SUPREME COURT OF QUEENSLAND

CITATION:	*Glancy v McPhail* [2003] QCA 263
PARTIES:	**MARTIN PATRICK GLANCY** (plaintiff/appellant) **v** **RONALD WILLIAM McPHAIL** (defendant/respondent)
FILE NO/S:	Appeal No 8242 of 2002 SC No 8466 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	6 June 2003
JUDGES:	McPherson and Williams JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – PROOF OF NEGLIGENCE – SUFFICIENCY OF EVIDENCE – where appellant was injured due to a fall from the top deck of a houseboat – where appellant alleged respondent was negligent in hiring out boat when he knew or ought to have known the railing was in an unsafe condition – where respondent did not give evidence at trial – whether the court should have more readily inferred negligence in the absence of evidence from respondent TORTS – NEGLIGENCE – PROOF OF NEGLIGENCE – WEIGHT AND CREDIBILITY OF EVIDENCE – where learned trial judge made findings of fact based on credibility of witnesses – whether demonstrable error in learned trial judge's reasoning – whether findings of fact were open on the evidence *Fox v Percy* [2003] HCA 22, 30 April 2003, cited *Jones v Dunkel* (1959) 101 CLR 298, distinguished
COUNSEL:	D K Boddice for the appellant R A Perry for the respondent

SOLICITORS: Forde Lawyers for the appellant
McCullough Robertson for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Williams JA for dismissing the appeal.

[2] The houseboat on which the appellant plaintiff's accident took place was the subject of a formal agreement in terms of which possession passed to the charterers Katrina Walker and Kelli Kennedy. That might mean that control of the vessel and, with it, liability for its condition passed to them. But the legal implications of this state of affairs were not investigated at trial or on appeal, where the parties were content to leave the issues to be determined in accordance with the ordinary principles of negligence. In those circumstances, it has not been necessary to consider the question referred to.

[3] **WILLIAMS JA:** The appellant sustained personal injuries on 19 November 1994 when he fell from the top deck of a houseboat and struck his head on the gunwale of the vessel. He brought an action against the respondent, who was the owner of the vessel which had been hired to friends of the appellant, alleging that the fall was caused by the negligence of the respondent, primarily in hiring out the vessel when he knew or ought to have known that the railing around the top deck was in an unsafe condition. The learned trial judge held that the appellant had not proved negligence, but assessed damages in the total sum of $242,088.89. The appeal is only against the finding on liability.

[4] The particulars of negligence alleged in the Statement of Claim were the following:

> "(a) Failing to maintain the railing in a safe condition;
>
> (b) failing to construct or have constructed a rail in accordance with a safe design and out of safe materials;
>
> (c) failing to have a railing of suitable height so as to avoid the risk of persons falling over the railing;
>
> (d) failing to warn all persons coming onto the boat of the state of the railing;
>
> (e) failing to warn all persons coming onto the boat not to lean over the railing."

[5] The learned trial judge found that the height of the rail in question exceeded the minimum required by the Uniform Shipping Code by 100mm and was higher than what was to be found on similar vessels. In consequence particular of negligence (c) was rejected, and it was not seriously contended on the hearing of the appeal that the learned trial judge erred in so finding.

[6] In his reasons for judgment the learned trial judge said: "The case ultimately advanced by the plaintiff was that the cause of his fall was the unexpected movement of a handrail when he leant upon it near where it was supported by the second of the three stanchions located on the starboard side of the upper deck shown in Ex. 9". In written outline before this court it was submitted that to succeed the appellant "only has to prove that the rail unexpectedly moved outwards". In oral argument counsel for the appellant used the expression "the rail moved suddenly

and unexpectedly" to describe what he submitted was the immediate cause of the fall. The argument addressed to this court was essentially that the rail moved suddenly and unexpectedly outward as the appellant leant on it thereby propelling him over the side of the boat. On that submission it did not matter how far the rail actually moved; it was the sudden and unexpected movement which precipitated the fall. That would be within (a) of the particulars in the Statement of Claim, but the submissions on appeal did not extend to any other particular therein alleged.

[7] The details of the fall were not reported to the respondent (or anyone on his behalf) when the vessel was returned after the accident. About three months after the incident the appellant took a number of photographs of different parts of the boat and these were ultimately used by his expert to advance his case in negligence. Either the appellant did not then test the rail for movement, or could not remember doing so. The writ of summons commencing the action was issued on 18 September 1997, nearly three years after the injury was sustained. The Statement of Claim delivered 17 February 1998 alleged that while "the Plaintiff was leaning over the rail, the rail moved outwards from the boat, causing the Plaintiff to lose his balance, whereupon he fell from the boat". That was the first occasion on which the respondent's attention was directed to the state of the rails around the upper deck in connection with the fall.

[8] The appellant's expert, KL King, furnished a report dated 11 November 1996. He did not inspect the vessel for the purposes of that report; his opinion was based on the series of photographs supplied to him, and an interview with the appellant. The respondent had sold the boat prior to its being inspected by his expert, R Behan, on 16 June 2000. The evidence does not establish when the boat was sold, and it is not clear whether or not it was sold before or after the action was commenced.

[9] The appellant did not report particulars of the incident immediately after it occurred, and the respondent had no reason to make specific examination of the rail in question in or shortly after November 1994. The respondent did not give evidence at trial and it was submitted, both at trial and on appeal, that the principle derived from the reasoning of the High Court in *Jones v Dunkel* (1959) 101 CLR 298 applied, and the court should more readily infer negligence in the absence of evidence from the respondent.

[10] Katrina Walker, who was one of the two persons who hired the houseboat, gave evidence that she spoke to the respondent the day after the incident and told him "that Marty had fallen overboard". Her evidence makes it clear that neither on that day, nor when the boat was returned after the incident, did she say anything to the respondent about the condition of the rails, although it was her evidence that the railing at the point in question could be moved backwards and forwards a considerable distance. At best for the appellant her evidence is that the respondent was told "that Marty had fallen off over the top". Walker's evidence was that she was aware of the condition of the rail on the upper deck from shortly after she first boarded the vessel.

[11] The learned trial judge in his reasons said that it was "clear upon the evidence that neither the plaintiff nor Kelli Kennedy nor Katrina Walker ever informed the defendant before the plaintiff's injury, or indeed after that injury for that matter, prior to the institution of proceedings to recover damages from him, of any deficiency in the guardrail as alleged…".

[12] In those circumstances the learned trial judge concluded, and I agree with him, that the *Jones v Dunkel* principle was not applicable. As nothing had been said to the respondent directing to his attention to the condition of the rail on or shortly after 19 November 1994, it could not be said that the respondent was a person able to give evidence as to the true condition of the railing at the material time. Here, the evidence was insufficient to call for an explanation for his failure to give evidence, because it was not shown that he was in a position to give specific evidence as to the condition of the railing at the relevant time.

[13] The learned trial judge approached the issue of negligence without relying on the *Jones v Dunkel* principle and in my view he was correct in so doing.

[14] The learned trial judge made an exhaustive, detailed analysis of the evidence given in support of the appellant's case. It is not necessary to quote all of what he said in the course of so doing. The appellant's evidence as to the circumstances in which he came to fall were described by the learned trial judge as follows:

> "The plaintiff said he recalls that while in the process of waking up he was standing at the guardrail talking to [Kelli Kennedy] although he could not recall what they were talking about. He said that he talked to her for about 5 minutes. He said that he put both hands on the guardrail and stretched backwards while in the process of "waking up". He said that he had been sleeping on the deck in the sun and was confused; he said that he was making sure that he had properly woken up before he attempted to climb down the stairs from the upper deck to the lower deck because he thought that it might be dangerous for him to do so in his condition while talking to Kelli at the guardrail. He said that he had made up his mind that he would not attempt to go down the steps to the lower deck to have something to eat until he was satisfied that he was sufficiently stable and composed to do so safely. He said that it was while in that condition that he leant backwards holding on to the guardrail with both hands and stretched and then leant forward while still holding onto the rail. He said that when he stretched himself by leaning backwards while holding onto the rail, it did not move; he then heard somebody on the lower deck speaking. He said that he then leant forward onto the guardrail and it unexpectedly moved forward – presumably under the pressure of his weight – and he lost his balance. He said that he remembered the rail "digging into my stomach". He said he attempted to grab hold of the rail but could not prevent his weight from going over the rail and he fell straight down. He said he felt a blow to his head just before he ended up in the water".

[15] It was also recorded in the reasons for judgment that the houseboat had been hired for the purpose of celebrating a birthday; there were about 10 people altogether on board the vessel. The appellant admitted that he had been drinking from about 6.30pm the previous evening until about 4.00am on the morning of the day of the accident. The accident occurred somewhere around 2.30 pm. Kelli Kennedy gave evidence that the appellant had been drinking beer that morning, but in his evidence he denied doing so. The learned trial judge made an observation that the appellant's ability to recall his activities on the day prior to going to sleep was probably affected by his intake of alcohol.

[16] There was evidence from the two girls Kelli Kennedy and Katrina Walker that from the time they boarded the vessel they were aware that the guardrail moved considerably. Kelli Kennedy's evidence was that "she noticed that the guardrail wobbled at the place where the plaintiff fell over it and she discovered that by putting her hands on it and applying force she could move it in each direction about 300mm". Despite her evidence that she noticed that before the vessel set sail, she did not say anything to anyone, including the appellant, about that. She was standing beside him immediately before his fall but as the learned trial judge observed she gave no evidence of seeing the rail move as he leant on it.

[17] The learned trial judge recorded that Katrina Walker gave evidence that she also noticed before the accident that when "we grabbed it" the rail could "wobble" around about 300mm each way. She did not notice any movement in the stanchions fixing the rail to the upper deck when the top rail moved through that range. The learned trial judge in his reasons found "this account inherently improbable; while the rail remained attached to the stanchions any lateral movement in it must have resulted in an equivalent movement at least at the top of the stanchion".

[18] The learned trial judge then referred to the evidence of the experts; I will return to that in a moment. Ultimately with respect to the evidence of the appellant and the two girls the learned trial judge said: "I am unpersuaded of the reliability of the evidence of the plaintiff or of Kelli Kennedy or of Katrina Walker as to the existence of the alleged deficiency in the safety rail structure on the upper deck of the houseboat at any time material to the plaintiff's fall on 19 November 1994". He went on to say:

> "I accept that the plaintiff did fall from the starboard side of the upper deck of "Mercury" on 19 November 1994. It is unnecessary to determine precisely what the plaintiff was doing at the time of his fall. I have very significant reservations about his reliability and that of Kelli Kennedy in this respect. It suffices to say that in my view having rejected their evidence of any obvious deficiency in the safety rail structure on the upper deck of the boat at the material time, a possible if not indeed probable explanation for the plaintiff's fall is that at a time when still affected by the consumption of alcohol, he leant over the rail to attract the attention of and/or to talk to his friends on the lower deck he simply over-balanced. This explanation is consistent with the account of his fall he gave to Dr Reddan on 6 March 1999. It is unnecessary however for me to make a specific finding on this aspect of the case. It suffices to say that I am quite unpersuaded that there was any deficiency in the guardrail around the top deck of a kind for which the plaintiff contended which was a cause of his falling over it on 19 November 1994".

[19] Subject to a consideration of the expert evidence those findings and that conclusion were clearly open to the learned trial judge on the evidence. Counsel for the appellant relied heavily on the recent decision of the High Court in *Fox v Percy* [2003] HCA 22, and submitted that as this was an appeal by way of rehearing this court should, on the basis that some error had been demonstrated in the reasoning of the learned trial judge, substitute findings of its own for those made by the learned trial judge. At the end of the day I am not persuaded that there was any demonstrable error in the reasoning of the learned trial judge such as would warrant

this court's reviewing the findings of fact. It is clear that credibility played a significant role in the fact finding exercise carried out by the learned trial judge and he had the advantage of being in a position to make an assessment of credibility taking into account the oral evidence before him.

[20] It is now necessary to say something of the expert evidence. As already noted King never inspected the vessel and his opinion was based on photographs of certain components of the railing taken some three months after the incident. The respondent's expert, Behan, did inspect the vessel, but that was some six years after the incident and at a time when the vessel was under new ownership.

[21] Of some importance, and it is clear that the learned trial judge placed weight on this, the vessel had been examined by a marine surveyor about a month before the date of the incident in question. The surveyor did not then record any deficiency with respect to the railing around the upper deck. Understandably the surveyor (McFarlane) had no specific recollection of the vessel some eight years after he carried out the inspection in question. His evidence was that in the ordinary course of carrying out a survey of a vessel of this type he would have visually inspected the handrails of the upper deck and grasped hold of the rails at one or two different places and put weight on them. The certificate he signed with respect to the survey acknowledged that "the fittings and appliances for the protection of openings, for guard rails, … are maintained in an effective condition". The learned trial judge made the observation in his reasons that the evidence of the appellant and the two girls "would seem to be quite inconsistent with the observations of the marine surveyor who examined the boat to determine whether any such defects existed only about five weeks before the date of the plaintiff's fall". In my view that was an observation which the learned trial judge was entitled to make and act upon.

[22] King had little or no experience with boats. Given that he had not examined the boat, much of his evidence was hypothetical. The evidence which he gave did not support the evidence of Kennedy and Walker that the rail could move some 300mm in either direction. He was not able to point to anything in any of the photographs which specifically confirmed that the top rail could have moved suddenly and unexpectedly as the appellant said it did. He gave evidence that movement of the combing would affect the stability of the guard rail system around the top deck, but his evidence did not support a finding that that was in fact the case. Against that Behan had vast experience as a marine surveyor. He was familiar with the type of vessel in question. He gave evidence as to the internal fixings for the rail in question and expressed the view that the design as a continuous loop with welded joints at top and bottom gave a high level of integrity to it. His evidence on examining the photographs was that they showed no evidence of movement; in his view movement in the rail to the extent referred to by the appellant would have to be associated with damage to the fibreglass.

[23] After referring to King's evidence on one point the learned trial judge said:

> "In coming to this conclusion I much prefer the evidence of Mr Behan with many years of marine survey experience who actually inspected the vessel, to that of Mr King who had no experience in this field of endeavour and who did not at any time inspect the vessel either before or after he gave his report".

[24] In his reasons for judgment the learned trial judge recorded a great deal of Behan's evidence, in particular evidence which rebutted suggestions advanced by the appellant and his witnesses as to the cause of the rail being able to move as alleged. It is clear that the learned trial judge acted on the evidence of Behan, at least to the extent that it prevented any finding being made in favour of the appellant on the issue of negligence.

[25] It is clear that the learned trial judge placed significantly more weight on the evidence of Behan and McFarlane than on that given by King.

[26] As already noted the reasons of the learned trial judge were carefully expressed, and all relevant evidence was analysed in some detail. The learned trial judge finally concluded that the cause of the appellant's fall and consequent injury was not proven to be negligence on the part of the respondent. The findings of fact made were clearly open on the evidence, and no basis has been established for this court setting them aside.

[27] It follows that the appeal should be dismissed with costs.

[28] **FRYBERG J:** I agree with the reasons of Williams JA and with the orders he proposes.