NEW SOUTH WALES COURT OF APPEAL

CITATION:
Sinclair v Darwich [2010] NSWCA 195

FILE NUMBER(S):
2010/39177

HEARING DATE(S):
5 August 2010

EX TEMPORE DATE:
5 August 2010

PARTIES:
Wayne Sinclair (Applicant)
Daniel Darwich (Respondent)

JUDGMENT OF:
Young JA Handley AJA Sackville AJA

LOWER COURT JURISDICTION:
District Court

LOWER COURT FILE NUMBER(S):
DC 4432/08

LOWER COURT JUDICIAL OFFICER:
Levy DCJ

LOWER COURT DATE OF DECISION:
18 November 2009

LOWER COURT MEDIUM NEUTRAL CITATION:
Darwich v Sinclair [2009] NSWDC 295

COUNSEL:
W H Fitzsimmons (Applicant)
K Andrews (Respondent)

SOLICITORS:
Hunt & Hunt (Applicant)
Carneys Lawyers (Respondent)

CATCHWORDS:

LEGISLATION CITED:

Motor Accidents Compensation Act 1999, s 109

CATEGORY:
Principal judgment

CASES CITED:
Baker v Salagiannis [2009] NSWCA 385
Holt v Wynter (2009) 49 NSWLR 128
Reeves v Reeves [2002] NSWCA 181
Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union (1979) 27 ALR 367

TEXTS CITED:

DECISION:
The application for leave to appeal is dismissed with costs.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

2010/39177

YOUNG JA
HANDLEY AJA
SACKVILLE AJA

Thursday 5 August 2010

SINCLAIR v DARWICH

Judgment

1 **YOUNG JA:** This is the concurrent hearing of an application for leave to appeal from a decision of the District Court and, if leave is given, a determination of the appeal.

2 The proceedings arise out of an incident that occurred on 27 February 2001. It seems tolerably clear that at about 6.45 pm on that date the respondent, then thirteen-years-old, was involved in an incident in a water shop in Juno Parade, Greenacre which caused the person apparently in charge of that shop, a gentleman of Asian extraction, to chase the respondent out of the shop and along Juno Parade possibly whilst holding a piece of wood. That person was referred to below as “the Asian man” and I will do the same.

3 The respondent decided to escape by running out onto Juno Parade. He seems to have been running diagonally. He safely passed through the eastern-bound lane but was hit by a vehicle being driven by the applicant whilst running across the western-bound lane. He was injured and taken to hospital. The police called at the scene. As will appear, the recollections of the two police officers who attended the scene are weakened by the delay and the notebook of one of them is missing. However, the respondent's mother swore an affidavit that one of the policeman said to her at the hospital that the applicant was not speeding and the accident was the respondent's fault for running across the road. The primary judge noted this, but said that that preliminary view of the police was not conclusive though it may have had the effect on the respondent's mother of inhibiting her from having her son take legal action.

4 Statements of bystanders made at the time suggest that the respondent ran across the road without looking. Those statements also confirm the police view that the accident was probably the respondent's fault.

5 The proceedings before the District Court were brought because no proceedings were commenced in respect of the accident until 19 September 2008. However, a claim form had been lodged with the applicant's insurers on 10 May 2007.

6 Section 109 of the *Motor Accidents Compensation Act* 1999 (the MAC Act) precludes a person from commencing proceedings in respect of a motor vehicle accident after three years from the date of the accident unless the relevant court gives leave. Section 109(3) of the MAC Act provides as follows:

> "The leave of the court must not be granted unless:
>
> (a) The claimant provides a full and satisfactory explanation to the Court for the delay; and
>
> (b) The total damages of all kinds likely to be awarded to the claimant if the claim succeeds are not less than 25% of the maximum amount that may be awarded for non-economic loss under s 134 as at the date of the relevant motor accident."

The dollar amount referred to in 3(b) is $67,750.

7 On 26 September 2008 a notice of motion was filed in the District Court seeking leave to bring the proceedings and that was the motion that was heard over three days by Levy DCJ. On 18 November 2009 his Honour gave reasons [2009] NSWDC 295, finding for the respondent.

8 On this application and appeal Mr Fitzsimmons of counsel appeared for the applicant and Mr Andrews of counsel appeared for the respondent. Although the matter was very much in issue before the primary judge there is no issue on this application about the respondent satisfying subs 3(a). The issues for us appear to me to be: (1) on whom is the onus of proof of the matters referred to in s 109(3) of the MAC Act; (2) whether the primary judge was in error in coming to the view that any prejudice caused

to the applicant by the delay was insufficient to deprive the respondent of the order he sought; and (3) whether the primary judge correctly dealt with the matters arising under s 109(3)(b) of the MAC Act.

9 As for the for the first, there are some expressions in the primary judge's reasons that the applicant had fallen short of establishing material prejudice. For instance, in para [57] he said:

> "In my view the defendant has failed to establish that it is unable fairly to defend itself...I therefore consider that it has failed to establish any significant prejudice."

10 The applicant says that when one reads the judgment as a whole including passages like that the primary judge reversed the onus of proof, it was for the respondent to show why the extension of time ought to have been granted, not for the applicant to establish matters.

11 A five judge bench of this court reviewed the authorities in this area of the law in *Holt v Wynter* (2000) 49 NSWLR 128. At p 146 of the report Sheller JA, who gave the majority judgment, said there was no presumption that an out of time application necessarily caused prejudice to the defendant. However, if the defendant proffered sufficient evidence to show that prejudice would be occasioned it was up to the applicant to show otherwise. Further, it always had to be borne in mind that the ultimate key question was whether the chances of a fair trial was likely.

12 Although there are some passages in the reasons of the primary judge which suggest he may have approached the question reversing the onus of proof, there are a number of other passages which point in the other direction, that is, as is the law, that if the applicant provided some sufficient evidence of prejudice the evidentiary onus passed to the respondent. If one analyses the primary judge's reasoning, as I will attempt to do, it seems to me that any error in this area did not affect the result of the motion in any event though I doubt whether the learned judge did make the error that the applicant accuses him of making.

13 The applicant puts that he suffers prejudice by delay in three areas:

1. It is now far more difficult to obtain witnesses to the event to give evidence or to obtain the identity of the possible witnesses.

2. There is difficulty in the availability of medical evidence.

3. There may be loss of evidence that might have come from the respondent's contact with an organisation called Australian Injury Compensation Service.

14 The primary judge rejected all three ends of alleged prejudice. It is unfortunately true that the judgment did not deal, or did not deal thoroughly with all the issues that seem to have been put for his consideration. However, it seems to me that that is not a fatal defect in this particular case.

15 The applicant's challenges to the primary judge's rulings on the question of prejudice on issues of liability, focus on the allegation that the primary judge failed to take into account a number of relevant considerations. The major matters were:

1. The primary judge failed to recognise the significance of the Asian man not being available as a witness.

2. The primary judge failed to appreciate the significance of the fact that the police officers' memory of the accident was poor and a notebook was missing.

3. The primary judge did not appreciate the significance of the fact that two vital witnesses could not be found.

However, the judge did hold that most of the vital witnesses were available. He said, as is the case, that the fact, if it be the fact, that some were reluctant to be approached or to give evidence was not a consequence of the delay and was a normal incident of litigation.

16 Mr Fitzsimmons says that the primary judge did not really deal with the point of a prejudice caused by the absence of witnesses at all. In particular, he submitted that the lack of availability of the evidence of the Asian man, is a most significant matter which the primary judge did not address at all. The applicant says that all his enquiries show that the water shop where the Asian man was working closed about three years ago and, despite his extensive searches, the Asian man cannot be found. If the claim had been notified in proper time, this difficulty would not have occurred.

17 However, there is a fair indication that the Asian man may have been Mr Park, an Asian man who remained at the scene and gave his name to the police. Again, it is rather difficult to see the need for evidence from the Asian man in view of the fact that there is evidence apparently available, not only from the respondent's friend, but also from the police, the applicant himself and the driver of a car who was following the applicant. It may have been nice to have had the Asian man's evidence as well, but I cannot see how it was a vital matter of prejudice.

18 Mr Fitzsimmons also notes that although the police were interviewed and the sergeant and a senior constable as they now are, did attend the accident, the senior constable's notebook which contains, or probably contains, the statements of the independent witnesses has been lost or mislaid. Again I consider that whilst this is a matter which will cause some inconvenience, it is not really a major matter of prejudice in view of all the evidence that is otherwise available.

19 Accordingly, the main thrust of the prejudice case was on the issue of liability and I cannot see that there is sufficient in what was so capably put by Mr Fitzsimmons to make me take the view that the primary judge's view on the matter was in error, even though he may not have dealt with all the details.

20 Mr Fitzsimmons made it clear that liability was the most significant aspect of the matter, however he also points to some problem his client has with damages, because of missing medical evidence.

21 As to this the primary judge said at para [47] of his reasons, that the applicant had not furnished any relevant evidence of prejudice in the area. However, there was at least one matter which did appear to have some significance and that was the fact that a psychiatrist's notes have been lost or mislaid and the primary judge just did not deal at all with that matter, or indeed any other problems in this area.

22 In the affidavit that was made by the applicant's solicitor, he deposed to issuing a subpoena to Dr Moorthy the psychiatrist, for all records relating to the plaintiff. He said that whilst his practice confirmed that the respondent was seen by Dr Moorthy on a number of occasions, they have been unable to locate those records, relating to him and he sets out the attempts he made to get the report.

23 It is clear however, that Dr Moorthy was first seen in 2003 that is well after the accident. Mr Fitzsimmons says that the significance is in the history given to Dr Moorthy which might be very significant. This of course could not mean the history given by the appellant himself, because he could have no memory of the accident, but it may be that the reference is to surrounding circumstances and his prior psychological conditions, or what the mother may have said.

24 It seems to me that whether this is a significant matter is really speculative. But in any event, one would have expected the general practitioner, to whom it would have been customary for the specialist psychiatrist to have reported, would have had sufficient details. Indeed, p 96 of the white appeal book (coded black), shows that it was reported to the general practitioner that Dr Moorthy diagnosed the appellant had adjustment disorder. It may be that the history given to Dr Moorthy would be relevant. But it is not clear whether particularly because of the respondent's behavioural problems at school before the accident, how there was any significant prejudice in the lack of his history being available. I do not consider that sufficient has been shown, that this would be a matter of prejudice which would cause the evidentiary onus to shift. Accordingly I cannot see sufficient matters as to prejudice in medical material.

25 Thirdly, it is alleged that the problem with lack of material from the Australian Injury Compensation Service, caused prejudice. As to this, the trial judge said in effect that only relatively feeble attempts had been made to contact the relevant organisation or its successors and that in any event, he could not see how this matter would significantly affect the applicant and I would agree. The ultimate question was not whether there was prejudice to the applicant, but whether a fair trial was unlikely in all the

circumstances and on whomever the onus was, this did not appear to the judge and it does not appear to me.

26 Turning to the matter of damages, the primary judge held it was likely for damages for non-economic loss would exceed $100,000, but he put that view to one side, because it could cause complications which need not enter into the decision and examined other heads of damages. He considered the respondent as a man of twenty-two with about forty-four years of working life ahead and reckoned that an appropriate economic buffer of at least $100,000 would be justified, see para 80 of the judgment. Of that $100,000 he added eleven per cent for superannuation plus out of pocket expenses and reached a figure of $114,533. That sum exceeded $67,750 which it will be remembered, was the barrier amount, the primary judge found the damages exceeded the barrier amount.

27 In my view, there can be no credible attack on that reasoning, at least by the applicant. However, the applicant says that the primary judge failed to take into account that there was almost certainly contributory negligence which would reduce the damages. Contributory negligence was raised during closing addresses. The transcript shows that the primary judge tended to dismiss the matter fairly summarily. He said in response to one of Mr Fitzsimmons' submissions:

> "Well to the contrary [the material you mentioned] would suggest that [the plaintiff] found himself in circumstances where he didn't have time to consider his own safety, therefore the absence of such consideration in that context must mean that he couldn't be assessed to have been contributory negligent."

28 See p166 of the white appeal books, p 15 of the transcript of 5 November 2009.

29 The judge did not refer to the issue of contributory negligence at all in his judgment and it would not seem to me that his Honour's remarks in the transcript were supported by any evidentiary material.

30 It is clear on the authorities that contributory negligence must be taken into account on the question of damages and that when working out what is the likely verdict, one must take into account this reduction on the basis of contributory negligence; see eg *Reeves v Reeves* [2002] NSWCA 181 at [16].

31 The respondent's written submissions put there was no significant evidence from which the primary judge could make a specific finding of contributory negligence and so that he was justified in passing over the question. With respect, it is almost impossible to support this submission. It is common ground that the respondent was running across the road, perhaps diagonally, there was some evidence that he did not look before he ran across the road and the preliminary view of experienced police was that the accident was the respondent's fault. If this material were accepted at the trial it would be more likely than not that there would be a finding of contributory negligence.

32 The respondent's fallback position is that if a finding of contributory negligence were to me made it would not more than about thirty per cent. The significance of this submission is that whilst fifty per

cent contributory negligence would reduce the primary judge's figure below the barrier, a finding of thirty, or indeed any finding below forty per cent, would still mean that the respondent would get over the barrier.

33 There are some authorities put forward by the applicant as to when contributory negligence of children is to be considered, when the Court was so inclined to adopt a lower assessment of fault than in other cases. I do not really see how this supported the applicant's position and in any event they are distinguishable on the facts that most of them occurred in situations where the presence of children on the road would throw a heavier onus on the driver of the car to be vigilant.

34 What the Court needs to do is to assess the likely result of damages after taking contributory negligence into account. Strangely enough the exact scope of the word "likely" in s 109(3)(b) of the MAC Act has not yet received authoritative determination. It was debated in this Court but not decided in *Baker v Salagiannis* [2009] NSWCA 385.

35 The popular view once was that it meant "more probable than not". Not even Mr Fitzsimmons adopted that in argument in this case though he put forward the synonym "probable". With respect, I disagree, because "probable" means "more likely than not". Mr Fitzsimmons said that such a construction would accord with the purpose of the whole statute, but, again, with respect, I would not agree.

36 It seems to me that the simple meaning of the word "likely" in the context of this Act is that there is a "real chance" or a "real prospect" or that such may well be the situation. Even though decided in a different area, cases such as *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, particularly the judgments of Bowen CJ at 375 and Deane J at 380-382 give some support to this.

37 The structure of the Act such as the MAC Act is to assume that the plaintiff will succeed however the Court has to assess whether there is a real chance of the verdict exceeding the barrier after considering the reduction for contributory negligence. Now if at the trial the statements of the bystanders is accepted there is a very great likelihood that the respondent was at least as culpable as the driver, probably more so, and it may be that a verdict of fifty per cent contributory negligence may be found, however that is not the question. The question is whether there is a real chance of the contributory negligence being assessed at forty per cent or less and it seems to me that that answer must be that there is a very real chance of that happening.

38 Accordingly the respondent satisfies the second part of the test that he has to pass under s 109. Because of this it is unnecessary to look at the question of non-economic loss. All this adds up that despite Mr Fitzsimmons' skilful submissions the applicant must be unsuccessful. If we granted leave to appeal we might have to consider technically whether the reasons below were so inadequate that we should reassess the situation ourselves, reaching the same result, or merely dismissing the appeal.

39 It seems to me that the simplest and still a just way of dealing with this case is merely to order that the application for leave to appeal be dismissed with costs and that is the order I propose.

40 **HANDLEY AJA:** I agree.

41 **SACKVILLE AJA:** I also agree with the conclusions and the reasons expressed by the presiding judge.

42 **YOUNG JA:** Accordingly the order of the Court is as I proposed.

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LAST UPDATED:
10 August 2010