HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

ROSE SHOREY APPELLANT

AND

PT LIMITED as trustee for McNamara Australia Property Trust & Ors RESPONDENTS

Shorey v PT Limited [2003] HCA 27
28 May 2003
S212/2002

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the New South Wales Court of Appeal dated 7 June 2001.*

3. *Remit the proceedings to the Court of Appeal for rehearing and determination of the appeal and cross-appeal to that Court conformably with the reasons of this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with A S Morrison SC and A C Casselden for the appellant (instructed by Maurice Blackburn Cashman)

B W Walker SC with P S Jones for the first respondent (instructed by PricewaterhouseCoopers Legal)

No appearance for the second and third respondents

CATCHWORDS

Shorey v PT Limited

Appeal – Rehearing – Causation – Conflict of expert evidence – Review of trial judge's finding of fact – Where plaintiff fell and suffered physical injuries as a result of tortfeasor's negligence – Plaintiff suffering from persistent psychologically disturbed condition – Whether psychological condition caused by fall.

Negligence – Damage – Causation of – Evidentiary foundation for proof of – Existence of multiple causes of damage – Obligation of plaintiff at trial to prove damage – Sufficiency of proof that the alleged tortfeasor's conduct was a cause of the plaintiff's damage – Alleged disproportion between the tortfeasor's conduct and subsequent symptoms – Whether plaintiff malingering – Obligation of tortfeasor to take plaintiff as it finds him or her.

Evidence – Evidentiary presumptions – Multiple causes of damage allegedly occasioned by tortfeasor's negligence – Evidentiary onus of tortfeasor to exclude the operation of its wrong as a cause of continuing damage – Relevance of factual findings made at trial – Whether alleged tortfeasor has displaced the causative effect of its injury.

1 GLEESON CJ, McHUGH AND GUMMOW JJ. The facts of the case are set out in the reasons for judgment of Kirby J and Callinan J. The issue upon which the Court of Appeal, by majority (Handley and Powell JJA; Davies AJA dissenting), reversed the decision of the trial judge is stated at the commencement of the reasons of Callinan J.

2 Accepting, as did the Court of Appeal, the finding of the trial judge that the appellant genuinely experienced the extreme, and in some respects bizarre, symptoms of which she complained, and that she was not malingering, the question became whether the fall for which the respondents were responsible was a cause of the appellant's condition as it manifested itself at trial. That there were other factors which contributed to that condition was beyond doubt; but if it were correct to conclude that the fall was a cause of the condition, then the appellant was entitled to succeed.

3 Deciding that question was not easy, as the medical experts acknowledged. The appellant's case was supported by Dr Yeo who said:

> "In this lady's case my interpretation of her problems is that she had an original injury from which she appears to have made a very satisfactory recovery from the surgery but she would have had scar tissue in and around the spine where that repair was done and the potential to have a trigger point there. For a period of at least 18 months she claims she was symptom free prior to the fall which occurred in April 1988 and from that point she obviously had an exacerbation of back pain and leg pain which ... was disabling but certainly had not reached the level of disability which subsequently occurred with her paraplegia. The three main psycho-social episodes that you describe could well have sensitized this lady to becoming more profoundly disabled than she would have been had those particular [episodes] not occurred but may have occurred had other particularly emotional crises occurred, different to the ones you describe. So that here we have, I believe, a very reasonable scenario of a physical disability and coupled with the complexity of emotional crises which are understandable and which led this lady to present as profoundly paraplegic which we know is not from an organic cause. In my opinion the main trigger point for this present level of serious disability is the fall that she had on 2 of the fourth 1988."

4 Dr Yeo's opinion depended for its psychiatric content upon the opinion of Dr Phillips, a psychiatrist called for the appellant. Dr Phillips was contradicted by Dr Dyball, a psychiatrist called for the respondents.

5 The evaluation of the evidence of Dr Phillips was complicated by the fact that he learned at a very late stage, and after he had formed his initial opinion,

certain important facts concerning the appellant's psychiatric history. The cross-examination of Dr Phillips is set out in the reasons of Callinan J. Handley JA regarded it as crucial. He said:

> "Dr Yeo rises no higher than Dr Phillips, Dr Phillips withdrew his opinion in cross-examination, and Dr Dyball's opinion was that the fall was not causative."

6 We are unable to agree that Dr Phillips withdrew his opinion. A concession by an expert witness of the possibility that an opinion may be incorrect, (a possibility of which reasonable people, including judges, are always conscious), does not amount to an abandonment of the opinion. When, as in the present case, an expert concedes under cross-examination that his or her original opinion was formed without knowledge of some material facts, an appreciation of the extent to which the witness accepts that the opinion is to be qualified or discounted may depend upon an assessment of the witness by the trial judge. Sometimes, of course, this will be plain from the transcript of evidence. In other cases, of which the present is an example, the record will be equivocal.

7 Handley JA also criticised the trial judge's finding that the fall in 1988 was a cause of the appellant's conversion disorder on the following ground:

> "If the fall only caused a temporary aggravation of the [appellant's] degenerative condition for some 12 months or so, her pain thereafter was not caused by the accident, but by her underlying condition for which the [respondents were] not responsible."

8 That, however, was not what the trial judge found. He said:

> "I find that the [appellant] suffered severe back pain as a result of the fall, probably mainly at the sites of previous surgery, and I find that this pain due to physical factors continued to some degree for approximately twelve months after the fall ... I also find ... that she has continued to experience back pain and leg pain from time to time as a result of degenerative disease of the lumbar spine. I find that this degenerative disease was aggravated by the fall of 1988."

9 The reasoning of Davies AJA on the facts appears to us to be persuasive. The principal problem in the case, once the possibility of malingering is put to one side, lay in relating legal concepts of causation to the medical concept of a conversion disorder. The appellant, suffering from a not insignificant, but not catastrophic, back complaint aggravated by her fall, with a history of psychological vulnerability, and being subjected to further severe emotional distress, developed a condition in consequence of which her disablement became

far greater than her physical problems could account for. Was the fall a cause of that condition? On the evidence, that became a difficult question of fact. Different conclusions were fairly open, and it is not surprising that the question gave rise to a division of judicial opinion. Even so, we agree with Davies AJA that the trial judge was not shown to be in error.

10 We would allow the appeal. We agree with the orders proposed by Kirby J.

11 KIRBY J. This appeal is one of a series in which challenges have been brought to this Court in respect of the appellate review of factual conclusions decided at trial by a judge sitting without a jury[1].

12 In the present proceedings the primary judge (Dodd DCJ) heard the action in the District Court of New South Wales. It was brought by Mrs Rose Shorey ("the appellant") against the respondents. Negligence was proved in a hearing in which that issue had been severed from the issue of damages. There is no challenge to the determination of negligence. In a second stage, the primary judge found that the appellant had suffered serious injuries, disabilities and losses as a result of the negligence. He entered judgment in favour of the appellant in the sum of $555,212.55 and made an order apportioning liability between the respondents. That judgment resulted in an appeal and cross-appeal to the Court of Appeal of the Supreme Court of New South Wales. The respondents sought a reduction in the damages to $68,911.05. The appellant, by cross-appeal, sought an increase to more than $2 million.

13 In the result, the Court of Appeal, by majority[2], allowed the appeal and dismissed the cross-appeal. The Court found appellable error on the part of the primary judge. It concluded that the Court of Appeal could, and should, proceed to a re-assessment, as requested by the respondents[3]. A substituted judgment was entered, in terms of the proposal of the respondents. Judgment was then entered in the appellant's favour in the sum so proposed.

14 By special leave, the appellant now appeals to this Court. She seeks orders setting aside the judgment of the Court of Appeal and remitting to that Court the cross-appeal which was not decided in consequence of the conclusions which that Court reached.

The facts, legislation and issues

15 The background facts are stated by Callinan J[4]. The appeal from the judgment of the District Court[5] had to be decided by the Court of Appeal in

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1 The other appeals are *Fox v Percy* (2003) 197 ALR 201; *Whisprun Pty Ltd v Dixon* reserved by the Court on 7 November 2002; *Joslyn v Berryman* reserved by the Court on 8 November 2002; *Hoyts Pty Ltd v Burns* reserved by the Court on 8 May 2003.

2 Handley JA, Powell JA concurring; Davies AJA dissenting.

3 *PT Limited v Shorey* [2001] NSWCA 127 at [69].

4 Reasons of Callinan J at [57]-[67].

5 Pursuant to the *District Court Act* 1973 (NSW), s 127(1).

accordance with the *Supreme Court Act* 1970 (NSW). Relevantly, such an appeal is by way of re-hearing[6]. The appellate court has the power and duty to draw inferences and make findings of fact on the basis of the record[7]. It may re-assess damages[8]. In specified cases, it may receive further evidence[9]. It is obliged to "make any finding or assessment [and to] give any judgment … which ought to have been given or made or which the nature of the case requires"[10].

16 The authority of this Court upon the application of the foregoing statutory provisions is contained in a series of decisions that settles the applicable law. An appeal by way of re-hearing must be "a reality, not an illusion"[11]. The appellate court must correct decisions of the trial judge found to be wrong. This includes decisions of law; but also decisions of fact. However, in respect of decisions of fact, the appellate court must perform its functions within the limitations inherent in the appellate process and in accordance with rules validly provided by law. This involves a recognition of the significant advantages of the trial judge in fact finding, especially[12] (but not only[13]) in cases in which the credibility of the parties, or of important witnesses, was in issue at the trial.

17 As in the other cases in the present series, the basic issue for decision in this appeal is whether the Court of Appeal erred in its application of the foregoing principles. Just as the proper functions of appellate courts in reviewing findings about the evidence have been the subject of detailed consideration in this Court, so in national courts in other common law countries the applicable principles have been explored and explained. The verbal formulae vary from one country to another, but the substance is much the same. In each case, the appellate court must respond in a principled way to the call for action to correct

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6 s 75A(5).

7 s 75A(6)(b).

8 s 75A(6)(c).

9 s 75A(7) and (8).

10 s 75A(10).

11 *Warren v Coombes* (1979) 142 CLR 531 at 553.

12 *Jones v Hyde* (1989) 63 ALJR 349 at 351-352; 85 ALR 23 at 27-28; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 482-483.

13 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306; 160 ALR 588.

error, whilst at the same time observing the demand for appellate restraint consonant with the respective facilities and functions of the appellate and trial courts[14].

18 At first instance the present proceedings revealed that the case was an unusual one. The appellant had been injured on 2 April 1988 in a fall at a shopping centre at Blacktown, near Sydney. From this seemingly unremarkable incident she claimed that a severe and grossly disabling condition developed, resulting in profound incapacity. Such incapacity did not have a provable organic foundation. Accordingly, at trial, it was alleged for the appellant that she was suffering a conversion disorder: a psychiatric condition said to explain her debilitating symptoms and to substantiate them as genuine and serious.

19 The issues for trial in the District Court were: (1) whether the appellant's disability, including her alleged inability to walk, were genuine or whether she was a malingerer; (2) if they were genuine, whether the disabilities were caused by the fall found to have been occasioned by the negligence of the respondents; and (3) depending on the answers to (1) and (2), the monetary amount of the damages to which the appellant was entitled.

The first issue: malingering

20 The primary judge rejected the respondents' contention that the appellant was a malingerer. He found that she was genuine. This was so despite some objective evidence (such as the lack of muscle wasting in her thighs and calf muscles) that gave a degree of objective support to the respondents' attack on the appellant's claims. In reaching this conclusion, the primary judge relied upon certain objective signs (calluses on the appellant's knees consistent with her claim that she was forced to crawl; as well as bizarre movements demonstrated when observed[15]). He also relied on "the way the [appellant] presented in court and the evidence of her daughter Tracey"[16].

21 In light of the reasons of the primary judge and consistent with authority, it became difficult for the respondents to overturn the judge's conclusion on the first issue. However, before the Court of Appeal, the respondents sought to construct a challenge based upon incontrovertible evidence so as to overcome this conclusion. In the result, that challenge was unanimously rejected by the

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14 *Fox v Percy* (2003) 197 ALR 201 at 206-210 [20]-[31].

15 *Shorey v PT Limited*, unreported, District Court of New South Wales, 29 February 2000 ("reasons of the primary judge") at 14.

16 Reasons of the primary judge at 14.

Court of Appeal. While acknowledging that the respondents' submissions "as a matter of ordinary common sense [appear] to have considerable force"[17], Handley JA, for the majority, concluded[18] that the submissions on the first issue could not overcome "the usual obstacles presented by the principles in *Abalos v Australian Postal Commission*"[19]. Davies AJA agreed[20]. Accordingly, the Court of Appeal decided the first issue in the appellant's favour. That issue has not been re-opened in this Court.

22 The acceptance of that conclusion is not determinative of the outcome of the second issue. But it is highly relevant to it. This Court must commence its analysis of the second issue, as the Court of Appeal was bound to do, on the basis that the appellant had been injured in a fall caused by negligence and that she had suffered very severe disabilities which, although bizarre and without an apparent physiological explanation, were genuine in the sense that she was not malingering.

The second issue: causation

23 The second issue was determinative for the majority of the Court of Appeal. Handley JA concluded that the causal link between the fall for which the appellant sued and the conversion disorder "was not based on … findings as to credit"[21]. It was, he said, an inference which the primary judge had drawn from his primary findings with the benefit of the expert evidence to which he had referred. Accordingly, Handley JA found that this conclusion was open to review in a re-hearing in accordance with the principles in *Warren v Coombes*[22]. Conducting that review, his Honour concluded that it was open to the Court of Appeal to reach the conclusion that the fall in 1988 was not the applicable cause of the appellant's conversion disorder.

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17 *PT Limited v Shorey* [2001] NSWCA 127 at [16].

18 *PT Limited v Shorey* [2001] NSWCA 127 at [15].

19 (1990) 171 CLR 167. That decision concerns the limits upon appellate disturbance of credibility-based conclusions reached at trial.

20 *PT Limited v Shorey* [2001] NSWCA 127 at [72].

21 *PT Limited v Shorey* [2001] NSWCA 127 at [65]. See *Fox v Percy* (2003) 197 ALR 201 at 208 [25], 223 [87]; cf 233-234 [134]-[135].

22 (1979) 142 CLR 531.

24 Nevertheless, Handley JA found that it was unnecessary to "go that far"[23]. It was sufficient "to decide on those other findings and that medical evidence that the plaintiff did not discharge the onus of proving a causal link between the fall and her conversion disorder". This was the basis upon which the majority in the Court of Appeal set aside the primary judge's assessment of the appellant's damages. In its place, their Honours proceeded to assess the damages on the footing that, in the fall, the appellant had suffered soft tissue injuries to her back involving a temporary aggravation of a pre-injury degenerative condition. As this was judged likely to have resolved within 12 months, the Court of Appeal majority reassessed the damages in the sum proposed by the respondents. It ordered that judgment be entered accordingly[24].

25 Davies AJA dissented. He pointed out that, at trial, counsel for the respondents had "passed very lightly over the events of 1988 and did not confront either Mrs Shorey or her daughter, Tracey, with the specific proposition that Mrs Shorey recovered during 1988 from the effects of the 1988 accident"[25]. He also pointed out that the primary judge had viewed the physical and psychological factors in 1988 (the time of the fall) and 1989 (the time of the death of the appellant's husband) as "intertwined"[26]:

> "The psychological factors would not have manifested as they did without the back pain. While it may be true to say that had she not had back pain the plaintiff's psychiatric disorder would have displayed itself in some other way that seems to me to be beside the point. She did have back pain. Just as frequently psychological complications occur in the recovery from physical injury, so this case is in principle no different. I find the plaintiff's conversion disorder caused by a variety of factors, including the fall in 1988 in respect of which the plaintiff sues."

26 In the opinion of Davies AJA this conclusion demonstrated no error on the part of the primary judge, was "well based" on medical opinions before him and "also on the facts as established by the evidence"[27]. His Honour proposed a minor adjustment of the quantification of damages but, otherwise, would have dismissed the appeal. In this Court, whilst maintaining her complaint about the

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23 *PT Limited v Shorey* [2001] NSWCA 127 at [67].

24 *PT Limited v Shorey* [2001] NSWCA 127 at [68]-[69].

25 *PT Limited v Shorey* [2001] NSWCA 127 at [100].

26 *PT Limited v Shorey* [2001] NSWCA 127 at [101] citing the reasons of the primary judge.

27 *PT Limited v Shorey* [2001] NSWCA 127 at [102].

quantification of damages, the appellant supported and elaborated the approach of Davies AJA. The respondents sought to uphold the approach of the majority.

27 Before seeking to resolve the competing submissions, it is convenient to dispose of one submission to the effect that the primary judge, having decided the issue of malingering, proceeded directly to assess the appellant's damages without addressing the second issue of causation. To the extent that this submission was pressed by the respondents, it must be rejected. This was not the way the Court of Appeal understood the primary judge's reasons. Nor, more importantly, was it the way in which those reasons were expressed.

28 Having resolved the issue of malingering in favour of the appellant, the primary judge went on to ask "[i]s this condition *caused by* the fall in 1988?"[28] This was the correct question to ask. His Honour then proceeded to answer it. In the ensuing passages in his reasons the primary judge made findings about causation on questions that loomed large in the Court of Appeal. His reasons are replete with the language of causation ("as a *result*"; "argue that the *effects* of the fall"; "*caused* by"). In these circumstances, any suggestion that the issue of causation was overlooked or bypassed at trial must be rejected. The issue in the appeal thus becomes whether the primary judge erred in the way he resolved the question, warranting the Court of Appeal's reversal of his conclusion.

29 The majority's opinion that the primary judge had erred on the causation issue was based on a conclusion, expressed by Handley JA, that the link between the fall and the conversion disorder that was postulated to explain the appellant's disabilities was not something that could depend upon ordinary lay estimation. The appellant therefore had to depend upon proof by expert medical evidence establishing the link. It was when that relevant expert evidence, called by the appellant, was examined that the flaw in the reasoning of the primary judge was said to be exposed. The evidence in question was that of Dr Phillips, a psychiatrist, whose specialty was central to proof of the aetiology of the conversion disorder. To the extent that the appellant also relied on the evidence of Dr Yeo, a consultant in spinal medicine and surgery, this could only be as strong as that of Dr Phillips – the expert with the relevant knowledge upon whom, in this respect, Dr Yeo relied.

30 In the critical passage in his reasons, Handley JA states[29]:

> "The causation of the plaintiff's conversion disorder was a matter within Dr Phillips' specialty and outside that of Dr Yeo. After the cross-

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28 Reasons of the primary judge at 15 (emphasis added).

29 *PT Limited v Shorey* [2001] NSWCA 127 at [57].

> examination of Dr Phillips, the Judge could no longer act on the evidence of Dr Yeo on the causation question … because Dr Yeo had relied heavily on the opinion expressed by Dr Phillips in his original report … Nor could the Judge act on Dr Phillips' opinion, given in his evidence-in-chief, that the fall was 'the sentinel event in the causal chain' … because he had withdrawn that opinion during cross-examination."

31 Passages from the cross-examination of Dr Phillips are set out in the reasons of Callinan J[30]. His Honour considers that, having regard to this cross-examination, the issue of causation was correctly decided by the Court of Appeal in the respondents' favour[31]. In my respectful view, it was not correctly so decided.

32 It is unnecessary in this appeal to consider whether the judicial authority about disturbing evidence on the basis of assessments of credibility applies, or applies with the same strictness, in the case of expert witnesses where (normally at least) the honesty of the witness is not in doubt and the issue for decision at trial is the acceptability of the witness' opinion, the extent of his or her experience in the specialty and whether one expert's conclusion is more acceptable and logical than that of another expert. Differing views have been expressed on that question[32].

33 In my view, the error on the part of the majority of the Court of Appeal can be shown without holding that their Honours were not entitled to disturb the conclusion of the primary judge because it rested, in part, on his impression concerning the credibility of Dr Phillips (a consideration incapable of precise replication in the Court of Appeal which did not see or hear Dr Phillips give his evidence). There are other and more fundamental flaws in the way Handley JA reasoned. They require reversal of his conclusion and of the orders to which his conclusion gave rise.

Erroneous findings by the Court of Appeal

34 *The supposed withdrawal of testimony*: It is incorrect, with respect, to say that Dr Phillips withdrew his opinion during cross-examination to the effect that

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30 Reasons of Callinan J at [81]-[82].

31 Reasons of Callinan J at [84]-[85].

32 *Ahmedi v Ahmedi* (1991) 23 NSWLR 288 at 291; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 321 [68]; 160 ALR 588 at 608; cf *Watts v Rake* (1960) 108 CLR 158 at 162-163; Bell, "Judgments Revisited: Abalos as a High Court Low", (2001) 33 *Australian Journal of Forensic Sciences* 61 at 70.

the appellant's fall in 1988 was "the sentinel event in the causal chain" linking the later gross disability to the fall. Dr Phillips did not say so in terms. He did, at one stage say "I withdraw everything I have said then". However, read in context, that was a semi-humorous remark ventured in response to the primary judge's rejection of the witness' postulated proposition that medicine did not "rule out other stressors" whereas "law would like us to have a single cause". When the primary judge, correctly, said "I don't know about that", Dr Phillips responded "I withdraw everything I have said then". The context and the word "then", makes it clear that the expression was in direct response to the judge's interjection.

35 During the hearing before this Court, counsel for the respondents agreed that this "withdrawal" of evidence was irrelevant and "facetious". It can be ignored. Dr Phillips went on to say immediately:

> "I believe the accident in the shopping centre and the course which followed remains of very great significance aetiologically."

36 Dr Phillips agreed with Dr Yeo's earlier oral evidence that "physical trauma usually – not always but usually – played a role in precipitating problems of this sort". Over objection, Dr Phillips agreed that this opinion accorded with his own experience.

37 The foregoing passages appeared in the re-examination of Dr Phillips that followed the cross-examination relied upon as demolishing the effect of Dr Phillips' aetiological opinion that linked the fall with the conversion disorder. On the face of things, the concluding opinion expressed by Dr Phillips fell far short of a withdrawal of his earlier testimony. To the contrary, it represented a reaffirmation of the causal link previously stated. Moreover, it amounted to a statement that, whilst there were other "stressors", the subject fall was "of very great significance". This statement simply cannot be viewed as an expression of opinion about the possibilities. Allied with the common experience that some physical events (of which the fall was the only one identified as relevant) are often associated with a conversion disorder, Dr Phillips' summation contributed a strong reaffirmation of his opinion identifying the fall in 1988 as a cause of the appellant's disabilities.

38 I have read, and re-read, the cross-examination of Dr Phillips. It does contain agreement that the appellant's case was "a most difficult" one. It does bring out the causative relevance of the previous back operation undergone by the appellant in April 1986, prior to her fall. It also accepts the causative significance of the supervening death of the appellant's husband and of her feeling of guilt associated with her administration of morphine to him at about the time of his death. However, much of the cross-examination of Dr Phillips was addressed to the issue of whether the appellant was malingering. This was a theory that Dr Phillips rejected and it can now be put to rest.

39 However, on the issue of the precise sequence of events after injury, following her husband's death and up to the date of the trial, Dr Phillips agreed to the cross-examiner's question:

> "Q What you would really prefer to do doctor is to see this lady again, armed with all this additional information … is that right?
>
> A Yes."

40 It is difficult to know what else Dr Phillips could say to such a question. An expert would normally welcome the chance to elaborate the recorded history and to clarify questions and doubts stated, or hinted, in cross-examination. Dr Phillips did state that the questioner was "perhaps even a little bit more optimistic than I would be" that such a further consultation would clear away all doubts. In short, he would welcome a chance to "sit down and work through all that with her", as the cross-examiner put it. But such agreement scarcely constituted a withdrawal of his earlier opinion. Obviously, the trial judge did not understand it to be so. It was not so stated in express terms. The answers in re-examination contradict that interpretation.

41 *The search for a single cause*: It is a basic principle of the law governing the recovery of damages that a claimant does not have to prove (as Dr Phillips seemed at first to assume was the law) that an impugned event was "the" cause, in the sense of the one and only cause. It is enough that the claimant shows that the event is "a" cause of the condition for which damages are claimed[33]. The fact that the appellant had undergone a laminectomy and discectomy of her spine in 1986 (before the fall) that she was of an age where deterioration in the condition of her spine might be expected to some degree, and that she also suffered grief and a sense of guilt following the death of her husband from lung cancer in January 1989 (after the fall) did not rule out the consequences of the fall as "a" relevant cause in the subsequent disability. In a sense, the back operation (which was reported as successful, following which the appellant was pain free until the fall) and the death of her husband simply rendered the appellant more susceptible to the consequences of the fall.

42 Certainly, that was a view open to the primary judge. It is the one that he preferred to that urged by the respondents, namely that a pre-existing back disability was aggravated for a limited time or that any aggravation was well on the way to recovery when the death of the appellant's husband, with consequent

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33 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 511; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7; *Henville v Walker* (2001) 206 CLR 459 at 480 [60]-[61], 490 [97].

grief and sense of guilt, precipitated the conversion disorder of which she complained. There is more than a hint in the reasoning of the majority in the Court of Appeal of a search for a single cause of the appellant's disability whereas the applicable law and the relevant facts contemplated that this was a case of multiple causes in which the fall and its outcomes could only be really understood in the context of events that happened before and after, rendering the appellant more susceptible to the kind of disability that in fact resulted.

43 *Discerning the operation of multiple causes*: Whereas it was for the appellant to prove her case, and although the burden remained upon her as plaintiff throughout the trial to establish that her condition of conversion disorder was caused by the fall, the appellant started with certain advantages in her endeavour to do this. The evidence supported the conclusion that she had made a good recovery from her back operation prior to the fall. The occurrence of the fall was clearly established. Its trauma was such as to produce injuries and disabilities. Malingering on the part of the appellant was ruled out. In this context, the appellant was entitled to invoke a principle of law and an evidentiary presumption that helped her to support the conclusion reached by the primary judge.

44 The principle of law is that a negligent defendant must take its victim as it finds her and must pay damages accordingly[34]. It is not to the point to complain that the injury, in the form of the fall, was trivial in itself and that it would be unfair to burden the respondents with the obligation to bear costs consequent upon the fact that the appellant was peculiarly susceptible to developing bizarre symptoms inherent in a conversion disorder. If such symptoms were genuine and a consequence of the subject trauma, the apparent disproportion between cause and effect is not an exculpation for the negligent party. It does not render the damage "unforeseeable" or otherwise outside the scope of the damages that may be recovered. As Dixon CJ explained in *Watts v Rake*[35]:

> "If the injury proves more serious in its incidents and its consequences because of the injured man's condition, that does nothing but increase the damages the defendant must pay. To sever the remaining leg of a one-legged man or put out the eye of a one-eyed man is to do a far more serious injury than it would have been had the injured man possessed two legs or two eyes. But for the seriousness of the injury the defendant must pay."

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34 *Watts v Rake* (1960) 108 CLR 158 at 160.

35 (1960) 108 CLR 158 at 160.

45 So here. The respondents must pay if the appellant's pre-accident operation and spinal condition and post-accident grief and sense of guilt rendered her specially susceptible to suffering an unusual psychiatric consequence (conversion disorder). It must do so as long as the accident triggered the appellant's condition and so long as its causative effects were still present as a factor to help explain the ongoing signs and symptoms.

46 So far as the evidentiary presumption is concerned, this is the *presumptio hominis* to which Dixon CJ referred in *Watts*[36]. It stands in a plaintiff's favour and "any tribunal of fact should insist that the defendant should overcome [it]". The presumption was explained in these terms[37]:

> "If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the accident as a contributory cause. If it be the case that at some future date the plaintiff would in any event have reached his present pitiable state, the defendant should be called upon to prove that satisfactorily and moreover to show the period at the close of which it would have occurred."

47 The other judges in *Watts* agreed with Dixon CJ's approach[38]. The principles so stated have been re-stated by the Court since then[39]. They are settled doctrine. They were not contested in this appeal. Indeed, they represent no more than the application of common sense to decisional reasoning. If it be the case that these principles were not expressly relied on at trial or in the Court of Appeal, it matters not. They are simple rules, applicable to judicial reasoning, whether at first instance in a trial, or in a re-hearing on appeal when the issue concerns the effect on damages of multiple causes.

48 In the present proceedings the foregoing principles had the consequence that, whilst the appellant carried throughout the burden of proving the occurrence of the fall and that it had consequences for her which continued to cause her disabilities and loss, in so far as the respondents asserted that some other cause or causes (the pre-accident spinal operation, the constitutional deterioration of the spine or the post-accident grief and guilt feelings) had taken over as the

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36 (1960) 108 CLR 158 at 160.

37 (1960) 108 CLR 158 at 160.

38 (1960) 108 CLR 158 at 163-164 per Menzies J, 165 per Windeyer J.

39 *Purkess v Crittenden* (1965) 114 CLR 164 at 168. See reasons of Callinan J at [87].

explanation of the disabilities and losses, the evidentiary obligation to establish such a proposition rested upon it. The appellant was not obliged to disprove the relevance of the supervening causes or their incapacitating consequences.

49 The burden of disentangling the ongoing operation of multiple causes (the "multiple stressors" to which Dr Phillips referred in his evidence) was upon the respondents if they wished to assert that other causative agents had taken over as the sole or the effective cause of the appellant's damage. One such effort by the respondents failed, namely the attempt to show that the real cause of the appellant's disabilities and loss was deliberate malingering on her part. In my view, the other hypothesis equally failed. No alleged recantation by Dr Phillips was established during cross-examination or otherwise to justify the contrary conclusion as expressed by the majority in the Court of Appeal.

50 *Misreading the judge's assessment of the evidence*: The opinion expressed by Handley JA was that the fall in 1988 caused only a "temporary aggravation"[40] of the appellant's degenerative condition of the spine. His Honour suggested that this opinion was in accordance with the primary judge's findings. With respect, Handley JA misread the primary judge's findings in this regard. The primary judge said that the appellant had initial severe back pain continuing for approximately 12 months, but that there had been a continuing consequence of the fall in the form of recurrences "from time to time". Contemporaneous records in 1988, prior to the death of the appellant's husband, showed that the appellant was then having difficulties in walking. Moreover, as Davies AJA noted, the appellant's daughter, Tracey, gave evidence that the appellant's condition steadily got worse after the accident. The primary judge said explicitly that he accepted such evidence and took into account the way the appellant and her daughter presented in court[41].

51 Moreover, as Davies AJA pointed out, it was not explicitly put to the appellant or her daughter that the appellant had effectively recovered from the temporary aggravation caused by the fall when she was propelled into bizarre symptoms by grief and feelings of guilt brought on by the death of her husband and its circumstances. Whether or not such a course of questioning was required by procedural fairness or otherwise, the failure to put the proposition directly to the appellant and her daughter at trial, so as to give them the chance to respond, weakened the significance of the argument that such an interpretation of events should be preferred on appeal. In my view it should not have been.

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40 *PT Limited v Shorey* [2001] NSWCA 127 at [20]. See also at [18].

41 Reasons of the primary judge at 14.

Conclusion: the appeal miscarried

52 It follows that, for reasons substantially similar to those expressed in the Court of Appeal by Davies AJA, I would conclude that that Court was not warranted to disturb the findings of the primary judge on the second issue at the trial, causation. The foundation for that step, as stated in the reasons of Handley JA was, with respect, mistaken. No other basis is demonstrated to support the conclusion on another footing. None of the respondents filed a notice of contention or relied upon a different basis to sustain the judgment of the Court of Appeal. That judgment must therefore be evaluated in terms of the reasons given by the majority to sustain it.

53 Even if I had come to the conclusion that the appeal to the Court of Appeal was bound to succeed (for example because of unsatisfactory reasoning by the primary judge in failing to address specifically the suggested force of the cross-examination of Dr Phillips) this would not, in my opinion, have been a case in which the Court of Appeal was entitled to substitute its own assessment of the appellant's damages for that arrived at in the trial[42]. There were, in addition to Dr Phillips, a number of witnesses whose evidence needed to be given weight in judging the duration of any disability caused by the fall, most notably the appellant herself and her daughter. The Court of Appeal had seen neither give evidence, yet their evidence was important, even perhaps critical. In such circumstances the most that the respondents could properly have hoped for was a retrial in which the alleged defect in reasoning at the trial was addressed and *all* of the evidence fully weighed and subjected to improved judicial reasoning. I see no defect in the primary judge's reasons sufficient to warrant such criticism and consequential relief.

54 The conclusion reached by the majority in the Court of Appeal appears to have diverted that Court from examining the particular complaints of the respondents, as appellants in that Court – such that related to the issue that led Davies AJA to propose an adjustment to one item in the composition of the damages. The Court of Appeal needed to assess the correctness of the complaints of the appellant on the footing that the general attack upon the damages, grounded in the arguments of malingering and causation fail, as in my opinion, they do. Because it is necessary for the cross-appeal to be heard and determined by the Court of Appeal, it seems appropriate to require that the appeal and cross-appeal both be returned to the Court of Appeal to be heard and determined conformably with these reasons.

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42 cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 477 [60], 501 [132]; *Fox v Percy* (2003) 197 ALR 201 at 212 [42] and 225 [97]-[98].

Orders

55 The appeal should therefore be allowed with costs. The judgment of the Court of Appeal should be set aside. In place of that judgment, the proceedings should be returned to the Court of Appeal for the hearing and determination of the appeal and cross-appeal to that Court, conformably with the reasons of this Court.

56 CALLINAN J. The question in this case is whether the appellant discharged the burden of proving that her persistent psychologically disturbed condition was the result of a fall which caused comparatively minor physical injuries.

Facts and previous proceedings

57 The appellant was 56 years of age in April 1988 when she suffered an injury in a fall in circumstances which gave her a right of action in which she succeeded in the District Court on the issue of liability, and, in a subsequent hearing (Dodd DCJ), on the issue of her damages which were assessed in the sum of $555,212.55 in February 2000.

58 The appellant believed that she became unconscious for a period after the fall. On recovering consciousness she experienced pain in her back and her legs. When she was discharged from hospital three weeks later the pain had abated to some extent. She was able to walk. She took painkillers and rested to ease the pain in her lower back. She was able to do some housework, to drive, and to shop. She had no need of a walking stick. Her right leg did not trouble her unless she walked too far. If she did, she noticed a tired feeling in it, and numbness.

59 The appellant continued to experience back pain. She was examined by a number of orthopaedic specialists and underwent several diagnostic procedures over the years. She also had consultations with psychiatrists. She began to use one walking stick and then two.

60 By July 1992 she was using a walking frame, and in early 1993 she started to use a wheelchair.

61 At the date of trial the appellant was not walking. She managed to move by using her arms and also her legs to crawl in a way which left calluses on both knees. There was no apparent physiological reason why she could not walk.

62 The first issue to which the primary judge directed himself was whether the appellant was deliberately malingering, or whether a genuine psychiatric condition was operating at a subconscious level to prevent her from walking. The second was, if the condition were genuine, what was the prognosis? The third issue was, if it were genuine, was it attributable to the fall in April 1988? As will appear the question in this appeal is whether the primary judge satisfactorily considered and answered that question.

63 The appellant's husband's health severely deteriorated in 1988. He was diagnosed with cancer and died on 1 January 1989. The appellant experienced guilt associated with his death and her administration of morphine to him, but said (in evidence) that she no longer felt guilty after about six months.

64 The appellant's evidence at the trial was that her own health began to deteriorate from about this time. On 5 April 1992 she had woken in the early hours of the morning with pain throughout her body. She was unable to move. One of her legs was twisted over the other, and she could straighten neither. It was necessary for her daughter to assist her. An ambulance was called and she was taken to Blacktown Hospital. There she had a CT scan, rested in bed, took analgesics and underwent physiotherapy including traction. She was gradually mobilised and was discharged on 11 May 1992. She continued to have physiotherapy after discharge.

65 The appellant was admitted to hospital again in September 1993 for eight days, and in October for 18 days. She was treated with bed rest, physiotherapy and analgesics. On discharge, on each occasion there was no improvement. Since then she has been treated with analgesics.

66 This apparently simple trajectory of deteriorating health and capacity is however complicated by the presence of a number of other factors. In cross-examination the appellant conceded that a stomach ulcer with which she was afflicted pre-dated the fall, and was not caused by it. She also conceded that in 1978 she had begun to lose the use of her right leg and to develop pain across the lower back. She agreed that there was significant family disharmony after her husband's death, indirectly related to money. A dispute about the family home which was in the name of her husband and a daughter erupted. She believed that on her husband's death she would continue to live in the house. The appellant came to think that she was being turned out of the home. About three months after her husband's death the appellant was able to drive to Queensland and back. She was away three weeks. She was able to move and walk around during that period.

67 The trial judge summarized the extensive medical evidence in this way:

> "Dr Graham Arthur Edwards, a psychiatrist, appeared to discard his original diagnosis. On hearing of aspects of the [appellant]'s evidence he thought she might be suffering from a conversion disorder or chronic hysteria, to which her husband's death and subsequent family squabbles over the family home may have contributed. Dr Edwards indicated that treatment for such disorder would have to be individually tailored for the [appellant]'s various symptoms and the precise causes of the disorder – including treatment by medication of the associated depression, working out the psychosocial factors such as fear of being thrown out of her own home and alleviating that fear, and encouraging walking again through a rehabilitation program of physiotherapy and graded exercise embarked upon with an attitude that recovery is possible.
>
> Dr Edwards did not think she was malingering.

Dr Malcolm Dent, psychiatrist, also gave evidence. He saw the [appellant] in September 1995 and considered a questionnaire she had completed at his request a little later. He diagnosed a chronic pain disorder of which at least fifty percent was made up of psychological factors. He agreed that for the [appellant] to say that she could not use her legs but to be able to crawl is bizarre behaviour, but he thought that she genuinely believes in her pain and disability. He thought the longer the duration of the disorder the more powerful would become the psychological issues, making reversal of the disorder more difficult. Nevertheless, Dr Dent reported a recovery success rate of sixty percent to seventy percent in dealing with people who have chronic pain disorder and have had it in a disabling fashion for twenty or thirty years. He added that by recovery he meant not cure but relief of suffering and some acquisition of autonomy over life. He thought there was a moderate chance of recovery of the [appellant]'s physical function. When pressed he said the likelihood that she will recover walking is low. Later he said the prognosis for the [appellant] is poor. Dr Dent also thought that she was not malingering although he indicated that he could not be certain of this and would need further information.

Dr John Yeo gave evidence. He is a consultant in spinal medicine and surgery. He saw her on 29 April 1999. He thought the predominant trigger of her complaint of pain was the fall on 2 April 1988. He also thought there was a substantial psychological disorder associated with her presentation. Her symptoms and signs are bizarre. It was not possible for Dr Yeo to identify specific pathology at various areas in her body that would be causing the symptoms. He did not think she was malingering.

Dr Yeo's interpretation of the [appellant]'s problems is that '... she had an original injury from which she appears to have had scar tissue in and around the spine where that repair was done and the potential to have a trigger point there ... from [the fall] she obviously had an exacerbation of back pain and leg pain which was disabling but certainly had not reached the level of disability which subsequently occurred with her paraplegia ... psychosocial episodes ... could well have sensitised this lady to becoming more profoundly disabled than she would have been had [they] not occurred but may have occurred had other particularly emotional crises occurred ... physical disability ... coupled with the complexity of emotional crises ... led this lady to present as profoundly paraplegic which we know is not from an organic cause'.

Dr Yeo thinks the [appellant]'s condition is permanent. Dr Yeo agreed that although the crawling activity of the [appellant] could explain the lack of significant muscle wasting in the [appellant]'s thighs, it could not explain the lack of significant muscle wasting in the [appellant]'s calf muscles. He further agreed that this lack of significant muscle wasting

was inconsistent with the [appellant] being confined to a wheelchair for most of the time. He said there is no question that the muscles are being used. The [appellant] is using and moving her lower legs despite her saying she cannot do so.

Dr Jonathan Phillips, consultant psychiatrist, gave evidence. He thought that the [appellant] might be suffering a conversion disorder. He thought the 1988 fall was 'the sentinel event in the causal chain'. That accident was '... the psychological trauma of principal importance'.

Dr Phillips did not think the [appellant] was malingering. He thought that if she was suffering from conversion disorder treatment would be very difficult, but that movement in the supposedly paralysed limb was a good prognostic sign. Dr Phillips was tentative as to all his conclusions, stressing that this was a very unusual case.

Dr Peter Brimage, consultant neurologist, gave evidence. With the possible exception that he did not see the value of psychiatry in helping the [appellant] to walk his views appear to coincide largely with those of Dr Yeo.

Dr A L G Smith, orthopaedic surgeon, also gave evidence. He concluded that the [appellant] was fabricating physical signs and that from an orthopaedic point of view there was not very much wrong with her. However, in the field of psychiatry he defers to psychiatrists. He did note that she had calluses on her feet, seemingly inconsistent with the [appellant] not using her feet to walk.

Dr Fernando Roldan, a consultant clinical psychologist, gave evidence. He thought it more likely than not that the [appellant] was not consciously exaggerating or fabricating her symptoms. He also thought it more likely than not that she was suffering a 'conversion type disorder'. He was guarded as to prognosis but suggested some general strategies for the resolution of the condition.

Dr Kenneth Dyball consulting psychiatrist, gave evidence. He saw her at her home on two occasions. He eventually came to the view that a theoretical case could be made out that she was suffering conversion disorder as a result of 'a need that had come about by virtue of her grief over the death of her husband, the potential loss of her home, the need to be cared for and looked after'. He thought the fall in 1988 may have provided the focus for the site of the possible conversion disorder. If she is suffering conversion disorder he thought her prognosis appalling, but he regarded it as possible that she might walk again if she felt she could get better perhaps by being able to buy her own home and have independence.

Dr John Shand, consulting psychiatrist, gave evidence. He saw the [appellant] on three occasions. He came to the conclusion that she was either malingering or she was suffering conversion disorder. He thought it more likely that she was malingering.

Ms Kathryn Bolger, occupational therapist, gave evidence. She visited the [appellant] with a colleague at her home to assess her needs. A videotape was produced showing the [appellant] at times during that visit. During the visit and on the videotape the [appellant] demonstrated an ability to use muscles and move her legs in ways entirely inconsistent with what she said she could not do.

Two reports of Dr Wendy Roberts, clinical psychologist, are in evidence, dated 27 April 1999 and 4 June 1999. She comes to the conclusion that malingering cannot be excluded, and that the chief problems of the [appellant] predated the 1988 fall which is of little significance in the development of her emotional problems and chronic depression with which she now presents. In her opinion this depression is not attributable to the fall, but to pre-existing factors and mainly her guilt over having administered what is said to be 'excessive' morphine to her husband and which according to Dr Roberts, killed him. I should note at this stage that much time of the case was spent on this issue. There is no evidence that the morphine killed the [appellant]'s husband, nor that the amount given was excessive in any way. However, it is clear that the [appellant] was asked by hospital staff to assist in giving it to him orally and that she felt for a time that it may have played a part in his death and because of this and perhaps other factors felt some guilt about his death.

There is an enormous amount of historical material including medical material, in evidence much of which has been summarised or extracted by the various experts already referred to. Other expert medical reports are in evidence, but those to which I have referred represent the range of views and reasons for coming to those views."

68 His Honour concluded that the appellant was not malingering. He said:

"I have come to the conclusion on the balance of probabilities that the [appellant] is not malingering. I base this finding mainly on these factors: she has calluses on her knees, indicative of regular and therefore unobserved crawling; and she demonstrated to a number of experts her methods of movement without attempting to hide the fact that she was able to use her leg muscles. In other words her behaviour has been consistent. I also take into account the way the [appellant] presented in court and the evidence of her daughter Tracey in coming to the conclusion that she is not malingering."

69 Later his Honour weighed up the prospects for the future.

> "What is the prognosis? I have wrestled with this. There appears to be a diversity of views to some extent, with some treatment options being supported as possibly leading to recovery of the walking function. It is fair to say, however, that the predominant view is that recovery prospects are not good. I must consider that in the context that no appropriate treatment has been tried. It does not appear to me that any attempt has been made to confront the [appellant] with her ability to use her leg muscles in a treatment context. By 'confront' I mean nothing more than an attempt to persuade her, possibly over considerable time, that she can use her legs in ways she has not realised and has previously denied, this seeking to encourage a belief, eventually, that she can walk. It is an affront to common sense and to the dignity of the [appellant] that she should be left untreated and not walking, when in fact she could walk if she wanted to.
>
> I prefer to proceed to assess damages on the basis that the [appellant] is likely to recover, given sympathetic appropriate treatment. I base this on the fact that she has not ceased to use the muscles in her legs, that it can be demonstrated to her that she is capable of walking and that in my observation of her in the witness box she is of sufficient intelligence and potential insight as to be capable of responding to an appropriate treatment regime. However it may take considerable time and I have allowed a period of ten years, roughly equivalent to that taken to get to this point in her condition."

The appeal to the Court of Appeal

70 The respondents appealed to the Court of Appeal of New South Wales (Handley and Powell JJA, Davies AJA dissenting). The judgment of the majority was given by Handley JA. In his judgment his Honour referred to the appellant's inconsistent behaviour during medical examinations, the absence of any wastage in her thigh and calf muscles (indicative of the use of these muscles for weight bearing), and the presence of calluses on the soles of her feet at a stage when according to her, she had been using a wheelchair. His Honour noted that the appellant had calluses on both feet when Dr Smith examined her in November 1996, but by May 1998 she had calluses on her knees and on the front of her ankles. No wastage was however discernible in her thigh and calf muscles.

71 Handley JA acknowledged that as an appellate judge he was bound to apply the principles stated in *Abalos v Australian Postal Commission*[43].

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43 (1990) 171 CLR 167.

Believing himself to be acting consistently with those, he rejected an otherwise impressive ground of appeal relied on by the respondents, that an inconsistency described by them as glaring, in the evidence, with the trial judge's findings with respect to the absence of wasting in the appellant's calf muscles and the presence of calluses on the soles of her feet, required that the respondents' appeal be upheld.

72 His Honour then went on to deal with the issue of causation. He said:

> "Having found that the [appellant] was not a malingerer, the Judge concluded that she suffered 'some kind of conversion disorder' which arose 'from unresolved psychological conflict'. This involved various aspects of the aftermath of her husband's death, mainly the Judge thought because of her fear of being thrown out of the family home. He then asked himself whether this disorder was caused by the fall. He referred to Dr Yeo's evidence that 'the main trigger point for this present level of serious disability is the fall', to Dr Phillips' opinion that the fall was 'the sentinel event in the causal chain', and to Dr Dyball's opinion that her ongoing back pain provided a focus for her psychological problems.
>
> He found that the [appellant] suffered severe back pain as a result of the fall and that her pain due to physical factors continued in some degree for approximately 12 months after the fall. He also found that the fall aggravated her degenerative disease in the lumbar spine but as I read his judgment he found that this was only a temporary aggravation. That was certainly the opinion of Dr Sengupta, her treating surgeon. The Judge also accepted Dr Smith's evidence that the [appellant] continued to experience back and leg pain from time to time as a result of the degenerative disease in her lumbar spine.
>
> The Judge said that it seemed to him that the [appellant]'s slide into her full-blown bizarre symptoms of psychiatric disorder commenced at some stage in 1988 when she began the use of a walking stick and her husband became very ill 'or at the latest on or shortly after his death on 1 January 1989'. He thought that the psychological and physical factors then became intertwined."

73 Handley JA was concerned in particular with the reasoning of the primary judge in this passage:

> "The psychological factors would not have manifested as they did without the back pain. While it may be true to say that had she not had back pain the [appellant]'s psychiatric disorder would have displayed itself in some other way that seems to me to be beside the point. She did have back pain ... I find the [appellant]'s conversion disorder was caused by a variety of factors, including the fall in 1988 in respect of which the [appellant] sues."

74 His Honour then analysed in depth for himself the medical and other evidence, pointing, as he did so, to a multiplicity of inconsistencies in it.

75 His Honour interrupted his review of the medical evidence to discuss the circumstances of the appellant's husband's death.

> "The [appellant] told the psychiatrist at Blacktown Hospital that her husband had received too much morphine administered by her and she had been left with 'tremendous guilt'. A nursing sister had handed her the morphine tablet or tablets to give to her husband and she came to believe that this dose was associated with his death. She blamed herself for not questioning the nursing sister who gave her the morphine, because she realised two days later that this was an increased dose. She did not learn until she saw a Dr Ruppin in 1991 that his dose of morphine had been increased that day from every four hours to every hour and that the nursing sister should never have asked her to give the dose to her husband."

76 And later his Honour added:

> "The records for her admission on 7 March 1991, more than two years after his death, refer to her grief reaction, her guilt feelings, depression, loss of appetite and weight loss. The consultant psychiatrist found that at that time she had a complicated or unresolved bereavement. Her grief reaction was mentioned again in the records for her admission on 26 March 1991.
>
> She was admitted to Westmead Hospital on 16 September 1993, four and a half years after her husband's death, and the nursing notes for the following day recorded: 'Husband passed away 4 years ago teary and hugging to his beret in bed'. The [appellant] said that she continued to carry her husband's beret around with her until 1994 or 1995. Her daughter was not aware of this but said that her mother always takes her husband's photograph everywhere."

77 His Honour's conclusions were stated in these passages:

> "The Judge found that a conversion disorder is based on an unresolved psychological conflict and this finding was supported by the evidence of Dr Phillips, Dr Dyball, and Dr Roldan. The obvious candidate for unresolved psychological conflict was, as the Judge indeed found, the death of her husband, how it occurred, her role in it and its aftermath in family conflict. This conclusion is supported by the marked contrast between the [appellant]'s normal presentation at Blacktown Hospital in November 1988, her distressed presentation at that Hospital in

> May 1989, and her bizarre presentation recorded by Dr Smith in April 1990, and by Dr Sinclair in June 1990.
>
> The Judge's conclusion that a causal link was established between the fall and the conversion disorder was not based on his findings as to credit. It was an inference he drew from his primary findings with the benefit of the expert evidence he referred to. As such it is open to review on a re-hearing in accordance with the principles considered in *Warren v Coombs*[44].
>
> When the Judge's findings, that the [appellant] was suffering from a conversion disorder, that this was caused by unresolved psychological conflict, and in her case this involved various aspects of the aftermath of her husband's death, are read with the whole of the evidence of Drs Yeo, Phillips, and Dyball, the proper conclusion may well be a positive finding that the fall in 1988 was not a cause of the [appellant]'s conversion disorder.
>
> However, it is not necessary for this Court to go that far and it will be sufficient for this Court to decide on those other findings and that medical evidence that the [appellant] did not discharge the onus of proving a causal link between the fall and her conversion disorder. ... Compare *Rhesa Shipping Co SA v Edmunds*[45]. The appeal therefore succeeds and the judgment entered by the trial Judge must be set aside.
>
> As a result of her fall the [appellant] suffered soft tissue injuries to her back. Dr Sengupta thought these involved a temporary aggravation to her degenerative condition which would resolve within 12 months. The [respondents were] not responsible for the [appellant]'s pre-existing degenerative condition, or for its progress, apart from the temporary aggravation. The [appellant] is entitled to damages for this temporary aggravation of her back condition."

78 It was consequently necessary for a fresh assessment of the appellant's damages to be made. His Honour considered himself able to do so. In the result, a judgment for the appellant of $68,911.05 was substituted for the judgment of the District Court.

79 In dissent, Davies AJA referred to some passages in the appellant's examination-in-chief and re-examination. He read passages in the cross-examination of Dr Phillips which Handley JA regarded as critical, differently

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44 (1979) 142 CLR 531.

45 [1985] 1 WLR 948; [1985] 2 All ER 712.

from his Honour: that they amounted to a concession of the possibility only that the doctor's view could be erroneous.

The appeal to this Court

80 The appeal should be dismissed. The approach of Handley JA was a correct one. As to the approach generally of appellate courts to findings of fact by trial judges I would have wished to adhere to what I said in *Fox v Percy*[46], but I am bound by the joint judgment in that case[47]. That judgment does in my opinion qualify what was said in *Abalos*. Whether, however, *Abalos* is to be applied in an unqualified way, or whether the joint judgment in *Fox v Percy* states the current rule, this was still a case calling for the intervention of an appellate court.

81 The trial judge failed to take any, or any sufficient account of the respondents' very effective cross-examination of Dr Phillips at the trial:

> "Q: Well, let me put it this way. It is not unusual for somebody with a conversion disorder to deny or regard as having little significance the very psychological conflict which might have brought about the disorder?
>
> A: We are moving steadily into the area of conjecture and psycho dynamics. Yes, one could state that and I would agree that a person with conversion disorder, and I might add that conversion disorder is comparatively rare, sometimes appears indifferent to the conversion symptoms.
>
> Q: So the fact that she says to you: Look, I'm not worried now about my husband's death, doesn't of itself mean that that may not have been a very important factor in the conversion disorder?
>
> A: Well, I'm prepared to accept the hypothesis, and it is no more than a hypothesis, that the death of her husband remained a painful matter for her. On the other hand, I would not like to disregard entirely what this lady told me.
>
> Q: I will come back to those matters but did you know that as at the 13th of March 1991 she was seeing a psychiatrist in Blacktown Hospital? Did you know that?
>
> A: The date was?

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46 (2003) 197 ALR 201.

47 (2003) 197 ALR 201 at 202-213 [1]-[47] per Gleeson CJ, Gummow and Kirby JJ.

Q: 13 March 1991.

A: I'm uncertain of that. She was seeing Dr Edwards but I don't believe at the hospital.

Q: Did you know that she was expressing concerns that her husband had died as a result of receiving too much morphine administered by her and that she was left with tremendous guilt?

A: My understanding was in fact she was concerned even prior to that, that she was, as it were, the person who administered the morphine and this was not a role that she felt comfortable with.

Q: When did you find that out?

A: I found that out subsequently on reading a number of other documents that were put to me.

Q: Well, when? When did you find that out?

A: Last night when I read a number of documents that were put to me.

Q: So up until last night, you knew nothing about the administration of morphine to the husband by her?

A: She told me nothing about it.

Q: You didn't know that she felt tremendous guilt associated with that?

A: Not at that stage, no.

Q: Did you know that around about this time in April 1991 she was presenting to a physician in a depressed state, feeling that the medical community had let her down and she had not been provided with sufficient grief counselling?

A: No.

Q: Did you know that as at that time, April 1991, she was obviously hyperventilating?

A: I have no history of her hyperventilating.

Q: Did you know that she was presenting with obvious grief and guilt about her husband's death?

A: In which situation?

Q: This is in April 1991, shortly after the incident I put to you at Blacktown Hospital when she saw the psychiatrist?

A: No, I am not aware of that.

Q: Doctor, someone who was concerned that their husband with whom apparently she had a close relationship had died as a result of receiving too much morphine administered by her and who was left with tremendous guilt more than two years after the death of the husband is not someone who had apparently got on top of things after six months following the death of their husband?

A: If the chronology is correct and in fact she was expressing guilt elsewhere two years after the death of her husband, then obviously I have to reconsider the stressor, the death of her husband.

Q: The death of the husband in the circumstances I have just mentioned to you is capable of causing an unresolved psychological conflict, isn't it?

A: That is always possible.

Q: Indeed, just dealing with the matters I have put to you, that is the March 1991 account from Blacktown Hospital and then the April 1991 account, that looks exactly as though that has happened, doesn't it?

A: Well, it is certainly possible.

Q: It is exactly the sort of unresolved psychological conflict which can bring on a conversion disorder, isn't it?

A: Well, it is possible, yes.

Q: It is often difficult, isn't it, determining the aetiology of a conversion disorder?

A: Extremely difficult, there is no doubt about that because not only are you looking back in time but you are looking at a complex process."

82 And subsequently these answers were elicited:

"Q: And doctor, would it be the situation that to really work out this riddle, and with all due respect it is a bit of a riddle as to exactly what's going on here, isn't it?

A: I think riddle is – I could only agree with you. This is a most difficult case.

Q: What you would really prefer to do doctor is to see this lady again, armed with all this additional information which you didn't have until last night and indeed, some of which I don't think you had until I put it to you, is that right?

A: Yes.

Q: Sit down and work through all that with her and it would only be at that point in time, wouldn't it, that you would be able to say with any confidence (1), what condition this lady has, and (2), what the aetiology of that condition is?

A: Well you are perhaps even a little bit more optimistic than I would be. I certainly agree that armed with additional information to go back and carry out a further examination would be very useful. Whether I could achieve those two end points I'm not quite sure but I would probably be in a stronger position that I am now.

Q: So that even armed with that additional information it still might not be possible to work out exactly what her diagnosis is and what the aetiology of the condition may be?

A: Yes. I think it's true to say that some diagnoses are harder to reach and to substantiate than others and conversion disorder is a diagnosis that is approached when most others are eliminated."

83 It is true that from time to time the witness used the language of possibility only. The unmistakable tone of his answers however is of uncertainty induced by an incomplete knowledge of the relevant facts. It is also possible to detect an unwillingness to concede that an important basis for his conclusion had been significantly eroded. That Dr Phillips only became aware the previous night of the appellant's concern about the administration of morphine to her husband as he was dying has an additional significance to its central importance to his diagnosis. It reflects on the appellant's reliability, and on her history of her symptoms and claims. As the plaintiff, she bore the onus of proving her damages. Uncertainty or selectivity in her claims inevitably weakened her case.

84 But in any event I find it impossible to accept that the cross-examination resulted in no more than a concession of a possibility of a misdiagnosis by Dr Phillips. It undermined the very foundation of his opinion which was of a course of generally consistent complaints by the appellant, and an explicit disavowal by her of any remnants of disabling distress as a result of her husband's death and the circumstances of it. The wide cracks which opened in Dr Phillips' evidence in cross-examination were not repaired by the quite unconvincing re-examination following it, a deal of which was the subject of leading questions. The primary judge made no reference to the evidence in cross-examination to which I have referred. It was of critical importance to the

validity of Dr Phillips' diagnosis. A judgment which relied heavily on Dr Phillips' evidence but made no attempt to deal with this damaging cross-examination was necessarily incomplete, and, in my opinion flawed for that reason. Furthermore, Dr Phillips was not the only medical specialist forced to retreat from an earlier confident diagnosis by reason of the appellant's failure to give a full and accurate history of her condition, relevant events and complaints, as some of the passages from the judgment of Handley JA which I have quoted exemplify.

85 Having regard to the matters that I have mentioned the Court of Appeal was right to intervene as it did.

86 The respondents' other submission should also be accepted: that the conversion disorder found by the trial judge should have been regarded as a supervening cause as in *Jobling v Associated Dairies*[48]. The principal focus of the trial judge was on the issue whether the appellant was a malingerer or not. That was an issue at the hearing but was not one which, if resolved in favour of the appellant, was determinative of the issue of causation. The main issue remained, whether the appellant's condition, whatever its nature or extent, genuine or otherwise, was caused by the appellant's fall, for which the respondents were responsible. Having regard to Dr Phillips' evidence in cross-examination that issue should have been resolved in the respondents' favour. The best that could be said for the appellant was that she failed to prove that her present condition was caused by the fall.

87 The respondents accepted that in principle there was relevantly no distinction between a pre-existing and a supervening contributory case. But, they submitted, correctly, no argument had been advanced at any stage by the appellant that the respondents had failed to disentangle the various components of the appellant's condition and their respective causes as required by the rule stated in *Purkess v Crittenden*[49]:

> "It was, in effect, pointed out that it is not enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacity. On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (ie either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would

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48 [1982] AC 794.

49 (1965) 114 CLR 164 at 168 per Barwick CJ, Kitto and Taylor JJ.

> establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence."

88 Alternatively, if such a requirement, of disentanglement, were to be imposed upon the appellant at this late stage, for the reasons stated, and on the basis of the analysis made by Handley JA in the Court of Appeal, the respondents submit, and I would accept, that they have satisfied it.

89 I would dismiss the appeal with costs.