SUPREME COURT OF QUEENSLAND

CITATION:	*Henderson v Dalrymple Bay Coal Terminal P/L* [2005] QCA 355
PARTIES:	**LEX WARREN HENDERSON** (plaintiff/respondent) **v** **DALRYMPLE BAY COAL TERMINAL PTY LTD** ACN 010 268 167 (defendant/appellant)
FILE NO/S:	Appeal No 4648 of 2005 SC No 88 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2005
JUDGES:	McPherson JA and Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE INFERENCES OF FACT INVOLVED – where the respondent was injured at work after tripping over some rocks which were scattered on the ground immediately outside a doorway that he exited through after completing his task of coal sampling – where the trial judge found that the appellant had been negligent in failing to provide a safe system of work and in failing to remove the rocks or to have a system in place which would have seen the rocks removed from the area – where the appellant argues that no allegation that the appellant caused the rocks to be in their location was pleaded – whether the the findings of the trial judge were open on the pleadings APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – PERSONAL INJURY OR DEATH CASES – where the trial judge allowed economic loss for the two years

and seven months that had passed since the accident and three years for the future – whether allowance should have been made for the possibility that the respondent would have ceased work at an earlier time

Brown v Hale [1995] QCA 003; [1996] 1 Qd R 234, cited
Dulhunty v J B Young Ltd (1975) 50 ALJR 150, considered
Katsilis v The Broken Hill Pty Co Ltd (1977) 52 ALJR 189, considered
Leotta v Public Transport Commission of New South Wales (1976) 50 ALJR 666, considered

COUNSEL: F G Forde for the appellant
D V C McMeekin SC for the respondent

SOLICITORS: McMahons National Lawyers for the appellant
Macrossan & Amiet for the respondent

[1] **McPHERSON JA:** I have read and agree with the reasons of Cullinane J. The appeal should be dismissed with costs.

[2] **CULLINANE J:** The appellant appeals against a judgment pronounced in favour of the respondent in the sum of $139,814.17 for damages for personal injury sustained by him on 6 October 2001 at the Dalrymple Bay Coal Terminal of which the appellant was the occupier. The judgment was delivered on 13 May 2005.

[3] The appellant appeals against the finding of negligence, the finding of no contributory negligence on the part of the respondent and certain aspects of the damages awarded by the learned trial judge.

[4] The respondent was an employee of a company Carbon Consulting International Pty Ltd which had contracted with the appellant to perform certain works at the appellant's terminal at Dalrymple Bay. The respondent was required to enter the appellant's terminal there for the purposes of sampling coal which had been transported by rail to the terminal.

[5] On the day that he was injured, the appellant had driven to the terminal, arriving there about mid-afternoon. On the facts found by the learned trial judge, he drove his utility to a doorway normally used for access to the receival area inside the receival shed at the terminal. Because there was a train already in the shed and it was necessary for him to access the side of the train away from him where the sampling was to be carried out, he entered the shed by means of a different doorway. It was however, the doorway to which he had reversed the utility that he was exiting from when he sustained his injuries.

[6] The taking of the samples took approximately two and a half hours and involved taking a sample from each of the wagons. After this, the respondent took the samples out to the utility. According to the findings of the learned trial judge, he did this by walking across the railway tracks and down a short flight of narrow steps leading out of the shed. It was necessary for him to turn slightly so as to descend the steps when carrying the bucket of samples in each hand, each bucket weighing some 15 kilograms. These buckets were placed directly into the utility. As he

exited the shed in this way he tripped on some rocks (described as "grizzlies") scattered on the ground immediately outside the shed doorway. At this time it was becoming dark outside but the shed was brightly lit. The respondent was wearing safety goggles which had some dust upon them. He did not see the rocks at the time he fell and injured his back.

[7] He had not seen the rocks when he entered the receival area and parked his vehicle and walked around to a different entrance.

[8] The learned trial judge found that the appellant was negligent in two respects. The first was that the appellant was negligent in failing to provide a safe system of work which would have ensured that the rocks were not in the doorway. The second was that the appellant was negligent in failing to remove the rocks or to have in place a system which would have seen the rocks removed from the receival area.

[9] It was not in issue that the appellant owed a duty of care to take reasonable care for the safety of people who came, like the respondent, upon the premises for the purposes of carrying out work there.

[10] Both findings of negligence were dependent upon a finding which the learned trial judge made that the rocks had been left where they were by an employee or employees of the appellant.

[11] The evidence was that grizzlies are large rocks and lumps of clay which are too large to pass through the grill through which coal was unloaded from the bottom of each of the wagons. They had to be removed for the purposes of ensuring that the flow of coal was not interrupted.

[12] The appellant contends that the finding that the grizzlies had been left at the doorway by an employee or employees of the appellant was not open because it was not pleaded as a fact by the respondent in his statement of claim. It was also argued that the first finding of negligence was also not open because it had not been adequately particularised in the allegations of negligence in the statement of claim.

[13] The appellant was also inclined to contend that his Honour was not entitled to find as a fact that an employee or employees of the appellant were responsible for the grizzlies being at the doorway.

[14] The statement of claim alleged that the appellant was the occupier of and in control of the terminal and that it permitted the respondent access for the purposes of carrying out coal sampling at the premises and a duty of the kind referred to above was pleaded. It was alleged by paragraph 6:

> "On the 6th of October 2001, the Plaintiff in the course of his employment attended at an area known as Rail Receival One at the Dalrymple Bay Coal Terminal for the purpose of obtaining coal samples from wagons. After obtaining the samples the Plaintiff went to exit the building through a doorway on the northern side with the intention of loading the coal samples that he was carrying into the tray of the utility. As the Plaintiff exited the doorway carrying coal samples he stepped onto rocks/lumps of coal that were strewn across the concrete pathway and fell (the 'incident')."

[15] Particulars of negligence were alleged in paragraph 8. Relevantly those were: (b) "Failing to provide a reasonably safe system of work" and (c) "Failing to clear up rocks and coal from the pathway at the exit of the area Rail Receival One".

[16] The respondent gave evidence that the only persons who had access to the area were employees of the appellant and specifically authorised personnel such as coal samplers. He gave evidence to the effect that coal samplers had nothing to do with the handling of grizzlies. He had seen grizzlies stacked beside a handrail beside the platform he stood on whilst taking samples.

[17] His Honour made the following findings:

> "[13] There was no direct evidence as to who put the rocks in the doorway. There is, however, a strong circumstantial case that they had been dropped there by the persons clearing away the rocks that had previously been stacked beside the handrail. Any resident of Central Queensland would be aware of the continuous running of the coal trains from the mines to the port facilities. Common sense suggests that even though Mr Henderson only saw the grizzlies being stacked against the handrail, the volume of material would be such that they would have to be regularly removed to somewhere else to avoid congestion of the platform. Since the accident the system has been altered to provide skips to hold the grizzlies. These are then periodically removed and emptied.
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> [14] Neither the plaintiff nor Mr Boyd Pollentine, another coal sampler with 11 years experience at Dalrymple Bay, had ever seen rocks in that entranceway before this event. Mr Bloomfield, another coal sampler at Dalrymple Bay at the relevant time also gave similar evidence.
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> [15] Mr Bloomfield's evidence was that at the time the coal sampler was in the receival area, the only other person present was the Dalrymple Bay employee who was unloading the wagons. He also confirmed that it was not the responsibility of the coal sampler to deal with or handle the grizzlies. There was also evidence that only authorised personnel could access the receival area. The only authorised personnel identified in the evidence were the coal samplers and the Dalrymple Bay employees.
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> [16] It follows, therefore, that the grizzlies must have been moved from inside the receival area to the entranceway by the defendant's employees. How or why they came to be in the entranceway is pure speculation. The most likely reason is that they were dropped accidentally while being moved to some other dumping area. It is not essential to the plaintiff's case that the evidence do more than establish on the balance of probabilities that the plaintiff's employees were responsible for their location at the time of the accident. The evidence does so."

[18] The ultimate finding it is said was not open to the court in the absence of a pleading of that fact.

[19] The appellant called no evidence on the issue of negligence contenting itself with cross-examining the respondent.

[20] As has been said, the claim against the appellant at all times was one of a failure by the appellant to take reasonable care for the safety of the respondent whilst he was upon the appellant's premises for the purposes of carrying out his duties.

[21] It seems to me that a finding that the grizzlies had been placed near the doorway by an employee or employees of the appellant did not involve any impermissible departure from or expansion upon the claim pleaded. The claim was not one based upon the appellant's vicarious responsibility for specific actions of its employees. It at all times remained a claim based upon a failure to have a system in place so as to ensure that the premises were reasonably safe for those coming upon them to perform tasks such as those performed by the respondent.

[22] The respondent was not entering as a member of the public, nor was he entering a place to which the public had access. The evidence, which in my view was consistent with what was pleaded, was that the only persons who had access were employees of the appellant and specifically authorised persons such as the respondent.

[23] It was the appellant's employees' function to move grizzlies. The respondent and other coal samplers had, on the evidence, no interest in moving them.

[24] Proof then of this matter is within the ambit of the cause of action pleaded. The respondent sought to lead evidence to show that it was the appellant's employees who were responsible for the grizzlies in the doorway and it was not dependent on an express pleading of that fact. It was both consistent with and relevant to the cause of action pleaded.

[25] It is also relevant to matters which the appellant sought to raise at the trial by way of exculpation. It was argued that in the absence of any evidence justifying a finding who was responsible for placing the grizzlies there, the appellant should fail because it could not be shown that the grizzlies had been in place for a sufficiently appreciable time for any reasonable system to have detected them. This argument assumed the possibility that another person might have placed the grizzlies at the doorway. Some reliance was placed upon the case of *Dulhunty v J B Young Ltd*[1] a case involving a supermarket to which members of the public had access. Evidence tending to establish that employees of the appellant were responsible for placing the grizzlies where they were when the respondent fell was directly relevant to this matter.

[26] Moreover, it was clear from the outset of the trial that the respondent intended to seek such a finding. In the course of opening, counsel for the respondent said in the course of an argument about discovery:

> "MR CROW: ----- and occasionally rocks - yes - and in those days, the rocks were supposed to be removed by the defendant's

[1] (1975) 50 ALJR 150.

> employees and put to the side of the shed, not straight into the doorway, and now the system is different."

[27] The learned trial judge said when speaking of the issues as he saw them at page 17 of the record:

> "HIS HONOUR: And your complaint is that there were rocks where you step down from the – from the step, you step down onto the rocks. Now, I have to decide whether that's unsafe and if it is, whether it was caused by some conduct on the part of the defendant or the defendant's agents."

[28] A notice to admit that the grizzlies had been placed near the doorway by the appellant's employees had been served on the appellant by the respondent. The appellant did not make the admission called for.

[29] Although some general submissions were made by counsel for the appellant before us there was no evidence placed before this court to suggest that the appellant was deprived of any opportunity to lead evidence on this subject at the trial.

[30] This issue in my view was open on the case as pleaded and the issue was addressed in evidence and the learned trial judge determined it.

[31] It seems to me that the approach taken by the appellant to the question of the pleadings is an unnecessarily restrictive one and not consistent with the approach in cases such as *Leotta v Public Transport Commission of New South Wales*[2] and *Katsilis v The Broken Hill Pty Co Ltd*.[3]

[32] Similarly, in my view it was open to the learned trial judge to base the first finding of negligence on the general particular relied upon in the absence of any attempt by the appellant to narrow it. Indeed whether the pleading contained such a particular or not I am inclined to think that the first finding of negligence would have been open on the evidence placed before the court. See *Katsilis v The Broken Hill Pty Co Ltd*.[4]

[33] As to the complaint about the finding as a matter of fact that the appellant's employees were responsible for where the grizzlies were placed, in my view his Honour's conclusion was plainly open on the evidence as to who had access to the terminal, who was present during the time that the respondent carried out his work and the evidence generally as to the reason why the grizzlies had to be removed.

[34] It is unnecessary to consider the question whether breach of ss 28 and 30 of the *Workplace Health and Safety Act* 1995 (Qld) gives rise to a cause of action and the associated questions of onus of proof so far as other relevant provisions of that Act is concerned.

[35] In its outline, the appellant challenged the finding that the respondent was not guilty of contributory negligence but did not address any argument orally to the court on this subject.

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[2] (1976) 50 ALJR 666
[3] (1977) 52 ALJR 189
[4] (1977) 52 ALJR 189 at 201 per Stephen, Mason, Jacobs and Murphy JJ

[36] His Honour found that the appellant had failed to discharge the onus which rested upon it on this issue. The relevant findings are at paragraphs 24 to 26 inclusive of the judgment. In summary his Honour referred to the fact that the respondent had not seen the rocks prior to falling over them and had never seen rocks in that area before. He was, according to the findings made, intent upon his work and it was necessary for him to twist into a side on position to descend the stairs whilst carrying the buckets of samples. His safety glasses were dusty and there was a contrast between the bright lighting of the shed and the somewhat darker conditions outside. The learned trial judge found that the obstacle was an unusual one and that the respondent was entitled to assume that the doorway would not be obstructed. In my view the finding that the respondent was not guilty of contributory negligence was open to the learned trial judge and should not be disturbed.

[37] Although there were a number of challenges made to the assessment of damages in the notice of appeal and the written outline, oral submissions were addressed to the court only upon the issue of the extent to which a pre-existing degenerative condition of the respondent's back had been accelerated by the injuries sustained in the accident of 6 October 2001. This finding affected a number of the heads of damages.

[38] An orthopaedic surgeon, Dr Cook, had expressed the opinion in a report (exhibit 7) that the respondent would have been able to continue working as a coal tester for somewhere between three to seven years from the date of the accident before degenerative changes would have first limited and then deprived him of the capacity to do so. The report states:

> "It is felt that somewhere over that time span that he would have begun to experience increasing low back pain and discomfort associated with his work especially lifting and carrying buckets of coal and putting them in the back of vehicles to take away for testing. As his low backaches and pains gradually increased it would have become necessary for him to try to obtain work of a lighter nature and no doubt similar to that that he currently performs."

[39] The respondent has been working in a position which involves less strenuous work since he returned to work after the accident.

[40] Dr Cook was cross-examined at some length. He repeated the same opinion although conceded that on certain assumptions the time frame might be shorter. On the other hand he thought that if the respondent had a high pain threshold or had been fortunate enough for the pain not to have presented itself until a later rather than an earlier time within the time frame, he may have worked for a longer period than the seven years which represented the upper limit referred to in the report. This is necessarily an area in which precise calculation is impossible.

[41] It is said on behalf of the appellant that his Honour, in allowing economic loss over the period that had passed since the accident (about two years and seven months) and allowing three years for the future, took an overly favourable view of the evidence for the purposes of assessing the respondent's damages and that, in accordance with Dr Cook's evidence, the allowance should have been made for the possibility that the respondent would have ceased such work by the time of trial or shortly thereafter. The respondent has given a notice of contention, claiming that the damages have been assessed on a less favourable basis than the evidence

justified and failed to make allowance for the fact that the respondent may have worked beyond the seven year period for reasons that have already been mentioned.

[42] His Honour had to consider the possibility that the respondent might have ceased work by trial or that he might have continued to work for the whole seven years. As has been mentioned, there was also the possibility he may have worked beyond this. No doubt a less favourable view of the years of purchase was possible but the allowance his Honour made was open and should not be disturbed.

[43] There was, in the written outline, a challenge to the preference by the learned trial judge for the evidence of Dr Cook over that of another orthopaedic surgeon, Dr Boys, who expressed the view that the respondent had suffered no more than a soft tissue injury in the incident which would have cleared up within some months. Dr Cook's view is that the respondent had suffered an injury to the spine with the result that a largely asymptomatic degenerative condition had been rendered symptomatic (something which the learned trial judge accepted) and that the degenerative process had been accelerated in the way already discussed. The preference for Dr Cook's evidence, which was based upon an acceptance also of the respondent's evidence about his pre-accident condition, was plainly open to the learned trial judge.

[44] A challenge was made to the finding by the learned trial judge that some allowance should be made in past economic loss and future economic loss for the extra costs associated with his having to travel from his home to Mackay. His home is close to where he had been carrying out his work at Dalrymple Bay, whereas it is a significant distance from Mackay, where he now carries out his employment. The evidence suggested that the respondent had to pay an extra $192 per week. His Honour expressed the view that things may be different in the future and raised the question of how long it would be reasonable to expect the appellant to pay for the costs of travelling the additional distance. It does not seem to me that there is any error in the approach that his Honour took nor any objection in principle to such a claim being advanced since the expenditure clearly results in a loss to him.

[45] The respondent advanced a claim for loss of overtime. No oral submissions were addressed to this subject by the appellant but they were challenged in the notice of appeal and are the subject of written submissions. The respondent is employed by the same employer who employed him at the time of the accident. He advanced a claim based upon the loss of overtime which he would have earned had he still been a coal sampler as compared with his current position. The learned trial judge was not prepared to conclude that he had lost the benefit of working additional overtime on the material before him, which was not without its complexities. His Honour thought however, that the evidence supported a finding that the respondent currently works overtime from which he does not derive any financial benefit because it was necessary, given the pain and discomfort that he suffers, to rest and take time off for this purpose when he has worked extended hours. The result is that he loses the benefit of the overtime that he works in the sense that it is offset by the loss of income from the time that he then takes off. His Honour, relying upon evidence of overtime worked during what he thought was a two month period, discounted this by one half, to arrive at a figure of $84 per week net as representing the benefit which the respondent would receive from the overtime he worked were it not for the fact that he took time off after working the extended hours. The evidence upon which his Honour relied in this regard is to be found at page 279 of the record (and is part of exhibit 22) and the amount which his Honour thought represented

overtime of two months is in fact overtime worked for one month. More than one half of this would appear to have been represented by overtime worked when another employee was on leave, something which his Honour thought would only occur once a year. He thought that the other overtime which related to monitoring work would be more regular.

[46] His Honour's discount of 50 per cent in this regard in fact is, given what appears to be a misunderstanding on his part, a discount of 75 per cent.

[47] The only oral evidence on the subject appears at pages 108 and 109 of the record.

[48] The evidence, it must be said, is relatively slight and it must be doubted whether it justified an allowance for ongoing losses calculated in this way. The amount allowed for the past and future loss is not insignificant. Nevertheless, the evidence justified a finding that the respondent had suffered and would suffer a loss and the evidence referred to provided some evidence by which it might be measured. Having regard to the heavy discount in fact applied, I am not prepared to conclude that the assessment was not open on the evidence.

[49] There was a challenge to some minor amounts which were not pressed in argument and which would not, given the principles expressed in cases such as *Brown v Hale*[5] attract the attention of this court.

[50] The appeal should be dismissed with costs to be assessed.

[51] **JONES J:** I agree with the reasons expressed by Cullinane J and the order proposed.

[5] [1996] 1 Qd R 234