[2015] QCA 174

COURT OF APPEAL

FRASER JA

Appeal No 6085 of 2015
SC No 789 of 2014

SUMMS OF QLD PTY LTD
trading as BIG BILLS BOBCATS
ACN 140 816 119 **Applicant**

v

JOSHUA DAVID BOON **Respondent**

BRISBANE

MONDAY, 21 SEPTEMBER 2015

FRASER JA: The evidence accepted by the trial judge was that, as the appellant, an employee on a worksite, was walking down a footpath, he felt a shooting pain in his hand, pulled his hand back, and blood shot out from his hand. An employee of the defendant was there. The appellant noticed him. The employee assisted. It appears to have been uncontested that the employee of the respondent was using a retractable knife with a sharp blade some six inches in length to peel an orange. Having peeled the orange, he stood up and accidentally stabbed the plaintiff in the hand.

The trial judge found that the plaintiff had failed to establish the alleged negligence of the employee of the respondent, for which the respondent, admittedly, would be vicariously responsible. The basis of that finding was explained in paragraphs 74 through to 76 of the trial judge's reasons. In the course of applying s 9 of the *Civil Liability Act* 2003 (Qld) and the principles for establishing whether or not there was a breach of duty of reasonable care stated

in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48, the trial judge focused upon the conduct of the employee of the respondent in using his sharp knife to peel an orange.

Thus, for example, the trial judge considered that the respondent had not established on the balance of probabilities that such a use of the knife would have involved a risk of injury to a class of persons nearby, which would have included the plaintiff. It seems to me that the appellant has a very strong argument on appeal that, in taking that approach, the trial judge misunderstood the case made by the appellant. The case was not that the use of the knife to peel an orange was negligent, but rather that the employee of the respondent was negligent in the course of standing up and accidentally stabbing the appellant in the hand with the knife.

There is, I think, on a provisional basis, a very strong case that such an event, without further explanation, could not have happened unless the employee of the respondent had failed to take reasonable care, by way of either folding up the knife before the employee stood up or, as was pleaded, by keeping a proper lookout in order to avoid an accident of just this kind. So I propose to deal with this application on the footing that the appellant, in my provisional view, has a very strong argument on liability in the appeal.

…

The evidence upon which the respondent to the appeal, that is, the applicant for security, relies establishes to my satisfaction that there is a significant risk that if the appellant fails in the appeal and is ordered to pay costs, then those costs, or at least the full amount of them, may not be paid or able to be recovered by the respondent to the appeal. I accept, however, that the appellant is in a somewhat different financial position from other appellants who have been ordered to provide security insofar as the appellant is in employment and there would be some hundreds of dollars available by way of garnishee proceedings to satisfy an order for costs.

It does seem to me that there is some risk that making an order for security would stifle the appeal. There is no suggestion in the evidence that anyone other than the appellant is available to finance the appeal and the evidence of the appellant's current assets and income supports the

conclusion that the appellant would not be in a position to provide any substantial amount for security of the respondent's costs before the time when the appeal ordinarily would come on.

I should say that the particular factors upon which the respondent to the appeal relied in supporting the grant of security were the evidence of the financial position of the appellant, which I've discussed, and the circumstance that after a three-day trial on the merits, the trial judge made findings of fact adverse to the appellant. In relation to the findings of fact, they do not seem to me, in this case, to carry anything like the weight that they have done in the other cases concerning security which have been cited. That is because the appeal does not involve any challenge to findings of primary fact. Contrary to a submission made in writing for the respondent to the appeal, nor does it involve any challenge to the exercise of a discretion. Rather, the appeal is based upon what is submitted to be a misinterpretation by the trial judge of the relevant facts, which I discussed earlier. That being so, I would not attribute any significant weight to the circumstance that there has been a three-day trial on the merits with findings of fact.

Taking all of these considerations into account, and particularly the possibility that the appeal might be stifled by an order for security, in my view, no security should be ordered in this very unusual case. So, in the result, I would refuse the application for security.