SUPREME COURT OF QUEENSLAND

CITATION:	*Wynne v Davey & Anor (No 2)* [2015] QSC 227
PARTIES:	**MARK DAVID WYNNE** (plaintiff) **v** **JOHNATHAN ALEXANDER DAVEY** (first defendant) and **NRMA INSURANCE ACN 000 016 722** (second defendant)
FILE NO/S:	No 12089 of 2014
DIVISION:	Trial Division
PROCEEDING:	Costs
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 200
DELIVERED ON:	7 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers; written submissions received on 30 July 2015 and 31 July 2015
JUDGE:	Burns J
ORDER:	**1. That judgment be entered for the plaintiff against the defendants in the sum of $1,015,104** **2. That the defendants pay the plaintiff's costs of and incidental to the proceeding to be calculated on an indemnity basis**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where plaintiff made an offer to settle pursuant to Part 5 of Chapter 9 of the *Uniform Civil Procedure Rules* 1999 (Qld) prior to trial – where offer was not accepted and trial proceeded – where the judgment awarded was more than the amount offered – whether the court should depart from r 360 of the *Uniform Civil Procedure Rules* 1999 (Qld) *Motor Accident Insurance Act* 1994 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 360 *Calderbank v Calderbank* [1975] 3 All ER 333, cited *Campbell v Jones* [2003] 1 Qd R 630; [2002] QCA 332, cited *Castro v Hillery* [2003] 1 Qd R 651; [2002] QCA 359, cited

McChesney v Singh & Ors [2004] QCA 217, cited
Morgan v Johnson (1998) 44 NSWLR 578, cited
Pollock v Thiess Pty Ltd & Ors (No 3) [2014] QSC 121, cited

COUNSEL: J Kimmins for the plaintiff
G O'Driscoll for the defendants

SOLICITORS: Shine Lawyers for the plaintiff
Moray & Agnew for the defendants

[1] On 17 July 2015, judgment was handed down on the issue of liability. In percentage terms, liability was apportioned 85:15 in the plaintiff's favour. Since then, written submissions have been received from the parties regarding two issues: (1) the amount for which judgment should now be entered and (2) the appropriate order as to costs.

Judgment

[2] Prior to trial the parties reached agreement on the quantum of damages, which agreement was confirmed by correspondence passing between the parties' solicitors on 11 and 16 March 2015. As there appears, quantum was agreed in the amount of $1,200,000 (inclusive of rehabilitation expenses totalling $5,760). As such, judgment will be entered for the plaintiff against the defendants in the sum of $1,015,104, being 85 per cent of the agreed quantum (net of the rehabilitation expenses).[1]

Costs

[3] For the plaintiff, it was submitted that there should be an order that the second defendant pay his costs of the proceeding to be calculated on an indemnity basis. In support of that submission, reliance was placed on the making of two formal offers to settle in accordance with Part 5 of Chapter 9 of the *Uniform Civil Procedure Rules* 1999 (Qld). The first such offer was made on 23 September 2014 in the sum of $950,000 and the second was made on 25 February 2015 in the sum of $900,000. Both offers were expressed to be inclusive of any statutory refunds. Reference was also made to a *Calderbank* offer[2] made on 11 March 2015 which was produced. It was expressed to be in the sum of "$750,000 clear of rehabilitation expenses".

[4] For the defendants,[3] it was conceded that they should be ordered to pay the plaintiff's costs of the proceeding, but it was submitted that the "appropriate order"[4] should be that those costs be calculated on the standard basis up to the expiration of the formal offer to settle made on 23 September 2014 and, thereafter, that they be calculated on an indemnity basis.

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1 Both parties submitted that a judgment in that amount should be entered.
2 See *Calderbank v Calderbank* [1975] 3 All ER 333.
3 Although all references in the body of the submissions were to "the defendant", the submissions were clearly made on behalf of both defendants.
4 Within the meaning of UCPR r 360(1).

[5] Rule 360 UCPR is in the following terms:

> "**Costs if offer by plaintiff**
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> (1) If—
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> (a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; and
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> (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
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> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.
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> (2) If the plaintiff makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule."

[6] It will be seen from the terms of r 360 that, even though two formal offers to settle were made in sums which were less than the amount for which judgment will be entered, the first of those offers in time is taken to be the only offer for the purposes of that rule. That, of course, is the offer made on 23 September 2014. I am satisfied that the amount for which judgment will be entered is "no less favourable than that offer" and that the plaintiff was at all material times willing and able to carry out what was proposed in that offer, that is, to accept payment of the sum offered (and costs) in full and final settlement of the proceeding.

[7] It follows that the court must order the defendants to pay the plaintiff's costs calculated on an indemnity basis unless the defendants have shown that "another order for costs is appropriate in the circumstances".[5]

[8] In the written submissions made on behalf of the defendants, an attempt was made to do so. In that regard, a series of offers made by the plaintiff was referred to; the formal offer to settle dated 23 September 2014 ($950,000), a "mandatory final offer" dated 14 May 2014 ($1.25 million) and the *Calderbank* offer dated 11 March 2015 ($750,000). It is, however, to be observed that the "mandatory final offer" to which the defendants' counsel referred was not produced and, in any event, it was in a sum greater than the amount for which judgment will be entered.

[9] The defendants' counsel then submitted:

> "In those circumstances it was not imprudent for the defendant to reject the $1.25 million that was first made. The judgment sum has indicated of course that it was imprudent of the defendant after the judgment to have rejected the $950,000.00 as the plaintiff had bettered it.
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> As was clear by his Honour's judgment there were clear factual issues of dispute between the parties and issues of credit that could only be resolved at trial. Those factual issues and issues with respect to the relative culpability of

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5 UCPR r 360(1).

> the respective [sic] which could only be resolved on a trial, which his Honour did in favour of the plaintiff, essentially rejecting the first defendant driver's (and his witnesses') versions."

[10] It was then submitted that the "history of offers from the plaintiff"[6] and the "diametrically opposed factual conflict that existed" made it "appropriate" that the assessment of the plaintiff's costs not be made on the more generous indemnity basis until after the expiration of the formal offer to settle made on 23 September 2014.

[11] The history of the offers made on behalf of the plaintiff show nothing more than that the plaintiff reduced the amount he was prepared to accept by way of compromise as the trial approached. There is nothing unusual about that. Offers to settle are often made for tactical reasons or, in other cases, a reduction in the quantum of offers over time might reflect a desire on the part of a plaintiff to avoid going through the emotional turmoil of a trial regardless of the strength or otherwise of the evidence going in support of his or her case. It should also be appreciated that, even if an award of costs on an indemnity basis is ultimately secured at trial, the actual costs and outlays incurred by a plaintiff may in fact be higher than that award when assessed and, for that reason, the difference will be irrecoverable. Such a possibility may make compromise at a lesser sum in advance of a trial attractive. In the end, all that can be said with any degree of assurance is that, as the defendants have submitted, they were right to reject the "mandatory final offer" but it was "imprudent" of them to reject the formal offer to settle made on 23 September 2014. The defendants cannot derive any support from the history of the offers made by the plaintiff in this case for the making of a different order to the one which, in the ordinary course, is contemplated by r 360.

[12] Turning then to the other basis for a different order which was submitted on behalf of the defendants, it is true that the versions offered by the plaintiff and the first defendant as to the happening of the accident were starkly different, and in important respects. However, the existence of such a contest was evident from an early point in time. Indeed, the versions offered to the investigating police on the day of the accident by the plaintiff, the first defendant and the various witnesses made that obvious. But that did not mean that such a conflict could only be resolved through the medium of a trial. To the contrary, it was open to the legal representatives for the parties to investigate the circumstances of the accident, as each did, and to form their own views about prospects of success, including views as to the likely credit findings that will be made at trial if it turns out that a trial will be required. In addition, the legal representatives were obliged to do so as far as they practically could in order to properly consider whether to accept or reject a formal offer to settle.

[13] Moreover, it cannot be suggested that some important evidentiary component in the plaintiff's case was unknown to the defendants until after the relevant offer expired or that there was a substantial change in the plaintiff's case on liability after that point in time. Either circumstance may supply a basis for the court to consider a different costs order,[7] but no such circumstance has been submitted to arise here.

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6 Counsel for the defendants also referred to "the history of offers between the parties" but no offer on behalf of the defendants was referred to, or produced.

7 See, for example, *Campbell v Jones* [2003] 1 Qd R 630; *Castro v Hillery* [2003] 1 Qd R 651.

[14] Counsel for the defendants referred to the statements of principle to be derived from *Pollock v Thiess Pty Ltd & Ors (No 3).*[8] However, in that case, McMeekin J was concerned with mandatory final offers made under the *Motor Accident Insurance Act* 1994 (Qld) and, in particular, the evidential onus cast on an offeree under that regime; his Honour was not dealing with formal offers to settle made under the UCPR.

[15] In the end, r 360 requires the making of a costs order in the plaintiff's favour to be calculated on an indemnity basis. That is the "ordinary provision [which] is expected to apply in the ordinary case."[9] This is an ordinary case, and that shall be the order.

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8 [2014] QSC 121.

9 Per Mason P in *Morgan v Johnson* (1998) 44 NSWLR 578 at 582, which passage was referred to in *McChesney v Singh & Ors* [2004] QCA 217, [13].