SUPREME COURT OF QUEENSLAND

CITATION:	*Lewin v Gould & Anor* [2015] QCA 107
PARTIES:	**BRITNEY EILEEN LEWIN by her litigation guardian RACHAEL EDITH LEWIN** (applicant) **v** **RENEE MAREE GOULD** (first respondent) **INSURANCE AUSTRALIA LIMITED** ACN 000 016 722 (second respondent)
FILE NO/S:	Appeal No 10577 of 2014 DC No 4285 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2014] QDC 231
DELIVERED ON:	19 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	21 May 2015
JUDGES:	Morrison JA and Mullins and Martin JJ 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 is refused.** **2. The applicant is to pay the respondents' costs, of and incidental to the application, to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – PROOF AND EVIDENCE – where the applicant sustained a whiplash type injury in a car accident – where the applicant sued for damages for the injuries – where the primary judge relied on the evidence of an orthopaedic specialist who said that such injuries normally resolve in two to three months, that he believed Ms Lewin's injuries had done so and that her ongoing pain was not related to the accident – where relying on the information the primary judge refused the applicant's claim for future economic loss – where the applicant contends that the primary judge's finding of fact that her symptoms are not accident related is an error that needs to be corrected – whether the primary judge's findings of fact is an error requiring appellate intervention

Lewin v Gould & Anor [2014] QDC 231, related
Mbuzi v Hornby [2010] QCA 186, cited
Pickering v McArthur [2005] QCA 294, cited

COUNSEL: M Horvath for the applicant
J O McClymont for the respondent

SOLICITORS: Smith's Lawyers for the applicant
DLA Piper Australia for the respondent

[1] **MORRISON JA:** Ms Britney Lewin was born on 22 August 2000. When she was about nine and a half years old she sustained a whiplash type injury, in a car accident on 26 March 2010.

[2] She sued for damages for the injuries. At the trial Ms Lewin said that she experienced pain in her neck immediately after the accident, easing to occasional discomfort over the months to July 2010. However it started to get worse in about October 2010, and has been ongoing since.

[3] The primary judge relied on the evidence of an orthopaedic specialist who said that: (i) such injuries normally resolve in two to three months; (ii) he believed Ms Lewin's injuries had done so; (iii) her ongoing pain was not related to the accident, but likely caused by poor posture and the carrying of a backpack for school books.

[4] On that basis the primary judge held that Ms Lewin experienced symptoms from the accident for two to three months, and her later and ongoing symptoms were not related to the accident. Because of that finding he refused her claim for future economic loss.

[5] The primary judge found that she was entitled to general damages of $1,000 and special damages of $1,470.60.[1] With interest the total amount of the judgment was $2,483.24.

[6] Ms Lewin applies for leave to appeal. The issues raised by the application are whether:

(1) an appeal is necessary to correct a substantial injustice; and

(2) there is a reasonable argument that there is an error to be corrected.[2]

[7] It is convenient to deal with the second requirement first.

Error to be corrected

[8] Ms Lewin attacks the factual finding that her ongoing symptoms are not accident related. Two principal errors were suggested. First, the primary judge should not have accepted the evidence of Dr Journeaux over that of Dr Pentis. Secondly, it was an error to reject the claim for future economic loss.

Acceptance of Dr Journeaux

[9] The primary judge explained that there were two reasons for his preferring Dr Journeaux's evidence over that of Dr Pentis.

[10] The first was that Dr Pentis had relied on some incorrect assumptions about the progress of treatment and Ms Lewin's reactions to the neck pain. They were that:

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1 *Lewin v Gould & Anor* [2014] QDC 231.
2 *Pickering v McArthur* [2005] QCA 294 at [3]; *Mbuzi v Hornby* [2010] QCA 186 at [13].

- she had missed one or two weeks rather than going straight back to school;[3] in fact she went straight back to school;
- she had X-rays and physiotherapy soon after the accident;[4] in fact the X-rays were in October 2010 and the physiotherapy started in November 2010;
- she had not returned to physical education exercises at school.[5]

[11] I doubt that Dr Pentis' report, correctly read, reveals the first two assumptions as incorrect. The relevant sentence in his report simply reads: "She was seen by her doctor that day and treated with analgesics, x-rayed and had a course of physiotherapy".[6] All of that was true as a matter of chronology, except that the X-rays and physiotherapy were later.

[12] Dr Pentis used his notes to correct the impression in relation to the physical education point, saying that he was told, and meant, some limited physical education participation.[7] However Dr Pentis seemed to accept, in cross-examination, that he was told, or at least understood, that the x-rays and physiotherapy were "fairly soon after the accident", and that was an important factor in his assessment of the seriousness of the injury.[8]

[13] The second reason was that he had "more relevant expertise as a paediatric trauma surgeon" when compared to Dr Pentis.[9] It is important to note that the primary judge's preference was not based on a lack of qualifications on the part of Dr Pentis, whose expertise was admitted.[10] It was simply the fact that, in the assessment of the primary judge, Dr Journeaux had the more relevant experience.

[14] At the time of his first report in 2012 Dr Journeaux had been a practising orthopaedic surgeon for about 15 years, and the Director of Orthopaedics at the Mater Hospital for nine years.[11] At the time of his second report in 2014 he was a consultant trauma and orthopaedic surgeon at the Mater Hospital. Further he had extensive experience treating injured children as part of the paediatric trauma roster at Mater Hospital.[12]

[15] By contrast Dr Pentis had ceased clinical practice in the early 1990's[13] and nothing in his curriculum vitae or experience suggested a focus on paediatric orthopaedics.

[16] There was therefore a solid evidentiary foundation for the primary judge's preferring Dr Journeaux's evidence. It cannot be demonstrated that the primary judge erred in this respect.

Rejection of the economic loss claim

[17] Dr Journeaux's evidence was that, based on his examinations and experience:

- the injury was a minor whiplash which had probably resolved in two to three months;

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3 Dr Pentis' first report, page 2, AB 224.
4 Dr Pentis' first report, page 1, AB 223.
5 Dr Pentis' first report, page 2, AB 224.
6 Dr Pentis' first report, page 1, AB 223.
7 AB 89.
8 AB 88.
9 Reasons at [50].
10 AB 86.
11 Dr Journeaux's curriculum vitae, AB 311.
12 AB 309.
13 AB 94.

- it would be highly unusual for a child not to fully recover from such an injury;
- there was no organic pathology for the symptoms experienced from October 2010;
- the symptoms from October 2010 were not related to the accident, and more likely caused by a combination of poor posture and strain from carrying a school backpack;[14]
- in any event there was no functional impairment that was related to the accident, nor would there be in the future.

[18] The primary judge accepted that evidence, and it was open to him to do so.

[19] Once that evidence was accepted there was no basis to make an award of damages for potential future economic loss. Simply put, any ongoing symptoms are not the product of the accident giving rise to Ms Lewin's claim.

[20] In any event, the evidence otherwise was that Ms Lewin was a good student, doing well at school, and was likely to go to university and graduate from whatever course she might undertake. Further, none of the likely forms of occupation she foresaw (to the extent that she had any concrete idea of what she wanted to do in the future) were ones where it could be demonstrated that there was any real likelihood of impairment.

[21] In my view it cannot be demonstrated that the primary judge erred in dismissing this part of the claim.

Substantial injustice.

[22] The evidentiary findings referred to above, which were open, compel the conclusion that there has been no substantial injustice.

Conclusion

[23] I would refuse the application. I propose the following orders:

1. The application for leave to appeal is refused.
2. The applicant is to pay the respondents' costs, of and incidental to the application, to be assessed on the standard basis.

[24] **MULLINS J:** I agree with Morrison JA.

[25] **MARTIN J:** I agree with Morrison JA.

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[14] Indeed Ms Lewin complained that she experienced pain on carrying the backpack, and that commenced at the end of 2010: AB 24, 36.