SUPREME COURT OF QUEENSLAND

CITATION:	*Merrin v Cairns Port Authority* [2005] QSC 229
PARTIES:	**ANNETTE ELIZABETH MERRIN & THOMAS WILLIAM MERRIN** (Applicant) v **CAIRNS PORT AUTHORITY** (Respondent)
FILE NO/S:	317 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	3 August 2005
DELIVERED AT:	Cairns
HEARING DATE:	3 August 2005
JUDGE:	Jones J
ORDER:	**1. Application dismissed.** **2. Applicants pay the respondent's costs to be assessed on the standard basis.**
COUNSEL:	Mr A Philp SC for the respondent
SOLICITORS:	Applicant self represented McDonnells Solicitors for the respondent

[1] By this application, the applicants seek to remove into the Supreme Court their action for damages which was commenced in the District Court in Cairns in 1997. By an Amended Claim dated 1 November 2004 the plaintiffs sought damages in the sum of $250,000 for negligence and public nuisance. The damages were not particularised in that pleading. An Amended Defence was filed on 3 December 2004 generally denying the claim.

[2] On 15 July 2005 the plaintiffs delivered an Amended Statement of Loss and Damage[1] identifying a claim in excess of $1,456,000. This forms the basis for the application which, if successful, would permit the applicants to deliver an Amended Statement of Claim in the terms of ex "G" to the affidavit of Mrs Merrin.

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1 Ex "C" Affidavit of Annette Merrin filed 28 July 2005

[3] The claim relates to the sinking of a catamaran sailing vessel on 28 March 1997. The vessel was used by the applicants as a residence for themselves and their two children, then aged respectively 13 years and 8 years. The applicants allege that the sinking of the vessel was the result of its striking a piece of a pontoon which was floating in an area of the ocean under the control of the Cairns Port Authority. The applicants allege that the presence of this obstruction was the result of the negligence of the respondent or was a public nuisance caused by it.

[4] The application is made pursuant to s 82 of the *District Court Act* 1962 which relevantly provides:-

> "(1) Where there is now or hereafter pending in the District Court an action, the plaintiff may at any time apply to the Supreme Court for an order to transfer the action to the Supreme Court, on the ground that there is reasonable ground for supposing that the relief or remedy sought is not available in the District Court.
>
> (2) If, on any such application, the Court is satisfied that there is reasonable ground as aforesaid, it shall made an order that the action be transferred to the Supreme Court."

[5] The relevant principles for the application of that section have been considered in a number of cases but I rely particularly on the discussion by Master Lee QC (as he then was) in *Re Lovell* .[2] The first point to observe is that an order for transfer of action to the Supreme Court "will not be automatically be made on the mere asking"[3]. What is required is for the applicant "to establish with clarity that she has brought herself within the section. Unless she does that, unless she convinces this court that there are reasonable grounds for supposing the amount recoverable to be in excess of [the limit] she must fail." *Stiffel v Industrial Dwelling Society Ltd*[4].

[6] Master Lee in *Lovell* observed also that it was not necessary "to advance evidence in full detail such as might be adduced at the trial of the action. On the other hand, it is not sufficient for a mere opinion to be expressed that the amount recoverable is likely to exceed the jurisdiction of the District Court without there appearing some reasonable grounds for so supposing."[5]

[7] Mr Philp of Senior Counsel appearing for the respondent drew my attention to the decision of *Woodward v Bernafon Australia Pty Ltd*[6] where Justice Fryberg expressed a view that the test was satisfied if there was a genuinely held subjective opinion that a sum in excess of the jurisdictional limit could be recovered. For my part I do not believe that that statement of the test is supported by authority, nor does it accord with the terms of the Act. The Act provides for a defendant in the event that the plaintiff has made a claim in the higher jurisdiction to apply to the court to have the claim removed to a lower court. The fact that there is a right to remove an action into a different court available to all parties would seem to me to indicate that the test must be objectively applied.

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2 Unreported O/S 587/83 – 5 August 1983; see also *Doo v Murphy*, Unreported, 995/92 – 22 December 1992

3 Ibid at p 2

4 (1973) 1 WLR 855

5 *Lovell* at p 9

6 Unreported 28 August 2002, No 4160/2002

[8] The key components of the Amended Statement of Loss and Damage relate to are for the damage to the property of the applicants, principally the vessel and its contents, which were jointly owned by them and damages for personal injuries that each of them claimed they suffered as a consequence of this event.

[9] The evidence before me indicates that the cost of the repairs of the vessel, if undertaken, would be likely to have been $70,000 and the value of the contents was just in excess of $50,000. To this claim there would be added the costs of salvage and various other incidental expenses which would indicate that the property damage assessment would not exceed $150,000. The applicants also claimed rental expenses for their need to provide a substitute dwelling. The period of time over which such a claim could be sustained was not particularly identified but it is a factor which I take into account in assessing claims relating to the loss of property. In short, it is reasonable to assume that the claim in this respect would not exceed $75,000 - $80,000 for each claimant.

[10] The major components of the respective claims for personal injuries may be listed as follows:-

	Mr Merrin	**Mrs Merrin**
Out of pocket expenses (medications)	$849.55	$114.60
Loss of Income	$80,000	$215,000 ++
Loss of Earning Capacity	$40,000	$522,500
Pain and Suffering	$103,000 (both)	
Care Expenses	$159,000	

[11] The claim for pain and suffering on behalf of Mrs Merrin is somewhat difficult to gauge since the only medical evidence relating to her are some medical practitioner notes (ex "EK5" and "EK6")[7] which do not relate any specific injury to the incident. Moreover, in the most recent Statement of Loss and Damage (ex "C") to her own affidavit it is claimed that Mrs Merrin "does not suffer from any debilitating injury which would prevent her from returning to work, even though she is under severe pressure and stress".[8] One assumes then that the large proportion of this claim must relate to the claim by Mr Merrin. In this respect the evidence which identifies any injury which could be found to be attributable to the incident is sketchy indeed.

Mr Merrin

[12] Mr Merrin's claim is to the effect that as a result of the incident he suffered physical and emotional disability. This has resulted in his being "stressed and severely depressed"[9] and is having no chance of going back to his work as a diver and caretaker of vessels.

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7 Affidavit of Etherios Karydas filed 2 August 2005

8 Ex "C" p 7 affidavit of Mrs Merrin (supra)

9 Ex "C" at p 7 affidavit of Mrs Merrin (supra)

[13] The evidence shows that Mr Merrin had had no formal employment for six years prior to the incident; that on 10 March 1995 he was in receipt of Sickness Benefits until 25 July 1996; and thereafter was granted a Disability Pension which he remained on until the date of the accident and ever since.

[14] The medical conditions for which he was presumably granted the Pension are set out in the report of Dr McAuliffe dated 10 July 1996[10] and include a reference to "stress and depression". The assessment at that time refers also to more serious psychological/psychiatric conditions. The medical examinations after the incident do not identify any new injury caused by it. There are references to symptoms of sleeplessness, poor concentration, anger, stress and aggressiveness.[11] There is reference also to a lung disorder which is later discussed by Dr Heiner in a report dated 27 July 2004[12]. This examination resulted in a diagnosis of asthma but otherwise states that Mr Merrin's "general health has been good". The only other post-incident medical evaluations are found in the medical notes of Dr Jenkins – "EK4" – which predate the referral to Dr Heiner referred to above.

[15] At best, all that can be made of this material is that Mr Merrin suffered quite significant pre-existing psychological/psychiatric conditions. It may well be that the incident has brought about some exacerbation of that condition and indeed it was most likely to have done so but what has not been established is the extent and duration of any such exacerbation whether the condition is treatable and what is the likely prognosis. Given Mr Merrin's age at the time of the incident and the florid nature of his pre-existing condition as described in the reports of Dr McAuliffe, it is unlikely that the exacerbation of that condition would call for anything more than a moderate allowance for pain and suffering.

[16] Similarly, in relation to Mr Merrin's claim for loss of income and loss of earning capacity the pre-accident record of sources of income other than the disability pension are not sufficient to sustain anything more than a very moderate global allowance for the loss of the part-time income which was essentially being allowed to live rent free on board a vessel which he was caretaking. The quantum of this was suggested at $6,400.[13]

[17] The item for care expenses is unsupported by any acceptable evidence. The arrangements for care is that care is provided by Mrs Merrin who receives a carer's pension on that account. In the Amended Statement of Loss and Damage the applicants disclose that in August 1994 Mrs Merrin "chose to leave her employment as her husband had not been well" and was paid Social Security Benefits in that connection.[14] That status does not appear to have changed since the incident and certainly there is no evidence showing any change because of the incident. The only evidence relating to the need for care is contained in the report of Dr McAuliffe dated 11 March 1999 – ex "EK3"[15]. Again there is no linking of this need on the part of Mr Merrin to disability caused by the incident nor is there any opinion expressed as to the length of time such care would be required and whether the condition could be improved by treatment and medication.

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10 Ex "EK8" to affidavit of Mr Karydas (supra)
11 Report of Dr Jenkins ex "EK2" to affidavit of Mr Karydas (supra)
12 Ex "EK7" to affidavit of Mr Karydas (supra)
13 Ex "C" at p 4 affidavit of Mrs Merrin (supra)
14 Ex "C" at p 3 para [3] (a) affidavit of Mrs Merrin (supra)
15 Affidavit of Mr Karydas (supra)

Mrs Merrin

[18] So far as Mrs Merrin's claim is concerned she seeks allowances for past loss of income and loss of future earning capacity. These losses are predicated upon the requirement that she give up remunerated work in order to care for her husband. The costs of such care, if related to the incident, are properly part of his claim and do not justify any claim on her part for loss of income. Mrs Merrin has frankly stated in the Statement of Loss and Damage that she "does not suffer from a debilitating injury which would prevent her from returning to work".[16] She was not in gainful employment at the time of the incident nor for some years prior to it. Her intention was to return to the Torres Strait where she had the prospects of re-entering the workforce. She asserts these prospects had been dashed by the need to care for her husband. In the absence of any injuries which has resulted in the loss of earning capacity it does not seem open to Mrs Merrin to make a claim for loss of earnings and earning capacity in the manner in which it is presently framed.

[19] The items of claim not discussed above are not of any particular significance. They relate to special damages for medication, the quantum of which is quite small and to the inability to gain income from beachcombing activities.

[20] There is no direct evidence to verify the principal issues of the claim. Specifically, there is no direct evidence linking the extent of the disabilities now described, to the incident referred to.

[21] Even if the articulated claim could be supported, the prospect of an award at the levels sought is not promising. Mr Merrin, prior to the incident, was in receipt of a Disability Pension. At the time of the incident he was 54 years of age, his pre-accident earnings other than the pension were minor and consistent with his status as a recipient of such a pension. Given the pre-accident history and the lack of identified physical or psychological injury referrable to the incident means that claims in the extent sought in the pleadings cannot be sustained.

[22] In the end result there is, to my mind, no reasonable ground for supposing that the relief or remedy sought is not available in the District Court. I dismiss the application and order that the applicants pay the respondent's costs to be assessed on the standard basis.

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16 Ex "C" at p 7 affidavit of Mrs Merrin (supra)