

AUSTRALIA / JUDGMENT

Qui v Obeid [2019] NSWCA 207

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Qui v Obeid [2019] NSWCA 207

Hearing dates: 3 May 2019

Decision date: 22 August 2019

Before: Gleeson JA at [1]; Payne JA at [2]; Simpson AJA at [3]

Decision: (1) Appeal dismissed;

(2) Cross-appeal dismissed;

(3) Appellant to pay the respondent's costs of the appeal.

Catchwords: MOTOR ACCIDENTS – where collision between two vehicles – where plaintiff injured and sought compensation under Motor Accidents Compensation Act 1999 (NSW) – whether plaintiff's car parked kerbside or executing a U-turn or right turn at time of collision – where primary judge found plaintiff's car was performing a U-turn or right turn at time of collision – no error in fact finding by primary judge

Legislation Cited: Motor Accidents Compensation Act 1999 (NSW)

Supreme Court Act 1970 (NSW), ss 75A, 101(2)(r)

Cases Cited: Fox v Percy (2003) 214 CLR 118; [2003] HCA 22

Robinson Helicopter Co Inc v McDermott [2016] HCA 22; (2016) 90 ALJR 679

Category: Principal judgment

Parties: Kylie Qui (Appellant)

Abdullah Obeid (Respondent)

Representation: Counsel:

J Turnbull SC/J Rowe (Appellant)

K Rewell SC/J A Gracie (Respondent)

Solicitors:

State Law Group (Appellant)

Holman Webb Lawyers (Respondent)

File Number(s): 2018/234736

Decision under appeal Court or tribunal: District Court of NSW

Jurisdiction: Civil

Date of Decision: 12 July 2018

Before: Sorby ADCJ

File Number(s): 2016/46985

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant was injured when the respondent's vehicle, travelling east in St Johns Road, Cabramatta collided with the rear driver's side of her vehicle. The appellant claimed damages under the Motor Accidents Compensation Act 1999 (NSW) alleging that the collision, and her injuries, had been caused by the respondent's negligence. An issue at trial was where the appellant's vehicle was at the time of the collision. The appellant initially said that it was parked on the southern kerb of the road facing west, but in evidence said that it was parked on the northern kerb, facing east. The respondent's position was that the appellant came in front of his eastbound vehicle either by executing a U-turn coming from the westbound lane or by turning right from the driveway of a property on the southern side of the road at which the appellant had attended a family gathering. Police attended the scene but did not make detailed enquiries. Members of the appellant's family who were passengers in her vehicle at the time of the collision gave evidence that was inconsistent with previous statements or was otherwise equivocal. Police, ambulance and hospital records suggested that the appellant was reversing out of the driveway, but did not identify the source of that information. Experts agreed that the appellant's account of being parked on the southern side of the road at the time of the collision could not be correct. The primary judge found that the appellant had pulled out of the driveway and swung right into the eastbound lane and had attempted to complete a U-turn from the westbound lane into the eastbound lane. Judgment was entered for the respondent. The appellant appealed.

The grounds of appeal were that:

- (1) the primary judge erred in the reliance he placed on, and weight he attributed to, records of statements said to have been made by the appellant and members of her family;
- (2) the primary judge erred in accepting the evidence given by the respondent;
- (3) the primary judge erred in his specific finding that the appellant drove out of the driveway and turned in front of the respondent's vehicle; and
- (4) the primary judge erred in failing to give adequate consideration to expert evidence.

The Court held (Simpson AJA, Gleeson and Payne JJA agreeing), dismissing the appeal:

- (1) The primary judge's findings of fact were correct: Simpson AJA at [57]-[58]; Gleeson JA at [1]; Payne JA at [2].

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22; *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22; (2016) 90 ALJR 679 applied.

- (2) The primary judge made a favourable finding in relation to the credibility of the respondent. He made no corresponding findings about the credibility of the appellant or her witnesses. Having regard to the contradictory accounts given by the appellant, it is inevitable that had any explicit findings as to her reliability been made they would have been unfavourable: Simpson AJA at [59]; Gleeson JA at [1]; Payne JA at [2].
- (3) There were a range of potential scenarios that may have resulted in the collision, all of which imposed upon the appellant an onus to execute the manoeuvre safely. The appellant had not shown that the respondent was travelling at an excessive speed or had failed to keep a proper lookout, as would have been necessary to establish that she had discharged her obligation: Simpson AJA [60]-[67]; Gleeson JA at [1]; Payne JA at [2].
- (4) The expert evidence initially supported the finding that the respondent was neither travelling at an excessive speed nor failing to keep a proper lookout. That evidence was only challenged on the basis of an answer given by the respondent (as to the timing of the collision) that could not fairly be taken as an informed estimate: Simpson AJA at [66]-[67]; Gleeson JA at [1]; Payne JA at [2].

Judgment

1. GLEESON JA: I agree with Simpson AJA.
2. PAYNE JA: I agree with Simpson AJA.
3. SIMPSON AJA: On 9 October 2014 a vehicle being driven by the respondent, Mr Abdullah Obeid, collided with the rear of a vehicle being driven by the appellant, Ms Kylie Qui, in St Johns Road, Cabramatta. The appellant suffered injuries for which, by statement of claim filed in the District Court, she claimed damages under the Motor Accidents Compensation Act 1999 (NSW). She alleged that the collision, and her injuries, had been caused by the

negligence of the respondent. On 12 July 2018 the primary judge dismissed the statement of claim, entered judgment for the respondent and ordered the appellant to pay the costs of the proceedings: *Ms Kylie Qui v Mr Abdullah Obeid* (District Court (NSW), 12 July 2018, unrep). Notwithstanding that he entered judgment for the respondent, the primary judge properly went on to assess the damages that would have been awarded had the appellant been successful. He quantified the damages as \$317,373.51.

4. The appellant now appeals against the orders. Neither party seeks to challenge the quantification of damages. Since the appeal therefore involves a matter at issue to the value of more than \$100,000, there is no dispute that it is brought as of right: see Supreme Court Act 1970 (NSW), s 101(2)(r). The appeal is subject to the provisions of s 75A of the Supreme Court Act by which this Court may exercise the powers and duties of the District Court, including making findings of fact and drawing inferences.

Uncontroversial facts

1. The following facts are uncontroversial.
2. In the evening of 9 October 2014 the appellant, with her two daughters and two nieces, attended a family gathering at Number 10 St Johns Road, Cabramatta. St Johns Road runs generally east to west. It has two lanes in each direction, in one of which vehicles may be parked, leaving one lane in each direction clear for traffic. The applicable speed limit is 60 kilometres per hour. To the west St Johns Road intersects with the Cumberland Highway. Number 10 is on the southern side of St Johns Road, some distance to the east of the Cumberland Highway intersection. Photographs in evidence show that Number 10 St Johns Road is a two-storey block of home units, with a wide driveway running the length of the building, and parking spaces at the rear. Between the Cumberland Highway and the location of Number 10 St Johns Road is a roundabout. A second roundabout is to the east of Number 10.
3. At about 9.45pm the appellant, with her daughters and her nieces, left the event. The appellant was driving her Toyota Camry. To get to her home it would be convenient to head in a westerly direction, towards the Cumberland Highway. But to take her nieces to their home in Cabramatta, as was her intention, the more convenient route was easterly.
4. The appellant's elder daughter, Wendy Nguyen (then aged 15), sat in the front passenger seat. Her younger daughter, Denise, sat in the centre of the rear seat, between the appellant's two nieces.
5. The respondent was travelling in his vehicle (a Nissan) east in St Johns Road. His vehicle collided with the rear driver's side of the appellant's Toyota. It is now uncontroversial that the collision took place in the northern (eastbound) traffic lane (that is, not the kerbside lane in which vehicles were parked). The collision forced the front of the Toyota into a tree on the northern kerb. Ambulance and police attended, and recorded information provided by various participants. However, police declined to make detailed enquiries at the scene

because of the perceived condition of the occupants of the vehicles. The appellant and at least one of her daughters were taken to Fairfield Hospital.

The trial

1. A major issue pursued in the trial concerned the location of the appellant's vehicle prior to the collision, and the circumstance in which it came to be in the eastbound traffic lane. Initially, and, indeed, up to the time of trial, it was the appellant's case that her car had been parked on the southern kerb of St Johns Road, facing west towards the Cumberland Highway, and that the respondent's vehicle struck hers while the Toyota was stationary in the southern kerbside lane. That was what was alleged in the statement of claim. At the commencement of the trial, an amended statement of claim was filed in which the appellant reversed her position. She then alleged that her car was "parked along the kerb ... or proceeding in an easterly direction ..." when it was struck by the respondent's vehicle. It was clearly implied that, if the car was parked, it was in the northern kerbside lane.
2. Evidence, to some of which it will be necessary in due course to refer in some detail, was given by the appellant, her husband, her daughters, one of her nieces, and a police officer who attended the scene. Also in evidence were contemporaneous documents which recorded (or purported or were taken to have recorded) statements made by the appellant, her daughters and her nieces, and by the respondent. Reports were commissioned on each side from traffic engineers who examined the scene and expressed opinions about how the accident was likely to have occurred, and the location on the road where the vehicles came into collision. A joint report identifying areas of agreement and areas of contention was prepared. The experts gave concurrent oral evidence.
3. The appellant's evidence at trial was that her vehicle was stationary, having been parked in the kerbside lane on the northern side of St Johns Road facing in an easterly direction when it was struck by the respondent's vehicle. The respondent denied that the appellant's Toyota had been parked. His evidence in chief was that he was driving east in St Johns Road when, from the opposite (that is, southern) side of the road, the Toyota performed a U-turn in front of his Nissan. He turned the wheel to the right and applied the brakes but was not able to avoid the collision. Both experts agreed that the appellant's version could not be correct, and that the point of impact was in the eastbound traffic lane.
4. As will be seen in the narrative that follows, the primary judge was faced with wildly conflicting accounts of the circumstances immediately preceding the accident. Those accounts were given by the appellant, her daughter, one of her nieces, and by the respondent. In some cases, contradictory accounts were given at different times by the same witness, notably the appellant herself. There were also inconsistencies in the accounts given by the respondent. The expert evidence went some way to resolving the conflict (specifically and importantly, the location of the appellant's vehicle when it was struck by the respondent's vehicle), but other areas of dispute remained for determination.

5. One significant issue for determination concerned the speed at which the respondent was travelling. It was the appellant's case that the respondent was travelling at well in excess of the applicable speed limit, or, alternatively, that he failed to keep a proper lookout or both.
6. The primary judge substantially accepted the respondent's account. He was not satisfied that the appellant's car had been parked on the northern side of the road. He was satisfied on the balance of probabilities that, at a time when the respondent was "in close proximity", the appellant drove out of the driveway of Number 10 St Johns Road, on the southern side of that road, "swung" into the carriageway of the eastbound lane, and in doing so failed to see the respondent's vehicle and thus caused his vehicle to collide with hers. In reaching that conclusion he expressly relied on statements made in the immediate aftermath of the collision by the appellant's older daughter Wendy Nguyen, and the evidence of the respondent. He had earlier referred to additional records of statements made at the scene and thereafter.
7. The primary judge did not make any objective finding about the speed at which the respondent was travelling.

The grounds of appeal

1. Four grounds of appeal were identified. The first asserts error in the reliance by the primary judge on, and the weight he attributed to, records of statements said to have been made by the appellant and members of her family to medical personnel and police, in preference to evidence given orally by those witnesses at trial. The second ground asserts error in the acceptance by the primary judge of the evidence given by the respondent, which, it was contended, was "unreliable, contradictory and based on assumptions" made by him. The third ground asserts error in the specific finding that the appellant drove out of the driveway and turned in front of the respondent's vehicle, such finding, it was said, being "against the weight of the evidence". The fourth and final ground asserts error in the failure of the primary judge to give adequate consideration to the expert evidence.
2. The respondent has filed a draft notice of (proposed) cross-appeal. He complains that the primary judge erred in failing to find contributory negligence on the part of the appellant. Such a finding would be necessary only if – contrary to the fact – the primary judge had accepted that the respondent had been negligent. Since contributory negligence was not pleaded in the defence, and not raised in lengthy – 46 closely typed pages – written submissions provided to the primary judge, the criticism seems more than a little unfair. However, senior counsel for the plaintiff very fairly accepted that the issue could (if necessary) be dealt with by this Court without the need for further evidence, and raised no objection to the respondent being granted leave to file an amended defence. That was done, and it may be taken that, should the appellant succeed in establishing that the respondent was negligent, the issue of contributory negligence is before this Court.

3. The respondent has also filed a notice of contention, asserting that, for reasons other than those he gave, the primary judge correctly dismissed the appellant's claim.
4. Having regard to the grounds of appeal, it will be necessary to consider, in some detail, the various accounts recorded.

The appeal books

1. The appeal books were in an unsatisfactory state. There was evidence that exhibits had been forwarded, by the District Court, to the appellant at a private address at which she no longer lived. They have not been retrieved. It seems that copies of a number, but not all, of the exhibits have been made available. The numbers assigned to those exhibits in the appeal book do not accord with the exhibit numbers to which the primary judge referred. An ambulance record (Exhibit 11) appears to be incomplete. A large proportion of the appeal books was taken up with medical and other reports relevant to the assessment of damages, which is not in issue in this appeal.

The evidence in detail

1. (a) accounts given by the appellant

The appellant gave a number of significantly different accounts of the circumstances of the accident.

1. On 13 October 2014 the appellant was interviewed by Constable Kafrouni, who had attended the scene. A transcript of the interview records the following:

"Q. Can you tell me what happened?

A. I was leaving my brother in laws house on St Johns Road. The car was parked on St Johns Road, Cabramatta and was facing in the direction Cumberland Highway. I turned the car on and before I could even move the car I was hit from behind.

Q. How fast were you going?

A. I was stationary." (italics added)

1. On 6 January 2015 the appellant made a claim for compensation for personal injury on the form prescribed for the purpose. A space provided for a diagram of the accident was left blank except for the words "[u]nable to draw". She completed the part of the form that provides for a description of the accident as follows:

"My car was stationary and parked on the kerb on St Johns Road, Cabramatta. I was in the driver seat and wearing a seatbelt. My daughter Wendy was sitting in the front seat, whilst my two nieces were sitting at the window seats in the back. My other daughter Denise was sitting in the middle. They were all wearing their seatbelts. I turned on the ignition with my key, turned on the lights, and moved the gear to drive mode, whilst my foot was on the brake. At that point, I felt a big shock and immediately lost consciousness. When I came to, my daughter Wendy was crying

and trying to wake me up. She told me that we had just been involved in an accident." (italics added)

It may be noted that in this statement the appellant did not specify on which side of the road the vehicle was parked, nor the direction in which it was facing.

1. On the same day the appellant's daughter Wendy also made a claim for compensation on the prescribed form. The appellant completed and signed a statutory declaration asserting the truth of the information contained in the form. That part of the form requiring a description of the accident was completed as follows:

"I WAS SITTING IN THE FRONT PASSENGER SEAT WITH MY SEATBELT ON. MY MOTHER WAS IN THE DRIVER SEAT. WE WERE STATIONARY AT THE KERB ON ST JOHNS ROAD. AT THAT POINT, A CAR HAD HIT US FROM BEHIND. OUR CAR WAS PUSHED FORWARD AND SPUN TO THE OPPOSITE SIDE OF THE ROAD AND COLLIDED WITH A TREE. MY MOTHER HAD LOST CONSCIOUSNESS AND I WAS CRYING AND WAS CALLING HER TO TRY AND WAKE HER UP." (italics added)

Again, the space provided for a diagram of the accident was left blank, except for the insertion of the words "[u]nable to draw". Although this statement does not specify on which side of the road the Toyota was parked, given the accepted fact that the collision took place in the eastbound lane, the reference to "spun to the opposite side" clearly implies that the vehicle was parked on the southern kerb.

1. The appellant was interviewed by an insurance assessor in relation to Wendy's claim, and made a statement in which she said:

"27. My car was parked and stationary on St Johns Road, Cabramatta. I was near the kerb and facing to the west towards Cumberland Highway. I was right outside the front of my aunties unit and on the same side of the road as her unit." (italics added)

Appended to the statement was a diagram that showed the collision having occurred on the kerbside lane of the westbound carriageway, with the appellant's vehicle forced across three lanes and into a tree on the northern kerb.

1. (b) ambulance and hospital records
1. The first account chronologically appears to have been entered in the ambulance electronic medical record and is relevantly as follows:

"Case C/T A 2 CAR MVA. O/A CHAOTIC SCENE WITH NUMEROUS PEOPLE AT SCENE, AN OFF DUTY RFS OFFICER STATES 2 CAR MVA, 2 PTS IN TOTAL, ON INVESTIGATION LATER CHANGED TO 6 PTS. FIRST PT IS A 40 YO FEMALE, DRIVER OF A CAR REVERSING OUT OF A DRIVEWAY, HIT FROM BEHIND BY A CAR TRAVELLING AT 40-60 KM/HR, NIL LOC ..." (italics added)

Description

In respect of this record, it is important to observe that the source of the information recorded is not identified.

1. A similar note appears in two places in the Fairfield Hospital records, again without identification of the source of information.
2. An Emergency Department discharge referral on the evening of the accident in relation to the appellant records:

"patient unable to completely remember the events regarding the mva

driving out of her driveway

hit from behind by another car

pushed into a tree

...

progress

discussed with patients daughter earlier

she was in the car during the MVA

mum reversing out of a relatives driveway when the back of the car was hit by another car

..."

1. (c) police records

1. An entry made by Constable Kafrouni in the computerised database of NSW Police ("COPS") on 10 October records:

"About 9:45pm on Thursday the 9th of October 2014 the motor vehicle [the respondent's Nissan] was travelling east along St Johns road, Cabramatta. The [appellant's motor vehicle] exited a unit complex and started to drive along St Johns Road. The vehicles have then collided causing [the appellant's] motor vehicle ... to collide with two parked cars ..."

The source of the information is not identified.

1. An entry on 13 October records an interview with the respondent, relevantly as follows:

"Can you tell me what happened?

A. ... I was driving from Liverpool, crunch fitness. I went through first round about (sic) then a woman came out from unit and they didn't see me. They turned in front of me and i didn't have enough time to stop."

He said that he was travelling at about 50 kilometres per hour.

1. An entry of 6 November records:

"Police have obtained statements from the passengers of the vehicle. All were also vague in what had occurred. On the night Wendy verbally told police their vehicle was turning (right) out of the drive way of a unit complex of St Johns Road. Police did not obtain a statement from her that night as they believed it would be more appropriate she gets fully cleared medically by the hospital. In her statement she now suggests other wise. Police believe it could be the mothers influence to change what exactly happened to favour them ..."

1. On 20 November 2014 Constable Kafrouni recorded in his notebook a brief statement by Wendy Nguyen, as follows:

"I am 16 years old. On the 9th of October 2014 at 9:45pm I was in a car with my mother, sister & cousins. My mother was in the drivers seat of the car & the car was parked facing the Cumberland Highway ... I went to hospital that night." (italics added)

The entry was signed by Ms Nguyen.

1. (d) accounts given by the respondent
1. The respondent was interviewed by Constable Kafrouni on 13 October 2014. That statement was recorded in the COPS database and has been set out above.
2. On 18 February 2015 the respondent took part in an interview on behalf of the insurer in relation to the personal injury claim made by Wendy Nguyen. The insurance investigator took a statement, which included the following:

"38. I was travelling at about 50km/h as I approached the area where the accident happened ...
...

44. I remember that just after I passed through the second round about and I was still travelling at about 50km/h I first saw the other car I was involved in the accident with.
45. My car was towards the middle of the road on the left of centre and there were cars parked along the left side of the road.
46. The car was coming out of a driveway on my right. I am not sure if it was a house or unit driveway but there are mainly units on that side of that road.
47. I was 10 to 15 meters from the other car when it came out from my right.
48. I am not sure if the other car had its headlights on as it happened too quickly. I am not sure if the driver was indicating.
49. The car accelerated out from my right fairly quickly and it wanted to travel in the same direction I was going. I thought she would wait for me to pass to give way to me.
50. Her car was already moving out when I first saw it but I cannot estimate the speed. The driver just kept coming at a constant speed she went right onto the road in a sort of arc and into my path.

51. I braked hard and swerved to the right but the front driver's side of my car hit the rear passenger side of the other driver's car.

...

74. The accident was not my fault at all. The other driver came out of the driveway on my right without stopping and giving way to me. I had no chance to stop and avoid the collision as it happened too quickly. I was not speeding but I was travelling at the speed limit." (italics added⁸)

1. On 1 October 2015 the respondent lodged a claim for compensation for personal injury he had suffered in the accident. He gave a description of the accident as follows:

"The claimant [that is, the respondent] was travelling along St Johns Road. Vehicle at fault made a U Turn without keeping a proper lookout. As a result, the vehicle at fault collided into the claimant's vehicle."

1. A "picture" of the accident was drawn in the space provided. While it shows the "vehicle at fault" making a U-turn, it is otherwise difficult to relate it to any of the known circumstances. Given the language ("the claimant") used in both the description of the accident and on the drawing, it seems likely that the diagram at least was drawn by somebody assisting the respondent (whose English is limited) with the completion of the form.
2. (e) expert reports
3. As noted above, both parties retained traffic engineers, who reconstructed the scene and expressed expert opinions about the circumstances of the collision. Not all of the reports are included in the appeal books.
4. After some initial exchanges, the two experts provided a joint report. By that time they had reached agreement on significant areas previously in contest. Importantly, the expert retained on behalf of the appellant (Mr Jamieson) agreed that, contrary to his initial assumption, the collision could not have occurred as described by the appellant, and that the point of impact was in the northern, eastbound traffic lane. He also agreed with a diagrammatic representation made by Mr Keramidas, who was retained on behalf of the respondent, showing the appellant's Toyota angled towards the north-east, the respondent's Nissan striking the rear driver's side. Both experts agreed that it was not possible to identify the precise angle of the vehicles at impact.
5. The joint report contains the following:

"6. Mr Keramidas is of the opinion that in all probability the Defendant's (sic – plaintiff's/ appellant's) vehicle had emerged from the driveway of No. 10 St Johns Road and was turning right so as to travel east on St Johns Road. Mr Jamieson accepts that this could be a possibility but that it is only one alternative.

7. The experts agree that shortly prior to impact the Defendant is likely to have steered to the right and was therefore closer to the northern kerb-line than at the time of impact. Mr Keramidas notes that there appeared to be several cars parked parallel to the northern kerb-line upstream of the impact location, which would constrain the extent of the lateral position of the Nissan towards the northern kerb-line. Mr Jamieson agrees.
8. The experts agree that in the scenario where the Plaintiff turned out of the driveway to No. 10, she would be expected to be accelerating during the turn. Mr Jamieson indicates that he would expect the speed of the Toyota to have been relatively low, perhaps in the order of 5 to 10 km/h. Mr Keramidas is of the opinion that this speed would have been higher, perhaps in the order of 25 km/h, with a range of 20 to 30 km/h.
9. The experts agree that the speed of the Nissan at impact is likely to have been in the order of 55 km/h, with a range of 50 to 60 km/h. The Nissan is likely to have been braking at the time of impact." (*italics added*)
1. The areas of remaining disagreement do not appear to be relevant to the issues on appeal.
2. (f) evidence in the trial
3. The appellant gave her evidence partly through an interpreter. Her oral evidence departed significantly from her earlier accounts. It is appropriate to extract some passages from the transcript.
4. In evidence in chief the appellant was asked about arriving at Number 10 St Johns Road and parking her vehicle. She said that she could not remember much about that. Although, in this respect, the transcript is difficult to follow, the appellant should be understood to have said that she parked her car on the northern kerb (that is, on the opposite side of the road to Number 10) and facing east. She was then asked about leaving the function and said:

"I crossed the road and get in the car to get home."

She said the car was still parked where she had left it, facing in an easterly direction. She said she inserted the key, sat in the driver's seat, and started the engine "and after that accident I don't know". She said:

"After that I didn't know – the accident come in from behind me, I don't know about accident. I can't remember about it."

The examination proceeded:

"Q. Do you remember anything immediately after starting the car?"

A. WITNESS: Yes.

Q. What do you remember?

A. WITNESS: I just remember I go in the car, I start engine, I turn the light, seatbelt and after that – and I don't know is – I just know it – I not really go and the accident from the back. I don't know. I have accident after that. Any my daughter called me out.

Q. What's the next thing you remember?

A. WITNESS: Just from the accident, I just remember from the first – I come like that and after that I don't know." (*italics added*)

1. In cross-examination the appellant denied having told the paramedics that she had been reversing out of a driveway. But later she said that she did not know and could not remember whether she had been told by her daughters that she had been reversing out of the driveway. She was cross-examined about the diagram in the statement to the insurance assessor that depicted her car facing west. She said that she had made a guess as to where the vehicle was, because she did not know.
2. Ms Wendy Nguyen gave evidence that, on their arrival at the function, the appellant parked the Toyota opposite Number 10 and that the group walked across the road, re-crossing the road when they left about 9.00pm. She could not recall whether or not she had any discussion with hospital staff about the accident. She was asked about the statement she made that was recorded by Constable Kafrouni which contained the contrary assertion, that the car had been parked facing the Cumberland Highway. She said that she had not read the statement before signing it. She was asked to explain how she had told Constable Kafrouni that the vehicle was facing the Cumberland Highway; she said that she was 15 years of age at the time and "I didn't know, like, my roads, directions". She then suggested that she might have been "misinterpreted".
3. Ms Denise Nguyen was 12 years of age at the time of the accident, 15 when giving evidence. She said that she recalled crossing St Johns Road when leaving the function, and she recalled the crash. She could not recall whether the appellant had started the ignition and did not recall if the car moved forward.
4. The appellant's niece, Ms Julie Pham, was called. She recalled leaving the function with the appellant's group to walk to the car. She could not recall where the car was.
5. The respondent also gave evidence partly through an interpreter.
6. He said that he had travelled through a roundabout, driving at about 50 kilometres per hour. Between the roundabout and the point of the collision he was travelling at "50-55".
7. He gave the following evidence:

"INTERPRETER: ... I finished with the first roundabout and then travelling after the first roundabout I saw a car making a U-turn in front of me, it was a white car, Camry, a white one.

Q. When you saw that car do that, did you do anything?

A. INTERPRETER: I tried to move away from her.

Q. In what way?

A. INTERPRETER: I mean the car is in front of me, after making the U-turn it came in front of me, and there was another car coming from the opposite side of the road, and at the end that resulted in me striking her in the corner of her car.

Q. Before you struck her, did you do anything in the nature of braking or a steering change?

A. INTERPRETER: I applied the brake and I turned the wheel to the right."

1. In cross-examination the respondent gave the following evidence:

"Q. Whereabouts on road was it, if it was on the road, when you first saw it?

A. INTERPRETER: In the middle of the road and it was making a U-turn.

Q. Which direction was that vehicle facing when you first saw it?

A. INTERPRETER: The direction was not that. I mean, she wasn't going to the left or going to the right. She was making a U-turn.

...

Q. When you first saw the white vehicle was it nearer the left-hand side of the road as you approached or the right-hand side of the road?

A. INTERPRETER: The left-hand side.

Q. When you first saw that vehicle, had it come out from the parking lane on the left-hand side?

A. INTERPRETER: I was on the left-hand side, she was on the right-hand side. She came out of the parking. If it was from the parking, it must have been from the driveway of the building.

Q. From your observation, was the vehicle making a turn from the right-hand side of the road towards the left-hand side of the road from where you were?

A. WITNESS: Yeah.

A. INTERPRETER: Yes.

Q. When you first saw the vehicle, was it coming towards you?

A. INTERPRETER: No, I did not see it coming from the opposite side towards me.

Q. When you first saw the vehicle, was it side on to you?

A. INTERPRETER: I saw it when it was making the U-turn.

Q. Do you know the difference between making a U-turn and making a right turn?

A. INTERPRETER: What is the difference between the left turn and the U-turn?

Q. I asked the difference between a right turn and a U-turn.

A. INTERPRETER: The right turn means that you're turning to the right, the U-turn means that you do a full turn and go back in the opposite direction.

Q. You've described the vehicle as making a U-turn?

A. WITNESS: Yeah.

A. INTERPRETER: Yes.

...

Q. ... Did you observe the vehicle commence to make the U-turn whilst it was coming towards you?

A. INTERPRETER: I saw the car from the middle of the road making a U-turn.

Q. You described to me a U-turn is a turn where you go round around and go back the other way. Is that right?

A. WITNESS: Yeah.

A. INTERPRETER: Yes.

Q. So how do you know the vehicle was making a U-turn if you didn't see from whence it started?

A. INTERPRETER: No, she was on the other side of the road and all of a sudden she is on my side of the road.

Q. When you first saw the vehicle, you say the vehicle was side on to you?

A. INTERPRETER: She was on the other side, I was on my side driving, and all of a sudden she made a U-turn in front of me.

...

A. INTERPRETER: And that took about five seconds, that's all.

Q. Five seconds?

A. INTERPRETER: Yeah, it was about five seconds. I can't explain to everything, it was a matter of five seconds when she did the turn." (*italics added*)

1. The respondent was asked to, and did, identify on a diagram where his vehicle was on the road when he first saw the appellant's vehicle. The diagram became Exhibit P, one of the exhibits which has been lost in the post.
2. It is only necessary to note one aspect of the oral evidence of the experts. That concerns the calculation of the respondent's speed immediately prior to the collision, a subject that arose at the very end of their evidence.

3. Based on the respondent's answers in cross-examination that he had had five seconds in which to react to the first appearance of the appellant's car, and Exhibit P, on which the respondent had marked his location when he first saw the appellant's car, Mr Keramidas calculated the speed at which his vehicle had been travelling as 129 kilometres per hour. Mr Jamieson was prepared to agree, although he thought that it was "high".

The primary judgment

1. The primary judge reviewed, in some detail, the evidence of the various accounts of the circumstances of the accident.
2. The dispositive findings of the primary judge are to be found in two paragraphs of the judgment, as follows:

"56. It was the sworn evidence of the Plaintiff in the court that her car was parked kerbside opposite No 10 St Johns Road. After she had crossed St Johns Road from No 10 with her two daughters and nieces, she sat in the car, put the key into and started the car then the car was hit from behind. Her car was stationary. Her daughter Wendy 16 years old at the time told police at the hospital that her mother's car had come out of the driveway before the collision. The Defendant driver, Mr Obeid was sure and convincing in his evidence, in my opinion, that the Plaintiff's car has suddenly emerged from a driveway on his right and did a 'U' turn in front of him.

57. I am therefore not satisfied that the Plaintiff's vehicle was stationary kerbside opposite No 10 St Johns Road when the Defendants motor vehicle collided with her vehicle. Both experts agree that the dynamics of the collision are such that the Plaintiff's vehicle must have been in the east bound carriageway and not parked kerbside. I am satisfied on the balance of probabilities, based upon what Wendy told Police, the ambulance Medics, hospital staff and the evidence of Mr Obeid that the Plaintiff drove her vehicle out of the driveway at No 10 St Johns Road, swung right into the carriageway heading east causing the Defendant's vehicle to collide with the rear of her vehicle. In performing the manoeuvre she did, that is driving out of the driveway at No 10 St Johns Road and turning right and driving across the path of the Defendant's vehicle travelling east to complete a 'U' turn, she failed to give way to Mr Obeid's vehicle and has done so when Mr Obeid's vehicle, with its lights on was in close proximity. The Plaintiff's claim fails."

1. Notwithstanding his express finding that the appellant had driven out of the driveway of Number 10 and "swung" right into the eastbound lane, the primary judge in the same paragraphs of the judgment – [56] and [57] – also held that the appellant attempted to complete a U-turn. There is an irreconcilable tension in those two findings.

The appeal

Grounds 1-3

1. The appellant seized upon the primary judge's acceptance of the respondent as "sure and convincing in his evidence". That assessment, it was contended, was not available in the light of the respondent's consistent description of the appellant as having performed a U-turn. That could be contrasted with his first account, in which he asserted that the appellant's car was coming from a driveway on his right.
2. The reliance by the primary judge on statements attributed to the appellant's daughter Wendy Nguyen was also attacked. First, it was argued, the ambulance and hospital records did not identify the source of the histories they noted. It was speculated that Wendy was that source. Second, even if she were the source, no weight could be attributed to her contemporaneous or near contemporaneous statements, given her age and the circumstances of the accident (that her mother was injured, and that she was also injured).

Ground 4

1. In support of Ground 4, heavy reliance was placed on the reports, and the concurrent evidence, of the experts where the speed of the respondent's vehicle was calculated as 129 kilometres per hour.
2. With respect to speed, the written submissions adopted two alternative positions: first, it was contended that the respondent's evidence that he was travelling at 55 kilometres per hour and observed the appellant's vehicle five seconds before the accident should be accepted. The conclusion to be drawn from that was that he failed to keep a proper lookout. Alternatively, the submission pressed in oral argument was that the evidence of the experts of his speed at 129 kilometres per hour should be accepted. The conclusion to be drawn from that was that the speed was plainly excessive and prevented the respondent from reacting to the presence of the appellant.
3. The respondent relied on the near contemporaneous and consistent accounts of the appellant and her daughter Wendy, and the early and consistent accounts of the respondent, all of which were to the effect that the appellant's car came from the southern side of the road.
4. On behalf of the respondent it was submitted that three alternative factual scenarios were open:
 1. that the appellant's car was parked on the northern side of St Johns Road, facing east, and that she had pulled out from the kerb into the traffic lane;
 2. that the appellant's car was parked on the southern side of St Johns Road, facing west, and that, in order to take her nieces home to Cabramatta, she did a U-turn across the westbound traffic lane and into the eastbound traffic lane;

3. that the appellant's car was parked in the premises of Number 10, and emerged from the driveway and turned into the eastbound lane.
1. Whichever is the correct alternative, it was argued, the appellant's conduct left no opportunity for the respondent to avoid the collision.

Determination

1. It is well established that findings of fact, such as those that are the basis for the primary judge's conclusion, will not be disturbed on appeal unless they are shown to be wrong by "incontrovertible facts or uncontested testimony" or are "glaringly improbable" or "contrary to compelling inferences": *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[29]; *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22; (2016) 90 ALJR 679 at [43].
2. Far from concluding that the primary judge's findings of fact come within any of those descriptions, I am satisfied that they were correct. This is not to say that there are not some anomalies within the findings. For example, as mentioned above, the dispositive finding included two contradictory propositions, that the appellant drove out of the driveway of Number 10 St Johns Road, and that she undertook a U-turn into the eastbound lane.
3. The primary judge made an explicit – and favourable – finding in relation to the credibility of the respondent. He forbore from making corresponding findings about the credibility of the appellant or her witnesses, favourable or unfavourable. Having regard to the contradictory accounts given by the appellant, however, it is inevitable that had any explicit findings been made, they would have reflected badly on, at least, the appellant's reliability. The failures of her daughters' and niece's memories of any of the events is also unilluminating. Contrary to the submissions made on behalf of the appellant, in my opinion, scant weight, if any, should be accorded to their trial testimony. Determination of the factual matters surrounding the accident must be made by analysis of the probabilities, bearing in mind the favourable finding as to the respondent's credibility and having regard to the objective evidence.
4. It is not unimportant that all early accounts given by the appellant and her witnesses had her jointly commencing her journey from the southern side of the road. Whether that was from the driveway of Number 10, or from a parked position on the kerbside is of little, if any, importance. Whether she "swung" out from the driveway or attempted a U-turn from the kerb makes little difference; these matters scarcely deserve the time and attention paid to them. What was important was that the appellant's vehicle came from the southern side of the road, and into the eastbound lane. The onus was on her to execute either manoeuvre with safety and having regard to the presence of other vehicles on the road.

5. To the three potential scenarios identified by the respondent, a fourth, drawn from the ambulance and Fairfield Hospital records may be added. That is that the appellant's vehicle reversed from the Number 10 driveway, across the westbound lane and into the eastbound traffic lane.
6. On any of these four scenarios, in my opinion, the appellant must fail, unless she could succeed in establishing that the respondent was travelling at an excessive speed, or failed to keep a proper lookout.
7. The most favourable scenario for the appellant is that advanced on her behalf at trial – that she pulled out from the northern kerb, into the eastbound traffic lane, and was struck by the respondent's vehicle. (That is not entirely in accord with the appellant's evidence, which maintained that she had not left the kerb.) It is, of course, the obligation of a motorist to ensure, before pulling out from a parked position into a traffic lane, that the manoeuvre can be effected with safety.
8. In order to show that she had discharged that obligation, it would be necessary that the appellant establish that the speed of the respondent's vehicle was such that she could not reasonably have been expected to see it (or, perhaps, that his headlights were not illuminated, but that was not suggested).
9. In order to establish that the respondent's speed was excessive, heavy reliance was placed upon the last-minute calculations made by Mr Keramidas during the dying minutes of the concurrent expert evidence. That calculation depended on the respondent's evidence that he had had five seconds to observe and react to the appellant's vehicle. In my opinion, no weight can be accorded to that assessment; when seen in context, it was made by the respondent in response to cross-examination in which he had said that "all of a sudden" the appellant made a U-turn in front of him. His assessment of speed was not a true assessment but an attempt to emphasise the urgency of the situation with which he was confronted.
10. The respondent's position at all times had been that he was driving at between 50 and 60 kilometres per hour. That evidence was never challenged in cross-examination. It was the estimate at which the two experts first arrived and agreed in their joint report. It has only now been challenged on the basis of an answer given by the respondent that could not fairly be taken as an informed estimate.
11. The same applies to the appellant's alternative argument, that the respondent had failed to keep a proper lookout. That, too, depended on the respondent's estimate of speed and the time between his first observation of the appellant's vehicle and the collision. It must be rejected for the same reasons.
12. In my opinion the appellant has failed to provide any basis on which the findings of fact made by the primary judge should be disturbed. The appeal should be dismissed, as should the cross-appeal. It is unnecessary to deal with the notice of contention.

13. The orders I propose are:
1. Appeal dismissed;
 2. Cross-appeal dismissed;
 3. Appellant to pay the respondent's costs of the appeal.

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Decision last updated: 22 August 2019

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