HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, KIRBY, HAYNE AND CALLINAN JJ

ROSALIE DERRICK APPELLANT

AND

WAH YE ROSANNIE CHEUNG RESPONDENT
(by her next friend XIE RUI HONG)

Derrick v Cheung [2001] HCA 48
9 August 2001
S151/2000

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales dated 11 October 1999 and in lieu thereof order that:*

   a) *the appeal to that Court be allowed;*

   b) *the orders and declaration of the District Court of New South Wales be set aside; and*

   c) *judgment be entered for the defendant.*

3. *Appellant to pay the respondent's costs in the District Court, the Court of Appeal and this Court.*

On appeal from the Supreme Court of New South Wales

Representation:

J D Hislop QC with P J Gormly for the appellant (instructed by Henry Davis York)

S L Walmsley SC with P C See for the respondent (instructed by Beston Macken McManis)

CATCHWORDS

Derrick v Cheung

Negligence – Standard of care of motorist – Vehicle struck infant who darted on to road – Vehicle travelling at 10 to 15 kilometres per hour under the speed limit – Whether Court of Appeal was entitled to find that the motorist was travelling at excessive speed in the circumstances.

1 GLEESON CJ, GAUDRON, KIRBY, HAYNE AND CALLINAN JJ. The question in this appeal is whether the Court of Appeal of New South Wales erred in affirming a judgment of a trial judge who held that a motorist exercising reasonable care was liable for the injuries suffered by an infant who ran into the path of her vehicle because a collision might have been avoided had the motorist been travelling at a lesser speed than she was.

The facts

2 At about 9.00am on Saturday, 17 December 1994, the respondent was taken by her mother across Victoria Avenue, Chatswood, from their home in that street to visit a friend. She was then aged about 21 months. While her mother was talking to her friend inside the house, the respondent left the house, walked along the front path to the pavement of Victoria Avenue, and moved out on to the roadway into the path of oncoming traffic.

3 The appellant was driving along Victoria Avenue in an easterly direction. The respondent suddenly emerged from between two parked vehicles. The appellant braked – there was nothing to suggest that her reactions were unduly slow – and attempted to avoid the respondent by veering to her right. Her vehicle skidded and collided with the respondent, throwing her to the road and causing her serious injuries. There was some damage caused to the nearside headlight of the vehicle.

4 The trial judge (Chesterman ADCJ), who was concerned with the issue of liability only, found that it was clear on the evidence that as the appellant approached the point at which her vehicle struck the respondent, the combination of parked cars on her left, and a tree and some shrubs by the side of the footpath prevented her from seeing the respondent, or having any opportunity to do so, until the respondent appeared on the roadway. His Honour also held that the respondent had moved very quickly on to the roadway. Mr Moye, the driver of a car approaching from the opposite direction, described the respondent infant's movement as a darting one.

5 The weather was fine and the road was relatively straight and in good condition. It was some 12.8 metres in width. There was enough space for the safe passage of a lane of traffic on each side of the centre-line, together with a line of parked cars beside each kerb. The pavement of the nearside footpath was about 3.8 metres wide.

6 The evidence of Mr Moye and Ms Margaret Anne Mason and Ms Catherine Mason, who were travelling in the car proceeding in front of the

appellant's, established that there was a fairly steady stream of traffic travelling on each side of the road at the time of the accident. The Masons gave evidence that their car was an "average distance" in front of the appellant's car. They also spoke of seeing the respondent appear from the left and running out from between the two parked cars.

7 The appellant, the Masons, and the police officer who investigated the accident (Senior Constable Anne Gordon) all gave estimates of the speed of the appellant's car when she first saw the respondent, as being about 40 to 50 kilometres per hour. The speed limit on that stretch of Victoria Avenue was the standard urban speed limit of 60 kilometres per hour.

The decision of the primary judge

8 On those facts the primary judge found entirely for the respondent. In doing so, he accepted a submission that in all of the circumstances, the appellant's speed of 45 to 50 kilometres per hour (despite being well within the prescribed speed limit) was excessive, because, his Honour said, at that speed it was beyond the power of a motorist to stop in time if a child suddenly appeared from in front of one of the parked cars.

9 His Honour stated his conclusions in this way:

> "My decision, after some hesitation, is that the [respondent] has succeeded in establishing that the [appellant] drove negligently at the material time. At the relevant section of Victoria Avenue, the [appellant] could not see any small children that might have been on the pavement to her left or indeed any very small children, such as the [respondent], who might have stepped onto the roadway between the parked cars. The presence of houses and shops in the vicinity, taken in conjunction with the date (shortly before Christmas), the day of the week (a Saturday) and the time of day (9.00 am), should have alerted her to the possibility that a small child such as the [respondent] might be on or near the road. The [appellant's] emphasis in her evidence on the need, as she put it, to 'look straight ahead' and her failure to realise that her view to the left was obscured suggest that she did not in fact have this possibility in mind. This raises doubts about the validity of her belief, both at the time of the accident and subsequently as conveyed in cross-examination, that she was travelling at a safe speed. While her speed was some 10-15 kilometres per hour below the prevailing speed limit, it was in fact high enough to give her very little time to stop in an emergency such as actually occurred."

He later said this:

> "Since the portion of the car which struck the [respondent] was the near side headlight and before the moment of impact the car was skidding to the right, it is open to me to infer that if the [appellant's] speed had been slower by a few kilometres per hour, she would have been able to veer away past the [respondent], or indeed stop in time to avoid the collision."

The decision of the Court of Appeal

10 An appeal to the Court of Appeal of New South Wales (Stein and Fitzgerald JJA, Davies AJA dissenting) was dismissed[1]. The majority quoted some passages from the judgment of the President of the Court (Mahoney P) in *Stocks v Baldwin*[2], which they thought relevant to this case. One of these was as follows[3]:

> "Pedestrians sometimes act carelessly. I do not mean by this that they do so more often than not. But, in my opinion, they do so with sufficient frequency that a prudent driver would take account of it. The likelihood of that occurring is not a 'far-fetched or fanciful' risk which is to be put aside or discounted. It is something which occurs often enough for the prudent driver to foresee it and take it into account."

Another of the passages to which the Court of Appeal referred was as follows[4]:

> "In this context, what is the significance of the speed at which the defendant was driving? The speed is significant because of the effect it has or may have upon what the driver will be able to do if such an eventuality occurs. If a pedestrian was to do what the plaintiff did, the things which the present driver could do to avoid her were limited. Swerving was of little if any use: he was driving in a traffic lane presumably not much wider than a car width, with a line of stationary cars on his right and the kerb on his left. In a practical sense, he could avoid

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1 (1999) 29 MVR 351.

2 (1996) 24 MVR 416.

3 (1996) 24 MVR 416 at 418.

4 (1996) 24 MVR 416 at 419.

the pedestrian only by stopping and, of course, his capacity to do so would be affected by his speed."

The majority in this case went on to say[5]:

"It is questionable whether the driving standards required by the statements in *Stocks v Baldwin*[6] are compatible with current driving practice in Sydney and its environs, or indeed always practical in the traffic conditions which exist. However that might be, they often do not correspond with the driving habits of many Sydney drivers.

It does not necessarily follow that they are a counsel of excessive caution or otherwise require an unreasonable standard of care. The circumstance that the exigencies of movement in and around the city cause many to drive too fast for the prevailing conditions might make such speed 'reasonable' in one sense but does not mean it is not a breach of duty to other road users.

Accidents such as the present [involve] special difficulties. Theoretically, a pedestrian might run out into the traffic at any point at any time. A driver might have no opportunity to avoid a collision. However, the slower the vehicle, the greater the opportunity that exists. Nevertheless, travelling within the designated speed limit and in conformity with the traffic flow is ordinarily reasonable. Indeed, to do otherwise would often create risks.

There is no reason to doubt that the trial judge appreciated such considerations or the need to take all surrounding circumstances into account. As his Honour said, his decision was reached '[after] some hesitation'. Another judge might have reached a different conclusion, despite the sympathy which the plight of the respondent and her family naturally attracts. Certainly, the appellant does not bear any moral, as distinct from legal, responsibility for what occurred.

However, we are not persuaded that this is a case for appellate intervention. As Mahoney P acknowledged in *Stocks v Baldwin*[7], the

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5 (1999) 29 MVR 351 at 352-353.

6 (1996) 24 MVR 416.

7 (1996) 24 MVR 416 at 420.

> determination of whether there was a breach of the duty of care is not determined by a 'syllogistic process from facts to conclusion'. Rather, it involves making value judgments, as referred to by Mason J in *Wyong Shire Council v Shirt*[8]."

Davies AJA in dissent said this[9]:

> "The facts of the present case were different from those in *Stocks v Baldwin* for there was no particular perceivable risk which the appellant should have taken into account but did not. She drove with other cars at a modest speed, 45-50 km per hour, keeping an appropriate distance between her vehicle and the vehicle in front and keeping a proper lookout. The appellant's driving was appropriate in the circumstances. For the appellant to keep up with the general flow of the traffic, when the traffic was travelling at a modest speed, well under the speed limit, and when there was no particular danger observable, was both a reasonable and a proper response to the traffic conditions on the day. For the appellant to have dawdled along Victoria Avenue when no particular danger was apparent would not have been appropriate for it could have caused disruption."

The appeal to this Court

11 The submission of the appellant was that the Court of Appeal should have intervened to reverse the decision of the trial judge because there was no basis upon which his Honour could properly hold that there had been any want of care on the part of the appellant. There was no relevant dispute about the facts of the accident and it was common ground that this was not a case which turned upon the impression made on the trial judge by any particular witness or witnesses. Nor was it a case where the incident occurred near to a school or bus stop or other place where reducing speed or special caution in driving might be required or prudent.

12 The substance of the appellant's contention in this Court is that the reasoning of Davies AJA is correct and that both the trial judge and the majority in the Court of Appeal erred, the latter in particular in effectively holding that

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8 (1980) 146 CLR 40.

9 (1999) 29 MVR 351 at 354.

driving at a speed which was "'reasonable' in one sense [did] not mean [that] it [was] not a breach of duty [by the driver] to other road users."

13 The appeal to this Court must be upheld. There was no basis upon which any finding of negligence on the part of the appellant could be made. That the facts of the case are tragic, and the collision a parent's worst nightmare, as the trial judge accurately described them, did not relieve his Honour of his obligation to determine the issues according to law: in this case, by not finding an absence of care in circumstances in which reasonable care was, as Davies AJA correctly held, in fact being exercised. Even if the inference which the trial judge drew, that if the appellant's speed had been slower by a few kilometres per hour she would have been able to avoid the collision, was more than mere speculation, it is still not an inference upon which a finding of negligence could be based. Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care. To offer, as the majority in the Court of Appeal did, its consolation that the appellant does not bear any moral, as distinct from legal, responsibility for what occurred is to obscure that issue.

14 *Stocks v Baldwin*[10], to which the Court of Appeal referred, depended on its own facts. The observations of Mahoney P were made with particular reference to the facts under consideration in that case. In any event, even if his Honour's remarks were intended to lay down general rules, they were not ones to be applied here. What was unlikely in this case was that an unattended infant of such tender years would dart in front of a relatively slow moving vehicle on a busy road in such a way that a collision was, to all intents and purposes, unavoidable.

15 No negligence on the part of the appellant was established. This was a case that clearly called for the intervention of the Court of Appeal. As that Court has not so acted, this Court must.

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10 (1996) 24 MVR 416.

Orders

16 The appeal should be allowed. The judgment of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In lieu thereof, it should be ordered that the appeal to that Court be allowed, the orders and declaration of the District Court of New South Wales should be set aside and judgment entered for the defendant. The appellant, pursuant to her undertakings, should pay the respondent's costs in the District Court, the Court of Appeal, and this Court.

17 The form of these orders reflects the fact that we make the order which the Court of Appeal should have made after setting aside the District Court's order.