SUPREME COURT OF QUEENSLAND

CITATION:	*Vos v Hawkswell & Anor* [2010] QCA 92
PARTIES:	**GLENN JOHN VOS** (plaintiff/appellant) **v** **RAYMOND HAWKSWELL** **and** **RACQ INSURANCE LIMITED** ABN 50 009 704 152 (defendants/respondents)
FILE NO/S:	Appeal No 13047 of 2009 DC No 88 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	23 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2010
JUDGES:	Holmes and Muir JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – GENERALLY – where respondent's truck ran into back of appellant's sedan – where appellant unsuccessfully sued respondent for damages for negligence – where respondent's truck hit appellant's sedan square on – where appellant's sedan had stopped in front of respondent's truck without warning twice prior to the collision – whether respondent should have appreciated heightened risk that appellant might continue past erratic behaviour – whether respondent should have adjusted driving to avoid a collision in circumstances of heightened risk – whether respondent negligent in failing to avoid a collision APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – GENERALLY – where primary judge

rejected appellant's account of the collision – where there were inconsistencies in evidence of respondent and eye-witness – where primary judge rejected some of respondent's evidence – whether primary judge erred in accepting the accounts of the respondent and eye-witness

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – WRONG PRINCIPLE – whether primary judge failed to properly apply the principles regarding the relationship between the "leading car" and the "following car"

Caterson v Commissioner for Railways (NSW) (1973) 128 CLR 99; [1973] HCA 12, applied
Clark v Hall and Anor [2006] QSC 274, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
McLean v Tedman (1984) 155 CLR 306; [1984] HCA 60, applied
Rains v Frost Enterprises Pty Ltd [1975] Qd R 287, cited
Sayers v Harlow Urban District Council [1958] 2 All ER 342, applied
Tebbit v Dunne & Anor [2009] QCA 86, cited

COUNSEL: M Eliadis, with D Keane, for the appellant
M O'Sullivan for the respondents

SOLICITORS: Shine Lawyers for the appellant
Cooper Grace Ward Lawyers for the respondents

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the order he proposes.

[2] **MUIR JA: Introduction**
The 1980 Ford F100 truck driven by the respondent, pulling a float containing three thoroughbred racehorses, ran into the back of the Holden sedan driven by the appellant, between 5.30am and 6am on 30 April 2007, on Hursley Road, Toowoomba. The appellant sued the respondent for damages for negligence. His claim, after a trial in the District Court, was ordered to be dismissed with costs on 23 October 2009. The appellant appeals against that order.

Grounds of appeal

[3] The grounds of appeal challenge few findings of fact. The thrust of the appellant's case is that, having regard to the primary judge's findings and other uncontradicted evidence, the primary judge should have found that the respondent's negligence materially contributed to the collision and breached the respondent's duty of care. The findings relied on are:

(a) That the respondent's vehicle hit the appellant's car square on from behind;

(b) Without warning or indication, the appellant's car had stopped a short distance in front of the respondent's on two occasions prior to the collision;

(c) The respondent ought to have appreciated the potentiality for and the heightened risk that the appellant might continue his past behaviour and re-enter the road in other than safe circumstances;

(d) The respondent was obliged to drive at a speed and otherwise manage his vehicle so as to be able to avoid a collision in the circumstances of the heightened risk;

(e) The respondent was travelling at a speed of 10 to 15 kilometres per hour and, assuming a speed of 10 kilometres per hour (2.7 metres per second) over a distance of 15 metres of travel, the respondent would have had some five seconds to avoid the collision from the time he first observed the appellant pull out from a stationary position;

(f) The evidence of Ms J Pujolas, an eye witness, that the respondent's truck "just ploughed into" the rear of the appellant's car.

[4] Other grounds are that the primary judge:

(a) Erred in law in holding that no degree of care on the part of the respondent could have avoided the collision;

(b) Erred in accepting the evidence of the respondent, particularly that he could not avoid the collision given the many and significant inconsistencies in his evidence and the evidence of Ms Pujolas as regarding the circumstances of the collision, and given the primary judge's rejection of the respondent's evidence in numerous significant respects; and

(c) Erred in accepting the evidence of Ms Pujolas, particularly to the effect that the respondent could not avoid the collision, despite the many discrepancies in her evidence, and the fact that the only evidence as to the actual distance between the front of the respondent's truck and the rear of the appellant's car at the time the appellant commenced to pull out onto the road was that of the respondent.

[5] Alleged errors of law were that:

(a) The primary judge erred in adopting and applying the statement of Douglas J in *Tebbit v Dunne & Anor*;[1] and

(b) Erred in failing to apply properly or at all the principles in *Rains v Frost Enterprises Pty Ltd*[2] and other authorities cited in the primary judge's reasons as to the special duty and relationship between the "leading car" and the "following car", particularly in the circumstances of, and given the conduct and actions of the drivers prior to the collision.

Finding of credit

[6] There were three accounts given of the accident and of the circumstances leading up to it; that of the appellant, the respondent and Ms Pujolas. The appellant was a 45 year old truck driver who, on either the Thursday or Friday evening prior to the Monday morning of the accident, "had endured the trauma of his daughter being admitted to hospital in Toowoomba suffering from a drug overdose as a result of an unsuccessful attempt on her life". The respondent was a real estate agent in his mid sixties and an owner/trainer of horses in his spare time. Ms Pujolas was a jockey

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1 [2009] QCA 86 at [23].

2 [1975] Qd R 287.

and track work rider. The primary judge found her to be an honest and reliable witness. The primary judge rejected the appellant's account of the accident and, whilst mindful of the inconsistencies in the respondent's evidence, accepted his evidence as substantially reliable.

The respondent's evidence

[7] The respondent's evidence was to the following effect. On the morning of the accident, the respondent drove slowly out of the Clifford Park Racecourse in Toowoomba onto Wyalla Street with his lights on low beam. He looked down Wyalla Street and saw lights coming from about 400 to 500 metres away. He moved onto Wyalla Street, turned left towards Hursley Road, continuing to drive very slowly. He "probably almost stopped" at the Wyalla Street/Hursley Road intersection with his indicators on, indicating his intention to turn left into Hursley Road. When the truck was on Hursley Road and the trailer was still coming through from Wyalla Street, a car "*flew around the outside*" of his vehicle, got in front of him, and stopped one or two car lengths in front. He got a bit of a fright, flashed his lights once or twice and may have sounded his horn. The car then moved off and stopped again after travelling "*Another couple of metres, 20 metres, 20 feet, whatever*". The respondent flashed his high beam again but the car did not move, so the respondent put his spotlights on the car. It then moved off.

[8] By this stage, the horses in the float were upset and kicking. As the car started to move again, the respondent moved off at low speed and observed the appellant's car pull off the road about 100 to 150 metres behind a taxi rank on the side of Hursley Road. When the respondent "*… had got nearly level with the [appellant's] vehicle … , without any indication at all, the [appellant] drove straight out in front of [the respondent] and put his brakes on*". The respondent "*… applied his truck brakes and the electric brakes on his float but could not stop in time*".

[9] The respondent got out of his car and said to the appellant, "*Are we going to talk about this*?" to which the appellant replied, "*Oh, I – I shouldn't be driving when I'm like this*", or words to that effect. The appellant said something in the course of the exchange about his daughter being "in a bad way".

[10] The primary judge discussed the evidence of the respondent on distances as follows:

> "I want to now focus on the evidence of where the defendant's vehicle was in relation to the plaintiff's vehicle when the plaintiff pulled out in front of the defendant. The defendant first said that he got nearly level with the plaintiff when he pulled out in front of him. He then said, "*As I drew near him he just came straight out in front of me"*. He then said that the distance was, "*A few metres; 10 metres, 20 metres*". He next said that he was two to three car lengths away from the plaintiff when he commenced to move out. I then sought to clarify the issue and the defendant said that the relevant distance was eight or nine metres although he could not say accurately. Finally, the defendant said he really did not know because, '*I wasn't measuring distances and, at the end of the day, I collided with him*'." (footnotes deleted)

Ms Pujolas' evidence

[11] The primary judge concluded that Ms Pujolas' account corroborated the respondent's in material respects. In this regard he said:

> "The important evidence she gave, which I accept, is that she was right near the two vehicles when the impact occurred, and that the plaintiff pulled out on top of the defendant when the defendant was in close proximity to him. Again, that does not accord with the variety of measurements given by the defendant seeking to explain the distance he was from the plaintiff when the latter pulled out. The defendant was clearly struggling in that regard to try to assist the court in giving measurements of some precision, but it was clear to me, that he could not reliably give much assistance as to actual measurements. The lack of any reliability of any evidence of the actual distance between the vehicles at the point when the plaintiff's vehicle pulled out in front of the defendant's makes the arithmetical calculations as to the time the defendant had to react, of little assistance, in my view.
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> …
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> Again, it is true that Ms Pujolas did not see the plaintiff's vehicle stop twice before she saw it pull off the road, but given that she was in a straight line or almost a straight line to both vehicles, and had the control and welfare of a horse to concentrate on, I do not think that detracts from the force of her evidence of the actual collision."

Central findings of the primary judge

[12] The primary judge's central findings as to the manner in which the accident occurred are to be found in the following paragraph:

> "In conclusion I reject the plaintiff's account of the accident. I find that the plaintiff overtook the defendant as the defendant was negotiating the Wyalla Street/Hursley Road left hand turn and twice stopped in front of the defendant's vehicle without any good reason. I further find that the plaintiff pulled off Hursley Road behind the taxi rank and brought his vehicle to a halt and, when the defendant was in close proximity to his vehicle, he pulled out without warning and drove back onto Hursley Road in front of the plaintiff. Once on the road I find that he braked his vehicle bringing it to a stop. The defendant's vehicle then collided with the back of his vehicle."

[13] The primary judge concluded that although the respondent should have been alert to the potential that the appellant might continue his erratic behaviour and "re-enter the road in other than safe circumstances", the respondent had, nevertheless, exercised reasonable care to avoid the collision. His Honour explained:

> "The next question is whether the defendant, in those circumstances I have found to exist, exercised reasonable care to avoid the collision. He was travelling at a low speed of 10kph - 15kph. He was aware of the plaintiff's position on the side of the road; he was driving with a load of 2.7 tonnes with three racehorses on board whose safety he was clearly concerned with. The plaintiff was aware of his presence on the road and that he was travelling towards him. In my view, the duty he owed to the other road users would not have extended to stopping his vehicle in anticipation of the plaintiff pulling out in front of him. That would run the real risk of creating yet another hazard on the busy road in question. Rather, I consider the duty on the defendant in all the circumstances imposed upon him an obligation to drive at a speed and

> to otherwise manage his vehicle so as to be able to avoid a collision in the circumstances of the heightened risk I referred to. Of course, there will always be a point in time when no degree of care by one driver can avoid the consequences of the absence of care of the other. In my view, this was just such a situation."

The appellant's counsel's submissions

[14] Counsel for the appellant attacked the primary judge's finding that the respondent found himself in a situation in which "no degree of care" could "avoid the consequences of the absence of care" by the appellant.

[15] It was submitted that the quality and content of the evidence of the respondent and Ms Pujolus did not reasonably permit the finding to be made. Rather, the evidence led to the inference that the collision was caused or contributed to by the actions of the respondent in failing to apply the brakes of his vehicle in a timely way. It was submitted that the finding that the respondent was travelling at a low speed of 10 to 15 kilometres per hour called for close scrutiny of the evidence concerning:

(a) The distance travelled by the appellant from his stationary position to the point of impact;
(b) The angle and direction in which each vehicle was travelling at the point of impact; and
(c) The points of impact on the vehicle.

[16] The respondent gave many differing accounts of where his vehicle was in relation to the appellant's car at the time the appellant moved from his stationary position. Ms Pujolus' evidence in relation to this matter was variously: "*up beside him*", "*Until [the respondent] was beside him again*"; "*He was beside him*"; "*it wouldn't have been the two-and-a-half [horse] lengths clear*"; and, "*he was … Only just clear of him*". The respondent's evidence was that the appellant moved onto the carriageway normally but that the movement "may have been a little bit fast". The vehicles were travelling straight ahead. No witness suggested that the vehicles collided at an angle or that the appellant was in the process of turning across the path of the respondent's vehicle at the time of the collision. The other evidence supported the conclusion that the respondent's truck struck the appellant's car "square in the back" when it was in "the middle of the carriageway".

[17] Having made a finding as to the speed at which the respondent was travelling, it was incumbent on the primary judge to undertake an analysis of the time available for the respondent to stop his truck and avoid a collision. He did not do this. Such an analysis would have established that the collision was due to, or contributed by, the respondent's conduct in failing to properly apply the brakes and stop his truck colliding with the appellant's car.

[18] It was inherently probable that the appellant had travelled at least 10 to 25 metres after pulling out from his stationary position, the primary judge could have determined the time available to the respondent to apply his brakes. The minimum amount of time available was two and a half seconds (using a distance of 10m and a speed of 15 km/hr) and a maximum of six to nine seconds (applying a distance of 25m and a speed of 10 to 15 km/hr). Had the primary judge performed this exercise, he would have found that the failure of the respondent to stop or properly apply his brakes was a cause of the collision.

[19] The concluding argument was that the primary judge failed to properly apply the principle of the "special relationship" between the lead and the following vehicle articulated in cases such as *Rains v Frost Enterprises Pty Ltd.*[3] In that regard, the primary judge failed to give due importance to the respondent's role as driver of the following vehicle in being able to choose "between creating a hazardous situation (as, by failing to steer clear) and a safe situation (as, by steering well clear or by stopping, if he is in any doubt as to the leader's intentions)".

Consideration

[20] In considering the challenge to the primary judge's findings of fact, this Court is obliged "to conduct a real review of the trial and … of [the] judge's reasons".[4] The task of appellate courts is that of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect".[5]

[21] In this process, the appellate court must have "respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not".[6]

[22] This was very much a case in which the primary judge's central conclusions were shaped by his impressions of the truthfulness and reliability of the witnesses. Counsel for the appellant failed to demonstrate that the findings of the primary judge under challenge were "glaringly improbable", "contrary to compelling inferences" or that the primary judge otherwise failed to make use of his advantage of seeing the witnesses. In my respectful opinion, the contrary is the case. The evidence of Ms Pujolas, in particular, was unshaken by cross-examination and the substance of her account supported the substance of the respondent's account of what happened. There was nothing inherently improbable about that account and it was an unlikely story to fabricate. The challenge to the primary judge's acceptance of the evidence of the respondent and Ms Pujolas thus fails.

[23] It emerges from the primary judge's findings of fact that the respondent found himself confronted by the appellant, who was driving erratically and, probably, aggressively. The respondent had responsibility, not only for himself and his truck and float, but for the three racehorses in the float. The protection of the animals and the size and configuration of the truck and float necessarily placed constraints on how suddenly the respondent could brake.

[24] Prior to the final incident, the appellant had twice stopped his car in front of the respondent's truck. As the primary judge found, that behaviour should have alerted the respondent to the potential that the appellant might continue to behave erratically. No doubt, the respondent was put on notice but the evidence does not suggest that the respondent did not view the appellant's vehicle warily. He was driving at a very low speed and, practically, he could do little more to avoid a mishap, apart from pulling off the road and hoping that the appellant and his car would go away. There was, however, good reason for not stopping. The horses had already been distressed by stopping and starting and were kicking in their confined spaces.

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3 [1975] Qd R 287.

4 *Fox v Percy* (2003) 214 CLR 118 at 126.

5 *Fox v Percy (supra)* at 127, citing *Dearman v Dearman* (1908) 7 CLR 549 at 564.

6 *Fox v Percy (supra)* at 127.

[25] The appellant pulled out in front of the respondent suddenly. This time, in contrast with his previous conduct, he stopped in front of the respondent's truck in such proximity to it that the respondent had insufficient time to stop.

[26] There was no expert evidence before the primary judge as to the distance required to stop the truck without endangering the horses. Various estimates of distance were given but the primary judge did not regard any of these as reliable: nor should he have. The respondent's evidence in this regard was vague and contradictory and his recollection was formed at a time of stress. Nevertheless, the primary judge was criticised for not extracting findings as to the location of the subject vehicles at critical times from this evidence so that he could calculate the time available to the respondent to avoid colliding with the appellant's car once it came back onto the roadway. As the primary judge appreciated, any such calculation would be pointless unless the distances upon which it was based were reliable. There was the added difficulty that the evidence failed to establish the distance required by the truck and trailer to stop once the truck and trailer brakes were appropriately applied.

[27] An argument was advanced by senior counsel for the appellant to the effect that it was possible to infer from the fact that the respondent had stopped before colliding with the appellant's car twice, but had failed to do so on the third occasion, that the respondent's care and attention had diminished. To my mind, the more obvious inference to draw is that although on the first two occasions the respondent was able to avoid an accident through a combination of his low speed and careful driving, the appellant's sudden manoeuvre on the third occasion created a risk of collision which the respondent's low speed and careful driving could not overcome completely. The evidence of minimal damage to the front of the truck and the back of the car demonstrate that the truck had almost stopped when the collision occurred. The respondent thus almost succeeded in avoiding the appellant's car for a third time.

[28] Senior counsel for the appellant placed great emphasis on the evidence that the truck struck the car squarely in the rear when the car was in the middle of its correct lane. It was said that this showed that the car must have travelled a considerable distance from a stationary position, thus affording the respondent ample time within which to brake. Again, there was no reliable evidence about how long and over what distance the manoeuvre was executed. Perhaps even more significantly, the manoeuvre was completed by the car coming to a sudden stop in the middle of the traffic lane in which the respondent's truck was travelling.

[29] Both the respondent and Ms Pujolas gave evidence, which the primary judge was entitled to accept, to the effect that the appellant's car pulled out suddenly and without warning from its stationary position into the path of the respondent's truck. The respondent said, "He just came straight out on top of me" and that he couldn't stop. He also said, "I braked as heavy as I could without knowing what I had … on the back, and I just couldn't stop".

[30] The appellant, having deliberately or recklessly created a dangerous situation which gave rise to a distinct risk of an accident of the kind that in fact occurred, cannot expect the respondent's conduct to be assessed according to the most exacting of standards.[7] In assessing the appellant's duty of care and any breach of it, due allowance must be made for the unusual situation in which the respondent found

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[7] *Sayers v Harlow Urban District Council* [1958] 2 All ER 342 at 348, 349.

himself. Faced with such a situation, a person may well react in a way which, with the advantage of hindsight, may appear less than optimal. That would not, of itself, establish negligence. Negligence would be found only if such person failed to act reasonably in the emergency created by the other's wrongdoing.[8] In those circumstances misjudgement does not equate with negligence.[9] In this case the evidence does not even show misjudgement. The primary judge's finding, in effect, that no degree of care by the respondent could have avoided the collision, was perfectly justified if, as his Honour doubtless intended, the degree of care referred to was reasonable rather than fanciful.

[31] Counsel for the appellant made much of the discussion of authorities by Dunn J in *Rains v Frost Enterprises Pty Ltd*[10] concerning the "special relationship" between the "leading car" and the "following car": the latter normally being in a better position than the former to observe and avoid creating a hazardous situation. The "special relationship" referred to by Dunn J was that between two cars "on a quite long straight stretch of road, in conditions of good visibility". His Honour's discussion does not suggest that the driver of the following car is inevitably liable should his vehicle collide with the vehicle in front. There is no such principle. Liability must be determined by reference to the particular facts of each case.[11]

Conclusion

[32] The appellant has failed to establish any error of fact or law on the part of the primary judge and I would therefore order that the appeal be dismissed with costs.

[33] **ATKINSON J:** I agree with the order proposed by Muir JA and with his Honour's reasons.

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8 *Sayers v Harlow Urban District Council (supra)*; and *Caterson v Commissioner for Railways (NSW)* (1973) 128 CLR 99 at 111 per Gibbs J.

9 *McLean v Tedman* (1984) 155 CLR 306.

10 [1975] Qd R 287 at 294, 295.

11 *Clark v Hall and Anor* [2006] QSC 274 at [23].