SUPREME COURT OF QUEENSLAND

CITATION:	*Sweeney v Attwood Marshall* [2003] QCA 348
PARTIES:	**PETER JOHN SWEENEY** (plaintiff/appellant/cross-respondent) **v** **ATTWOOD MARSHALL** (a firm) (defendant/respondent/cross-appellant) **PETER JOHN SWEENEY** (plaintiff/respondent) **v** **ATTWOOD MARSHALL** (a firm) (defendant/appellant)
FILE NO/S:	Appeal No 9256 of 2002 Appeal No 9262 of 2002 SC No 1410 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2003
JUDGES:	McPherson JA, White and Fryberg JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In Appeal No 9256 of 2002: appeal dismissed with costs** **In Appeal No 9262 of 2002: appeal dismissed with costs**
CATCHWORDS:	PROFESSIONS AND TRADES – Lawyers – Solicitor and client – Duties and liabilities to client – Transactions and proceedings on behalf of client – Exercise of skill – Liability for negligence – What constitutes negligence – Failure to prosecute action within limitation period – Consequent dismissal – Proceedings against solicitor – Assessment of plaintiff's prospects of success – Whether plaintiff could have succeeded in proving negligence PROFESSIONS AND TRADES – Lawyers – Solicitor and client – Duties and liabilities to client – Transactions and proceedings on behalf of client – Exercise of skill – Liability for negligence – Damages – Method of assessment – Chances of success in action not brought within time

Johnson v Perez (1987) Aust Torts Reports ¶80-146, followed
Kitchen v RAF Association [1958] 2 All ER 241, followed

COUNSEL: G R Mullins for the appellant in Appeal No 9256 of 2002 and for the respondent in Appeal No 9262 of 2002
K N Wilson SC for the respondent in Appeal No 9256 of 2002 and for the respondent in Appeal No 9262 of 2002

SOLICITORS: Quinn & Scattini for the appellant in Appeal No 9256 of 2002 and for the respondent in Appeal No 9262 of 2002
McInnes Wilson for the respondent in Appeal No 9256 of 2002 and for the respondent in Appeal No 9262 of 2002

[1] **McPHERSON JA:** I agree with the reasons of Fryberg J. The appeal and cross-appeal should each be dismissed.

[2] **WHITE J:** I have had the advantage of reading the reasons for judgment of Fryberg J and agree with his Honour that the appeal and cross appeal should be dismissed.

[3] I had thought that the language chosen by the learned trial judge to describe the appellant's chances of success on each of the five bases of negligence advanced such as "very slender", "very difficult…to persuade a Court", "slender if any prospect" and "a Court would reject the plaintiff's contention" as indicating an intention to find that the appellant would have had no chance of success in the putative trial. But since his Honour estimated the appellant's chance at about one-third it is clear that he accumulated the possibilities inherent (if only slightly so) in those expressions. It is clear that his Honour therefore did not conclude that the chose in action had no "reality or substance", *Kitchen v RAF Association* [1958] 2 All ER 241 at 251, as the appellant contended.

[4] Such an outcome can lead to the somewhat anomalous result that in certain cases a litigant suing a negligent solicitor may be better off than had he sued the original wrong-doer when he would have recovered nothing.

[5] I agree with the orders proposed by his Honour.

[6] **FRYBERG J:**

The nature of the plaintiff's claim

On 17 August 1995 the appellant was injured by a truck. The truck was owned by Volunteer Marine Rescue Currumbin Inc, an incorporated association of which the appellant was a member. The association owned and operated a boat used for marine rescues. At the time he was injured the appellant was carrying out his duties as a volunteer crew member of the boat, which was on a trailer attached to the truck.

[7] In or about February 1996 the appellant retained the respondent firm as his solicitors in respect of a claim against the association for damages for his injuries. It agreed to "spec" an action. However it was careless. Although it commenced proceedings on the appellant's behalf within time, it failed to give notice under s 37 of the *Motor Accident Insurance Act 1994* until a month after the expiry of the

limitation period.[1] As far as the action was concerned that omission was fatal.[2] It was common ground between the parties that thereby it breached the duty of care which it owed the appellant. The appellant claimed that as a result he suffered damage. He did not allege that he had been put to expense or otherwise suffered any consequential loss. He claimed that he had a valuable chose in action (his claim against the association) when he consulted the respondent. Because that right was rendered worthless due to the respondent's failure to give notice, the measure of his loss was the value of the chose in action. That is the issue in this appeal.

[8] Some choses in action (typically, those able to be exploited without litigation, such as shares in publicly listed companies) can be valued by reference to a market price. Others, even some capable of realisation only by action (e.g. commercial debts) can be valued by applying a market discount rate to their face value, at least where there exists a sufficiently active factors market to permit the identification of such a rate. The value of a claim for personal injuries cannot be calculated in this way. The right to make such a claim is a mere personal right and is unassignable. There is no market for such things. Their value can be ascertained only by determining their net realisable value (i.e. what the owner could recover by action) and adjusting it for contingencies of realisation.

[9] With one exception, there were in the present case no contingencies outside the litigation process to be taken into account. It was common ground that the association was insured and could have met any judgment given against it. The exception was the possibility that the association might have been willing to settle for a relatively small sum to avoid the cost of litigating against the impecunious plaintiff. Consideration of that contingency can be deferred for the time being. The primary issue between the parties at trial and on appeal was what, if anything, the appellant would have recovered in a properly conducted action. The correct approach in this situation was described 45 years ago by the then Master of the Rolls:

> "In my judgment, assuming that the plaintiff has established negligence [by the solicitors], what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."[3]

In the Trial Division, Ambrose J did not refer to that case, but that was the approach which he adopted.

[10] At the trial the appellant claimed he would have recovered substantial damages from the association. The respondent claimed he would have recovered nothing. Although his Honour did not say so expressly, Ambrose J accepted neither submission in his reasons for judgment, instead awarding the appellant $10,000. The "easy" answer described by Lord Evershed MR was therefore not open to him:

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1 The primary effect of this legislation seems to be to transfer liability from motor vehicle insurers to professional indemnity insurers.

2 *Sweeney v Volunteer Marine Rescue Currumbin Inc* [2000] QCA 455.

3 *Kitchen v RAF Association* [1958] 2 All ER 241 at p 251.

> "If, in this kind of case, it is plain that an action could have been brought, and, that if it had been brought, it must have succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that she can get nothing save nominal damages for the solicitors' negligence."[4]

The judgment of the trial judge

[11] There is now little dispute as to the primary facts which would have been found at the hypothetical trial. They were undisputed or have been found by Ambrose J.

[12] The plaintiff and his wife moved to the Gold Coast about 18 months before the accident in August 1995, where they invested in and managed a motel. The appellant, who was born in 1950, joined the marine rescue association. He had had a lot of experience over the years in driving tractors, earthmoving machinery and trucks of various sorts, and this skill was appreciated by the association as it used a truck to move its twin-hulled rescue vessel.

[13] On the day of the accident the association provided its vessel to enable the ashes of a deceased person to be scattered at sea. It is convenient to set out what happened and some of the judge's findings in his own words:

> "[6] According to the plaintiff, when he arrived at the boatshed, where the shark cat was housed on a trailer attached to a F100 V8 four wheel drive Ford utility truck ("the truck"), he opened the doors at either end of the shed and in preparing to reverse the truck, trailer and vessel down a ramp towards Currumbin Creek discovered that the battery used to start the truck was flat. He said that he used a jumper lead from a second battery, used apparently to power an electric winch to enable the engine battery to operate. He said that he started the truck engine in this fashion. It emerged in the evidence, which I accept, that two other men with the plaintiff were to crew the shark cat for its operation that day. One man named Craig was to be skipper of the vessel and another man Saunders was to be one of the crew. The plaintiff was to be the third crew member. There was a fourth man who attended the association premises for the purpose of manning a radio facility. It was one of the rules of the association that as the shark cat crossed a bar into the ocean there had to be a man manning a radio ashore. The skipper or at least one of the other crew members on the vessel could advise that person as to the progress of the vessel as it passed over the bar whether it was going out to or coming in from the ocean. Although there was some conflict in the evidence as to whether Mr Gay actually travelled on the vessel that day, I find that a Court would probably find that Mr Gay did not attend the

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4 *Ibid* at 250.

boatshed or board the vessel when it was launched but instead made his way to the shore radio operations room. Whatever may have been the fact, it seems to have little relevance to the issues in this case.

[7] The plaintiff was in the process of starting the truck as Mr Craig the skipper walked past it. I am satisfied that he heard the utility engine start and perceived nothing unusual about the way it was started. On the other hand, he became aware of a discussion at some stage before he heard the engine of the truck start concerning problems with its battery. When he heard the truck engine start, apparently as it usually did, as he walked past the truck/boat and trailer he gave the matter no further thought. Mr Saunders the third member of the crew on the shark cat when it was eventually launched walked to a jetty near the launching ramp. The skipper climbed into the vessel and took steps to make it operational when it reached the water. The plaintiff reversed the truck and trailer down the launching ramp and the vessel on it was launched. He then drove the truck to which the trailer was still attached up to and into the boatshed and closed the doors. He then made his way to the jetty near the launching ramp from where he and Mr Saunders boarded the vessel. The vessel then headed for the open sea, one of the crew advising somebody on shore, Mr Gay – by radio – of the safe negotiation of the Currumbin Creek bar. The ashes were scattered and the vessel then made its way back to the launching ramp. When it reached the jetty near the launching ramp the plaintiff and Mr Saunders left the vessel and made their way to the boatshed. The plaintiff then opened the doors of the shed and reversed the truck with trailer attached down the launching ramp to a position where the trailer was partly submerged in the water to a depth, which would permit the skipper in effect to motor the vessel up out of the water onto rollers on the trailer using its outboard motors.

[8] Mr Saunders waited at the entrance to the boatshed with Mr Gay who by this time had made his way from the radio operations room to the boatshed to assist in cleaning the vessel preparatory to locking it up in the shed. The plaintiff in the meantime had fastened the vessel to the winch of the trailer and to a safety chain to connect the two and had then driven the truck, trailer and vessel up to a position where the truck had proceeded into the shed so that the front of it was a metre or so from the front entrance. The trailer was brought to a halt on a gently sloping concrete access slab commencing perhaps 5 feet inside the rear entrance to the shed and extending a similar distance perhaps outside that entrance to where it joined the more steeply sloping concrete launching ramp.

[9] The reason for so positioning the vessel was to have the two outboard motors attached to its stern within 3 or 4 metres of a tap located 4 or 5 feet inside the building. Attached to this tap was a garden hose with a special fitting which permitted it to be

attached to the outboard motors so that fresh water could be injected into them so that when started by the skipper any salt left in their cooling systems would be washed out. It would take a couple of minutes to clean out each engine. When the plaintiff brought the vessel to a halt both Mr Saunders and Mr Gay were on its portside and were preparing to attach the hose to one of the engines so that the skipper who was still in the vessel could start its engine to clean the salt out of its cooling system with the use of the tap water.

[10] According to the plaintiff, the procedure he had always followed in the past and which was prescribed by the association to make the truck, trailer and shark cat immobile while being cleaned before they were locked away in the boatshed, was to leave the truck in low gear in four wheel drive and switch off the engine; however, on this occasion he decided that he would depart from the prescribed procedure because he wished to disconnect the boat and trailer from the truck after the boat and trailer had been cleaned and take it for a short run to recharge the starting battery which he thought might be so flat that he might not be able to start the truck again if he again switched the engine off. He decided, contrary to all instructions and procedures required by the association, that he would simply apply the handbrake of the truck and leave the engine running so that the motor would not need to be started again. He decided that to do this he would take the truck out of gear so that the only braking device on the stationary trailer and boat would be the handbrake on the truck. I am satisfied that there was indeed a separate handbrake in the cab of the truck which could have been applied to render that trailer immobile if it were applied while the engine of the truck was left running. However he gave evidence that he decided for reasons, which I will deal with later not to apply the handbrake to the wheels of the trailer, which could only have operated while the engine of the truck was working.

[11] According to the plaintiff, he then decided that he would get a fire hose, which was kept at the front of the boatshed to assist in hosing down the trailer. It is clear in my view on the evidence that at some stage this fire hose would have to have been brought from the front of the shed along the portside of the vessel so that the trailer and the hull of the boat could be washed with fresh water. Either Mr Saunders or Mr Gay could have done this. For reasons which I will give later, I find that a Court would find this aspect of the plaintiff's account a little difficult to accept. The skipper of the vessel was in it waiting for advice that the hose was attached to one of the outboard motors so that he could start its engine and flush it of salt water. He was not particularly looking towards the truck or towards either Mr Saunders or Mr Gay. I mention merely that by the time of trial Mr Gay had died. Mr Saunders however said that he was certainly standing in a position preparing to attach the

> hose to one of the outboard motors at a time when the plaintiff said he was actually cleaning the trailer with a powerful fire hose. Mr Saunders was unaware of this which seems a little surprising because he would have been standing, one would think, very close to the position where the plaintiff says he was commencing to hose down the trailer and perhaps the hull of the vessel which was then stationary. In any event, at some stage when the plaintiff was outside the truck doing something either on its portside or starboard side, the truck and trailer and vessel started to move backwards towards Currumbin Creek. According to Mr Saunders he and Mr Gay both noticed a slight movement and each attempted to push against the back of the truck to prevent it from further moving towards the launching ramp. In spite of their efforts they found it impossible to impede the movement of the truck. Perhaps that was because the vessel and trailer weighed something in excess of 3 tonnes and once the trailer which rolled from the slightly sloping access slab at the boatshed entrance onto the much more steeply sloping launching ramp the moving trailer gathered momentum.
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> [12] At some stage it is clear that the plaintiff attempted to get back into the moving truck through the drivers side door of the cab so that he could apply the footbrake. However by the time he did this, the truck had moved back a significant distance from where it had been left in a stationary position with the hand brake on. Apparently the drivers side door of the truck cab was open when he tried to climb back into it. However the door came into contact with a small cupboard on the wall of the boatshed which is depicted in photograph F in Ex 1A. When this happened the door was forced onto his right arm and he lost balance. I am satisfied that a Court would probably find that the events which led to his injury occurred very quickly. Once the trailer commenced to move down the slope of the launching ramp of course the more quickly it would travel. In any case the plaintiff contends that he was thrown off balance and at least one wheel of the truck passed over his right foot. He said that it also passed over his left foot. I assume that he would contend that he was not wearing shoes and significant injury was caused to his right foot although none apparently to his left foot. Significant injury was also caused to his right arm when the door of the truck cab came into contact with it.
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> [13] In any event, the truck together with the loaded trailer careered down the launching ramp and ended up in the water. Neither Mr Saunders nor Mr Gay was injured however they saw the plaintiff lying injured on the other side of the concrete slab giving access to the rear of the boatshed and gave assistance to him and eventually he was taken to hospital."

[14] His Honour then proceeded to consider in turn each of the five bases of liability ("particulars of negligence" as counsel described them) advanced on behalf of the appellant. I set them out and record after each his Honour's conclusion in relation to it:

(a) Negligence of some member of the association in not taking steps to avoid the starter battery of the truck becoming flat.

"I have significant reservations about the evidence given by the plaintiff that it was in fact the usual procedure adopted by members of the association to disconnect the positive terminal of the starter battery on the truck before storing it away in the boatshed. … In my view, even if his unsupported evidence were preferred to that of Mr Craig and Mr Saunders the plaintiff would have a significant difficulty in persuading a Court that the injury he suffered to his foot in the circumstances … was a foreseeable consequence of a failure to disconnect the positive lead from the starter battery …. In my view it is likely that a Court would hold that the real and indeed only causes of his injury were his own actions."

(b) Failing to ensure handbrake of truck was so adjusted as to hold it stationary on an incline when applied.

"In my view, the plaintiff would have very slender if any prospect of succeeding on this particular of negligence."

(c) Failing to have chocks available to put under the wheels of the truck and/or trailer while stationary at the top of the ramp for cleaning.

"While out on an abundance of caution persons performing a cleaning operation on the vessel near the entrance to the boatshed may have applied wheel chocks if they had been available I think it would be very difficult for the plaintiff to persuade a Court that the failure to provide such wheel chocks for use when the boat was being cleaned at the top of the launching ramp when the truck and most of the trailer were inside the boatshed amounted to negligence on the part of the association."

(d) Failure of the skipper to properly supervise the plaintiff so that he might direct him not to do what he did leading to his injury.

"In my view, this ground of negligence advanced by the plaintiff would have slender if any prospect of being accepted upon trial."

(e) Failure of the skipper to warn the plaintiff not to do what he did when the plaintiff told him he proposed to do such a thing.

"In my view, any Court would find it most unlikely that the plaintiff did tell his skipper that he proposed to do what he did in fact do which led to his injury. … Upon the evidence, I am persuaded that the probability is that a Court would reject the plaintiff's contention that he had been informed not to apply the trailer brakes as “hand brakes” because the system did not work properly."

[15] Having dealt with each of those bases of liability his Honour considered an argument (now no longer relied on) for the plaintiff under the *Workplace Health and Safety Act 1995*, without summarising his conclusion on the plaintiff's prospects of success on liability in negligence. He then wrote:

“[40] Even if the plaintiff did succeed in establishing liability against the association under one or more of the causes of

> action he sought to pursue, in my view upon the whole of the evidence – including his own – a Court would find that essentially he was the author of his own injury. Essentially it was his fault that the truck was brought to a halt and left unattended at the top of a steep slope and immobilised in a way quite contrary to the procedures adopted and followed for many years by the association and indeed followed by him on previous occasions.
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> [41] In my view, if it ever fell to a Court to determine questions of contribution it is probable that the plaintiff would be required to bear a significant part of the responsibility for his injury."

[16] His Honour then proceeded to determine what level of contributory negligence would have been apportioned to the plaintiff in the hypothetical trial had he (contrary to his Honour's view) succeeded in establishing liability. Then he dealt with quantum in some detail. He held:

> "[74] The maximum assessment of quantum of the plaintiff's damage, in my view, would not exceed, $250,000. In my view, the plaintiff would be required to bear at least 70% of the responsibility for this loss. This would leave a maximum judgment of $75,000.
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> [75] Of this sum, of course, the plaintiff would be required to repay approximately $40,000 to Workers' Compensation and D.S.S. etc. This would lead to recovery of a maximum sum (ignoring any difference between standard and indemnity costs) of $35,000.
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> [76] In assessing the value of the loss of the chance which the plaintiff had to find himself in this financial position, I kept in mind that, in my judgment he would probably have failed to recover anything. But, of course, it is impossible to predict with certainty the outcome of litigation. The figure of $75,000, to which I have referred, assumes that he may have persuaded a Court that the association was in breach of one of the duties, which I have examined in detail and that he may have obtained employment returning about $400 net per week, but for, his injury.
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> [77] If he did succeed in obtaining any judgment, the value to him would be something in the vicinity of $35,000.
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> [78] Of course, cases of this kind are often settled. Had the plaintiff's action been properly instituted, he may have been able to negotiate with the association's insurer to achieve a settlement of his claim on the basis that he was prepared to bear a significant part of the responsibility for his injury – even in excess of 70%. I must say, in my view on the material advanced upon this trial, there would be only a faint prospect of the association accepting any responsibility for the plaintiff's injury. However, it may have been prepared to make an offer of settlement rather than incur the expense of

> defending an action and run the risks inherent in all litigation.
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> [79] The real question to be answered then is, what is the value of the chance the plaintiff lost by virtue of the negligence of his solicitors of recovering a maximum award of damages in the vicinity of $75,000, keeping in mind that on my assessment of the case, he would probably have failed altogether on the issue of liability.
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> [80] Doing the best I can, I assess the value of the plaintiff's lost chance in the sum of $10,000 which is about one third of the maximum sum of $35,000 that he could have hoped to recover had his case proceeded to judgment, having regard to the quantum of the refund that he would be compelled to make out of an award of $75,000.
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> [81] I assess the value of the plaintiff's lost chance to sue the association successfully then in the sum of $10,000."

The cross-appeal

[17] The respondent submitted that the judge correctly concluded that the accident was the plaintiff's own fault and that he would not have established liability against the association. It drew attention to paras [40] and [41], and [76] and [78], quoted above. It submitted that having reached these conclusions his Honour ought to have dismissed the plaintiff's action; findings on contributory negligence were unnecessary and led to a misdirection on the assessment of damages. Only if he had found that there was an arguable case against the association on the issue of negligence did the judge need to consider contributory negligence in order to assess the value of what the plaintiff had lost. Having concluded, as he did, that the plaintiff would not have succeeded in proving negligence, there was no need to go further. The judge ought to have dismissed the plaintiff's action.

[18] The respondent also pressed in a slightly more refined form a submission which it made below. It submitted that having regard to the findings made by the trial judge, the refunds payable from any award of damages and the costs of litigation, the appellant would not have pursued the underlying cause of action. He therefore suffered no loss as a result of the solicitors' breach of duty. Logically, the questions raised by the respondent's submissions are anterior to those which arise in the appeal.

[19] Initially I found the first submission attractive. However further consideration has persuaded me that it is based upon a misreading of the judge's reasons. His Honour found that in respect of each of the particulars of negligence the plaintiff's prospects were poor. He used different terms to describe them: "likely that a Court would hold that the real and indeed only causes of his injury were his own actions", "very difficult for the plaintiff to persuade a Court", "very slender if any prospect of succeeding", "slender if any prospect of being accepted", "the probability is that a Court would reject the plaintiff's contention". He found that the plaintiff would probably have failed altogether on the issue of liability. However he did not find that the plaintiff had *no* chance of success. On the contrary, as appears from para [80] of his reasons for judgment, he assessed the value of the plaintiff's lost chance

at “about one third”. That assessment is not inconsistent with the terms used to describe the various particulars of negligence. A chance of (say) 7% would rightly be described as "very slender"; but five such chances would constitute a 35% chance. In such a case it would be correct to say that the plaintiff "would probably have failed altogether on the issue of liability"; but such a case would not be one where it was "clear that the plaintiff never had a cause of action", to use the words of Evershed MR.

[20] Ambrose J did not assign a numerical probability to any of the particulars, and he was right not to do so. They were not susceptible of precise individual quantification. There was also considerable overlap among them in the sense that the appellant's prospects of success on a number of them depended on some common factors, particularly the assessment of his credibility in the hypothetical trial. They were however cumulative; the appellant had to succeed on only one of them. Whether their cumulative effect was to give the appellant more than a trivial chance involved an exercise of judgment. Five slight chances combined might well amount to no more than a slight chance; but it was open to the judge to rate them more highly than that. That is what he did. He found an arguable case, albeit one which would probably have failed. The respondent's first submission should be rejected.

[21] In reaching this conclusion, I have not overlooked para [40] of the reasons for judgment. There is unfortunately a degree of ambiguity in that paragraph resulting from the use of "essentially". Devoid of context it might mean "solely"; but here it might mean "predominantly". I think his Honour used it in the latter sense. Paragraph [40] appears immediately after the conclusion of his Honour's discussion of issues related to the *Workplace Health and Safety Act*. It commences his Honour's discussion of the issue of contributory negligence, which his Honour apportioned against the appellant to the extent of 70%. That context supports the view that his Honour was not making a finding that the appellant would certainly have been found solely responsible for his own loss. Moreover, his Honour was aware of what the respondent was arguing (see para [18]). One would expect him to have made an explicit finding that the plaintiff had no prospect of success in his action if that were his intent. The reasons contain no such finding. On the contrary, his Honour later assigned a value to the plaintiff's chance, assessing it at about one-third. I would not be prepared to hold that when he made this finding, his Honour had forgotten an earlier finding that the plaintiff had no prospect of success. Paragraph [40] is the opening paragraph of the discussion on contributory negligence.

[22] In the alternative, the respondent submitted that Ambrose J should have found that a reasonable solicitor would have advised the appellant that the prospects of success were poor and that in the face of such advice, the plaintiff would not have pursued the action. In support of that submission the respondent cited the decision of this Court in *Dickson v Creevey*[5]. That was a case where the plaintiffs lost an action against their solicitor for failing to give timely advice to sue because (*inter alia*) they did not prove what the solicitors’ advice would have been. Such was not the position in the present case. The appellant testified in cross-examination that he was told by the solicitor that his case was a good case. It was put to him that he was aware that if he lost the case he would most likely be ordered to pay the other side's

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5 [2002] QCA 195.

costs and he answered, "No, I was always told it would be no cost to me." In these circumstances it is hardly surprising that he said he would have given the case a run if told the chances were only 50/50: "I've played two-up. Yes." Wisely, counsel did not ask what his attitude would have been if told the chances were less than that.

[23] The respondent did not call the solicitor to give evidence and advanced no explanation for this omission. It was therefore open to his Honour to accept what the appellant said[6], despite his doubts about the appellant's credibility. He made no express findings on this point but his acceptance of the appellant's evidence is implicit in the award in his favour. The respondent's submission should be rejected.

The appellant's chances of success

[24] Ambrose J was obliged to assess the appellant's prospects of success in a hypothetical action. The task has been described in this Court in the following terms:

> "[In] *Kitchen's* case and … *Tutunkoff v Thiele* (1975) 11 SASR 148 … three situations are distinguished. The first is one where the plaintiff must have succeeded in the statute-barred action. In that case the plaintiff could recover against the solicitor all the damages he could have recovered in that action. The second is one where the plaintiff must have failed in the statute-barred action. In that case he could recover only nominal damages against the solicitor. The third situation is one where it was uncertain at that time of the action against the solicitor what the result of the statute-barred action would have been if it had come to trial. In that case the Court was required to assess the chances that the plaintiff would have succeeded in that action."[7]

That decision was subsequently reversed by the High Court[8], but in my judgment not so as to cast doubt upon this passage.

[25] The appellant submitted that his Honour's assessment of his prospects did not fairly reflect the strength of his case. He related that submission particularly to the issues of the association's failure to have chocks available to put under the wheels and the failure of the skipper to intervene[9].

[26] The task which would have confronted the appellant at the hypothetical trial in demonstrating negligence on the part of the association in relation to non-provision of wheel chocks was daunting. He was himself the maintenance officer for the association (albeit appointed only a couple of weeks before the accident) and had plenty of experience with the truck. He claimed that on "numerous occasions" before the accident he suggested to "them" that "you should have chocks and chock vehicles in unstable positions". Initially he could not remember with whom he discussed the subject, nor when he first raised it, but pressed by his own counsel he remembered asking Mr Purchass, the then maintenance officer, a few months before

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6 *Jones v Dunkel* (1959) 101 CLR 298.

7 *Johnson v Perez* (1987) Aust Torts Reports ¶80-146 per Ryan J, with whom Andrews CJ and Kelly SPJ agreed.

8 *Johnson v Perez* (1988) 166 CLR 351.

9 The respondent did not submit that the association would not have been vicariously liable for the conduct of its members, apparently on the basis that all would have been covered by the relevant compulsory policy of third-party motor vehicle insurance.

the accident. Having regard to the judge's findings on credibility his problems are obvious. Moreover it is difficult to see why chocks would have been necessary in this situation. The system of turning off the engine and leaving the truck in gear was a sound one. If it were adopted chocks were unnecessary. Even if a situation arose in which it was necessary to leave the engine running (as the appellant claimed was the position in this case) there was no need to do what he did. He could have stayed in the cabin of the truck with his foot on the footbrake or, better still (particularly if he was concerned that if he did that he might be thought lazy) he could have asked Mr Gay, who had "a gammy hip", to do so. That would have activated the brakes on both the truck and the trailer. Alternatively he could have engaged the trailer brake in the cabin of the truck, which would have locked the wheels on the trailer while the truck engine was running. With those brakes, applied chocks would have been unnecessary. He claimed he did not do this because a former skipper had told him not to use the trailer braking system because it was defective, but Ambrose J found that a court would probably have accepted the evidence of Mr Craig that these brakes were regularly used and adjusted. His Honour was also persuaded that the hypothetical court would probably have rejected the appellant's contention that he had been told not to apply the trailer brakes as "handbrakes" because the system did not work properly.

[27] It is also necessary to take into account the difficulty which the appellant would have faced in persuading the hypothetical court that he would have used any chocks provided. He swore that he would have done so, but evidence of that sort is always scrutinised with caution[10]. He swore that there was nothing lying around the shed or the park outside it which he could have used as a chock. Photographs tendered at the trial show suitable rocks lying around outside, but they were not taken until some years after the accident. Whether he would have been able to persuade a judge at a trial held closer to the time of the accident that he would have used any chocks provided is speculative; but having regard to the findings on credibility the difficulty must be taken into account.

[28] The appellant also submitted that the failure of the skipper, Mr Craig, to intervene, was at least as culpable as his failure to care for his own safety. He submitted that the danger of what he did would have been obvious to the skipper. However, this was not a master and servant case and the appellant abandoned any argument that he was owed a duty of the type which arises in such cases. He relied solely on the general duty of care. As Ambrose J found, any contention that the skipper should have watched the appellant was unlikely to be accepted, having regard to the age and experience of both men. Ambrose J also found it most unlikely that a court would find that the appellant told the skipper what he proposed to do, in the light of Mr Craig's denial of any such conversation. Those findings were in my judgment correct.

[29] For these reasons, I am unpersuaded that the appellant has demonstrated any error in Ambrose J's assessment of his prospects of success.

Damages

[30] In cases such as the present, once it is established that the plaintiff had a significant chance of recovering damages it is necessary to establish how much was likely to be

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10 *Watson v Foxman* (1995) 49 NSWLR 315 at pp 318-319.

recovered. Depending upon the circumstances that may involve one enquiry into how much the plaintiff would have been able to prove as his quantum of damages and another into whether, and to what extent, damages would have been reduced for contributory negligence. The answers to these enquiries will identify a dollar amount. The product of that amount and the plaintiff's prospects of success in the action will establish the value of the chose in action of which the plaintiff has been deprived. In some cases (for example, where the chose in action lies in contract or in debt) the amount which would have been recovered may not be in doubt. In cases where the hypothetical action is for damages for personal injuries, the amount which the plaintiff would have recovered will usually be attended by some uncertainty. However the amount will not be at large. Often it will be possible to identify an amount which on any sensible view is the minimum at which the plaintiff's damages could have been assessed, and another which on any sensible view is the maximum. It can then be stated as a certainty that the assessment would have fallen within the identified range. In theory, the plaintiff would have a set of chances for the various amounts (or perhaps steps) within the range; the sum of the elements of the set would necessarily be 1 (certainty).

[31] In practice it would be ridiculous to expect a judge to conduct a detailed probability analysis in respect of the various amounts at which damages might be assessed. Usually it would also be pointless since in the end those probabilities would have to be weighed and accumulated. Sometimes it may be helpful to identify the maximum and minimum amounts which the plaintiff could have recovered in the hypothetical action, or particular amounts (and their probabilities) dependent upon alternative findings. Often the practical course (particularly in cases where there is no difference between the evidence which would have been available in the hypothetical trial and that available in the professional negligence trial) will simply be to make an assessment. That necessarily involves weighing and balancing all of the contingencies. Given the uncertainties of the data the more mathematical approach would seldom produce a greater level of accuracy or precision. How the judge approaches the task in practice will vary depending upon the facts of the case. No single approach will be correct in every situation. In the end, it will be necessary for a figure to be identified which reflects all of the contingencies, favourable and unfavourable, which would have affected the proof of quantum. Provided the reasoning is transparent, the process will be no more open to challenge on appeal than an assessment of damages in any other case.

[32] Ambrose J wrote, in making his assessment:

> "[73] In my view, on the material, the maximum assessment of various heads of damage that the plaintiff would be likely to have obtained in March 2000 would be –

(a) General damages Interest for five years	$40,000.00 $ 2,000.00
(b) Special damages	$ 1,861.25
(c) Loss of income – August 1995 to March 2000 4.6 years	$93,000.00

Interest thereon	$13,250.00
(d) Future economic loss – present value of the loss of $400 per week for say five years (March 2000 to March 2005) until plaintiff was 55 years of age. Using a multiplier of 232 figure discounted by 25%	$69,668.00
(e) Past *Griffith v Kirkemeyer* say three hours per day for three months at $12 per hour	$ 1,208.00
(f) One hour per day for following nine months at $12 per hour	$ 3,276.00
(g) Future *Griffith v Kirkemeyer*	…….
Total:	**$224,263.25**
(h) Other possible awards of damage for loss of past and future superannuation, interest, future medication etc not assessed	**+$25,000.00**

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[33] Unfortunately, the approach which his Honour took in reaching this conclusion is not altogether clear. He described his assessment as the "maximum assessment of quantum of the plaintiff's damage". It seems clear from his Honour's reasons that the assessment was not in fact intended to represent the highest amount which the appellant could possibly have recovered if the contingencies of litigation had favoured him at the hypothetical trial. In particular, his Honour was satisfied that a court would probably have preferred the evidence of Dr Morris to that of Dr Saxby (who originally saw the appellant at the request of WorkCover). Dr Saxby's evidence favoured the appellant and, if accepted, tended to support a higher award than that of Dr Morris. Unless it were held that there was no chance of Dr Saxby's evidence being accepted, an assessment of the maximum amount which the appellant might recover at the hypothetical trial would have to proceed on the basis of his evidence. It could not be said that there was no chance of Dr Saxby's evidence being accepted.

[34] On the other hand, his Honour allowed a substantial amount for economic loss after April 1998, despite his finding "that a court would look at the plaintiff's past and future economic loss on the basis that by April 1998, the effects on the injury he suffered in August 1995, had ceased to contribute to his loss of earning capacity." He also allowed an amount of $25,000 for "other possible awards of damage or loss of past and future superannuation, interest, future medication etc not assessed". It is difficult to discern the basis for the inclusion of this amount in the assessment. Both these matters suggest that his Honour was endeavouring to include in the assessment amounts to take into account contingencies favourable to the appellant; they appear inconsistent with the finding that by April 1998 the effects of the injury

has ceased to contribute to the loss of earning capacity. That would be a legitimate approach if the starting point were the minimum amount which the appellant could have recovered in the hypothetical trial.

[35] At this point it is convenient to turn to the particular heads of damage challenged in the course of the appeal.

Loss of earning capacity

[36] Both parties attacked his Honour's assessment of damages for loss of earning capacity (both past and future economic loss). The respondent did so on the basis of the inconsistencies referred to above. It submitted that the proper assessment would have been made up to April 1998 using the weekly loss of $400 adopted by the judge. There was no suggestion that any lower figure for the weekly loss was open and it is difficult to see how any lower figure could have been supported. The issues between it and the appellant was whether a higher weekly figure should have been adopted and whether a longer period should have been allowed.

[37] Both of these questions depended upon the medical evidence. It is common ground that by the time of the trial the appellant was suffering degenerative changes in the injured foot. In issue was whether the degeneration predated the injury or was the consequence of operations conducted as a result of the injury. Dr Morris testified that there was probably pre-existing asymptomatic degeneration. His opinion was supported by evidence of spurring in an x-ray taken three months after the accident. Spurring is one, but only one, indicator of *possible* degeneration. He said that the appellant "could have gone on for many number of years" without pain. It was difficult to estimate how long. Dr Saxby testified that the degeneration was probably the consequence of the injury. His opinion was supported by the absence of any evidence of degeneration in an x-ray on the day after the accident. Neither x-ray was conclusive and neither opinion absolute. His Honour’s selection of April 1998 was based on his acceptance of Dr Morris's evidence. On that evidence, I do not think he could have selected any earlier date.

[38] The appellant led evidence that had he not been injured he could have worked as an employed driver with earnings in the range $1,300-$1,500 per week. That evidence came primarily from the witness Slack. His Honour found it quite unlikely that the appellant would have been able to demonstrate the capacity to do this sort of work, quite apart from the accident, because of the stress which it would impose on his degenerated joints. He accepted that the appellant was able to do casual work with bulldozers from time to time and that this was not inconsistent with his arthritic condition. He also accepted that but for the accident, the deterioration would have been gradual. He held that by reason of the appellant's educational background and work history his only prospect of obtaining employment was in a labouring or semi-labouring field. It is unclear whence he derived the figure of $400 per week which he used in his assessment. There was evidence of a range of scenarios upon which he could have formed the judgment. On any view, $400 per week seems to be the bottom of the range.

[39] It follows that, in my judgment, $400 per week calculated up to April 1998 represents the best result which would have been open to the respondent at the hypothetical trial in respect of loss of earning capacity. There was no reasonable chance of a lower award.

[40] The appellant submitted that the amount awarded by Ambrose J should be increased. He submitted that the evidence of Mr Slack was uncontradicted. It followed that, unimpaired, the appellant could have earned $1,400 per week. To take account of the contingency that arthritic degeneration may have occurred independently of the accident, his Honour should have followed the usual course of discounting. On the evidence, a discount of 40% would have been appropriate. The appellant lost the whole of that discounted earning capacity because, on his Honour's findings, he was unsuited by reason of age, education and experience, for other work. His loss should therefore be assessed at $800 per week.

[41] It was open to Ambrose J to find that the hypothetical trial judge might have made such an assessment. However, he was not in my view bound to find this. He determined that the hypothetical trial judge would give weight to the evidence of Dr Morris. He was entitled to do so. He was entitled to increase the minimum amount which would be assessed on Dr Morris's evidence to take account of the chance that the hypothetical judge might adopt a different course. That is what Ambrose J did. He allowed the amount for the period until the appellant reached the age of 55 and he included an amount to cover consequential increases in superannuation, interest and miscellaneous amounts. If that solution was not entirely elegant it was because the nature of the process which his Honour was obliged to carry out lacked elegance. It would have been preferable not to have used the word "maximum", but I think the word was not intended to refer to the maximum which could have been awarded by the hypothetical trial judge on different findings.

General damages

[42] The respondent submitted that the maximum award for general damages in the hypothetical trial would not have exceeded $30,000. Ambrose J allowed $40,000. He included that amount in a total assessment of $250,000 which he reduced to take account of contributory negligence, workers' compensation payments and his assessment of the prospects of success. The last step involved multiplying $35,000 by one-third. His Honour rounded that product to $10,000. Mathematically, the result exceeded $11,000, but the appellant made no complaint about this. Even if the respondent is right about the general damages, reducing the total assessment by $10,000 still produces a final judgment greater than $10,000. It is therefore unnecessary to consider the question of general damages. It cannot affect the outcome of the appeal.

[43] $250,000 was an appropriate amount to use in the calculation of the value of the appellant's lost chose in action.

Contributory negligence

[44] The final element in the calculation involved assessing the chances that the appellant's damages in the hypothetical trial might have been reduced for contributory negligence. On the facts, such a finding was a certainty. What was in doubt was the extent of the reduction. The maximum reduction practically possible would have been 95%. In theory, the minimum reduction possible would be 5%, but on the facts, anything less than 40% would be perverse. Possible reductions would range from that figure to 95% in increments of 5%, with the alternative

possibility of a reduction of two-thirds. If this were a mathematical exercise one might try to assess the probability of the hypothetical judge selecting each step in turn, and then add the probabilities. But it is not a mathematical exercise. Ambrose J was entitled to estimate a figure which in his judgment represented the sum of the chances. He selected 70% and used that figure.

[45] The appellant submitted that 70% was substantially outside the appropriate range. He submitted that assuming negligence on the part of the respondent (the assumption giving rise to the need to assess the chances of a finding of contributory negligence) any failure to take heed of his own safety had to be assessed in the context of an unsafe system of work. I do not find the invocation of phrases hallowed in the context of master and servant litigation helpful in this context. On the judge's findings, the majority of the fault would have been laid at the door of the appellant. 70% does not unfairly reflect his prospects on the issue. He was lucky it was not higher.

The chance of settlement

[46] I have set out above what was said by Ambrose J on this topic[11]. I doubt if it had any impact on his ultimate assessment. If it did the effect was very small. It made no difference to the judgment. Although it is unnecessary for the purposes of the decision, I would add that, as presently advised, I see no reason to think that his Honour erred in law in what he said.

Orders

[47] The appeal and the cross-appeal should be dismissed with costs.

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11 Para [15].