SUPREME COURT OF QUEENSLAND

CITATION:	*Cosgrove & Anor v Johns* [2000] QCA 157
PARTIES:	**JENNIFER MARGARET COSGROVE** (first defendant/first appellant) **CHEVRON QUEENSLAND LIMITED** (second defendant/second appellant) **v** **DALLAS MIDGLEY JOHNS** (plaintiff/respondent)
FILE NO/S:	Appeal No 453 of 1998 SC No 599 of 1993
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury – Liability and Quantum (Leave granted)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 May 2000
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2000
JUDGES:	de Jersey CJ, McMurdo P and Thomas JA. Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal allowed; judgment of Derrington J of 12 December 1997 set aside; direction that there be a new trial of the action; respondent/plaintiff to pay the appellants' costs of and incidental to the proceedings before Derrington J and of and incidental to this appeal, including the proceedings before Fryberg J to be assessed**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT – WHERE FRAUD, MISREPRESENTATION OR SUPPRESSION OF MATERIAL FACTS – setting aside judgment for fraud – reference by Court of Appeal to Trial Division for finding whether fraud proved – alleged errors by trial division judge in making findings – approach of Court of Appeal to acceptance of such findings and to whether fraud should be found – consideration of power under s 68(3) of *Supreme Court of Queensland Act* 1991 – powers of Court of Appeal on remitter – whether findings of fact by trial division should be accepted in whole or in part – whether judgment against the second defendant tainted by fraud in judgment

against the first defendant - whether discretion exists to refuse to set aside judgment obtained by fraud – exercise of discretion

APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – FRESH EVIDENCE – PARTICULAR CASES

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ENTRY OF JUDGMENT OR NON-SUIT OR GRANT OF NEW TRIAL

EVIDENCE – ADMISSIBILITY AND RELEVANCY – SIMILAR FACTS – TO PROVE FACT IN ISSUE – IN GENERAL
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EVIDENCE – WITNESSES – CORROBORATION – ADMISSIONS – CONDUCT – OTHER CONDUCT

EVIDENCE – WITNESSES – CORROBORATION – WHAT CONSTITUTES - whether corroboration of statement of deceased person required – whether evidence capable of implicating plaintiff in fraud – reasonable evidence of agreement between plaintiff and witness – whether evidence of witness' expectation of money from the plaintiff corroborates allegation of fraud – conduct of other persons supporting inference of fraudulent agreement – evidence of lies by witness not corroborating allegation of fraud – effect of legal error in use of evidence of lies by witness

TORT – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – ROAD ACCIDENT CASES

TORT - NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – nature of process of assessment of contributory negligence – whether different apportionment of contributory negligence in judgment against first defendant might follow from conclusion of fraud in judgment against second defendant

TORT – NEGLIGENCE – PROOF OF NEGLIGENCE – ADMISSIBILITY OF EVIDENCE

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NEGLIGENCE – ROAD ACCIDENT CASES – ACTIONS FOR NEGLIGENCE – APPORTIONMENT OF DAMAGES – GENERALLY

TORT – NEGLIGENCE – PROOF OF NEGLIGENCE – MISCELLANEOUS MATTERS

Evidence Act 1977 (Qld) s 101(1), s 102
Law Reform Act 1995 (Qld) s 6(a), s 7
Supreme Court of Queensland Act 1991 (Qld) s 68(3), s 68(4), s 69

Ahern v The Queen (1988) 165 CLR 87, applied
Aroutsidis v Illawarra Nominees Pty Ltd (1990) 21 FCR 500, considered
Barisic v Devonport & Ors [1978] 2 NSWLR 111, considered
Briginshaw v Briginshaw (1938) 60 CLR 336, applied
Burton v The Melbourne Harbour Trust Commissioners (1954) VLR 353, considered
DF Lyons Pty Ltd v Commonwealth Bank of Australia (1991) 28 FCR 597; 100 ALR 464, considered
Edwards v R (1993) 178 CLR 193, considered
Fitzgerald v Lane [1989] 1 AC 328, considered
Gates v City Mutual Life Assurance Society Ltd (1982) 43 ALR 313, considered
Hip Foong Hong v H Neotia & Co [1918] AC 888, considered
Hobbs v CT Tinling & Co Ltd [1929] 2 KB 1, considered
Jack v Smail (1905) 2 CLR 684, considered
Kelly v Narrandera Shire Council [1998] NSW SC 686, 16 December 1998, considered
Re Knowles [1984] VR 751, considered
Lucas v R [1981] QB 720, considered
McCann v Parsons (1954) 93 CLR 418, considered
McDonald v McDonald (1965) 113 CLR 529, considered
Martin v Osborne (1936) 55 CLR 367, considered
Mister Figgins v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23, considered
Rejfek v McElroy (1965) 112 CLR 517, applied
Sedgwick v Law Society of New South Wales NSWCA No 40111 of 1992, 18 May 1994, considered

Thompson v Australian Capital Television Pty Ltd (1996) 186 CLR 574, considered
Tripodi v The Queen (1961) 104 CLR 1, applied
VRS v The Queen (1997) 191 CLR 275, considered
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534, considered
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1984-1985) 155 CLR 448, considered

COUNSEL: SC Williams QC, with TD North SC for the appellants
CE Hampson QC, with GW Diehm for the respondent

SOLICITORS: Gadens Lawyers for the appellants
Standfield & Smith for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Thomas JA. I agree with the orders proposed by His Honour for the reasons he expresses.

[2] **McMURDO P:** I have read the reasons for judgment of Thomas JA. Like him, I am satisfied the error made by Fryberg J (referred to in para [69] of Thomas JA's reasons) was not such as to require this Court to reject Fryberg J's finding that the judgment given by Derrington J was obtained by fraud. I, too, am independently satisfied on the evidence that Fryberg J's findings (set out in para [11] of Thomas JA's reasons) are correct. I agree with Thomas JA's reasons and proposed orders.

[3] **THOMAS JA:**
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Whether the judgment should be set aside and a new trial ordered	[92]

[4] This is an appeal by two unsuccessful defendants against whom judgment for the plaintiff for $277,560 was granted by Derrington J on 12 December 1997. The action was for damages for personal injuries.

[5] The defendants were respectively Chevron Queensland Ltd (the owner of the hotel which, on his Honour's findings, supplied liquor to the plaintiff before he was injured by a motor vehicle) and Ms Cosgrove (who drove the vehicle which subsequently collided with the plaintiff).

[6] The learned trial judge found that each defendant was negligent, that the plaintiff was guilty of contributory negligence and that "responsibility should be apportioned to the plaintiff to the extent of 45 per cent, as to (Ms Cosgrove) to the extent of 30 per cent and to (Chevron) to the extent of 25 per cent". There had however been no contribution proceedings between the two defendants, and consequently the judgment, after making the appropriate deduction for the finding of 45 per cent contributory negligence, was relevantly limited to a money judgment against both defendants.

Issues

[7] The appeal to this court seeks only that the orders below be set aside and an order for a new trial be made. The grounds are that the judgment was obtained by fraud, and that fresh evidence has been discovered such that it cannot reasonably be supposed that the same judgment would have resulted against the defendants. The legal correctness or otherwise of the reasoning underpinning his Honour's findings of negligence and the apportionment determined by him are not here in issue. All that is sought is a new trial.

[8] On 29 May 1998 this court (differently constituted), pursuant to s 68(3) of the *Supreme Court of Queensland Act* 1991, remitted for determination by the Trial Division the questions of fact raised by paragraph 2(a) of the Notice of Appeal. The trial division judge to whom the questions of fact were remitted made findings of fraud adverse to the plaintiff, which the plaintiff now challenges. Such a remittal does not deprive this court of the power or responsibility of final determination of the questions that are remitted. Section 68(4) provides:

> "Subject to s 69, the Court of Appeal may accept any determination of the trial division in whole or part".

[9] Section 69 additionally creates a right of appeal to this Court from "any determination of the court in the trial division in a proceeding remitted under s 68". The latter power was not however invoked. The plaintiff's challenge to the findings of fraud in the trial division is based upon s 68(4). The submission for the plaintiff is that the determination of the issues of fact should not be accepted.

[10] The referred issues came before Fryberg J who heard evidence over a number of days in October-November 1998 and who made his determination on 20 September 1999. The issues as stated in paragraph 2(a) of the Notice of Appeal were:

> "(a) The judgment appealed from was obtained by fraud in that:
>
> (i) Bruce Donald Anthony ("Anthony") who was called on behalf of the plaintiff and gave evidence at the trial was not in fact a witness to the events he swore he witnessed;
>
> (ii) In or about the early months of 1994 Anthony orally agreed with the plaintiff to give false evidence on the plaintiff's behalf and to find others to give false

evidence in return for the plaintiff's promise to pay Anthony the sum of $20,000;

(iii) Pursuant to the agreement referred to in (ii) Anthony procured one Ian Robert Schultz to give false evidence;

(iv) Carole Anne Sole, a witness called on behalf of the plaintiff gave false evidence and did so after having been prevailed upon to do so by Anthony."

[11] Fryberg J's determination was in the following terms:

"The judgment appealed from was obtained by fraud in that:

(i) Bruce Donald Anthony, who was called on behalf of the plaintiff and gave evidence at the trial, was not in fact a witness to the events he swore he witnessed;

(ii) In or about the early months of 1994, Anthony orally agreed with the plaintiff to give false evidence on the plaintiff's behalf and to find others to give false evidence in return for the plaintiff's promise to pay Anthony the sum of $20,000.

(iii) Carol Ann Sole, a witness called on behalf of the plaintiff, gave false evidence at the trial, and did so after and as a result of having been prevailed upon to do so by Anthony, pursuant to the agreement referred to in paragraph (ii)."

[12] In order to understand the plaintiff's challenge to that determination and the findings on which it is based it will be necessary to outline the evidence given at the original trial and to assess the evidence given before Fryberg J along with the manner in which his Honour dealt with that evidence. The court must then decide whether to accept his Honour's determination in whole or in part. Ultimately it will be necessary to consider whether this court is satisfied that the grounds relied upon by the appellant defendants in their notice of appeal have been made out, and to determine whether a new trial should be ordered.

The trial before Derrington J

[13] The plaintiff suffered injuries when he was struck by a motor vehicle at about 10.30 pm on 24 April 1990. He was at that time grossly intoxicated with a blood alcohol level measured shortly afterwards at .332 per cent. Immediately prior to the accident he had been standing holding on to a bus stop at Ferny Avenue Surfers Paradise at a place north of the intersection with Cavill Avenue. This was across the road from the rear of the then location of the Chevron Hotel. The evidence suggests that he suddenly moved rapidly onto the roadway and was struck by a vehicle driven by Ms Cosgrove.

[14] The starting point of the case that the plaintiff wished to make against Chevron was that he was at material times drinking in the Chevron Hotel, and displaying signs of intoxication such that the servants or agents of Chevron should have declined to serve him and/or taken some other protective action pursuant to a duty of care that Chevron owed him. The threshold allegation in the statement of claim is that between 4.30 pm and 10.00 pm on that day he was a patron at the Chevron Hotel.

The main evidence led at trial to establish the plaintiff's presence in the hotel and the awareness of his condition by Chevron employees will now be summarised.

[15] The plaintiff gave evidence that he recalled going into the Long Bar of the hotel at about 4.30 pm on Tuesday 24 April 1990. He remembered standing at the bar and being served his first beer and waving to his friend (Quilligan) who had driven him to the hotel. That however was his last recollection of the day. He gave further evidence that he was a heavy drinker, and that during the preceding months he had usually had drinks there on Tuesday, Wednesday and Friday nights. He was attracted by the "happy hour" rates that applied at that hotel commonly between about 4.00 pm and 7.00 pm. His "practice" on nights preceding a holiday was to stay until "stumps" that is to say until closing time. He also used to drink at the Benowa Tavern on Saturdays and Sundays. His usual practice when he drank at the Chevron Hotel was to catch a bus at the Ferny Avenue stop nearest to the hotel which would take him to the Main Beach area where he lived.

[16] The plaintiff stated under cross-examination that on this particular day however he had not intended to stay for his usual full session. He was only intending to stay long enough to see a barmaid named Sue about returning to her a watch that she had left at his place. He said that as soon as he had returned her watch he would be heading home, as it was a Tuesday night and he had had a big weekend, including attending a wedding. It was common ground that Sue's shift had changed and she was not working that night. The plaintiff stated that he did not know what he did after being in the hotel a very short time. He perceptively added "apparently I didn't go home". It may be mentioned in passing that the trial judge's finding that on the occasion in question "he had gone there to drink heavily and to become intoxicated in accordance with his usual habit" is not supported by the evidence.

[17] Ian Schultz, another regular drinker, gave evidence that he was at the hotel regularly nearly every night of the week. He saw the plaintiff there normally on a Friday. On the day in question he saw the plaintiff in the Long Bar when he (Schultz) arrived there between 5.00 and 5.30 pm. They had two drinks together before Schultz ventured to another bar called the Quarter Deck. He did not see the plaintiff again after that. He left the hotel "out the back way" at 6.55 pm. His evidence does not seem capable of placing the plaintiff in the hotel any later than approximately 6.00 pm. At the time Schultz saw him the plaintiff was in a very happy mood but was not silly.

[18] Christine Klauer was a barmaid at the Chevron on the night in question, working the shift 5.30 to 10.30 pm in the Long Bar. She had no recollection of the plaintiff having been there on that occasion. She knew him as a patron and heard that he had been involved in an accident less than a week later. She said that if he had been there until 10 o'clock and had been very drunk the prospects of her remembering that fact would be very good. She considered Tuesday night to have been a quiet night and that if he had been there until 10.00 pm she was "fairly sure" that she would remember it if he was very drunk.

[19] Thus far the evidence founding a conclusion that the plaintiff remained in the hotel until closing time, let alone that he was there in such a condition as to impute fault to any servant of Chevron who served him liquor, is at best tenuous. However the evidence of two other witnesses, Donald Anthony and Carol Sole, provided a basis

which, to say the least, made it safer for the gaps to be closed. Anthony gave evidence that he was in the bar that night having arrived at about 6.30 pm. The plaintiff, he said, was still there drinking. When Anthony first saw him the plaintiff was "half drunk" and when he left at half past eight he was "hopeless", could not talk any sense and was drunk. According to Anthony, by that time (8.30 pm) the plaintiff was "staggering around all over the place".

[20] Sole gave evidence that she was a barmaid at the Chevron. She knew the plaintiff as a patron who came a couple of times a week and would usually stay until closing time. On the night in question she finished work at 6.30 pm but did not leave the premises until about 7.30 pm. The plaintiff, she said, was still there at that time. She did not observe his condition, but stated that when he did stay until closing time he was usually drunk and staggering.

[21] The reasons for judgment of Derrington J indicate that the finding of liability against Chevron was based on the following view of the evidence:

> "He had gone there to drink heavily and to become intoxicated in accordance with his usual habit and, again in accordance with his usual habit, on leaving the hotel he had found his way to traffic lights on Ferny Avenue and crossed safely at a pedestrian crossing there and moved to the bus-stop where he intended to catch a bus home. His usual practice was known to at least some of the hotel's staff.
>
> …
>
> Its bar staff continued to serve the plaintiff until he reached the state of intoxication described above. For some time before he left the hotel, he must have been patently affected by his intoxication and yet he was supplied with liquor to the degree revealed by his blood alcohol level.
>
> There was no direct evidence that he remained at the hotel until shortly prior to the accident, but this is strongly inferred from the circumstantial evidence. He was seen there over a period of some hours and about two hours before the accident, he was plainly in a befuddled state".

(This clearly shows acceptance of and reliance upon Anthony's evidence).

> "In such circumstances it was his habit to continue to drink at the hotel until closing time and to go from there to the bus-stop where the accident occurred. He was not in the habit of drinking at other hotels in that area, and it is unlikely that he went a night-club on that evening.
>
> There was conflicting evidence as to the policy of the hotel in respect of supply of alcohol to intoxicated customers. On all the evidence such customers were supplied, the only disparity in the evidence being the degree of intoxication involved before refusal to serve. A former employee claimed that the benchmark was only rudeness or abuse or disturbance of other customers by the customer. Another employee said that it was the time when the customer had difficulty picking up change from the counter or was staggering. The difference is minimal and irrelevant in the present case. Whatever the rule, the plaintiff was served up to the state of gross intoxication when he was a danger to himself, for it was known to

> the bar staff that he would then go home by a route that would take him into close proximity to a busy highway.
> …
> It is not negligence merely to serve a person with liquor to the point of intoxication; but it is so if because of the circumstances it is reasonable (sic) foreseeable that to do so would cause danger to the intoxicated party, such as, for example where the intoxication is so gross as to cause incapacity for reasonable self-preservation when it is or should be known that he or she may move into dangerous circumstances, and where no action is taken to avert this.
> The danger would be enlarged if it were known that the intoxicated person would be negotiating dangerous traffic such as would be found where the hotel was situated between two major arterial roads, and his habit of going home unescorted was known. The second defendant is therefore liable and the only question remaining is the apportionment of responsibility between the various parties …".

The proceedings before Fryberg J

[22] It was common ground that the defendants bore the onus of proving the allegations contained in the Notice of Appeal. It is also common ground that the standard of proof required is that stated in *Rejfek v McElroy*[1] namely upon a balance of probabilities, while at the same time recognising that the degree of persuasion of the mind that is required varies with the gravity of the fact or issue which requires to be proved[2]. On an issue such as fraud the proof "should be clear and cogent such as to induce, on a balance of probabilities, an actual persuasion of the mind as to the existence of the fraud"[3].

[23] The allegations respecting the evidence of Schultz were not persisted in, and issue was joined on the allegations respecting the plaintiff, Anthony and Sole. None of the evidence presented to Fryberg J was reasonably available to the defendants at the time of trial. Insofar as the application is based on the discovery of fresh evidence the evidence satisfies the tests applicable to the reception of such evidence.

[24] The primary case advanced for setting aside the judgment was that there had been a conspiracy between Anthony and the plaintiff to obtain and present false evidence, resulting in false evidence being given by both Anthony and Sole. There are however other issues contained within paragraph 2(b)[4] of the Notice of Appeal which, if sustained, might arguably justify the setting aside of the present judgment. However argument focussed on ground 2(a)[5] which will now be considered. It is in

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1 (1965) 112 CLR 517.

2 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

3 *Rejfek v McElroy* above at 521.

4 "2(b) Alternatively that fresh evidence has been discovered to the effect outlined in (a) hereof which evidence could not with reasonable diligence have been discovered before or during the trial and it cannot reasonably be supposed that judgment would have been given against the second defendant or that liability as between the plaintiff and first defendant would have been apportioned as it was had such evidence been produced at trial".

5 See par [10] above.

substance satisfied by his Honour's findings on the evidence, subject of course to their acceptance by this court.

[25] The principal source of the evidence supporting his Honour's adverse findings concerning Anthony[6] was the two statements of a witness named Neil Armstrong given to an investigator on 23 and 24 January 1998. Those statements were executed as statutory declarations by Armstrong on 2 February 1998. At the time Armstrong knew he was suffering a serious heart condition and he had suffered previous serious episodes resulting from heart disease. In fact he died three days later from cardio-myopathy ischaemic heart disease and hypertension. His statements were received under s 92 of the *Evidence Act* 1977. Armstrong had been an associate of Anthony since late 1993.

[26] Armstrong's first statement commences with details of his association with Anthony and continues:

> "13. ANTHONY arranged witnesses to give evidence at JOHNS' personal injury hearing recently, which he won.
>
> 14. One beautiful sunny day, early 1994, I spent the day in the Longbar at the Chevron Hotel with ANTHONY and various other people. I think "Lyn", ANTHONY'S girl, was there for some time.
>
> 15. The next day I picked him up at his place as arranged, and I'm positive we went straight back to the Chevron. I recall I parked the vehicle at the back of the hotel, and we walked into the hotel via the back entrance and I followed him to our regular spot in the dry bar.
>
> 16. We were only there a few minutes when the person I now know to be Dallas JOHNS walked straight over and spoke to ANTHONY. JOHNS came into the bar after us.
>
> 17. There was no small talk, they started talking about JOHNS' case almost immediately. I recall ANTHONY said to JOHNS, "How's your case going". JOHNS said, "I'm living at home with Mum, and if it wasn't for her and my Solicitor picking up the tab, I'd be completely broke".
>
> 18. ANTHONY said, "Well how long before they settle. How much will you get". JOHNS said, "Mate, not much without witnesses. I'm having trouble finding witnesses to back my story".
>
> 19. Things were said then that lead me to assume the witnesses were important, that JOHNS' Solicitor had advised him that without witnesses he couldn't expect much, if anything. The words, "the claim will be very small without witnesses" were used.
>
> 20. ANTHONY came straight out and said to JOHNS, "I'll be a witness, and I'll get a couple of other blokes, but it'll cost you $20,000.00". JOHNS said, "Okay, you get the witnesses and get signed statements, the $20,000.00 is right".

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6 See findings (i) and (ii) in paragraph [11] above.

21. I don’t recall who initiated the move, I suspect it was ANTHONY, but they made a "tactical advance to the rear". I assumed they were discussing the witnesses.
22. That didn't surprise me. Despite me being his mate and gofer at that time, ANTHONY only ever told me what he wanted me to know.
23. I know time is important, but the best I can recall at this point in time is, it was before the Indy Carnival, early 1994, January/February – February/March, that period. It was very hot.
24. ANTHONY and JOHNS had a conversation which lasted 5, maybe 10 minutes, after which JOHNS just walked out of the bar.
25. ANTHONY gestured to me, indicating we were leaving too, and we walked out the back to the car. I'm pretty sure we were using his XF Falcon Sports Pac. I'm pretty sure I left my car at his place.
26. We entered the car, I was driving. ANTHONY said to me words to the effect, "That bloke is a mate of mine. He got knocked over by a car. He's got a compensation claim going and needs witnesses. Will you go witness for him". I said, "No, I don't know the guy". ANTHONY said, "You'll be paid". I said, "No, I'm not interested, I'd prefer to stay out of it".
27. I said to ANTHONY, "Were you there". He said, No, and it doesn’t matter, nobody remembers the silly bastard there, not even the barmaid".
28. The way ANTHONY spoke it was clear to me he was "ecstatic" about the prospect of picking up $20,000.
29. He didn't ask me to be a witness again that day, or any other day.
30. ANTHONY said, "Nobody can remember him (JOHNS) being there, there won't be a problem being a witness". I said, "No, I'd rather not get involved". He never asked me again.

…

39. The third meeting. I was in ANTHONY'S company. I recall I was driving that day and again think it was his white XF SPAC we were in.
40. He said to me, "We are going to see JOHNS at the Lone Star Tavern. He actually involved me and said, "We are going to meet Dallas JOHNS".
41. On the way he was telling me what was going on, just to the effect, "We are meeting JOHNS, getting an update on this court case business".
42. We arrived before JOHNS, went into the Gunfighters Bar and got a beer. We were there just long enough to drink that beer and JOHNS arrived. I knew JOHNS by this time.
43. We all three moved to a table directly in front of the bistro. ANTHONY sent me to the bar to get two beers, and a soft

drink. I recall I was served virtually straight away and was back at the table within minutes. It was in the morning again, because there was only us three and two other blokes up the other end of the bar, as I recall.

44. ANTHONY allowed me to stay at the table and talked freely about the case, in front of me.

45. I recall ANTHONY said to JOHNS words to the effect, "Are you happy with the witnesses". JOHNS said, "Yes, the Solicitor is happy, it puts a whole different slant on things. They're not going to settle now, they're going to fight on. The Solicitor thinks the case is winnable now we have the witnesses, and $500,000 is not beyond reason. He thinks we can get $500,000."

46. When JOHNS mentioned $500,000 ANTHONY's eyes lit up and he immediately asked him what he was going to do with his money. JOHNS said, "I want to get into a small business". ANTHONY said, "I've got an investment right for you, we will make big bucks. All you have to do is throw in $50,000.00, I'll do the rest. Have we got a deal". JOHNS said, "Yeah, when the money comes through, done deal".

47. JOHNS was there about half an hour and when they had finished talking he got up and left. ANTHONY and I had another beer, and went to other places. He was drinking, I was driving so I wasn't drinking too much.

48. ANTHONY usually had a couple of VB's to start the day and thereafter JD (Jack Daniel) and Coke, no other brand, JD and coke, and he can drink it all day and night.

49. ANTHONY said things later that day that left me in no doubt that the $50,000.00 JOHNS agreed to come up with was for ANTHONY. There was no investment deal, it was $50,000.00 on the top of the $20,000.00".

[27] There was additional evidence of Anthony's conduct and statements on other occasions. Its capacity for corroborating Armstrong's evidence will be considered in due course.

[28] The plaintiff suffered a head injury in the accident in April 1990. The evidence accepted by Derrington J was that by trial he had made a good recovery from his head injury but still had some symptomatic disturbance of higher cortical function, with some evidence of mild frontal and temporal lobe disturbance. Derrington J observed that "careful scrutiny of his performance revealed a good understanding of what was beneficial or otherwise to his case, a reasonably good capacity to express himself, and a moderately good memory. It also confirmed some clear signs of intellectual deficit such as a slowness of speech". His Honour also commented "there also may be some reduction in his responsibility as to money matters. Generally his capacity appears to be sufficient, but it is somewhat likely that he would be vulnerable to persons who would prey upon him if he had control of a large sum". He was not regarded as by any means unemployable although serious restrictions in his capacity in that field were recognised.

[29] Because of his Honour's perception of a danger of the plaintiff being imposed upon by unscrupulous strangers, a protection order was made. There is nothing to suggest that this plaintiff would be incapable of fraudulent intent or dishonesty, or that he would have any difficulty in comprehending the rather simple proposition that Anthony is said to have put to him. His disability however must not be overlooked when considering questions such as the possibility of error, mistake or absence of fraudulent intent.

[30] Apparently the plaintiff did not consult solicitors until 1993. In due course a writ was issued not long before the expiry of the limitation period. The meeting between the plaintiff and Anthony which is the basis of the alleged fraud would seem to have taken place early in 1994. In due course the trial took place between 10 and 13 November 1997 resulting in judgment for the plaintiff on 12 December 1997.

[31] In the proceedings before Fryberg J both the plaintiff and Anthony gave evidence denying fraud. Each however admitted that a conversation had taken place between them in the Long Bar of the Chevron somewhere about the time suggested. There is little doubt that the plaintiff, having spoken with his legal advisers, was at that time concerned about the absence of witnesses who could say that he was in the Chevron Hotel on the night of the accident. The plaintiff's recollection was of an innocent conversation with Anthony on this subject. Having gone to the Long Bar in the Chevron looking for such witnesses, he asked Anthony "if he remembered me being there". Anthony said that he did. The plaintiff then "left it in his hands". No money was offered. He did not recall any third person being there and denied having met Armstrong. The plaintiff further agreed that he had also met Anthony for lunch on a later occasion in the Lone Star Hotel. He denied however discussing the case or its progress. He also denied that Armstrong was present.

[32] Anthony gave evidence confirming that two occasions of conversation with the plaintiff such as those just mentioned had occurred. His evidence-in-chief was similar to that of the plaintiff, although initially he seemed unsure whether Armstrong was there or not. He later firmed in saying that he was not.

[33] The essential difference between Armstrong's account of the first meeting on the one hand and that of Anthony and the plaintiff on the other lies in a few critical words. The evidence suggests that all are speaking about the same occasion, even though there is conflict on whether Armstrong was present. The critical difference is whether or not Anthony made it clear to the plaintiff that he was offering to give false evidence. The plaintiff could not have known that it would be false unless Anthony told him so. The plaintiff had no recollection of who had or had not been at the Chevron at the night of the accident, or even whether he had been there himself. Any finding of complicity on the part of the plaintiff comes down in the end to the acceptability of Armstrong's evidence of what Anthony told the plaintiff when he offered to give evidence for him.

[34] Leaving aside for the moment Fryberg J's analysis of the evidence and his Honour's view of the witnesses, the evidence leaves little doubt that Anthony thereafter engaged in activity aimed at making himself a beneficiary in the proceeds of the plaintiff's action. Various submissions on behalf of the plaintiff urged the court against reaching the view that the further activity of Anthony was improper, but it

may be foreshadowed that having read the evidence I consider it convincingly established that it was. A more difficult question is however raised in relation to the plaintiff, namely whether it has been proved to the requisite standard that the plaintiff agreed to improper activity, and specifically whether it should be found that he was aware that any evidence given or obtained by Anthony would be false.

Allegations of fraud

[35] Simply put, the allegations by the defendants are that Anthony orally agreed with the plaintiff to give false evidence and to find others to give false evidence in return for $20,000 to be paid from the damages.

[36] The only direct evidence of any such agreement was that of Armstrong. Fryberg J considered that Armstrong's statements alone were "a less than satisfactory basis for a finding as serious as the one sought by the defendants in these proceedings". His Honour added "if the defendants' evidence from and in relation to Armstrong stood alone, I would not be satisfied to the requisite standard that the agreement alleged between Anthony and Johns was in fact made". Consequently there was a search for what might variously be called "corroboration" or something tending to confirm the truth of Armstrong's statements or as tending to "support", "confirm" or "strengthen" such statements[7].

[37] Mr Hampson QC for the plaintiff submitted that the circumstances surrounding the giving by Armstrong of his statements rendered them unreliable. As it seems to me there are two main points of criticism. Firstly evidence was given by Armstrong's sister to the effect that he had spoken to someone from an insurance company and had remarked that when the matter was finished there might be something in it for him (Armstrong), but that he did not care either way. Secondly Mr Hampson drew attention to Armstrong's admitted feeling of grievance against Anthony as a result of Armstrong suffering a conviction for possession of a stolen vehicle in 1994. That conviction followed a transaction in which Anthony had been the ringleader and with respect to which Anthony had escaped "scot free". These factors are not however particularly persuasive. In my view the Armstrong statements are essentially credible on their face and the surrounding circumstances (which included Armstrong's knowledge of his serious heart condition) do not on the whole raise strong suspicion or concern although naturally circumspection is required.

[38] The main consideration requiring caution in the acceptance of such statements is the fact that in view of his death the statements could not be tested by cross-examination. Accordingly the search for confirmation or corroboration was an important and legitimate factor in the case.

[39] In my view the evidence that was adduced provided corroboration. It can best be discussed under the following three headings:

(a) Anthony's expectation of money from the action.
(b) Anthony's solicitation of Sole, and her ensuing conduct.
(c) Other supporting details.

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7 *Doney v R* (1990) 171 CLR 207, 211; *BRS v The Queen* (1997) 71 ALJR 1512 at 1538-1539 per Kirby J.

Anthony's expectation of money from the action

[40] On 7 October 1997, shortly before the hearing of the plaintiff's action, Anthony pleaded guilty in the District Court to three counts of fraudulent disposition of mortgaged goods. He obtained an adjournment on the basis that he was expecting some $30,000 which would be able to be used in restitution. There can be no doubt that he instructed his counsel to this effect and his expectation was of money out of the damages hoped to be obtained from the plaintiff's action which was then imminent. Further adjournments were obtained on the same basis whilst such monies remained inaccessible to Anthony. It may be inferred that the form of Derrington J's order and the bringing of the present appeal made it impossible for Anthony to obtain money out of the plaintiff's award.

[41] The sequence is best explained in the following passage from Fryberg J's reasons:

> "I am satisfied that Anthony expected a financial reward in the event that the plaintiff's action succeeded. In cross-examination, Anthony initially denied that he thought he might get money from the plaintiff's damages. The trial in the present action took place in November 1997 and Derrington J delivered a reserved judgment for the plaintiff on 12 December 1997. Appellate proceedings began in late February 1998. On 19 June 1998, Anthony came before Judge Hanger in the District Court at Southport for sentence on the three counts referred to above. On that occasion, he was represented by Mr Cousins of counsel. The crown prosecutor said to the judge:
>
> > "The matter was listed for trial and certainly he was arraigned on 26 September 1997. At that arraignment he pleaded not guilty to all four counts in the indictment. The last time the matter was listed for trial was 7 October 1997 when the prisoner pleaded guilty, was rearraigned and pleaded guilty to the three counts we're dealing with today on the morning of the trial and, as I've said, the matter has been adjourned since that date on the basis that the prisoner indicated to the court that he would obtain the $30,000 which is outstanding from a friend who he informed was soon to recover some money or soon to receive some money from a personal injuries settlement.
> >
> > That matter has been adjourned in response of the accused's assertions that the money will be forthcoming and, of course, the Crown consented to those adjournments on the basis that the complainant was anxious to have the funds recovered and the Crown did consent to those adjournments until the last mention date of 29 April where the Crown opposed any further adjournment and the matter was adjourned to today for one last time.
> >
> > It seems that despite earlier assertions that a full sum of $30,000 would be available from this civil settlement from the last mention date it was clear that only half that sum would become available, if at all, from that settlement and certainly that no entitlement for that money would be seen, only in agreement, perhaps, by the person receiving the money, and it seems at that time the prisoner mentioned that

> other avenues might be used to obtain the balance of the money, but certainly that could have been done prior to this date. In effect, there is no prospect, it seems, that funds would be available, Your Honour. In relation to penalty, Your Honour would note that this offence is not one that commonly comes before the court".

In cross-examination before me, Anthony said that this passage was accurate. He further admitted that the "settlement" referred to was the settlement of Johns' action - the present proceedings. He acknowledged that on his instructions, Mr Cousins dealt with the topic in this way:

> "Your Honour, even up to this day, he still says he wants to pay the money, and that he will pay the money. But in all honesty, he admits that he just can't give any iron clad guarantee to the Court today as to when the money will be paid. He has a legitimate expectation of receiving money by virtue of this other personal injuries pay out, but he just can't, in all honesty, tell the Court when that will be. And rather than come here today and make shallow promises that the money will be paid in three months or four months or what have you, mmm, he's just telling you the truth, through me, that he still wants to pay the money. If he can, he will. But he just can't make that promise, and so he accepts that he will be sentenced on the basis that no moneys have been paid, and that there is little or no point in making an order for restitution, particularly if a term of imprisonment is imposed. But, he makes it very clear, and this can be relied upon in any subsequent civil proceeding, he still intends to pay the money when he is able to do so".

He said that what Mr Cousins told the court was true. He sought to explain it by asserting that in about November 1997, the plaintiff offered to lend him $30,000 if he ever got paid.

I do not believe this explanation. It is completely uncorroborated and is inconsistent with the evidence of the plaintiff. It is worth noticing the circumstances in which it was given. Anthony was being cross-examined by reference to the transcript of the proceedings before the District Court. He agreed that the Crown prosecutor's statement, referred to above, was accurate. Thereupon, counsel tendered the transcript. In the presence of the witness, Mr Hampson objected to the tender on the ground of relevance. In the course of argument he said:

> "Yes, it is, Your Honour, but I object to it all in total even though the witness says that on his recollection that is what the Crown Prosecutor said and so forth about the circumstances of the things. The only possible area in which it touches the matter before you today and I invite Your Honour to look at this - there are some passages in green where it seems suggested that this witness by his counsel or

> solicitor had sought adjournments in the past with a view of trying to make restitution, and his counsel says that with relation to one avenue of money that was no longer now available but he was hoping to get a loan, I think it was, from some compensation claim, something about a compensation claim. That is as close as it comes to anything here - the line of questioning that has been put before Your Honour, that is what I mean by "anything here". I invite Your Honour to have a look at the rest of it. Even that is too remote, with respect, to what is before Your Honour. It is only those passage that seem to be highlighted that come anywhere near the matter for what Your Honour is concerned with and I object to it."

> The claim that the money was to be a loan was made in Anthony's first responsive answer after the conclusion of this argument and the admission of the transcript as evidence. However, Mr Hampson's reading of the transcript had been in error. It contains no reference to the expected moneys being paid by way of loan. Anthony heard the submission, decided it suited him and lied.
> It is true that the amount referred to in the District Court was $30,000, whereas Armstrong's evidence was of an agreement between Anthony and the plaintiff for the payment of $20,000. I do not think the difference is of any consequence. Perhaps Anthony was exaggerating the amount to the District Court - it was certainly in his interest to do so. Perhaps by 1997 the plaintiff had agreed to increase his offer. It does not matter. What was said to the District Court in 1998 corroborates Armstrong's evidence of the plaintiff's agreement to pay Anthony. I find that in or about the early months of 1994 at the Chevron Hotel, the plaintiff promised to pay Anthony the sum of $20,000."

[42] His Honour was plainly entitled to reject Anthony's belated suggestion that the plaintiff had promised him a loan. The plaintiff, in his evidence, had denied giving Anthony any expectation of receipt of money from him and had claimed that he never promised Anthony any money. Anthony's expectation of money from the proceeds of the action was proved independently of Armstrong's statements. This corroborates Armstrong's version. Corroborative evidence rarely confirms all relevant details that may be in issue, but it would be wrong to think that this evidence merely implicates Anthony and not the plaintiff. It tends to suggest that the plaintiff was involved because he was the person from whom the payment was expected; and it generally supports the truth of Armstrong's version.

[43] Of course innocent explanations are still possible so far as the plaintiff is concerned, such as the possibility (strongly pressed by Mr Hampson) that there may have been an agreement to pay Anthony a large sum for honest solicitation of witnesses who would tell the truth. However neither the plaintiff nor Anthony ever suggested such an agreement or intermediate explanation. The plaintiff swore that he had never promised to pay Anthony anything. Two further points may be noted. Firstly any honest arrangement giving rise to an entitlement to $30,000 for the services that Anthony claims to have rendered is not easy to credit. Indeed, prima facie it may

be thought to be suggestive of dishonesty, despite Mr Hampson's submissions which will be mentioned later[8]. Secondly his Honour was right in thinking that the difference between the reference to $20,000 in one part of the evidence and $30,000 in another was not a matter of particular consequence. The prospect of Anthony believing that he could obtain more than $20,000 from the plaintiff is at least consistent with Armstrong's evidence of the later conversation in the Lone Star Tavern.

[44] It is true that this evidence of Anthony's expectation of money from the plaintiff does not of itself specifically corroborate awareness on the part of the plaintiff that Anthony would give or obtain perjured evidence. Even so, such evidence is good evidence of corroboration. Among other qualities it strongly refutes the suggestion that Armstrong's statements were figments of the imagination of a person with a grievance against Anthony.

Anthony's solicitation of Sole and her ensuing conduct

[45] Fryberg J found that Sole gave false evidence at the trial before Derrington J and that she did so after having been prevailed upon by Anthony to do so. His Honour extensively reviewed the evidence given by Anthony and by Sole. There were nine separate occasions when she made statements on the question whether she had seen the plaintiff in the hotel on the night in question. All written statements given by her up to and including 16 February 1998 indicate that she had no such knowledge of seeing the plaintiff that night. Indeed the only statement claiming that she had seen the plaintiff in the hotel was that which she gave in the trial before Derrington J on 11 November 1997. A few months later she gave four successive statements (between 10 and 16 February 1998) confirming her original statement and admitting that she had given false evidence to the court. However, eight months later (two days before the proceedings before Fryberg J commenced) she gave a statement to the plaintiff's solicitors repudiating her former statements in that respect, and in due course supported that statement in her evidence before Fryberg J, although when asked about the statements in detail she elected to claim privilege against self-incrimination.

[46] On behalf of the plaintiff Mr Hampson contended that in the light of so many inconsistent statements no safe finding could be made regarding the truth of what Sole said on any occasion. However that is not necessarily so. A court is entitled to consider many factors including the sequence in which the statements were given, whether the earlier statements are more likely to be true than the latter, and also how such a sequence fits in with the other evidence including the existence or non-existence of an arrangement such as that described by Armstrong. Fryberg J noted (significantly in my view) that there was evidence that Anthony had had further contact with Sole on the day when they both gave evidence at the trial before Derrington J. His Honour concluded that Sole had given false evidence and that she had done so as a consequence of Anthony's impositions.

[47] It may be possible, even in the case of a highly discredited witness, to discern that that person's statements against interest may be more likely to be correct than self serving statements. This is not a statement of law, but of common sense. A similar

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[8] See par [74] – [75] below.

rationale underlies the willingness of the common law to receive evidence of admissions of a party against interest but not self serving statements, and its preparedness to accept the truth of confessions because of the difficulty of comprehending an acknowledgment of guilt if it were untrue[9].

[48] Anthony's own version accepts that after his conversation in the hotel with the plaintiff he approached a considerable number of people about the possibility of their giving evidence for the plaintiff. When he approached Sole for this purpose he told her that no-one could recall the plaintiff being in the hotel that night and that he needed witnesses to place the plaintiff there. He admitted the following during cross-examination:

> "Q: Well, I suggest that she did ask that and you said words to the effect, "I can't say when. Look after Johns and you'll be right. You will be right. Stick with me and you'll be right. You'll be looked after". Did you say that to her?—
> A: I would have said, "You will be looked after at the end of the day.", yeah, standard saying of mine.
> …
> Q: "Stick with me and you'll be right. You'll be looked after" You said that to her?—
> A: I would have said something like that.
> Q: Well, what do you say you meant by that? What do you say you meant by that?—
> A: I always – it is just a standard saying see you at the end of the day. Look after you at the end of the day.
> Q: "Stick with me and you'll be right". What did you mean by that?—
> A: We will have drinks like we normally do at the end of the day."

Later questioning continued:

> "Q: … he needed witnesses to say he was there and that he was drunk?—
> A: Yes, he did.
> Q: And that's something you told Carol Sole, isn't it, is it not?—
> A: Roundabout them words, I was looking for witnesses, yeah.
> Q: I suggest it is something you told her in the same conversation in which you said to her, "Look after Johns, okay?" "Expect them", that is John's solicitors, "to get in touch with you and look after Johns", okay I suggest to you that was in the same conversation, would it be?—
> A: Could have been.
> Q: And in the same conversation in which you said, "Look after Johns and you will be right."?—
> A: Well it could have been.
> Q: Stick with me and you'll be right. You'll be looked after."?—
> A: At the end of the day.
> Q: At the end of the day, is that – you said, "You'll be looked after at the end of the day."?—
> A: If I said – that is my normal saying, I just –

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9 *McKay v The King* (1935) 54 CLR 1, 8 per Dixon J.

> Q: You didn't mean that day when she knocked off work from the milk factory?—
> A: No, we met somewhere else and talked later".

[49] After further questioning he said that by "the end of the day" he had meant "next time we met". That seems an unlikely explanation, especially when there is no particular suggestion that he "looked after" her either at the end of that day or when they next met.

[50] The finding that Sole gave false evidence before Derrington J was amply supported by the statement that she gave in November 1995, apparently without pressure or enticement in which she claimed no knowledge of the plaintiff's presence in the hotel on the night in question.

[51] She maintained that position, even to the plaintiff's legal advisers until the virtual eve of the trial. There is no satisfactory explanation of her change of heart within a few days other than that she succumbed to Anthony's solicitation. Her statements concerning Anthony's enticement, especially Exhibits 7 and 8 are admissible as evidence that such things happened, notwithstanding the contrary evidence she gave in the witness box before Fryberg J[10]. Soon after she had given evidence before Derrington J she gave a series of statements to an insurance investigator admitting that that evidence had been untrue and detailed the manner in which Anthony had approached her to give such evidence. These statements included the following:

> "4. Don ANTHONY told me no-one recalled Dallas being in the Hotel that day/night, and he needed witnesses to place him there, and say he was drunk.
> 5. ANTHONY made me "feel for Dallas", saying that if nobody remembered him being in the Hotel and drunk, he was not going to get anything from the insurance.
> 6. ANTHONY asked me to say I remembered Dallas was in the Hotel and drunk, while I was working and at the time I left. I don't recall him being there.
> 7. I said I recalled him being there because ANTHONY asked me to help JOHNS get his insurance claim. What I said in court was not true. I have no recollection of him being there in the afternoon, or when I left that night.
> 8. I am truly sorry for giving false evidence, I thought I was helping Dallas. It is true he was in the Hotel very regularly, but I can't say that he was there on the night of his accident".

and

> "9. I said to ANTHONY, 'You know me Don, I talk to everybody.' He said, "Well expect them to get in touch with you, and look after JOHNS, okay.'
> 10. I said to ANTHONY, 'When will they do that?' He said, 'I can't say when. Look after JOHNS and you will be right. Stick with me and you'll be right, you'll be looked after.'
> 11. I knew what he wanted me to do".

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[10] *Evidence Act* 1977 s 101(1), s 102.

[52] This obviously was the foundation of the cross-examination of Anthony earlier mentioned which produced some degree of acceptance from him before a partial and ineffective retreat. The evidence as a whole amply justified his Honour's findings concerning Anthony's solicitation of Sole.

[53] The evidence satisfies the requirements of *Ahern v The Queen*[11] and *Tripodi v The Queen*[12]. There being credible evidence of an agreement between the plaintiff and Anthony, evidence of the conduct and utterances of Anthony in apparent furtherance of that agreement is admissible against the plaintiff whether or not he was present when the acts are carried out. The acts and words of Anthony consistent with his carrying out of the common purpose are admissible to help prove the participation of the co-conspirator[13].

[54] The learned trial judge formed a very adverse impression of both Anthony and Sole as witnesses. Regarding Anthony, his Honour indicated that he did not rely on anything he said "unless it coincides with the evidence of a person whom I believe". Respecting Sole, his Honour described her as a "greedy liar". Those indications should be taken as general statements, and not as overriding the careful analysis which his Honour presented of the evidence of Anthony and Sole and other persons who had contact with them, and finally reached specific conclusions about the nature of their dealings. There was evidence upon which his Honour was entitled to make the findings that have been mentioned and I consider that he was correct in so finding.

[55] Anthony's approach involved language such as "Look after Johns and you will be right" and "You'll be looked after". A lawyer might of course identify this as vague language, but its intent unhappily seems only too clear. It is further evidence, established otherwise than by Armstrong's statements, that can be regarded as corroborating the conspiracy that Armstrong described.

Other supporting details

[56] There are a number of facts independently proved which tend to support Armstrong's statements, although standing alone each fact could be innocently explained. Much of the surrounding detail given by Armstrong concerning the two relevant meetings between Anthony and the plaintiff is difficult to explain unless Armstrong was present. The plaintiff confirms that a meeting occurred between him and Anthony on the topic of obtaining witnesses at the place designated by Armstrong at approximately the time nominated. Anthony confirms that such a meeting occurred at that place although he says it was "a long time" after the accident. As mentioned earlier[14] the essential difference in the versions lies in a few critical words.

[57] Armstrong's statements attribute to Johns the statement that he was living at home with his mother and "if it wasn't for her and my solicitor picking up the tab, I'd be completely broke". Anthony agrees that such words were used by the plaintiff to him. It was established that Johns was living with his mother and that his solicitor

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11 (1988) 165 CLR 87.

12 (1961) 104 CLR 1.

13 *Ahern* at 100, cf *R v Wallis* CA No 86 of 1998, 21 August 1998.

14 Paragraph [33] above.

was at that time "picking up the tab" for all outlays. Armstrong's knowledge of this is difficult to explain other than by his presence during the conversation. There is no suggestion that he had any association with the plaintiff or that Anthony had given him such information on some other occasion. Similarly Armstrong's description of the later meeting at the Lone Star Tavern has the plaintiff moving to a table directly in front of the Bistro. The plaintiff's evidence of this occasion, which was the only lunch he had ever had with Anthony at the Lone Star, was "I remember it clearly – we had it right in front of the brasserie, in front of where they serve the meals". Anthony also accepted that much of what Armstrong recounted in his statement was in fact discussed between him and Johns on that occasion.

[58] Armstrong's knowledge of such details is difficult to explain other than by his presence. Further, his recollection of the plaintiff mentioning $500,000 as his solicitor's opinion of the amount that might be obtained is consistent with the known facts. It was submitted however that not too much should be attached to that detail, as Armstrong might have obtained it from some other source (perhaps from the press or general talk after the award was announced) before giving his statement. It is however just another circumstance not easily explained away. The further circumstance that Anthony sought out so many persons to obtain helpful evidence for the plaintiff, combined with his Honour's perception of the limited nature of his relationship with the plaintiff and his lack of altruism, also assist towards a conclusion that Armstrong's statement is overall a credible one.

[59] Whether the details here discussed under this heading should be characterised as corroboration does not really matter. Such details do not need to be unequivocal in order to qualify. They need merely be factors capable of giving some support to a circumstantial case, and individual circumstances are rarely unequivocal[15].

[60] I have concluded that the details discussed under the above three sub-headings (paragraphs [40] to [59]) afford strong confirmation of Armstrong's statements from sources other than Armstrong and that there are persuasive reasons why they should be accepted.

Alleged errors of judge in determination

[61] Counsel for the plaintiff however submitted that Fryberg J's findings ought not to be relied on, that his Honour misused his advantage as the trial judge and that his Honour committed legal errors in reaching his conclusions. The principal submissions on these questions will now be dealt with.

[62] It was firstly submitted that the evidence was not capable of implicating the plaintiff in the alleged fraud. However the above analysis amply demonstrates that Armstrong's evidence does implicate the plaintiff, and that other evidence tends to confirm his version and overall to reveal it as credible.

[63] It was further submitted that his Honour could not be satisfied that any particular account of events by Sole could be relied upon. That seems to assume that particular statements must be wholly accepted or rejected. In any event the fact that

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15 Cf *Doney v R* (1990) 171 CLR 207, 211; *VRS v The Queen* (1997) 191 CLR 275, 282-285, 290, 324-325.

a witness gives differing accounts on differing occasions does not oblige the court to conclude that that person's evidence must be entirely disregarded. This submission has already been discussed and rejected in paragraphs [46], [52] and [54] above.

[64] It was then submitted that error is revealed in the following passage of his Honour's judgment, which immediately follows his Honour's summary of Armstrong's evidence:

> "There was other evidence from which inferences in support of that direct evidence as to agreement might be drawn or which related to issues of credit. I list some categories of oral evidence which I have found helpful:
>
> (a) Anthony's alleged misleading of the District Court at Southport during sentencing proceedings in 1998;
>
> (b) Anthony's alleged willingness to make a false affidavit when it suited his interest;
>
> (c) Anthony's alleged expectation of financial gain in consequence of Johns' action;
>
> (d) Anthony's acceptance in 1994 of $5,000 in return for his promise to destroy evidence of a crime."

[65] No error is revealed in that paragraph. Sub-paragraphs (a) and (c) are references to evidence which was rightly regarded as corroborative of Armstrong. Sub-paragraphs (b) and (d) refer to matters which were adduced in cross-examination of Anthony and which were rightly regarded as reflecting adversely on Anthony's credit. The evidence in question showed that:

(a) Anthony was prepared to mislead the District Court at Southport concerning his prospects of employment if he were to suffer a conviction or gaol sentence; and

(b) He swore a false affidavit in his own compensation claim as to times when he was out of employment, which he then attributed to an injury sustained by him; and

(c) He agreed to accept a sum of $5,000 in return for a promise by him, to a co-accused, to cause evidence to "disappear".

[66] It was submitted that his Honour treated this evidence as similar fact evidence, but a close reading of his Honour's reasons fails to substantiate this.

[67] I did not understand Mr Williams QC to submit that such evidence could be used on the similar facts principles applicable to civil law. It may be mentioned in passing that it is by no means unarguable that propensity evidence of this kind may be received in civil proceedings[16]. But the balance of authority, whilst suggesting that the essential criterion for admissibility is relevance, would suggest that such evidence would fail, perhaps on the basis that it does not reveal sufficient

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16 *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23, 30-31; *Gates v City Mutual Life Assurance Society Ltd* (1982) 43 ALR 313, 327; *Aroutsidis v Illawarra Nominees Pty Ltd* (1990) 21 FCR 500; *DF Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597, 603-607; 100 ALR 468, 472-478; cf *VRS v The Queen* (1997) 191 CLR 275 at 311 per Kirby J; *Re Knowles* [1984] VR 751, 768.

similarity[17]. The propensity of an actor such as Anthony to deceive courts or to try to make money from abusing the legal process, whilst arguably a persuasive consideration would seem unlikely to be identified as a sufficiently relevant issue in the proceedings. The short answer to the submission is that his Honour did not use those matters as similar fact evidence.

[68] It was further submitted that findings that Anthony was dishonest and discreditable could not be used to supplement a lack of positive evidence to establish the matters alleged. On this point there are statements by his Honour which suggest that his Honour may have used lies which he considered Anthony had told for purposes other than diminishing his credit. Such an error is revealed in the following passage:

> "In my assessment, the answers which Anthony gave in cross-examination were lies. I watched him carefully throughout his evidence, the more so since credit was particularly important in the circumstances of the case. He was in my judgment a blatant and cynical liar on numerous occasions. He was shown to be untrustworthy. By his lies, he provided some corroboration for Armstrong's statements."

[69] It is objected that the above passage suggests that his Honour used his conclusion that Anthony had told lies in court contrary to the principles stated in *Lucas*[18] and *Edwards*[19]. In particular it was submitted that the lie must be proved aliunde, that is to say without looking at the evidence that needs to be corroborated. The lies which his Honour regarded as corroborative were not clearly specified. The above paragraph immediately follows his Honour's description of Anthony's eventual assertion of certainty that Armstrong was not present on the occasion when Anthony offered to be a witness for the plaintiff. This of course followed his earlier statement in evidence that Armstrong could have been there. Such a lie could properly result in disbelief of the witness, but could not afford evidence of a positive fact to the contrary of what is disbelieved[20]. On the other hand Anthony had also told lies when he initially denied expectation of money from the plaintiff but later admitted that that was wrong and claimed that he expected to get a loan. The latter statement was probably untrue also, but the earlier lie was proved both by his own admission and the transcript of the proceedings containing his instructions to his counsel. That evidence did corroborate Armstrong's statements. But it was not the telling of the lie that provided that corroboration; it was the proof of Anthony's true state of mind through the evidence of his authorised statements in a previous court proceeding. The final statement in the above passage "by his lies, he provided some corroboration for Armstrong's statements" cannot be supported.

[70] It was further complained that his Honour misused certain evidence called from a Mrs Mills. The defendants presented that evidence, over objection, in an attempt to prove that Anthony had on another occasion sought witnesses, promising them money as a result of an arrangement with another plaintiff (Beecroft). Such

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17 *Cross On Evidence* (Australian Edition) paras 21275 to 21290; *Martin v Osborne* (1936) 55 CLR 367, 375.

18 [1981] 1 QB 720.

19 (1993) 178 CLR 193.

20 *Hobbs v CT Tinling & Co Ltd* [1929] 2 KB 1, 21; *Jack v Smail* (1905) 2 CLR 684, 698.

evidence would, if properly established, be capable of qualifying as similar fact evidence. In the result it was not satisfactorily shown that Anthony had such an arrangement with Beecroft and his Honour did not rely on her evidence as proving what was alleged. Mr Hampson's objection is that his Honour however used some of that evidence on the question of Anthony's credit, that is to say that his Honour relied upon collateral evidence going to the credit of another witness. If evidence properly received on another issue happens at the same time to discredit another witness, there is no reason why the court cannot take that into account in its assessment of such a witness. Strictly speaking, however, if the evidence of Mrs Mills was ultimately found to be incapable of reception as similar facts evidence, it should have been treated as excluded or as in effect having been received on voir dire and ultimately rejected. Of course no submissions to this effect were made.

[71] In this instance then it would have been an error to rely on Mrs Mills' evidence as adding to Anthony's discredit. However Mr Hampson did not refer the court to any passage where his Honour expressly used such evidence in discredit of Anthony, and I can find no more than a passing and innocuous reference to such evidence in his Honour's reasons. I conclude that this objection is not made out. If it were, the effect of such an error was insignificant in the catalogue of discreditable factors concerning Anthony which emerged in evidence including in his own cross-examination. Such an error would not in my view be capable of having affected his Honour's conclusions on the ultimate issues.

Acceptance of determination

[72] Under s 68(4) of the *Supreme Court of Queensland Act* 1991 this court may accept Fryberg J's determination in whole or in part. The way in which a court of appeal should approach the findings of a judge to whom a matter has been remitted for determination has received very little judicial discussion. A variety of legislative formulae provide for remittal of matters by various courts in Australia[21]. There is no counterpart to s 68(4) of the *Supreme Court of Queensland Act* in any other legislation. The only decision of which I am aware in which some challenge was made to the findings of the remittal court resulting in some discussion is the New South Wales Court of Appeal decision of *Sedgwick v Law Society of New South Wales*[22]. In that case the Court of Appeal directed that disputed questions of fact arising in an appeal before the court be referred for determination to the Common Law Division. Cripps JA, acting as a judge in that division, made findings of fact which were returned to the Court of Appeal. Under the New South Wales *Supreme Court Act* 1970 an appeal lies against a determination by the remittal court, but no such appeal was brought in *Sedgwick's* case. The New South Wales Court of Appeal seems to have assumed a power similar to that expressed in s 68(4) of the Queensland Act. It is not surprising that a superior court should retain the power to accept or reject findings which it has, usually for reasons of convenience, requested another court to determine. In *Sedgwick's* case the appellant challenged in argument the correctness of some of Cripps JA's findings. Mahoney JA (with whom the other members of the court agreed) stated:

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21 By the High Court, *Judiciary Act* 1903 s 44; by the New South Wales Court of Appeal *Supreme Court Act* 1970 s 51(4); by the Tasmanian Full Court, *Supreme Court Civil Procedure Act* s 27; by the Queensland Court of Appeal, *Supreme Court of Queensland Act* 1991 s 68.

22 NSW CA No 40111 of 1992, 18 May 1994, BC 9404988.

> "I have, in fairness to Mr Sedgwick in considering the findings of fact on which the court should act, taken into account not merely the findings as made by Cripps JA but also the submissions which in respect of the matters indicated, Mr Sedgwick has made in relation to them".

His Honour continued:

> "In determining whether and to what extent this Court should act upon what his Honour has said, two things are to be taken into account: the qualifications urged by Mr Sedgwick in his oral submissions to this Court (to which I have already referred); and (as I shall describe it) the Smith principle."

The "Smith principle" is not relevant for present purposes[23].

[73] Mahoney JA observed that in some respects Cripps JA had made findings which went further than was strictly necessary for the determination of the relevant issues of fact. His Honour concluded in particular that in that case it was not appropriate to take into account, separately and as such, the judge's findings in relation to the veracity of Mr Sedgwick's statements to him or to the Law Society. In the end, Sedgwick's case may be seen as an example of a court of appeal dealing with challenged findings of fact, reviewing the same, noting a reservation, and accepting the conclusions subject to the reservation.

[74] Mr Hampson for the plaintiff submitted that it could not safely be held that Anthony's evidence at the original trial was false. That however was the only reasonable inference if Armstrong's statement is accepted as true. In particular the combination of paragraphs 20, 26 and 27 of that statement[24] is that Anthony was not present with the plaintiff in the hotel on the night of the accident, and that he lied when he gave evidence that he was. Furthermore the nature of his approach to Sole tends to support the conclusion that he was pursuing a dishonest enterprise. There was adequate evidence to support his Honour's finding that Anthony's evidence was false.

[75] Mr Hampson further submitted that there is insufficient evidence to implicate the plaintiff as a knowing party in the conspiracy. However, as indicated above there was ample corroboration of Armstrong's description of the meeting and the nature of the arrangement that it produced. Acceptance of the sequence of events in paragraphs 19 and 20 of Armstrong's statement[25] suggests that the plaintiff must have known of the dishonest nature of the arrangement.

[76] I am not satisfied that Fryberg J "misused his advantage" as submitted on behalf of the plaintiff. His Honour saw and heard the witnesses, which is an advantage not enjoyed by the members of this court. It is true that a legal error has been exposed in the course of his Honour's reasons[26]. However having extensively reviewed the evidence given before his Honour I cannot see how any different view upon the

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23 This is a reference to *Smith v New South Wales Bar Association* (1992) 176 CLR 256, 273. That case deals with the question whether it is proper in disciplinary proceedings to take into account against a practitioner inappropriate conduct revealed by him in the course of the disciplinary proceedings themselves.

24 Set out in par [26] above.

25 See par [26] above.

26 Above pars [68] to [69].

credit of any witness could reasonably be taken by this court or that different conclusions could reasonably have been reached upon the evidence than those which his Honour reached. The very adverse view taken of the credit of both Anthony and Sole was inevitable when one has regard to the evidence as a whole. Indeed, the only clear legal error that has been demonstrated is in his Honour's statement respecting Anthony "by his lies, he provided some corroboration for Armstrong's statements". The above analysis of the evidence, particularly paragraphs [40] to [59] show an amplitude of corroboration against which any possible support from Anthony's lies pales into insignificance.

[77] The error was not such in my view as to require this court to regard the exercise as having failed or as sufficient to persuade this court not to accept the ultimate determination of Fryberg J[27].

[78] I am satisfied that Fryberg J's determination[28] that the judgment was obtained by fraud based on three specified particulars should be accepted. I am also independently satisfied that on the evidence that was given those are the correct findings.

Whether the judgment against Ms Cosgrove should be set aside

[79] In my view the judgment against both defendants was affected by the fraud, notwithstanding that the immediate target of the fraud was Chevron. The present issue is not determined by the answer to the legal question whether in the case of concurrent tortfeasors there is only one judgment for the plaintiff against both defendants or two separate judgments. So far as that question is concerned, despite submissions from Mr Williams QC to the contrary, in an action against concurrent tortfeasors there is a separate judgment as between the plaintiff and each defendant representing the distinct cause of action that the plaintiff has against each[29], even though the judgment may be expressed for a single sum against all defendants. At common law a single cause of action against several defendants arising from a joint tort produced a single judgment necessarily for one sum. However that rule was abrogated by legislation which is now found in Queensland is s 6(a) of the *Law Reform Act* 1995. The effect of the subsection is that the cause of action against joint tortfeasors is no longer one and indivisible[30]. These matters however do not touch the question whether the judgment against Ms Cosgrove is affected by the fraud that has been proved.

[80] The formal order following Fryberg J's determination (set out above at par [8]) does not distinguish between the position of the respective defendants, although his Honour expressly purported to find that the judgment against Ms Cosgrove was not obtained by fraud in the respects alleged in paragraph 2(a) of the Notice of Appeal. On this point I do not accept the views expressed by Fryberg J. Whether the necessary connection between the fraud and the judgment in question is best

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27 See par [11] above.

28 See par [11] above.

29 Glanville Williams *Joint Torts and Contributory Negligence*, paragraphs 2, 3, 112; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 608 per Gummow J.

30 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 582 per Brennan CJ, Dawson and Toohey JJ; cf *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1984-1985) 155 CLR 448.

described by the word "tainted", "affected", "obtained" or some other word does not really matter. This court has the ultimate duty of determination of such questions. For reasons which will now be stated Fryberg J's view on this question should not be accepted.

[81] Inevitably the fraud enabled a picture to be presented to the court of someone other than the plaintiff himself as legally responsible for contributing to his intoxication. Had the case been presented as one of a grossly intoxicated pedestrian solely responsible for his own condition who came into collision with a motor vehicle, the assessment of contributory negligence against the plaintiff would in all probability have been different. According to the reasoning of Derrington J there were two blameworthy causes of the accident – the negligent driving of the car and the plaintiff's intoxication. Both Chevron and the plaintiff were treated as being partly responsible for the latter condition. In the final analysis his Honour stated that "responsibility should be apportioned to the plaintiff to the extent of 45 per cent, as to (Ms Cosgrove) to the extent of 30 per cent and to (Chevron) to the extent of 25 per cent". Plainly Chevron's 25 per cent was for its responsibility for the plaintiff's intoxication, and the plaintiff's 45 per cent was for his own residual responsibility for his intoxication. Overall, the intoxicated condition of the plaintiff was treated as 70 per cent responsible and the car-driver's negligence as 30 per cent responsible for the accident. If the fraudulently induced finding against Chevron is removed, presumably the plaintiff should bear the entire responsibility for his own intoxication to the extent to which it contributed to the accident. On Derrington J's view of the matter it is tolerably clear that a different judgment would have resulted against Ms Cosgrove in that the plaintiff should be held responsible for what had formerly been blamed on Chevron. Whether or not that responsibility is arithmetically added on to lead to a finding of 70 per cent contributory negligence on the part of the plaintiff, it is obvious that once Chevron's responsibility is removed from the equation there is an immediate instability in the relativity between the plaintiff and Ms Cosgrove.

[82] Putting the matter more broadly, the judgment and the apportionment were clearly founded upon the view that Chevron had to bear some of the blame for getting the plaintiff into an intoxicated condition. This has inevitably affected the level of contributory negligence assessed by his Honour and the judgment against Ms Cosgrove.

[83] It may be mentioned that the process by which his Honour arrived at those percentages is anything but clear. It may well be that his Honour overlooked the process considered necessary in *Barisic v Devonport & Ors*[31] which is discussed below. My purpose in referring to his Honour's actual reasoning is to demonstrate that the fraudulently induced findings concerning Chevron in fact reached into and affected the judgment that was given against Ms Cosgrove.

[84] In deference to Mr Hampson's contrary submissions some further discussion of this point seems necessary. *Barisic v Devonport & Ors* is a complex decision which identifies the process by which and the sequence in which assessments should be made of contributory negligence and of contribution between tortfeasors. The reasons of the members of the court (Moffitt P, Hope and Samuels JJA) are not

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31 [1978] 2 NSWLR 111.

identical. Hope JA agreed in part with the reasons of Moffitt P and in part with those of Samuels JA, but their Honours' conclusions were in the end the same. Moffitt P considered the various ways in which an assessment of contributory negligence might be made, and opted in favour of what he called "alternative I". This requires the responsibility of the plaintiff "to be compared with the responsibility, or sum of responsibilities of the defendants, so that the damage, and hence the judgment, is scaled down equally in respect of each defendant"[32]. His Honour expressly rejected the alternative of comparing the plaintiff's responsibility separately with that of each defendant so that each judgment would be scaled down according to separate comparisons, resulting in different judgments against each defendant. In assessing the plaintiff's share of blameworthiness, his Honour found it appropriate, as an intermediate step, to make some comparison of the blameworthiness of each of the three[33]. In similar vein Hope JA concluded:

> "It is … to the relevant acts and omissions of all persons responsible for the damage, as a whole, that the court must have regard, and the assessment which it must make is of the share in that total responsibility which is constituted by the relevant acts and omissions of the plaintiff."[34]

His Honour further noted that it may be necessary to make an assessment in relation to different kinds of fault and to aggregate different kinds of fault[35]. He also noted the relevance of "the 'causative potency' of the plaintiff's failure to have regard for his own safety" and that it was necessary "to determine what share that culpability comprises in an aggregate which includes as well the degrees of departure from the relevant standard of care and the causative potency" of the various failures of the defendants[36]. Samuels JA also adopted what he called the first of three possible modes of apportioning for contributory negligence. He described it as "the conventional method where the plaintiff's responsibility is weighed against the aggregate or unitary responsibility … of the defendants"[37]. His Honour concluded:

> "In my view, any comparison can be made only by comparing the plaintiff's fault, on the one hand, with the combined fault of the defendants, viewed as a unit, on the other"[38].

[85] *Barisic* decides that under s 10(1) of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) (which is the same as s 10(1) of the *Law Reform Act* 1995 (Qld)) the necessary comparison of fault can only be made by comparing the plaintiff's fault on the one hand with the combined fault of the defendants, viewed as a unit, on the other. It was further held in *Barisic* that only after the shares to be borne by the plaintiff on the one hand and by the defendants on the other have been established is it appropriate to apportion the defendants' shares of contribution between themselves. This latter process (contribution between tortfeasors) was and is governed by statutory provisions similar to those of ss 6 and 7 of the *Law Reform Act* 1995 (Qld)[39].

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32 Ibid at 118.
33 Ibid p 128.
34 Ibid at 131.
35 Ibid at 132.
36 Ibid at 132.
37 Ibid at 150.
38 Ibid at 152.
39 See pp 131-132 per Hope JA, pp 152-154 per Samuels JA, pp 118, 127-129 per Moffitt P.

[86] Consistently with this view, the leading judgment in *Fitzgerald v Lane*[40] states:

> "In my judgment, in order to assess the 'claimant's share in the responsibility for the damage' which he has suffered as a result of the defendants' established negligence, the judge must ask himself to what extent, if at all, the plaintiff has also been part author of his own damage. This obviously requires careful evaluation of the plaintiff's conduct in the light of all the circumstances of the accident and those circumstances, of course, include the conduct of all the defendants who have been found guilty of causative negligence. Circumstances will, naturally, differ infinitely"[41].

[87] In support of his submission that the plaintiff's fraud does not taint the judgment against Ms Cosgrove, Mr Hampson invited the court to pay particular attention to the dissenting judgment of Powell JA in *Kelly v Narrandera Shire Council*[42] as an instance of a judicial determination that the existence of two tortfeasors instead of one did not necessarily result in any different proportion being assessed of contributory negligence than that which had been assessed on the assumption that there was only one tortfeasor. On examination the result favoured by Powell JA turns on his Honour's view of the facts of that case, and does not reveal any principle suggesting that assessments of contributory negligence cannot be different when the combined fault of two tortfeasors is measured against default of the plaintiff than it would be in measuring the fault of one tortfeasor against that of the plaintiff. Mr Hampson also referred to *Burton v The Melbourne Harbour Trust Commissioners*[43] where a re-trial was ordered of a claim against one tortfeasor but not of a claim against another. The decision preceded legislation abrogating the common law rules concerning judgment against joint tortfeasors, and turned upon whether the defendants were joint tortfeasors. There was in any event no factor present in that case that could have caused a different result as between the plaintiff and the second tortfeasor. Sholl J stated:

> "I would for myself add that, even if the stevedoring company did show that the judgment was a true joint judgment, the onus would still be upon it to show at least that the verdict upon which the judgment was founded was vitiated by an error affecting the liability of both defendants alike, or of the stevedoring company alone, and not merely an error affecting the liability of the shipping company alone. This admittedly it could not here do."[44]

[88] In the present case one part of the combined fault of the defendants – the fault of Chevron – was determined as a consequence of the respondent's fraud. The learned trial judge's reasoning on the issues of apportionment and contributory negligence[45] suggests a connection between the respective apportionments of fault between all three parties. If Chevron's responsibility is subtracted from the "unit" of circumstances in which the plaintiff's negligence is to be evaluated, the result of the evaluation would almost inevitably have been different. The purpose of the exercise of apportionment was of course to arrive at a percentage figure – which by

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40 [1989] 1 AC 328, 344.
41 Per Lord Ackner at 344.
42 [1998] NSW SC 686, 16 December 1998.
43 [1954] VLR 353.
44 Ibid at 389.
45 See par [6] and par [21] above.

its nature requires a relative and not an absolute assessment of the plaintiff's responsibility.

[89] In summary the findings of responsibility for the plaintiff's intoxication have been compromised by fraud. In the absence of such findings the judgment as between the plaintiff and Ms Cosgrove would probably have been different. If a finding were made upon re-trial that the plaintiff should bear full responsibility for his own intoxicated state a different apportionment might properly follow as between the plaintiff and Ms Cosgrove.

[90] There is another less complex basis upon which it is appropriate that both judgments be set aside. The plaintiff was privy to the fraud which misled the trial judge. The false evidence given before the judge, and on which the judge relied, related among other things to the plaintiff's state of intoxication. It therefore bore on an issue central to the assessment of contributory negligence, not only with respect to the claim against Chevron, but with respect to the claim against Ms Cosgrove as well. If, for argument's sake, it emerged on a retrial, from a proper consideration of the credible evidence, that the plaintiff was not as plainly "befuddled" as the learned judge found him to be, then there may be a case for a lesser finding of fault on his own part. Equally of course, a finding could be made that the plaintiff should bear a much greater personal responsibility for the consequences than Derrington J found.

[91] On either of the above bases the judgment against Ms Cosgrove must be seen as tainted or affected by the fraud, so that it too should be set aside, subject to discretionary factors that will now be considered.

Should the judgments be set aside and a new trial ordered?

[92] It was submitted on behalf of the plaintiff that even if there were to be a finding that the judgments were obtained by fraud in which the plaintiff was a party, discretionary considerations would persuade the court against setting them aside and ordering a new trial. Reference was made to the statement of Barwick CJ (with which Kitto J agreed) in *McDonald v McDonald*[46]*:*

> "It is not necessary in that event that the evidence of the fraud, the surprise or the subornation though it should be "fresh", should be evidence which would be admissible on the issues between the parties in the action; or that it should be found to be probably conclusive of those issues. The Court's conclusion upon the fresh evidence before it that the verdict was obtained by fraud, by surprise or that witnesses were suborned, is sufficient to justify setting aside the verdict and ordering a new trial. Whether or not the Court does so must finally depend on the Court's view as to whether or not the interest of justice, either particularly in relation to the parties or generally in relation to the administration of justice, require such a course. So much, I think, is definitely established by the authorities to which I have referred".

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46 (1965) 113 CLR 529, 533.

[93] Menzies J stated the matter somewhat more strongly holding that if the judgment were tainted by fraud it would be set aside without more. All members of the court recognised that different tests were applicable according to whether a judgment is affected by fraudulent conduct[47] or whether fresh evidence has been discovered which would have produced a different result. In the latter case special rules are recognised such as the need to show that the evidence could not have been sooner discovered by the exercise of reasonable diligence, and that the evidence is of such probative value that, taken with the evidence already given at trial, it will in all probability be decisive of the issues between the parties in a sense opposite to that of the original decision. Taylor J referred with apparent approval to *Hip Foong Hong* where it was accepted that when fraud is alleged and affirmatively proved, the judgment "is tainted throughout and the whole must fail"[48]. Windeyer J does not deal with the approach to be taken when fraud is proved. *McDonald's* case does not contain a clear majority opinion that there is a residual discretion in the court to decline to set aside a verdict after proof that it has been obtained by fraud.

[94] However I am inclined to favour the view taken by Barwick CJ that a residual discretion exists. A tension will always exist between aversion of courts to fraud in its own process and recognition by courts of the danger of too readily granting a re-trial[49]. Some degree of materiality and causation is implied in the requirement that the judgment be "tainted", "affected" or "obtained" by the fraud, and the concept of automatic extinction of a judgment upon an ill-defined degree of connection by means of those terms seems too blunt an instrument with which to govern this area. Further, the need for some supervisory discretion on the part of the courts seems recognised in *Wentworth v Rogers (No 5)*[50] where it was stated that it was necessary for the party alleging fraud to show that the other party was "responsible" for the fraud in such a way as to render it inequitable and that such party should take the benefit of the judgment.

[95] The authorities suggest however that it will be a rare case where a party who was shown to have been privy to fraud which has misled the court in proceedings resulting in a judgment in that party's favour will be permitted to retain the benefit of the judgment. It was observed in *McCann v Parsons* that "there was never any hesitation at common law to use the power to grant a new trial, once it appeared from further evidence that the verdict had been obtained by putting forward a false case"[51]. As all the members of the court acknowledged in *McDonald* above, fraud cases[52] stand on a different footing to other "fresh evidence" cases[53].

[96] The submission that this court should exercise its discretion so as to permit the present judgment to stand was largely based upon the premise that the judgment against Ms Cosgrove could not be set aside. For the reasons given above that

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47 These are the words used in *Hip Foong Hong v H Neotia & Co* (1918) AC 888 stating that, "if a judgment is affected by fraudulent conduct it must be set aside".

48 *McDonald* (above) at 535.

49 *McCann v Parsons* (1954) 93 CLR 418, 430-431.

50 (1986) 6 NSWLR 534, 539 per Kirby P with whom Hope JA and Samuels JA concurred.

51 Ibid at 426.

52 Barwick CJ includes "surprise" and "subornation" along with fraud.

53 Cf *McCann v Parsons* (above) at 427-428, 430-432; *Hip Foong Hong v H. Neotia & Co* [1918] AC 888 at 894, where it was said that the requirement that the effect of the fresh evidence be conclusive "does not apply to a case of surprise, much less one of fraud".

assumption is incorrect. I do not think that the present determination can be successfully unscrambled into discrete separate judgments unaffected or untainted by the fraud. Had the judgment against Ms Cosgrove been unable to be set aside, the submission would have proceeded that there was only minimum practical utility, from a monetary point of view, in conducting further proceedings, as before the action was heard there was an agreement between Chevron's insurer and Ms Cosgrove's insurer that Chevron's insurer would satisfy any judgment against either party. The full arrangement between the insurers has not been presented to the court and it is not known whether some implications will or will not follow from the conduct of further proceedings or what the ultimate accounting arrangements may be. However both appellants apparently see some utility in having a re-trial.

[97] It was submitted that if a new trial were ordered the plaintiff would probably succeed in proving that he was at the hotel as alleged even without the evidence of Anthony and Sole. I do not think that such a conclusion can satisfactorily be determined by this court. It would be far more satisfactory that such an issue be properly ventilated at re-trial than that this court should now engage in a hypothetical exercise designed to anticipate such a finding. A proper appraisal will involve matters of credit. Any combination of results is possible upon a re-trial as between all parties, where a different factual matrix free from the pollution of fraud may emerge.

[98] The effect of the fraud cannot be extracted with any precision leaving discrete segments of the trial intact. The situation more resembles a cracked windscreen than damage to a discrete unit. The plaintiff's credit might fairly be thought to be under a cloud, and without expressing any view on the matter, it is at least possible that issues such as exaggeration could be raised. Fraud having been shown to which the plaintiff was a party, the re-trial should be on all issues, including liability and quantum. It would be strange if Ms Cosgrove could remain liable for the amount of the original judgment whilst a concurrent tortfeasor might, if found liable at all, be found liable to a different quantum of damages for the same injuries. In my view the fraud which the plaintiff has been shown to have been a party taints the whole trial.

[99] In the present circumstances the court should not decline to order a re-trial on discretionary grounds. Fraud having been shown, a wrong has been done and justice has miscarried. The plaintiff having been shown to be party to the fraud, there should be a re-trial between all parties on all issues. Needless to say, upon such trial the court will not be bound to reach the same conclusions on fact or law as those reached by Derrington J.

[100] It is unnecessary to consider the alternative ground 2(b) of the Notice of Appeal[54]. The appeal should be allowed. The judgment of Derrington J of 12 December 1997 should be set aside. It is directed that there be a new trial of the action. The respondent plaintiff should pay the appellants' costs of and incidental to the proceedings before Derrington J and of and incidental to this appeal, including the proceedings before Fryberg J, to be assessed.

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[54] See par [24] above.