SUPREME COURT OF QUEENSLAND

CITATION:	*Moore v Kelly & Anor* [2006] QCA 380
PARTIES:	**PHILLIP JOHN MOORE** (plaintiff/appellant) **v** **MATTHEW BARRY KELLY** (defendant/first respondent) **SUNCORP METWAY INSURANCE LIMITED** (ACN 075 695 966) (defendant/second respondent)
FILE NO:	Appeal No 2686 of 2006 SC No 1771 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2006
JUDGES:	McMurdo P, Jones and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	DAMAGES - MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - MEASURE OF DAMAGES - PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – where appellant injured in an accident – where evidence of appellant's future economic loss was unreliable – where credibility of appellant's witnesses was in question – whether the learned trial judge erred in assessing damages *Fox v Percy* (2003) 214 CLR 118, cited *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, applied
COUNSEL:	C Newton, with M Alexander, for the appellant S Williams QC, with DJ Murphy, for the respondents
SOLICITORS:	Carter Capner for the appellant Jensen McConaghy Solicitors for the respondents

[1] **McMURDO P:** The appeal should be dismissed with costs for the reasons given by Douglas J.

[2] **JONES J:** I have had the advantage of reading the reasons prepared by Douglas J. I agree with them and the orders he proposes.

[3] **DOUGLAS J**: At the trial of this matter, which was an assessment of the damages suffered by the appellant as a result of injuries he received in an accident, the learned trial judge assessed the appellant's damages for past and future economic loss as $85,000 without allowing anything for interest "because it is impossible to know if any part of that notional sum would have been earned in the past". The nature of his Honour's findings was dictated by the very real difficulties he had in believing the appellant and his witnesses in respect of the prospects of the appellant seeking or obtaining employment before and after the accident he suffered on 25 May 2000.

[4] At that stage the appellant was 51 years old. He had qualified as a plumber in England where he worked from the age of 16 until he was about 28 when he emigrated to Australia. Here he worked as a plumber and established his own large plumbing and draining business which went into liquidation after a company which owed it about $1.5 million itself had gone into liquidation. He did not return to plumbing except for a period of about 12 months after his companies were wound up in 1992-1993 when he did maintenance work and repair of defects on previous projects. He then tried to recover his fortunes from property development, a venture which failed partly because his advisor and partner proved to be an incompetent and dishonest solicitor.

[5] When the failure of that venture became clear in June 1999 he did not return to work as a plumber but applied to Centrelink for a Newstart allowance and has been receiving social security payments from then onwards. As his Honour found, the appellant had not been employed for remuneration since the collapse of his business in about 1992 until he began to receive the social security payments.

[6] The appellant sought to establish that, a few days before his injury, he had secured employment as a plumbing supervisor with a plumbing contractor called Etter and Green Plumbing and Drainage Pty Ltd and was to have commenced work on the Monday following his accident, 29 May 2000. His Honour did not believe that he had been offered such a position for a variety of reasons analysed carefully by him in his reasons at [23]-[47]. There was evidence clearly available to his Honour to reach that conclusion and I do not understand the submissions of the appellant to challenge his ability to conclude that the appellant was not made a genuine offer of employment as a plumbing supervisor at that time.

[7] Having rejected that basis for the appellant's claim for damages for economic loss, his Honour went on to consider the possible alternative bases:

> "[48] It follows that the factual basis for the computation of loss undertaken by Mr Thompson has not been made out. The consequence is not, of course, that the plaintiff recovers nothing by way of damages for economic loss. A consequence of the plaintiff’s broken leg is that he has lost his capacity to earn an income as a plumber, or plumbing foreman, or plumbing supervisor. I am not satisfied that he

would have utilised that capacity, as he claims, with Etter and Green but he might have utilised it with some other employer for all or some of the years between 2000 and 2013 when he will turn 65. The decision of the High Court in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 requires an assessment of the degree of likelihood that the plaintiff would have engaged in remunerated employment had he not been injured. The purpose of the assessment is to determine the extent to which the loss of the plaintiff's earning capacity, which in this case is complete, has been and/or will be productive of financial loss: *Husher v Husher* (1999) 197 CLR 138; *Graham v Baker* (1961) 106 CLR 340 at 347.

[49] What then was the chance that the plaintiff would have returned to plumbing work after May 2000? What is the degree of probability that he would have obtained paid employment in his trade? The evidence suggests the likelihood is low. The starting point of the assessment is that in the eight years or so between the collapse of his plumbing business and his injury the plaintiff did not seek paid employment. There is no doubt he was deeply affected by the liquidation of his company and no doubt bereft of motivation. It is significant that when he sought to re-establish some income he did not return to his trade but turned to the novel venture of property development. When that, too, failed in mid 1999 the plaintiff was again, understandably, devastated. Although his finances must have been straitened he was not impelled to return to work. Instead he sought social security.

[50] When in August 1999 the plaintiff wanted to retain his drivers' licence he invented a fictitious job rather than applying for a real one. In September 1999 his wife enrolled at a TAFE college to improve her accounting and computer skills in order to enhance her prospects of obtaining employment. I infer that the family needed money. The plaintiff was not moved by shame to go back to work himself. Mr Etter gave evidence, which I accept, that at any time from the mid 1990s he would have employed the plaintiff as a plumber and would have had no difficulty in finding a position for him. The plaintiff could have earned between $700 and $750 gross per week plus superannuation and overtime. The plaintiff's own evidence was that he could have obtained the position he had his daughter assert that he had, that of delivery driver with Brisbane Earthmoving Pty Ltd for $450 per week. He said that he could have had the driver's job whenever he wanted. He never applied for it.

[51] As the years went by it would, I think, have become progressively less likely that the plaintiff would have made the effort to return to work. Idleness appears to have had its

> attractions for the plaintiff. Eight years without a regular income had not induced the plaintiff to seek work. It is habit as well as necessity that keeps people working, and the plaintiff had lost the habit.
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> [52] I would assess the plaintiff's economic loss on the basis that there was one chance in five that he would have returned to remunerated employment as a plumber had he not been injured. There is no firm evidentiary basis for that assessment, or indeed for any other assessment, but the evidence strongly indicates the likelihood of a return to work was low. I must for the purposes of the assessment quantify the chance and 20 per cent as a degree of probability is the best I can do."

[8] His Honour then applied that percentage, 20 per cent, to uncontroversial figures dealing with the appellant's likely income as a plumbing supervisor had he worked to 60 or 65. His Honour said that, given the appellant's years of idleness, it was perhaps more likely that he would have retired earlier rather than later but took the average of the two figures for economic loss totalling $426,859 and assessed the actual loss as one-fifth of that, $85,371.80, which he rounded down to $85,000.

[9] As I have already indicated his Honour was unable to conclude on the evidence available to him whether any of that loss would have been past loss and was not "disposed to make assumptions in the appellant's favour". The evidence of an incident where the appellant had previously misled the Magistrates Court in order to retain a driver's licence after a drink driving offence provided significant justification for that conclusion by his Honour as did other evidence of assertions made by the appellant to Centrelink and to the Court in respect of his gratuitous care claim where he said that he could not do things which surveillance films established that he was "demonstrably able to do"; see at [60].

[10] In my view these conclusions by his Honour were firmly founded in the evidence and based on conclusions as to credibility which were open to him to make. They were also based on the fact that the appellant had not worked as a plumber or in a salaried position for about 8 years before his accident.

[11] The submissions for the appellant were that his Honour failed to place sufficient weight on evidence that the appellant was trying to spend part of that period by recovering some of his investments through property development and litigation and that he had also suffered from a foot injury suffered in late 1999 which would have prevented him returning to work for some months. The evidence for that submission was rather thin; see R 22 ll 8-27, R 49-50. The payments received by him during this period were from his solicitor, allegedly from work done by the solicitor, not the appellant and from the appellant's children.

[12] His Honour was also criticised for allegedly finding that the appellant would not return to work. His Honour made no such finding. He did find at [54] that there was no basis for thinking that he would set up business for himself a third time or that he could have raised the capital to do so. It was submitted that he could have worked as a self-employed plumber without the need for significant capital behind him but, if he had done that, the evidence does not support a real likelihood that his net income

would have been significantly greater than a plumber employed as a supervisor. Nor does the evidence support any conclusion that he would have had the energy or money to recommence a more significant plumbing business akin to the business that failed.

[13] His Honour also found that he would not have worked for the firm Etter and Green pursuant to the offer of employment that he believed was not genuine. He did conclude, however, that he may have used his capacity to work as a plumber or plumbing foreman or supervisor with some other employer for all or some of the years between 2000 and 2013 when he would turn 65; see at [48]. As I have already said he assessed the chance of the appellant returning to remunerated employment as a plumber as one chance in five.

[14] That seems to me, again, to be a conclusion open to his Honour on the evidence, as was his conclusion at [54] that it was entirely speculative that the appellant would have recommenced business as a plumber on his own account, particularly if his Honour meant by that a business of the type previously operated by the appellant. That seems to be a logical conclusion given that the likely net income from work as a self-employed plumber operating on a smaller scale was comparable to that able to be earned by a supervisor and because of his Honour's reference to the need to raise capital. On the basis that the return to business regarded as entirely speculative by his Honour was business on a larger scale requiring some significant capital backing, his Honour was justified in disregarding that possibility in assessing the damages; *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, 643. Again those were matters of evidence where the trial judge was well equipped to make the factual findings on which that assessment was based.

[15] Nor did his Honour doubly discount the economic loss claim as suggested in the appellant's written submissions. Rather he assessed the probability of his loss as a percentage chance and applied that to the mean of the amount claimed by the appellant as representing the properly assessed loss to ages 60 and 65 respectively, on the perfectly legitimate assumption that the appellant would have worked only to the age of 62 years and six months.

[16] Mr Williams QC also drew our attention to a number of other matters relevant to the appellant's credit that were not explicitly mentioned by his Honour. One significant issue was that the appellant's statement of loss and damage referred to his future plans to run his boat as a survey vessel with his son. The original instructions to the accountant who gave evidence for the appellant were to examine the likely income the appellant would earn from a boating business. He was unable to do that because of a lack of documentation or information from the appellant. It was not until 18 months later, however, that he was instructed to proceed on the basis that the appellant would have worked as a plumber.

[17] The analysis by his Honour at [49]-[51], which is extracted above, was also relied on by Mr Williams QC as establishing the significant factual findings justifying his Honour's conclusions about the degree of probability of the appellant returning to work, consistently with the High Court's decision in *Malec v J C Hutton Pty Ltd*.

[18] The principle that should guide us in cases like this is that findings of fact by a trial judge, based on the credibility of a witness, may only be set aside on appeal where incontrovertible facts or uncontested testimony demonstrate that the judge's

conclusions are erroneous or where it is concluded that the decision at the trial was glaringly improbable or contrary to compelling inferences in the case; see *Fox v Percy* (2003) 214 CLR 118, 127-128 at [26]-[29]. That does not excuse us from weighing the conflicting evidence and drawing our own inferences and conclusions, but nothing in the evidence suggests that the conclusions or findings made by the trial judge were either inappropriate or not open to him.

[19] His findings on credit were based not just on an assessment of the appellant's and the other witnesses' demeanour but on the appellant's own admissions of dishonesty, in particular at pp. 77-84 of the record, and on the objective evidence that the appellant had not worked for remuneration in any significant form between 1992 and the date of the accident. Nor did he have any documentary evidence recording any attempt to obtain employment from August 1999 to mid-May 2000; R 50 ll 45-51. He was also shown on film performing activities of a type he had previously claimed to be beyond him, such as washing windows; R 74-75.

[20] His Honour's view of the appellant's honesty was such that he referred the papers to the Attorney-General in relation to an issue whether he had perjured himself before the Magistrates Court. The evidence justified him in taking that course and in forming the view that he did about the prospect and the likely timing of any return to work by the appellant.

[21] I would dismiss the appeal with costs.