge approached his findings of fact with his customary rigour. Having regard to the way in which the evidence unfolded and its lack of clarity, his Honour enjoyed a distinct advantage over this Court in determining the facts and this Court should not interfere with the findings unless persuaded that they are "glaringly improbable" or "contrary to compelling inferences"[11]. I am far from being so persuaded.

[31] Consequently, the argument that the primary judge's mistaken view of the evidence warranted appellate intervention was not made out. Even if this Court had concluded that the primary judge mistook the evidence, it would not follow necessarily, for the reasons given later, that leave to appeal should be granted.

Ground 2 – The primary judge erred in finding that the applicant breached its duty of care to the respondent by failing to provide proper training and instruction to the respondent

[32] It was submitted that if the reasons are to be understood as finding that the two techniques should not have been performed in physical contact without the combination being practised with no contact several times before, the primary judge erred. That was because there was no evidence that the combined techniques increased the risk of falling when moving backwards. It was not put to Mr Howell that there was such a risk and Mr Turner did not give such evidence.

[33] It was also submitted that in considering Mr Howell's approach to be unreasonable, the primary judge was influenced by the absence of any independent evidence to support that approach.[12] The existence of an alternative expert view, of itself, does not make Mr Howell's approach unreasonable.[13]

[34] There is nothing in the latter point. The primary judge was well aware of the decision in *Endeavour Foundation v Weaver*,[14] on which the applicant relied. He discussed it in paragraphs [27] and [28] of his reasons. Paragraph [25] of his reasons contains the offending comment but it is merely a comment. The primary judge did not reason that the absence of independent evidence supporting Mr Howell's approach, in itself, provided evidence of the unreasonableness of that approach.

[35] The primary judge was entitled to accept Mr Howell's evidence. He was also entitled to form his own opinion about the risks involved in the respondent, with her physical characteristics, performing an unfamiliar backwards manoeuvre wearing sneakers on an unfamiliar, yielding surface immediately after striking a person with her foot.

[36] A complaint was also made that it was not put to Mr Howell that his permitting the respondent to employ the combined technique without further or other training was not something that a reasonably competent instructor exercising due skill and diligence would have done. This, it was submitted, contravened the rule in *Browne v Dunn*.[15] In reliance on *Bale v Mills*,[16] it was submitted that failure to object to the rule in *Browne v Dunn*[17] does not amount to a waiver of it.

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11 *Fox v Percy* (2003) 214 CLR 118 at 128.
12 *Munro v State of Queensland* [2014] QDC 3 at [25].
13 *Endeavour Foundation v Weaver* [2013] QCA 371 at [33] and [43].
14 [2013] QCA 371.
15 (1893) 6 R (HL) 67.
16 (2011) 81 NSWLR 498.
17 (1893) 6 R (HL) 67.

[37] This application does not provide a suitable vehicle for further consideration of the application of the rule in *Browne v Dunn*.[18] The matter for determination is whether leave to appeal should be granted. The applicant was represented on the trial by experienced counsel. Counsel did not assert before the close of evidence that the evidence of Mr Turner was led in breach of the rule in *Browne v Dunn*.[19] No submission was made to that effect in final address. There may have been legitimate forensic reasons for this approach. There is a serious question as to whether Mr Howell had been called as an expert witness or was qualified to give the relevant expert opinion evidence. More significantly, the case involves a relatively small claim by a former employee of the respondent who, on the face of things, is likely to have limited financial resources. The trial was heard over two days. The evidence, as I have remarked, was unclear in significant respects. The facts and legal principles were carefully considered and addressed by a District Court judge. No questions of public interest or legal principle arise for determination.

[38] The interests of finality and justice militate against permitting the applicant to rely on the rule in *Browne v Dunn*,[20] not having made it an issue on the trial.[21]

[39] In *D'Orta-Ekenaike v Victoria Legal Aid*, it was observed:[22]

> "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances…
>
> The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules about when further evidence may be called in an appeal (in particular, the so-called 'fresh evidence rule') are all rules based on the need for finality. As was said in the joint reasons in *Coulton v Holcombe*: '[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial.'"

[40] The following observation in the joint judgment in *Water Board v Moustakas*[23] is also relevant:

> "More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below."

[41] Had objection been taken to the infringement of the rule in *Browne v Dunn*[24] the primary judge could have been requested to permit Mr Howell to be re-called and given the opportunity to comment on the matter which it was submitted should have been raised with him.

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18 (1893) 6 R (HL) 67.
19 (1893) 6 R (HL) 67.
20 (1893) 6 R (HL) 67.
21 See e.g. *Coulton v Holcombe* (1986) 162 CLR 1 at 8–9; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17–18.
22 (2005) 223 CLR 1 at 17–18.
23 (1988) 180 CLR 491 at 497.
24 (1893) 6 R (HL) 67.

Ground 3 – The primary judge erred in finding that the breach of duty found by him caused the respondent's injury

[42] The applicant's argument was to the following effect. The primary judge inferred that, had the "Turner technique" been followed, the respondent "would probably have coped better with sliding her feet over the matting, and therefore would probably not have fallen".[25] The cause of the respondent's fall was not the combination of techniques. The cause found by the primary judge was the respondent's failure to comply with the instructed technique by bringing her feet to a parallel position, producing some instability and, hence, lack of balance if her foot caught. The Turner technique did not obviate the respondent having to eventually combine the techniques and then drag her foot. There was no evidence it would have obviated the respondent's misunderstanding in producing the manoeuvre she took that resulted in her fall.

[43] The breach found was a technique that "increased" risk. The Turner alternative, conversely, was found to have "reduced" risk. A material reduction in risk does not prove causation.[26] Nor is a mere increase of risk to be equated with causation.[27]

[44] The interests of finality and justice once more render this ground unmeritorious. Causation was not an issue on the trial. The applicant should not be permitted to rely on this ground when the focus of the argument before the primary judge was whether the applicant's duty of care had been breached. In any event, the arguments advanced by the applicant do less than justice to the primary judge's findings.

[45] The primary judge's comments about the increased risk of a participant falling resulting from the way in which the technique was taught by Mr Howell were made in the course of a discussion about the breach of a duty of care in paragraph [26] of his reasons. It is not implicit in the primary judge's reasons that he took the view that causation was established by an increase in risk. Causation was found because of the primary judge's conclusion, supported by the evidence, that had "Mr Turner's technique been followed, the [respondent] would probably have coped better with sliding her feet over the matting**, and therefore would probably not have fallen**".[28] (emphasis added)

Ground 4 – The primary judge erred in admitting and relying upon the evidence of Mr Turner

[46] The primary judge held that the Turner opinion was only relevant in its description of how courses of the nature of the one in question ought be conducted. It was submitted:

> "If, and to the extent, the learned trial judge allowed, and relied upon, evidence from Mr Turner that related to biomechanics or human movement, Mr Turner was not qualified to give that opinion."

[47] It was argued also that Mr Turner's evidence could not be relied on for any inference that any biomechanical risk would have been "increased" or "reduced" by adopting a particular technique. It was alleged, at least inferentially, that the primary judge relied on evidence of Mr Turner outside the scope of his ruling. On

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25 *Munro v State of Queensland* [2014] QDC 3 at [30].

26 *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors* [2006] QCA 335 at [286].

27 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at 53 and 89; *Batiste v State of Queensland* [2002] 2 Qd R 119 at [8]–[9] per Thomas JA with whom McMurdo P agreed.

28 *Munro v State of Queensland* [2014] QDC 3 at [30].

the hearing of the appeal, there was no attempt to identify what it was in paragraphs [25], [26] and [29] (the paragraphs relied on by the appellant) that showed the primary judge's reliance on inadmissible evidence. I am not persuaded that the primary judge did so. This ground of appeal was not made out.

Conclusion

[48] In *Rodgers v Smith*,[29] Keane JA observed in respect of applications for leave to appeal:

> "It is well settled that '[l]eave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected'. The statutory restriction on appeals to this Court:
>
> > 'serves the purpose of ensuring that this Court's time is not taken up with appeals where no identifiable error or injustice can be articulated by those litigants whose arguments have already been fully considered at two judicial hearings.'" (citations omitted)

[49] The applicant did not identify any substantial injustice which ought to be corrected. Nor was there a reasonable argument that there was an error to be corrected. Certainly, there was no reasonable argument that there was both an error to be corrected and a substantial injustice requiring correction.

[50] For the above reasons I would order that the application for leave to appeal be refused with costs.

The costs appeal

[51] On 17 April 2014, the primary judge ordered that the applicant pay the respondent's costs of the action from 3 June 2013 on the Magistrate's Court scale applicable where the amount recovered is more than $50,000. The order was made on 17 April because, when the primary judge gave judgment in the proceedings on 10 January 2014, the parties requested and were granted an opportunity to make written submissions on costs. The applicant applies for leave to appeal against the costs order. Section 118B of the *District Court of Queensland Act* 1967 provides:

> "**118B Leave of District Court required to appeal in relation to costs**
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> (1) An appeal only in relation to costs lies to the Court of Appeal from a judgment or order of the District Court only by leave of the judge who gave the judgment or made the order, or, if that judge is not available, another District Court judge.
>
> (2) However, if, after an appeal to the Court of Appeal is properly started, the appeal becomes an appeal only in relation to the costs of the original proceeding—
>
> (a) subsection (1) does not apply; and
>
> (b) the appeal may be heard and determined only by leave of the Court of Appeal."

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[29] [2006] QCA 353 at [4].

[52] As leave to appeal is refused in the substantive application, the applicant is applying for leave to appeal only in relation to costs. As appears from the reasons of Peter Lyons J, the applicant has no avenue of appeal. Even if this Court had power to grant leave to appeal in the costs application, the granting of leave would not be appropriate in the circumstances. The subject costs were awarded on a Magistrates Courts scale. Plainly, the costs recovered will not come near indemnifying the successful respondent against the costs incurred by her in this litigation at first instance or on appeal. As a general rule, appeals only in relation to costs should be discouraged. They increase costs and delay relieving the successful party of the burden of continuing litigation. There is another consideration. As Keane JA remarked, s 253 of the *Supreme Court Act* 1995 (Qld), a generally similar provision:[30]

> "… serves the important function of filtering appeals as to costs in order to:
>
> > 'ensure that the primary judge's balancing of discretionary considerations should not be reconsidered on appeal save in cases where the primary judge has first addressed the question whether there is good reason to allow his or her exercise of the discretion to be reviewed.'"

[53] I would order that the application for leave to appeal against the order made on 17 April 2014 be refused.

[54] **PETER LYONS J:** I have had the advantage of reading the reasons for judgment of McMurdo P and Muir JA. Notwithstanding the assistance I have derived from their Honours' reasons, it seems to me to be necessary to give further consideration to the application for leave to appeal against the costs order made in the District Court.

[55] In his reasons for judgment, Muir JA sets out s 118B of the *District Court of Queensland Act* 1967 (Qld). That section immediately follows ss 118 and 118A of the same Act. All three sections appear in Part 9, which is entitled "Appeals from the District Court to Court of Appeal".

[56] Section 118 creates rights of appeal from the District Court to this Court. Appeals in cases which come within s 118(2) do not require leave. It is implicit in the application that the costs order is not an order in respect of which s 118(2) grants a right of appeal.

[57] Section 118(3) provides that, in other cases, a party "may appeal to the Court of Appeal with the leave of that court". However, the subsection expressly refers to ss 118A and 118B, making its provisions subject to those sections.

[58] Section 118A provides that an appeal lies to the Court of Appeal from a judgment or order by consent, "only by leave of the judge who gave the judgment or made the order, or, if that judge is not available, another District Court judge".

[59] Section 118B(1) permits an appeal "only in relation to costs"; but then only with the leave of the District Court judge who made the order for costs; or, in some circumstances, another District Court judge. Section 118B(2) provides an exception to the limitation on this right of appeal.

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[30] *Virgtel Ltd v Zabusky (No 2)* [2009] 2 Qd R 293 at 295. See also *ASIC v Jorgensen & Ors* [2009] QCA 20 at [29].

[60] When s 118(3) and s 118B are read together, it seems to me that the only circumstances in which a person might bring an appeal "only in relation to costs" are those found in s 118B. Its provisions have the effect that such an appeal may only be instituted with the leave of a District Court judge. However, where an appeal was properly instituted and becomes an appeal only as to costs (which could only be the case if it was not such an appeal when instituted), it may be determined only with the leave of this Court.

[61] This legislative scheme leaves no scope for the grant of leave by this Court in relation to an appeal against the costs order made in the present case in the District Court. Since leave is to be refused to appeal against the damages judgment given in the respondent's favour in the District Court, there is not, and will not be, an appeal properly instituted which might be said to have become an appeal "only in relation to the costs of the original proceeding". My conclusion follows from the natural reading of ss 118-118B, and there is no sufficient reason to depart from that reading.[31]

[62] I would add that the statutory context in which s 118B appears does not permit the word "appeal", in any of the places in which it appears in s 118B(2), to be read as extending to an application for leave to appeal. The term is used for the proceeding which is ultimately to be determined, and which itself requires leave. Moreover, the word is used throughout the three sections to which I have referred, to describe an appeal, and not an application for leave to appeal.

[63] The Act does not include a definition of the word "appeal". In any event, it seems to me that the context to which I have referred would preclude an extension of the meaning of that word to include an application for leave to appeal.

[64] I would accordingly refuse the application on the basis that this Court has no power to grant it.

[65] If my conclusion were wrong, I would agree with the reasons of her Honour the President, for refusing leave to appeal against the costs order. I would also agree with the reasons of Muir JA for refusing leave to appeal against that order. I otherwise agree with the reasons of Muir JA, and the orders proposed by his Honour.

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[31] See the discussion by Fraser JA in *Smith v Ash* [2011] 2 Qd R 175 at [33]-[36], [38].