SUPREME COURT OF QUEENSLAND

CITATION:	*Drew v Makita (Australia) P/L* [2009] QCA 66
PARTIES:	**PAUL DREW** (plaintiff/respondent) **v** **MAKITA (AUSTRALIA) PTY LTD** ACN 001 117 335 (defendant/appellant)
FILE NO/S:	Appeal No 9558 of 2008 DC No 4664 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 March 2009
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2009
JUDGES:	Holmes and Muir JJA and Daubney J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The orders made on 29 August 2008 are set aside.** **3. The matter is remitted to the District Court for a new trial on all issues other than quantum.** **4. The respondent's damages, should he be successful in establishing liability on the part of the appellant on the new trial, are as assessed by the primary judge in the reasons dated 29 August 2008.** **5. The costs of the first trial abide the result of the new trial.** **6. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERRORS OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where respondent claimed damages for injuries sustained by him when his left hand was severed by a circular saw – where respondent alleged that appellant manufactured or was deemed to have manufactured the circular saw and that a

defect in it was the cause of his injuries or alternatively the injuries resulted from the appellant's negligence – where primary judge held that both bases of claim were made out and awarded damages against the appellant – where primary judge's reasons did not discuss any inconsistencies in the evidence; the reliability, weaknesses or strengths of the evidence and whether the evidence of one expert was to be preferred over the other – whether reasons adequate

Trade Practices Act 1974 (Cth), s 75AC

Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500; [1983] FCA 179, cited
Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430, cited
Cypressvale Pty Ltd v Retail Shop Leases Tribunal [1996] 2 Qd R 462; [1995] QCA 187, cited
Fitzgibbon v Waterway Authority & Ors [2003] NSWCA 294, cited
Flannery v Halifax Estate Agencies Ltd [2000] 1 All ER 373, cited
Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, cited
Pettitt v Dunkley [1971] 1 NSWLR 376, cited
Public Service Board of New South Wales v Osmond (1986) 159 CLR 656; [1986] HCA 7, cited
Res 1 v Medical Board of Queensland [2008] QCA 152, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, considered
Strbak v Newton (Unreported, New South Wales Court of Appeal, Gleeson CJ, Samuels and Priestley JJA, 18 July 1989), cited
Sun Alliance Insurance Ltd v Massoud [1989] VR 8, cited
Waterways Authority v Fitzgibbon (2005) 79 ALJR 1816, cited
Wiki v Atlantis Relocations (NSW) Pty Ltd (2004) 60 NSWLR 127; [2004] NSWCA 174, cited

COUNSEL: R A I Myers for the appellant
J W Lee, with M A McLennan, for the respondent

SOLICITORS: Sparke Helmore for the appellant
Wellner Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and with the orders his Honour proposes.

[2] **MUIR JA: Introduction**
On 29 August 2008, the plaintiff/respondent was awarded judgment against the defendant/appellant in the sum of $194,454 after a trial in the District Court for the respondent's claim for damages for injuries sustained by him on 19 December 2001 when his left hand was severed by a circular saw he was using. The respondent

alleged that the appellant manufactured or was deemed to have manufactured the circular saw and that a defect in it, within the meaning of s 75AC of the *Trade Practices Act* 1974 (Cth), was the cause of his injuries. Alternatively, he alleged the injuries resulted from negligence of the appellant. The learned primary judge held that both bases of the claim had been made out.

[3] The notice of appeal is against the whole of the judgment and challenges the primary judge's findings on liability on 19 grounds. Only a few grounds were relied on by the appellant's counsel on the hearing of the appeal and there was no challenge to the primary judge's findings on quantum.

The grounds of appeal relied on in the hearing of the appeal

[4] The appellant's counsel concentrated on the following grounds in his written and oral submissions.

[5] The primary judge erred in finding that when the accident occurred:

(a) The safety guard of the circular saw was jammed or stuck in the open position and was therefore not able to retract to the closed position when removed from the cut;

(b) Immediately before the respondent sustained his injury, the Weathertex board he was cutting, fell from the working bench as a result of which the respondent instinctively attempted to grab hold of the Weathertex, but instead grabbed hold of the exposed blade of the saw, thereby suffering his injuries;

(c) In accepting the respondent's evidence as to how the accident happened; and

(d) In failing to provide adequate reasons for his decision.

The allegations in the pleadings

[6] In his amended statement of claim, the respondent alleged as follows:

(a) When the respondent was operating a circular saw, manufactured and supplied by the appellant, to cut a Weathertex cladding sheet, the sheet slipped;

(b) The respondent attempted to prevent the sheet from slipping as the saw was removed from the cut, leaving the blade exposed;

(c) The respondent suffered severe lacerations to his left hand as a result of the jamming of the safety guard of the saw, which did not return to the closed position when removed from the cut;

(d) The safety guard jammed as a result of a defect within the meaning of s 75 AC of the *Trade Practices Act* 1974 (Cth).

[7] The following particulars of the alleged deficiency were provided:

"**Particulars**

The safety of the Circular Saw was not such as persons generally were entitled to expect by reason of the following:

a. the safety cover of the Circular Saw did not return to the closed position as and after the Circular Saw was removed from a cut or at the end of a cut;

b. the blade of the Circular Saw remained exposed as and after the Circular Saw was removed from a cut and at the end of a cut;

c. the range of travel of the safety cover of the Circular Saw was limited by contact with a protruding structure in the guide path formed by the fixed upper guard;

d. the trailing edge of the safety cover of the Circular Saw became jammed as it was deflected laterally and partially moved across the protruding structure."

[8] Alternatively, it was claimed the "accident" was caused by the appellant's negligence.

[9] The following information was contained in a reply to a request for particulars dated 2 March 2005:

"1. … the plaintiff … does not know how the sheet of weathertex cladding slipped.

2. … the plaintiff was operating the saw immediately before the weathertex slipped by his right hand on the handle of the saw, right index finger pulling the trigger to activate the switch. His left hand was in front of the right hand on the saw handle to steady the saw.

3. … the plaintiff attempted to prevent the sheet of weathertex cladding from slipping by taking his left hand off the saw to take hold of the weathertex but it had slipped."

The respondent's evidence

[10] In his evidence-in-chief, the respondent gave evidence that the cutting he was carrying out at the time of the accident was work of a type performed by him on many occasions in the past and that he went about it in the same way as he had always done. He used the subject saw on four or five occasions prior to the accident. He was taught, as an apprentice, to lift the guard on every occasion that he started the saw. A number of boards had been cut by the respondent prior to the accident with Mr Vayro's assistance.

[11] The respondent's evidence of what took place immediately before and at the time of his accident was somewhat disjointed, but it is possible to reconstruct the following account. The respondent, assisted by a Mr Vayro, intended to cut a piece of Weathertex 3.6 m long, 300 mm wide and 12 mm thick, down the middle. Weathertex is a material used to clad the outside walls of houses. The respondent positioned two trestles, which were approximately 600 mm high and placed on top of them two hardwood boards which were 200 to 250 mm wide, 3.6 m long and 50 mm thick. The Weathertex board was then placed on the stable hardwood

platform with a little more than half of its width protruding beyond the hardwood so that the saw could be run down the centre of the Weathertex board.

[12] At the start of the operation Mr Vayro was "at the end of the first horse, at the end of the 3.6 metres" holding the Weathertex board down onto the bench. The respondent lifted the guard with his right hand in order to place the saw on the board. That enabled the guard to "clear the commencement of the cut." He then released his left thumb "off the handle of the guard … for the guard to retract … straight away." He did not consciously lock the guard open. He did nothing in the course of his cutting "which might have caused the guard to move from the position that [he] had put it in before [he] commenced the cut." In order to cut parallel to the hardwood support, the Weathertex had to extend beyond the supporting hardwood by at least 180 mm.

[13] The respondent made the first 150 mm of the cut with the board placed squarely on hardwood base but overhanging the base sufficiently to accommodate the cut. Leaving the saw in the cut, the board was moved by him with the assistance of Mr Vayro, who supported the board. He continued cutting to halfway, when he stopped again and Mr Vayro came around behind him and took hold of the board. When he had cut to within 300 to 400 mm of the end of the board, it fell. He described what happened then:

> "I tried to grab hold of the board that was falling because that's the natural instinct … but the board wasn't there … consequently because the guard didn't retract back around, I grabbed hold of the blade."

[14] Asked if it was the left hand side of the board "that somehow fell off the horse", the respondent responded, "The whole lot fell off the horse at the end."

[15] In cross-examination, the respondent admitted that he told staff at the Princess Alexandra Hospital after his emergency admission that he "went to catch a block of wood and [his] left hand caught the saw blade." He admitted also that he told a Dr James, whom he saw on 19 August 2002, that he had sustained a left hand injury, grabbing a hand saw which hadn't stopped. He admitted that he didn't notice at the time of his accident that the guard was jammed, or that the guard didn't close. He had not seen the guard jammed open prior to the time of the accident on any of the occasions on which he had used it.

[16] The respondent received a letter from the appellant dated 14 November 2002. It, relevantly, stated:

> "Our Warranty records indicate that you have purchased one of the Makita power tool models mentioned above.
>
> It has been brought to our notice that, should any of these models be used in a manner where the lower guard is forcibly held up in the open position, there is a possibility that it may stick and not return to the closed position at the completion of the cut, thus leaving the blade exposed.

> Use of the tool in this way does not accord with warnings included in the Makita instruction manual provided with each tool. Nevertheless, as a potential hazard has now been identified, we have decided to recall and modify these tools so that the potential for injury is eliminated, whether or not the tool is incorrectly used."

[17] After he received the letter, the respondent took the saw out of its box and noticed that "the guard was still jammed up in the cowl." In giving a demonstration to the cross-examiner of how he had handled the guard, he lifted the guard up in the way he said he normally did and it locked in the open position.

[18] Included in the respondent's instructions recorded in the report of Mr McDougall, a mechanical engineer, who gave expert evidence in the respondent's case, were:

> "[The respondent] did manually open the blade guard at the start of the cut.
> [The respondent] was approximately 200 to 400 mm from completing the cut. He was gripping the saw handle with his right hand and saw motor with his left hand.
> At this time, the Weathertex board did move towards [the respondent] and fell from the saw stool/timber planks.
> As the board fell, and prior to it reaching the ground, [the respondent] removed his left hand from the saw motor and attempted catch (sic) the board."

In a letter dated 20 June 2003 to the appellant's solicitors, the respondent's solicitors argued that "the incident happened when [the respondent] had cut to within 250 mm from the end of the Weathertex."

Dr Coleman's evidence

[19] The respondent gave the following account of the accident to Dr Coleman, a surgeon who gave a report dated 15 February 2005:

> "1. *Mr.Drew's recollections of the circumstances of the alleged incident.*
>
> Mr. Drew was at home helping a neighbour cut a piece of Weathertex cladding. He was ripping the cladding with a 7 1/4 inch Makita hand held circular saw. *He said the piece of board that was cut off dropped when it was near the end.* The board was approximately 3.6m long and another person was holding the other end of the board. The board was set on stools and a plank. He was using his left hand to steady the saw and his right hand on the trigger.
>
> As the board started to fall, he went to grab it, and accidentally grabbed the blade. *He said the blade was still in the cut.* He said the guard had not fully covered the blade. The teeth of the blade lacerated the flexor aspect of his left palm around the mid palm aspect, and extended around the dorsal and ulna aspect of the hand. Because of the severity of the injury, he was transferred to the Princess Alexandra Hospital for further treatment." (emphasis added)

[20] In cross-examination, after referring to his notes, Dr Coleman said that the respondent had told him:

> "I was cutting this length of the saw - length of the timber and a piece - and *the piece that I cut off started to fall* and, as it started to fall, *I grabbed it with my hand to stop the piece of timber falling* and, as I did so, my hand went underneath the timber to grab it and hit the blade of the saw, which was exposed." (emphasis added)

Mr Vayro's evidence

[21] Mr Vayro's oral evidence was to the following effect. At the commencement of each cutting operation, he stood at the opposite end of the board to the respondent but moved around to the other end when the cut got to about halfway. He was behind the respondent when the accident happened and unable to see what took place. He realised that something had gone wrong when the respondent started shouting. He didn't recall whether any hardwood had been placed on the trestles to support the Weathertex. His recollection was that the Weathertex "definitely didn't fall off a trestle so far as [he] was aware."

[22] He gave a statement to the appellant's solicitors dated 7 September 2004, in which he said:

> "5. We had set up a workspace running from east to west on a flat concrete driveway at the front of my parent's house. The area was very clean. I remember this because Paul and my stepfather were constantly at me to clean up.
>
> 6. We had set up a piece of timber on 2 or 3 trestles. I cannot remember the dimensions of the timber other than to say that it was pretty long and around 10 mm thick. The trestles were at each end of the timber. Attached to this statement and marked with the letters "MV1" is my diagram of our workspace.
> …
>
> 8. Paul started cutting the timber from where I was standing lengthwise from east to west. I was standing about 1 to 2 metres behind him holding the timber to keep it steady so that it wouldn't bow. I was not trying to hold the pieces of timber together. My job was just to keep it steady. I can not remember if we had clamped the timber as well.
> …
>
> 10. Paul was about halfway through the cut when the accident happened. I do not know where his hands were.
>
> 11. I remember hearing the sound of the saw change just before the accident. It was only a slight change and it may have been Paul powering off the saw or it may have been when the saw actually contacted with Paul's hand. I do not know.
> …

16. I did not see or touch the saw before or after the incident."

[23] The diagram accompanying the statement depicts a sheet of Weathertex resting on three trestles placed at right angles to the length of the Weathertex and to the front of a garage. The respondent is located at about the middle of the Weathertex on the side away from the garage and a little below the middle trestle, looking up the diagram. Mr Vayro's position is shown as level with the bottom end of the Weathertex on the same side as the respondent and the same distance from it.

Mr O'Shea's evidence

[24] Mr O'Shea, a friend of the respondent and a registered builder, was nearby at the time of the accident. He heard screaming and was at the scene of the accident in a few seconds. He didn't observe anyone touch the saw, which was lying on the ground. He noticed that a piece of Weathertex had been cut "three-quarters of the way along, and … was lying on the ground." He noticed "a score mark on the face of it … where the saw must have cut it … it went diagonally across the … face of the … sheet." The guard had not retracted to cover the blade. He and another person manipulated the guard on the saw and noticed that it was "actually sticking and jamming … in place." Asked what would cause the diagonal score mark, he answered, "… when the saw comes out – has come out of the cut … backwards, or – it's actually been dragged sideways across the – face of the timber."

[25] In cross-examination, Mr O'Shea accepted that the saw may have been thrown or dropped in the course of the accident. He conceded that he hadn't told the respondent of his observations at the accident and that he hadn't been asked to recall the events of the accident scene until the Thursday prior to his giving evidence, some six years after the accident.

[26] Mr O'Shea wasn't able to say who had put the saw back in the box. He recalled that it was covered in blood. He accepted that the reason for raising the guard was "simply to have the lower guard clear the workpiece at the commencement of the cut" and that he wouldn't "pull it out with any force or endeavour to jam it open or anything of that kind." He accepted also that "the first thing you do once you start your cut is to see that the heel of the guard has gone back onto the workpiece" and that he would "ensure that that was happening in the course of the cut." He accepted that if the cut "had advanced as far as 150 to 200 millimetres from the end … the piece … that wasn't being supported would be likely to fall."

The evidence of Mr McDougall, consulting mechanical engineer

[27] Reports of Mr McDougall, consulting mechanical engineer, dated respectively 2 December 2004 and 30 October 2007 were put in evidence.

[28] In the first report Mr McDougall observed:

> "The author was readily able to reproduce jamming by inducing some lateral movement of the lower moveable guard as it opened and approached the limit of travel. Force required to achieve this would be described as slight. This lateral movement is a combination of clearance in the lower guard attachment mechanism and elastic bending of the guard.

> The opening of the guard to it's (sic) range of travel will predictably occur at the start of a job when the operator is working quickly. For some cutting techniques, e.g. plunge cut, this is more likely to occur. In these situations, the potential for jamming to occur is high and the jammed condition of the guard may not be detected by the operator when visual attention is focussed on the line of the cut.
>
> This potential for jamming is an undesirable design feature of the saw which should have been identified and rectified had the product been subject to an appropriate risk assessment."

[29] In his October report, Mr McDougall's opinions, included:

(a) Once a decision is made by the operator to hold open the guard, right hand dominant operators would commonly hold it at its maximum range of travel;

(b) The holding of the guard by such a person at less than its fully open position tends to result in "a very awkward posture, restriction to vision and reduced control of the saw";

(c) "The guard may be held open until the cut extends beyond the diameter of the blade. At this point, the workpiece holds the guard at close to its fully open position. Therefore, lack of movement of the guard as it is released may not readily be interpreted as 'the guard has jammed' but rather that the workpiece is now holding the guard open."

(d) "The problem with the guard jamming is therefore likely to be a combination of inadequate design, inadequate design specification provided to the manufacturer, or lack of quality control by the manufacturer."

[30] The report commenced by accepting the respondent's description of how the accident happened, including the instruction that "the automatic guard was found to be jammed in the fully open position."

[31] At the commencement of his cross-examination, Mr McDougall said that he had limited expertise in using saws such as the subject saw. The respondent's counsel then objected to his being questioned on the proper method of using the saw on the grounds that his client's expert lacked relevant expertise. The objection was implicitly upheld.

[32] In notes of a conversation with the respondent in late November or early December 2004, Mr McDougall recorded "saw in both hands, second handle fitted." Mr McDougall made a note "that there was a second handle fitting." The saw was supplied to Mr McDougall for examination prior to his first report with its cover "jammed".

[33] At the conclusion of the cross-examination of Mr McDougall, the primary judge asked, "But that particular guard doesn't always self-close does it?" Mr McDougall replied in the affirmative. He was then asked how it could be made to remain in the open position. His evidence was to the effect that this could be done by pushing the handle slightly away from the body or away from the saw. In further cross-examination it was established that the guard would remain open only if pushed and moved "sideways to some extent." Mr McDougall said that it was "relatively easy to cause it to jam" and he confirmed also that there was "a need to provide some lateral force to cause it to jam."

The evidence of Dr Grigg, consulting mechanical engineer

[34] Dr Grigg, a consultant mechanical engineer called by the appellant gave the following evidence in report dated 27 October 2005:

> "As made available, the bottom guard of the saw was seen to be jammed with its control lever in the fully forward position, as shown in Photo 1 after the blade was removed. It was found that it was readily possible to release the guard from the jammed position by pulling sideways on the guard control lever and, when released, the guard appeared to function quite normally. That is, it rotated freely under the action of its spring to the closed position covering the bottom of the blade and, when positioned on a table in the manner shown in **Photo 2**, it was able to be rotated against the action of its spring to the position shown and, when lifted from the table, it swung back so as to cover the bottom of the blade.
>
> …
>
> D**ISCUSSION**
>
> Since it was found during the inspection that heel contact on the workpiece does not cause the bottom guard to move to a position where it becomes stuck on the rib in the top guard, there is a high probability that the bottom guard was jammed open by force being applied to its control lever either prior to or during the cut.
>
> …
>
> In the handwritten InterSafe notes, at the third line from the bottom, there is an entry which appears to read "*saw in both hands (2nd handle fitted)"*. Given that the second handle was still sealed in its plastic bag, it seems improbable that it was fitted to the saw at the time of the accident.
>
> …
>
> If, as appears most probable, the Plaintiff pushed the control lever of the bottom guard forwards so as to cause it to jam in the open position, this is contrary to Item 2 of the Additional Safety Rules listed on Page 4 of the Instruction Manual where it states:
>
> > '*Keep guards in place and in working order. Never wedge or tie lower guard open. Check operation of lower guard before each use. Don't use if lower guard does not close briskly over saw blade. Caution: If saw*

> *is dropped, lower guard may be bent, restricting full return.*'
>
> Given the free operation of the guard once it was released from its jammed position, there is nothing to suggest that the guard itself had been damaged in the manner suggested in this caution.
> …
>
> **CONCLUSIONS**
>
> 1. Although it was found that the bottom guard of the saw could be made to jam on a rib within the top guard, this would only occur if the guard was opened beyond its working range by applying a forward force to the control handle of the guard.
>
> 2. During normal cutting following the procedures set out in the Instruction Manual, the bottom guard would not open to the extent where jamming would occur.
>
> 3. The method used by the Plaintiff to support the workpiece whilst he was undertaking the cut could best be described as precarious and not in accordance with either good practice or the instructions contained within the Instruction Manual supplied with the saw."

[35] In cross-examination Dr Grigg gave the opinion that "normal use of the saw wouldn't result in it being in a position where it jammed" and also that the saw, as designed, was not unsafe. He said also:

> "… I find it hard to believe that putting it – moving it to the position where it can jam would not involve a conscious realisation that it was jammed."

[36] Pressed by cross-examining counsel, he explained:

> "… Anyone who has used a saw of this type would know that, when you rotate the guard forwards, if there's a certain resistance from the spring which gets slightly greater as you move it - move the control lever to the forward position, there's no extra resistance generated other than a progressive increase in the force unless you encounter the end-stop, which, in this case, happens to be a rib which could cause - which can cause the saw - the guard to jam in the open position. But the – there is extra force needed, having reached the rib, to cause the bottom guard to remain open, so that the encountering of the extra force would warn a user of the saw that there was no point in going further and, secondly, the - if it – normally, the - if you take it to any position prior to reaching the end of its movement, it will immediately return and, in this case, if it was - if it actually was taken to the point where it jammed, then it would clearly not return if it was jammed - if the force applied to it was sufficient to cause jamming to occur.

> …
> Well, look, I don't know whether the guard was jammed open. You could cut your hand off without jamming the guard open, I don't know whether that occurred. We're dealing with a situation where I've been asked to comment on the fact that that guard can jam open."

[37] Dr Grigg said that he had owned a saw similar to the one in evidence and had used it for over 30 years. Later, in cross-examination he reaffirmed that the safety guard could not be jammed open "in the normal process of cutting a piece of timber or a piece of Weathertex …"

[38] The following exchange occurred in cross-examination:

> "… You'd agree, wouldn't you, that, in circumstances where there's the risk of a guard being jammed open inadvertently, as appears to be the case here, that, in the least, the manufacturer should give warning of that fact, shouldn't it?-- Yes, I believe that's desirable.
>
> It's an absolute, isn't it?-- Yes.
>
> Yes. Further, you would say, as a safety expert, that the engineering controls are much more important than the operator or human controls, aren't they, because the engineering controls can be affirmatively put into place?-- Yes, that's basically correct, yes.
> …
> ----- let's not beat about the bush. You're an expert, you're giving unbiased evidence to this Court. It's your opinion, is it not, that a design that allowed for that guard to be jammed open inadvertently would be a faulty design?-- Yes, I think I'd agree with that.
>
> Yes. And, in fact, if there was a risk assessment conducted under your control of such a device, for the purpose of seeing whether that device could be released onto the market, you'd send it back for rectification, wouldn't you?-- Yes.
>
> You would never have allowed this saw to get onto the market, would you?-- No."

No objection was taken to any of these questions.

[39] Asked if he agreed that "the most probable explanation for the injury sustained by the [respondent], is that the guard jammed and failed to retract." He said, "… you can cut your hand off with a guard that is capable of retracting if you put your hand in the danger zone before it actually can retract. It takes a finite time for it to retract … it's only about a second or so." It was put to him that it took .3 of a second and he acknowledged that he hadn't timed it but thought that that timing was "a bit hopeful". Counsel for the appellant conceded that the design of the saw was "such that the guard should return to the closed position within .3 of a second."

[40] Asked if the most probable explanation for the injury was that the guard became jammed and failed to retract, on the assumption that the retraction would only take .3 of a second, he answered:

> "… Not at all. There's many ways it could happen.
> …
> There's - my understanding is that he's cutting a piece of timber that fell, he goes to grab the piece of timber. So, where's the saw? Is the saw still in contact with the rest of the piece of timber, so the guard is open? So that, as he goes to grab it, he's grabbed it before the guard has a chance to do anything?"

[41] In response to the primary judge's question whether the locking or the jamming of the guard in the open position could be done subconsciously or inadvertently in the normal course of working with the saw, Dr Grigg responded:

> "I have difficulty in believing it would be totally inadvertence (sic), because if you don't go to the point where you can jam it, you first of all don't experience any significant noticeable change in the resistance, it does increase a bit as you bring the lever over, and normally you would - if you were actually making a cut - when you let the lever go, as you - because there is no need to hold onto it any longer, you would feel it come back as you were letting it go, because the heel of the guard then rests on the work piece as you were making the cut. There is absolutely no need to continue to hold it forward, and you would expect it to come back – you would need it to come back, if you like – so that it could perform in the normal way."

[42] This exchange then occurred:

> "But isn't it a fact that sometimes the guard retracts and sometimes it doesn't?-- No. It should always retract to perform its job.
>
> Yes, but sometimes it doesn't, as we've heard, because it can jam or lock in the open position, can't it?-- Well, but - yes, that can happen with this sort but you have to push it beyond the range where you need to open it in order to - in order to do the normal job. You don't have to open it that far. The blade is fully exposed. The normal reason for using the lever to open the guard is to enable your saw to enter the work piece. It's not - there's no reason to hold it wide open.
>
> What action do you say is required to lock or jam the guard in the open position?-- You have to push forward on it with a noticeable increase in the force that would otherwise be required to simply open it.
> …
> I'm asking you really, because you would have examined it. What do you say is the action required to lock or jam the guard in the open position?-- Well you have to push the control level which I've got

illustrations in my report which explain what these words mean. You have to push the control lever in what I think you're calling the fully clockwise direction and you have to exert additional force when it encounters the rib to get it to jam. And if you pushed laterally relative to the saw, it might also assist in causing it to go to a point where it would jam."

The structure of the reasons

[43] The primary judge's finding of particular relevance for present purposes are:[1]

"[54] (v) The Weathertex was supported by two lengths of timber board, each of which was of the dimensions of 3.6 metres long, by 200 to 250 millimetres in width, by 50 millimetres in thickness, placed on top of two saw-horses approximately 650 millimetres high which formed the working-bench;

…

(ix) When the plaintiff reached a position in the cutting process between 400mm and 200mm from the end of the cut, the Weathertex fell from the working-bench as a result of which the plaintiff instinctively attempted to grab hold of the Weathertex but instead grabbed hold of the exposed blade of the saw thereby suffering serious injuries to his left hand ("the incident");

(x) The safety guard of the circular saw was jammed or stuck in the open position and was therefore not able to retract to the closed position when removed from the cut;

(xi) The saw had a design defect in that it was possible for an operator of the saw in the normal course of its operation to "jam" or "stick" the safety guard, either consciously or unconsciously, in the open position because of "the trailing edge of the moveable guard" being capable of becoming wedged "over onto a protruding structure in the guide path formed by the fixed upper guard" by only a slight lateral movement.

…

[57] In making the above findings on the saw defect I rely upon the evidence of both experts McDonnell (sic) and Grieg (sic) who were essentially *ad idem* on the point that where there was a "possibility or the potential" for the safety guard of the saw to jam or stick in the open position inadvertently, the design of the saw is faulty and should have been rectified by the manufacturer. (footnote deleted)

[58] The defendant has pleaded "further or alternatively the incident was caused solely by a deliberate act, negligence or inadvertence on the plaintiff's part", but I am not persuaded

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1 See also *Drew v Makita (Australia) Pty Ltd* [2008] QDC 223, [57] and [58].

> that the defendant has discharged its onus of proof in respect of this pleading, as I am not satisfied that the plaintiff deliberately or consciously jammed the guard in the open position before operating the saw. On the contrary I am satisfied on the evidence that it was possible for an operator of the saw either inadvertently or subconsciously to jam or stick the safety guard in the open position because of the inherent design defect referred to in paragraph [54(xi)] above. I therefore find the plaintiff did not contribute to his injury in any way."

Were the reasons adequate?

[44] In the relevant part of his reasons the primary judge: set out a brief resume of the evidence of each lay witness; referred to parts of the experts' oral and written evidence; discussed relevant principles of law; and summarised the respective submissions of counsel for the parties. He then made the findings, including those set out above, which he introduced with the words, "On a review of all the evidence and the submissions made, I make the following findings in this proceeding: …"

[45] The primary judge made no reference to and did not discuss: any inconsistencies in the evidence of any witness; the reliability, weaknesses or strengths of the evidence of any witness; whether the evidence of one expert was to be preferred over the other and if so, why.

[46] The primary judge's finding in paragraph [54](xi) implicitly accepts the evidence of Mr McDougall which is not wholly consistent with the evidence of Dr Grigg. The thrust of the latter's evidence was that the safety guard could be jammed if the control lever was pushed forward beyond the point where it was designed to be placed in the course of normal operations. He accepted that this was characteristic of the saw and was a design or manufacturing failure. Mr McDougall was of the opinion that the safety guard could become stuck in the off position by using slight force on the lower guard to induce "some lateral movement … as it opened and approached the limit of travel".

[47] In his answer to the last question asked in re-examination, however, Dr Grigg did mention that pushing the control lever "laterally relative to the saw … might also assist in causing it to go to a point where it would jam." But Dr Grigg also gave evidence to the effect that the safety guard would not jam when used in the normal way and that an operator moving the guard with sufficient force to jam it would be conscious that jamming had occurred, if that was the case.

[48] The existence of a defect in the saw which enabled the safety guard to stick or jam in the open position does not lead, necessarily, to a finding for the respondent on liability. It needed to be established that the safety guard was stuck in the open position at the time of the accident and that the failure of the guard to operate was the cause of the injury. It was implicit in the finding in paragraph [54](x), that the safety guard was stuck and unable to retract when the blade was removed from the cut and that the respondent's injury occurred when the saw was free of the Weathertex.

[49] Whether the respondent took hold of the saw blade when the saw was in the position in which the safety guard would have protected the respondent had it not

been jammed (assuming that it was jammed), as Dr Grigg pointed out, would depend on whether the saw was still in contact with the Weathertex and whether the respondent "grabbed it before the guard has a chance to do anything." If the saw was being held on a piece of Weathertex resting on the hardwood planks the safety guard would be prevented from engaging. The safety guard may also have been prevented from engaging if the blade was in the cut in the Weathertex when it fell.

[50] The precise way in which the accident happened is unknown, apart from the obvious fact that the blade of the saw was revolving at the time and unprotected by the safety guard. The account given to Dr Coleman by the respondent is consistent with the accident happening when the severed piece of Weathertex fell. The respondent's account in his oral evidence was that the whole board, which had not been completely divided in two, "slipped off the workplace", i.e. the hardwood on the trestles. But even if this version of his evidence is correct, it does not follow, necessarily, that the saw must have been disengaged from the cut in the Weathertex at the time the blade made contact with the respondent's hand. The reasons did not address this question or explain the basis for the finding that the safety guard was jammed or stuck in the open position at the time of the accident.

[51] It is plain from the respondent's evidence that he had no recollection of whether the safety guard was jammed or not. He swore that he would not have deliberately put the safety guard in the open position so that it would not retract automatically. The possibility that the safety guard may have become stuck in the open position did not occur to him until after he received the recall letter from the appellant. According to him, he then took the saw out of its box and noticed that the safety guard was in the off position. But acceptance of his evidence in this regard does not establish the position that the safety guard was in at the time of the accident. Mr O'Shea was called to give that evidence. His evidence is set out above.

[52] If Mr O'Shea's evidence is accepted, it is likely that the safety guard, unless damaged by falling to the ground, was stuck in the off position and that the guard had a tendency to jam when placed in the off position. Curiously, this fault in the safety guard did not appear to have excited Mr O'Shea's interest or the interest of anyone else who was present immediately after the accident. Neither Mr O'Shea nor, it would seem, anyone else, drew this matter to the respondent's attention. Mr O'Shea said that there were other people with him at the time, including Mr Vayro, the owner of the house, and a person working with him whose Christian name was Graham. Graham, according to Mr O'Shea, also manipulated the safety guard. Neither Graham, nor the owner of the house, was called to give evidence. Mr Vayro, who did give evidence, made no observations about the condition of the saw. Presumably, any defect in the safety guard, if there was one, was not drawn to his attention. None of these matters were discussed by the primary judge in his reasons: but in fairness to him, some of them were not drawn to his attention.

[53] Nor did the reasons discuss an obvious difficulty with the evidence that the whole Weathertex sheet fell. The evidence of the respondent and Mr O'Shea was that the Weathertex (for a little under half its width) was supported by hardwood planks roughly equal in length to the Weathertex. Both the respondent and Mr Vayro also swore that Mr Vayro was holding one end of the Weathertex when the accident happened. Mr O'Shea's opinion was that the respondent's setup was "a solid, safe, stable working platform." Yet, according to Mr Vayro, he realised that something had gone wrong only when the respondent started shouting. It seems odd that the

Weathertex board could fall without Mr Vayro noticing it immediately. After all, it was only 3.6 metres long. But he said that as far as he was aware, "the Weathertex definitely didn't fall off a trestle."

[54] The respondent himself was unable to explain how the Weathertex could have fallen from its platform. Mr O'Shea accepted that if the cut was within 150 to 200 mm from the end of the Weathertex board, the unsupported length of Weathertex would be likely to fall, but his evidence was that the cut was about 900 mm from the end. The respondent's oral evidence was that the accident happened when he had cut to 300 to 400 mm from the end but Mr McDonald's notes of oral instructions received by him from the respondent in November or December 2004 noted "whilst ripping 150 – 200 mm from the end of the cut" and his solicitors advised the appellant's solicitors that the cut was within 250 mm of the end. This was not the only awkward aspect of the respondent's evidence. He instructed his solicitor in 2005 for the purpose of providing particulars of "the exact manner in which the plaintiff was operating the saw immediately before the weathertex cladding slipped …", that his hand position was "right hand on saw handle left hand on top of handle of saw in front of saw." Dr Grigg's report revealed that the front handle of the saw remained in its sealed plastic bag. The respondent's oral evidence seems to have been that he had one hand on the handle grip and the other around the saw's cylindrical motor.

[55] The primary judge did not attempt to explain, let alone resolve, these difficulties and inconsistencies in the evidence. Nor did the reasons advert to Dr Coleman's evidence referred to in paragraphs [19] and [20] above. In re-examination, Dr Coleman said he had a particular interest in circular saw injuries and believed that he could remember what was said to him by the respondent. He then gave this account:

> "I was cutting this length of the saw – length of the timber and a piece – and the piece that I cut off started to fall and, as it started to fall, I grabbed it with my hand to stop the piece of timber falling and, as I did so, my hand went underneath the timber to grab it and hit the blade of the saw, which was exposed."

[56] After this evidence was given, counsel for the respondent declined the primary judge's invitation to cross-examine in relation to it.

[57] A court from which an appeal lies must state adequate reasons for its decision.[2] The failure to give sufficient reasons constitutes an error of law.[3]

[58] The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing party with "a justifiable sense of grievance"[4] through not knowing or understanding why that party lost;[5] to facilitate or not frustrate a right of appeal;[6] as an attribute or incident

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2 *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8 at 18, 19; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 270, 279, 280 per McHugh JA.

3 *Soulemezis v Dudley (Holdings) Pty Ltd (Supra)*; *Res 1 v Medical Board of Queensland* [2008] QCA 152 at para [14]; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 431; and *Fitzgibbon v Waterway Authority* [2003] NSWCA 294.

4 *Beale v Government Insurance Office of NSW (Supra)* at 431.

5 *Beale v Government Insurance Office of NSW (Supra)* at 442.

of the judicial process;[7] to afford natural justice or procedural fairness;[8] to provide "the foundation for the acceptability of the decision by the parties and the public" and to further "judicial accountability".[9]

[59] The extent to which a trial judge must expose his or her reasoning for the conclusions reached will depend on the nature of the issues for determination and "the function to be served by the giving of reasons."[10] For that reason, what is required has been expressed in a variety of ways. For example, in *Soulemezis v Dudley (Holdings) Pty Ltd*, Mahoney JA said:[11]

> "… And, in my opinion, it will ordinarily be sufficient if – to adapt the formula used in a different part of the law … by his reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he has acted."

[60] McHugh JA's view was that reasons sufficient to meet the above requirements do not need to be lengthy or elaborate but "… it is necessary that the essential ground or grounds upon which the decision rests should be articulated."[12]

[61] In *Strbak v Newton*,[13] Samuels JA said:

> "…What is necessary, it seems to me, is a basic explanation of the fundamental reasons which led the judge to his conclusion. There is no requirement, however, that the reasons must incorporate an extended intellectual dissertation upon the claim of reasoning which authorises the judgment which is given."

[62] Woodward J, in *Ansett Transport Industries (Operations) Pty Ltd v Wraith*,[14] said that the decision maker:

> "…should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions."

[63] Meagher JA in *Beale v Government Insurance Office of NSW* stated these propositions:[15]

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6 *Soulemezis v Dudley (Holdings) Pty Ltd (Supra)* at 259, 271; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 666 – 667 per Gibbs CJ; *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at [129].

7 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257, 269, 273, 279.

8 *Soulemezis v Dudley (Holdings) Pty Ltd (Supra)* at 279; *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377 at 381 – 392; *Waterways Authority (Supra)* at [129]; *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 475, 476.

9 *Soulemezis v Dudley (Holdings) Pty Ltd (Supra)* at 279.

10 *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386.

11 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273

12 *Soulemezis v Dudley (Holdings) Pty Ltd (Supra)* at 280.

13 (Unreported, New South Wales Court of Appeal, Gleeson CJ, Samuels and Priestley JJA, 18 July 1989).

14 (1983) 48 ALR 500 at 507.

15 (1997) 48 NSWLR 430 at 443 – 444.

> "…there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it: *North Sydney Council v Ligon 302 Pty Ltd* (1995) 87 LGERA 435. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.
>
> Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached. The obvious extension of the principle in *North Sydney Council* is that, where findings of fact are not referred to, an appellate court may infer that the trial judge considered that finding to be immaterial. Where one set of evidence is accepted over a conflicting set of significant evidence, the trial judge should set out his findings as to how he comes to accept the one over the other. But that is not to say that a judge must make explicit findings on each disputed piece of evidence, especially if the inference as to what is found is appropriately clear: *Selvanayagam v University of the West Indies* [1983] 1 WLR 585; [1983] 1 All ER 824. Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance: *Rajski v Bainton* (Court of Appeal, 6 September 1991, unreported).
>
> Thirdly, a judge should provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found. Those reasons or the process of reasoning should be understandable and preferably logical as well."

[64] Whilst, in my respectful opinion, it would be inconsistent with authority to apply the three "fundamental elements" rigidly, and I do not understand his Honour to be suggesting otherwise, they provide useful guidance for a determination of the sufficiency of reasons in the general run of cases.

[65] The following remarks of Henry LJ in *Flannery v Halifax Estate Agencies Ltd* [16] relating to expert evidence were referred to with approval in the reasons of Ipp JA in *Wiki v Atlantis Relocations (NSW) Pty Ltd*:[17]

> "It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons. This is because issues are so infinitely various. For instance, when the court, in a case without documents depending on eye-witness accounts is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible ... But with expert

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16 [2000] 1 WLR 377 at 381 – 382.

17 (2004) 60 NSWLR 127 at 137.

> evidence, it should usually be possible to be more explicit in giving reasons: See Bingham LJ in *Eckersley v Binnie* (1988) 18 ConLR 1 at 77–78:
>
> > 'In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons ...'
>
> And:
>
> '... [w]here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other ... .' "

These observations are also apposite, particularly in relation to the appellant's contribution claim.

[66] The reasons in relation to liability, disclose very little of the primary judge's reasoning processes. As far as one can tell from the reasons, his Honour's conclusion about how the accident happened may be derived from intuition as much as from, or in lieu of, any logical reasoning process.

[67] The appellant argued at first instance that: the evidence of Dr Coleman should have been treated as more reliable than the respondent's oral evidence, which was unreliable; it was now only possible to speculate about how the accident actually happened and as to the position of the saw and safety guard at the time of the accident; there was substantial evidence that the accident happened when the respondent was nearing the end of the cut he was making, increasing the likelihood that the outside piece of Weathertex broke and fell; and the saw blade was not proved to be out of the cut in the Weathertex at the time of the accident. These arguments had substance. It was incumbent on the primary judge to explain why they were rejected or did not prevent the respondent's claim from succeeding. As part of any such explanation, it was necessary for the primary judge to resolve significant evidentiary conflicts or inconsistencies. In that regard, it was desirable that he make findings on credibility for the benefit of an appellate court in the event of an appeal and to obtain the benefit to be gained by submitting himself to the intellectual discipline thereby imposed.

[68] The consequence of these findings is that the appellant is entitled to have the judgment set aside.

[69] Counsel for the appellant submitted that the respondent's claim should be dismissed also but that course is inappropriate in the circumstances. There is evidence which, if accepted in preference to other evidence led at first instance, would enable the respondent to establish his case on liability. As resolution of some of the evidentiary difficulties discussed earlier depends on findings of credit, it is not possible for this Court to make all of its own findings of fact. In that regard, it is

relevant to note that some of the oral evidence was accompanied by physical demonstrations, which were unexplained in the record.

[70] Although the appeal was against the whole of the judgment, there is no good reason why the parties should be put to the trouble and expense of re-litigating issues relating to quantum. No ground of the notice of appeal challenged any of the primary judge's findings on quantum. The new trial should be before a different judge: that would remove the risk of the primary judge being exposed to allegations of pre-judgment should liability be decided against the appellant.

[71] I would order that:

1. The appeal be allowed.

2. The orders made on 29 August 2008 be set aside.

3. The matter be remitted to the District Court for a new trial on all issues other than quantum.

4. The respondent's damages, should he be successful in establishing liability on the part of the appellant on the new trial, be as assessed by the primary judge in the reasons dated 29 August 2008.

5. The costs of the first trial abide the result of the new trial.

6. The respondent pay the appellant's costs of the appeal.

[72] **DAUBNEY J:** I also agree with the reasons for judgment of Muir JA and with the orders proposed.