Dog bite has lost its appeal

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Photo by Heath Missen, The Age Photo Sales.

As you may recall, the April edition of Plaintiff contained a case note on the Brisbane District Court decision of ***Aldrick v EM Investments Pty Ltd*** *involving a security guard's dog biting a plaintiff who had escaped police custody.*

At that stage, the case was on appeal with the defendant seeking to appeal both liability and quantum. The matter has now been resolved.

Appeal Grounds

In its notice of appeal, the defendant claimed that:-

a) the trial judge erred in making a finding of negligence because the plaintiff was adamant that the dog bite was not negligent;
b) the finding of negligence was contrary to the evidence;
c) the trial judge erred in accepting the plaintiff's evidence regarding the dog bite, because there were inconsistencies in the plaintiff's evidence on other matters;
d) the judge erred in implicitly finding that either the security guard or one of the police officers said to the Redcliffe Hospital that the plaintiff injured himself on barbed wire; and
e) the trial judge erred in awarding aggravated damages in a case where the judge found that the attack was only negligent and not deliberate.

Leave to Appeal

Before filing his outline of argument, the plaintiff raised with the defendant its apparent need to obtain leave before appealing. The defendant was adamant that it did not require leave. Instead of waiting for the issue of leave to be resolved at the hearing of the appeal, the plaintiff made an application to dismiss the appeal as incompetent. The defendant immediately cross applied for leave.

The Relevant Legislation

On 1 August, 1997 the *District Court Act 1967 (Qld)* was amended and the current Section 118 which governs the District Court original jurisdiction civil appeals took effect. The section states, in paraphrase, that a party does not require leave if a judgement:-

1. is for more than $50,000.00; or
2. relates to a matter in issue with a value equal to or more than $50,000.00; or
3. deals directly or indirectly with any claim, demand or question in relation to any property or right with a value equal to or more than $50,000.00.

All other appeals require the leave of the court.

Previous Cases

The section was first considered by the court in the decision of *Schiliro v Peppercorn Child Care Centres* [1998] QCA 446, where the plaintiff, who was unsuc-

cessful in a District Court action, had a judgment awarded against him with damages assessed at less than $50,000. The majority considered that it was sufficient that the plaint claimed an amount of more than $50,000 and therefore held that the plaintiff did not require leave of the court to appeal. In contrast, Pincus J, in dissent, considered that leave was required. His Honour was prepared to grant it in the circumstances.

In a subsequent case of *Australian Meat Holdings Pty Ltd v Morris (1999) QCA 135*, the court unanimously held that an unsuccessful defendant seeking to appeal required the court's leave to appeal where a decision in the plaintiff's favour was for an amount of less than $50,000. As the plaintiff had claimed unspecified damages in its plaint, the court had no figure to assist it. The defendant therefore sought to rely on the figures from the plaintiff's statement of loss and damage to show that the appeal related to a matter involving more than $50,000.00. That argument was rejected.

The Present Case

In *Aldrick v EM Investments Pty Ltd*, the plaintiff had claimed more than $50,000 in his plaint and his statements of loss and damage but had been awarded less than $50,000 at trial. Only the defendant appealed, the plaintiff being content with the damages assessed at trial.

At the hearing of the applications regarding leave, the defendant sought to rely on the figures raised in the plaint and in the statements of loss and damage as per the *Morris* case.

Up to that time, it was arguable that based on the court's decisions in *Schiliro* and *Morris*, a plaintiff did not require leave but the defendant did, at least in situations such as the present case. Indeed that is what Mr Dan Kelly of counsel submitted on behalf of the plaintiff.

The court resisted any such separation of principles based on which party was appealing and instead formulated a new test in which the relevant factors are:-

1. the figure claimed in the plaint; and
2. whether there is a live contention between the parties that the matter involves more than $50,000.00.

While the plaint claimed over $50,000, as there had been no contention about the matter involving more than $50,000, the court found that the defendant required leave. It therefore appears that the "live contention" requirement is the overriding one.

Leave Refused

The court refused leave finding that the circumstances did not warrant it. In the words of Thomas J, who delivered the leading judgment, this was no more than a case of a disgruntled litigant seeking to overturn findings of credit which were unfavourable to it.

The court in particular pronounced its displeasure at the defendant's submissions that the learned trial judge had made up his mind to find for the plaintiff and then worked backwards to find the reasons to justify that decision.

Aftermath

The defendant's appeal was dismissed, the defendant was ordered to pay the plaintiff's costs of application and the defendant's cross-application. All up the matter cost the insurer in excess of $100,000 - a far cry from the plaintiff's offer of approximately $20,000 made some 12 months earlier. ■

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Game win for asbestos victim

CLAIRE HARVEY

DYING carpenter Peter Thurbon hopes to live out his dream of seeing the World Cup rugby final in November, thanks to a negligence settlement from cement manufacturer James Hardie.

The game will be especially sweet because evidence given in Mr Thurbon's landmark case is to have a major impact on asbestos-related legal actions in NSW.

The testimony of James Hardie safety officer Peter Russell, who says he warned the company in the 1960s that asbestos was potentially deadly, may be used in hundreds of future negligence actions in the NSW Dust Diseases Tribunal.

Mr Russell, who resigned from James Hardie in frustration in 1970 after company executives and doctors brushed off his fears, said yesterday he was not pursuing a vendetta against his former employers but he felt he had done the right thing by testifying in Mr Thurbon's case.

"If I think of a hundred of my colleagues at Hardie's, about 95 at least would now be dead," said Mr Russell, 70.

"There's a lot of people who pass away that never come to the surface. Some of them, sadly, have no one who's interested in fighting the case for them and others are so ill they just don't want to go through it. A class action's the only thing now."

Mr Thurbon, 51, who has been told he has less than a year to live, won a secret settlement this week from James Hardie after he sued for more than $800,000 in negligence damages, claiming he developed the lung cancer mesothelioma while using cement sheeting made by the company.

His barrister, Jack Rush QC, told the tribunal James Hardie was too concerned with profit to warn of the dangers of asbestos dust.

Mr Thurbon's wife, Elizabeth, said from their Canberra home yesterday they were relieved at the settlement as it meant she would not have to go to work to support the family during his last days.

"But it's a tinged happiness," she said. "It doesn't change Peter's health but it means he can come home free of worry."

Mr Thurbon's solicitor, Tanya Segelov, said Mr Russell's evidence could be used in every case involving a plaintiff who claimed to have contracted dust-related diseases.

"It's relevant to lung cancer, asbestosis, and it'll be used in cases against James Hardie and other manufacturers," said Ms Segelov, an associate partner with law firm Turner Freeman.

"James Hardie was the largest manufacturer of asbestos materials, and Mr Russell's evidence shows what was going on inside these firms."