# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Tebbit v Dunne & Anor* [2009] QCA 86 |
| PARTIES: | **SHANE ANTHONY TEBBIT**<br>(plaintiff/respondent)<br>v<br>**MATTHEW JAMES DUNNE**<br>(first defendant /first appellant)<br>**ALLIANZ AUSTRALIA INSURANCE LIMITED**<br>ACN 000 122 850<br>(second defendant/second appellant) |
| FILE NO/S: | Appeal No 11403 of 2008<br>SC No 58 of 2008 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Mackay |
| DELIVERED ON: | 9 April 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 March 2009 |
| JUDGES: | Muir JA, Mullins and Douglas JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal dismissed with costs.** |
| CATCHWORDS: | TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – ACTIONS FOR NEGLIGENCE – APPORTIONMENT OF DAMAGES – INTERSECTION AND JUNCTION ACCIDENTS – whether there had been any negligence by the respondent contributing to the accident – onus of proof – where appellant's vehicle accelerated to its left at high speed from behind another vehicle close to intersection, overtook that vehicle and drove into intersection which the respondent's motorcycle was then leaving and collided with it – where respondent had no memory of the collision<br><br>*Transport Operations (Road Use Management – Road Rules) Regulation* 1999 (Qld), s 147<br><br>*Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; [1986] HCA 20, referred<br>*Carter v Gilmore* (1975) 49 ALJR 360 referred<br>*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, referred<br>*Impiombato v Unsworth* [1969] QWN 8 referred |

*Nance v British Columbia Electric Railway Company Ld* [1951] AC 601 referred
*Sibley v Kais* (1967) 118 CLR 424; [1967] HCA 43, referred
*Thomas v Macfarlane* [1969] Qd R 178 referred

COUNSEL: S C Williams QC, with J Williams, for the first and second appellant
J Baulch SC, with P Cullinane, for the respondent

SOLICITORS: Sciaccas Lawyers for the first and second appellant
Macrossan & Amiet for the respondent

[1] **MUIR JA**: I agree with the reasons of Douglas J and with the order he proposes.

[2] **MULLINS J**: I agree with Douglas J.

[3] **DOUGLAS J**: At the trial of this action it was agreed that the respondent, Mr Tebbit's, damages amounted to $520,000.00. The main issue was whether there had been any negligence by him contributing to the motor vehicle accident in which he suffered serious injuries. The learned trial judge found that the appellants had not established that Mr Tebbit was guilty of contributory negligence. This appeal challenges that conclusion and associated findings by his Honour. There is no appeal from his Honour's conclusion that the first appellant, Mr Dunne, was negligent.

**Background**

[4] The accident happened in Mackay on 2 April 2005 at about 7pm at the intersection of the Mackay-Bucasia Road and Phillip Street. Mr Tebbit was riding his motorcycle south along the Mackay-Bucasia Road and proceeded to make a right turn into Phillip Street to head west out of the intersection. It was dark.

[5] Mr Dunne was driving in a northerly direction along the Mackay-Bucasia Road in a powerful utility at a speed calculated to be between 80 kilometres per hour and 109 kilometres per hour when he hit Mr Tebbit's motorcycle. He had been accelerating for some distance before the intersection over a stretch of the road approximately 300 metres in length from a roundabout at Malcolmson Street further south along the Mackay-Bucasia Road. There were two northbound lanes in the road but they merged back into one lane after the Phillip Street intersection. The speed limit was 60 kph. Another vehicle was travelling more slowly than his in the right lane, the same lane as he was in, but slightly ahead of him. There was also a third vehicle travelling in the same direction behind him whose driver, Mr Patullo, provided some relevant evidence of the events that occurred. It included an estimate that Mr Dunne was travelling at about 75-80 kph along the Mackay-Bucasia Road.

[6] As Mr Dunne approached the vehicle travelling more slowly ahead of him he changed into the left lane and accelerated into the intersection to collide with the motorcycle at a spot in or near the left lane. He had a green light facing him. Mr Tebbit had a green light facing him as well. There were no green arrow controls governing the intersection from either side. The intersection itself was described as a wide one. Its dimension from where the motorcycle probably started its turn to

the opposite entry to the intersection was close to 30 metres. The two northbound lanes on the road before the intersection increased to three at the intersection to include a right hand turning lane. That right hand turning lane started approximately 80 metres back from the entry into the intersection.[1]

[7] Mr Dunne did not see the motorcycle until just before the collision. The lane markings leading up to the intersection were continuous lines for 38 metres before the entry to the intersection, a feature designed to prohibit traffic from crossing those lines; see s 147 of the *Transport Operations (Road Use Management – Road Rules) Regulation* 1999 (Qld). Because of his injuries Mr Tebbit has no memory of the collision.

[8] The precise point at which Mr Dunne changed lanes assumed some significance both before his Honour and in this appeal.

[9] His Honour analysed the evidence relevant to whether he was guilty of contributory negligence by failing to keep a proper look out in these terms:

> "There is no direct evidence as to the relative positions of the vehicles when the plaintiff made the decision to execute the turn, and no direct evidence as to what the plaintiff himself saw.
>
> What the evidence does establish is that for the plaintiff there were three oncoming vehicles in the section of the Mackay-Bucasia Road between the intersection and the roundabout at Malcomson Street.
>
> One of them, Mr Patullo's, was 200 metres from the intersection when the plaintiff was making his turn. At the time the plaintiff had partially executed the turn to the point of being one-third of the way across the right outbound lane. Mr Patullo said that at that time the utility was some 50 to 100 metres in front of him.
>
> Obviously, the plaintiff perceived no threat from the closest to him of those three vehicles nor, indeed, did any such threat materialise.
>
> The plaintiff was entitled to assume that other road users would obey the traffic code as to speed and as to compliance with road markings. Indeed, had the first defendant done so to the extent of even remaining in the right lane which he intended to use after passing through the intersection, there would have been no collision. He would have passed behind the plaintiff's motorcycle which had almost cleared the left-hand lane by the time the first defendant reached the intersection, notwithstanding his disturbingly high speed.
>
> This suggests that when the plaintiff made the decision to turn, he was not at any risk of being struck by any vehicle whose driver was complying with the road rules.
>
> The next question is: Did anything occur to cause a change in such an assessment of risk?

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1 Judging by the plan at R86.

> Mr Harrison, of counsel, for the first defendant, argued that the Court should accept that the first defendant crossed into the left lane at a point approximately 15 metres south of the intersection. He submitted from that point the Court would conclude that the plaintiff was negligent either because his lookout was deficient if he did not see the utility make this manoeuvre, or because he failed to give right of way if he had seen it.
>
> It is not clear to me on the evidence where the first defendant changed lanes. He has given conflicting evidence as to this point and I don't find either version particularly reliable.
>
> What needs to be shown are the circumstances by which the plaintiff ought to have been aware when he made the decision to execute the turn that the presence of the utility posed a foreseeable risk of colliding with him if he did not give right of way to it.
>
> The defendants bear the onus of proving both that the plaintiff was negligent and by that want of care of himself in his own interest he contributed to his injuries. See *Nance v. British Columbia Electric Railway Company* [1951] AC 601.
>
> Only Mr Patullo saw the plaintiff executing the turn. The position of the utility at that time has not been established to my complete satisfaction, but Mr Patullo's evidence was that it was some 50 to 100 metres in front of him. That is, some 50 to 100 metres from the intersection at which time the turn was partially executed. If that was correct, then the decision to turn would not have occasioned foreseeable risk by reason of the oncoming traffic.
>
> The high speed of the utility, however, is beyond doubt, and that is not something the plaintiff could be expected to have gauged when making his decision to make the turn."

[10] His conclusion was that the defendants had not satisfied him on the balance of probabilities that Mr Tebbit showed any lack of care for his own safety.

**The submissions**

[11] The appellants drew attention to the fact that the lights facing Mr Dunne were green which required Mr Tebbit to give way when turning at the intersection. There was also evidence that someone in Mr Tebbit's position would have had a reasonably clear view of traffic coming from the Malcolmson Street roundabout as the area was well lit. Mr Dunne's lights were on. Mr Tebbit agreed in his evidence that he could normally pick up the headlights of different vehicles in the same lane and also agreed that if a vehicle was moving a lot faster than one in front of it he would be in a position to see the headlights from the one behind at some point even if they disappeared behind the closer vehicle eventually.

[12] By reference to some of the evidence the appellants also argued that if Mr Dunne's change of lane occurred near where he said it occurred in his oral evidence then

Mr Tebbit should have seen his vehicle or its lights before he commenced his right hand turn. They argued that Mr Tebbit was not entitled to assume that Mr Dunne's vehicle was not going to change lanes at some point before the intersection.

[13] In this context there was some limited evidence from Mr Dunne that the vehicle in front of him moved partially into a right hand turning lane to go up Phillip Street at about the same time as he moved to overtake it on its left. Mr Patullo was not aware of that unidentified vehicle and the evidence was that it had not previously indicated any intention to turn right at the intersection.[2]

[14] The learned trial judge's finding that it was probable that in changing lanes Mr Dunne crossed over the continuous lane marking before the intersection was challenged, particularly in the written submissions. In developing that argument the appellants pointed to another, allegedly inconsistent, finding of his Honour where he said that it was not clear where Mr Dunne changed lanes. They also relied on evidence of Mr Patullo that he saw Mr Dunne's vehicle in the left hand lane at about 50 to 100 metres from the intersection when he saw the motorcycle turning. His Honour had, however, rejected evidence of Mr Patullo that Mr Dunne's utility travelled only in the left lane and had accepted Mr Dunne's own evidence that he did change lanes. His Honour's finding that it was probable that Mr Dunne crossed over the continuous line shortly before the intersection was also one based on an earlier version of Mr Dunne's evidence in a statement by him. Clearly it was a finding that was open to be made.

[15] The appellants also relied upon a calculation that, if Mr Dunne's vehicle was travelling at, for example, 94 kilometres per hour, it would have been travelling at 26.11 metres per second so that it would have been virtually impossible to commence the move from one lane to place the vehicle fully inside the other lane in less than 1.5 seconds. The effect of that submission was that his lane changing occurred, on that view and on his Honour's finding that the lane change occurred close to the intersection, at most a couple of seconds before the collision so that his and the car in front of him were sufficiently close to Mr Tebbit's motorcycle to make it negligent of Mr Tebbit to enter the intersection when he did because of his failure to keep a proper lookout.

[16] On the hearing of the appeal the appellants argued that, whether the lane change occurred very close to the intersection or a long way from it, it was an obvious possibility and the closer Mr Dunne's vehicle was to the intersection when it occurred then the graver was Mr Tebbit's conduct in making the turn. The argument was that Mr Tebbit must have failed to keep a proper look out for the accident to have happened as it did. Because his Honour found that Mr Dunne failed to keep a proper look out in failing to observe Mr Tebbit on his motorcycle, the appellants submitted that the converse applied, that Mr Tebbit should have seen Mr Dunne's utility approaching at speed behind the unidentified vehicle.

[17] Mr Tebbit should not, they argued, have entered the intersection because of that obvious risk and, if he failed to observe the utility, he failed to keep a proper lookout. This was particularly so if Mr Dunne's vehicle changed lanes just before the intersection, crossing the continuous line, because, they submitted, Mr Tebbit must have been very close then to the unidentified vehicle when he moved across its path.

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[2] See R. 57, R 61 l. 39 and R 125.

[18] On the other hand, if the unidentified vehicle and Mr Dunne's diverged at the start of the turning lane, with the utility overtaking the unidentified vehicle at approximately 100 metres from the intersection, then it should have been plainly observable, travelling quickly and Mr Tebbit should not have turned across its path.

[19] It was submitted for Mr Tebbit, however, that there was a third view of the facts available, namely that it had not been shown that the unidentified vehicle posed a threat to him making the turn. At that stage all that was known of Mr Dunne's utility was that it was approaching the rear of the unidentified vehicle at a speed a little faster than that vehicle's speed and it was not until he was almost through the turn that Mr Tebbit's motorcycle was hit. It was hit, on that submission because of the sudden, unpredictable overtaking manoeuvre by the utility coupled with its significant acceleration into the intersection. The power of the utility was relevant to that argument.

[20] The submissions for Mr Tebbit also included that he was entitled to assume that vehicles travelling towards him in a marked lane would continue to travel in those marked lanes through the intersection in the absence of some clear indication to the contrary. His counsel pointed to the fact that Mr Dunne's overtaking of the car in front of him occurred close to the intersection, was overtaking to the left of the vehicle in front of him and also included acceleration to a speed very significantly in excess of the speed limit of 60 kilometres per hour in that area. The submission was that Mr Tebbit, when he decided to turn, faced no previous risk of collision with the vehicle travelling in front of Mr Dunne's utility and no collision would have occurred unless Mr Dunne executed what was described as the extraordinary overtaking manoeuvre. The argument was that Mr Tebbit was likely to have commenced the turning manoeuvre when the unidentified vehicle and Mr Dunne's vehicle were travelling one behind the other where there was no indication of any risk of collision.

[21] They responded to the criticism of his Honour's finding that it was probable that Mr Dunne crossed the unbroken line marking and his subsequent statement that it was not clear on the evidence where Mr Dunne changed lanes by pointing out that, when his Honour made the latter comment, he was dealing with a submission that Mr Dunne crossed into the left hand lane at a point approximately 15 metres south of the intersection and may well have been focussing on the obvious difficulty of identifying so much later the precise point where the lane change occurred.

[22] It was argued, therefore, that his Honour was entitled to conclude that, on such a view of the facts, the appellants had not discharged the onus of proof of showing that Mr Tebbit was contributorily negligent.

**Discussion**

[23] It is seldom helpful in cases of this nature to try to analyse minutely, with the benefit of hindsight, the precise positions of motor vehicles involved in a collision within the period of a few seconds leading up to the accident. His Honour's analysis of the situation that faced Mr Tebbit, doing the best he could on the evidence available to him without a version from Mr Tebbit, was rational. His conclusion that, when the plaintiff made the decision to turn, he was not at any risk of being struck by a vehicle whose driver was complying with the road rules may be

buttressed by the fact that there was no collision between him and the vehicle travelling more slowly ahead of Mr Dunne.

[24] That absence of a collision with the unidentified vehicle is obviously not a complete vindication of Mr Tebbit's behaviour as he may have been reckless or simply have been lucky to have avoided that fate. By the same token it may have been the case that the presence of that vehicle itself did pose an obvious danger to his entry into the intersection, but there is no evidence from which that conclusion must be drawn and Mr Patullo's direct evidence suggests the contrary. It is difficult to estimate how close Mr Tebbit was to that vehicle and the evidence from Mr Patullo suggests that it did not pose any obvious danger to his entry into the intersection. We also know that the evidence suggests it was not indicating a right turn, that it was travelling slowly and that it may have commenced to veer to a right hand turning lane at about the time Mr Dunne pulled out to its left. It was a large intersection, the right hand turning lane commenced a significant distance before the start of the intersection and there is no reliable evidence to suggest that the unidentified vehicle was very close to Mr Tebbit or moving in such a way as to pose a threat to him. The very fact that he entered the intersection when he did in spite of the presence of this vehicle suggests that he, at least, did not perceive that it posed a threat to him or that he needed to give way to it.

[25] In my view, therefore, the evidence does not establish with any degree of certainty that a reasonable person in Mr Tebbit's position should have perceived a threat from Mr Dunne's vehicle before it pulled out to overtake the unidentified vehicle on its left.

[26] It was legitimate, therefore, for his Honour to conclude that the appellants had not satisfied him that Mr Tebbit showed any lack of care for his own safety. His motorcycle appeared to have been almost out of the intersection when the collision occurred in circumstances where, when he commenced to turn into the intersection, nothing had obviously occurred on the available evidence to warn him of a risk associated with the unidentified vehicle or that Mr Dunne would suddenly change lanes and accelerate into the intersection. Even if he could have seen earlier that Mr Dunne's vehicle was accelerating towards the one in front of it, that did not necessarily mean that it was reasonable for him then to infer that Mr Dunne would also execute the dangerous manoeuvre that followed. The more likely and reasonable conclusion would have been that Mr Dunne's vehicle would slow down to match the speed of the car ahead of it.

[27] A collision between two vehicles at a street intersection of itself does not provide evidence of a want of reasonable care on the part of both drivers.[3] While reasonable care requires a plaintiff to guard against a reasonably foreseeable risk that others may fail to take reasonable care for his or her safety, the court must judge the reasonableness of the plaintiff's conduct in the context of the finding that he or she has been exposed to unnecessary risks by the defendant's negligence.[4] When one applies those principles to the conduct of Mr Tebbit it is difficult to conclude on this evidence that it has been established that he has failed to take reasonable care for his own safety.

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3 *Impiombato v Unsworth* [1969] QWN 8; *Thomas v Macfarlane* [1969] Qd R 178 at 182; cf., particularly as to the facts, *Carter v Gilmore* (1975) 49 ALJR 360 at 361.

4 *Halsbury's Laws of Australia* at [300-105] referring, among other cases to *Sibley v Kais* (1967) 118 CLR 424 at 427 and *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301at 310.

**Conclusion and order**

[28] The onus of proof lay on the appellants at the trial to establish that there was a failure by Mr Tebbit to guard against a reasonably foreseeable risk that Mr Dunne would not take reasonable care for Mr Tebbit's safety. In my view his Honour was entitled to be satisfied that the onus had not been discharged on the evidence led before him. Reasonable care for his own safety did not require Mr Tebbit to anticipate Mr Dunne's last second surge at high speed from behind the unidentified vehicle to its left and into the intersection which Mr Tebbit was then leaving.

[29] These conclusions do not rely on a glaringly improbable view of the facts nor are they contrary to compelling inferences from the evidence. They also derive to a significant extent from the advantage held by "the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share."[5] There seems to me, therefore, to be no reason to interfere with the learned trial judge's decision.

[30] The appeal should be dismissed with costs.

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5 *Fox v Percy* (2003) 214 CLR 118 at 125-129 at [23]-[31].