# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

---

BARBARA FOX APPELLANT

AND

MEGAN L PERCY RESPONDENT

*Fox v Percy*
[2003] HCA 22
*30 April 2003*
S88/2002

**ORDER**

*Appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

**Representation:**

P Menzies QC with C R Burge for the appellant (instructed by Beston Macken McManis)

J D Hislop QC with P J Nolan for the respondent (instructed by Sparke Helmore)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

**CATCHWORDS**

**Fox v Percy**

Appeal – Rehearing – Review of findings of fact based on trial judge's assessment of credibility of witnesses – Whether findings inconsistent with incontrovertibly established facts – Power of appellate court to set aside findings.

Appeal – Issue not raised at trial – Where argued that expert report based on matters not proved or supported by the evidence – Whether re-examination of facts by appellate court appropriate.

Appeal – Rehearing – Substitution of judgment of appellate court for that of trial judge – Whether re-trial an appropriate remedy.

*Supreme Court Act* 1970 (NSW), s 75A.

1 GLEESON CJ, GUMMOW AND KIRBY JJ. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of New South Wales[1]. The issue in the appeal is whether that Court erred in reversing a judgment of the District Court of New South Wales. By that judgment, the primary judge (Herron DCJ) resolved a factual conflict at trial in favour of the appellant. A subsidiary question arises in the appeal as to whether, if the Court of Appeal was justified in upholding the appeal, the correct order for it to make was for a new trial, rather than the entry of judgment in favour of the respondent.

The background facts

2 Ms Barbara Fox (the appellant) was injured on 11 April 1992 when a horse she was riding came into collision with a Volkswagen Kombi Van driven by Ms Megan Percy (the respondent). The appellant claimed damages for negligence in respect of the respondent's driving of the motor vehicle. The crucial factual contest at the trial was whether the respondent's motor vehicle was on the correct, or incorrect, side of the road at the time of impact. Both the appellant and the respondent gave evidence that, at that time, they were on the correct side of the road. They could not both be right. The appellant's entitlement to damages depended upon the primary judge's accepting her version of the events leading to the collision.

3 The appellant was seriously injured as a result of the collision. The trial in the District Court did not take place until November 1999. It was heard over four days in Moruya, New South Wales. A number of facts, as accepted by the primary judge, were not disputed. The collision occurred on a narrow, unsealed, country road that was about seven metres wide. The respondent was driving her vehicle in a westerly direction, travelling downhill. At the point immediately prior to the collision there was an almost, but not completely, blind left-hand turn. The appellant was proceeding on a large half draught horse in an easterly direction. Immediately behind her, also on a large horse, was a companion, Mr Christopher Murdoch. The head of his horse was close to the near-side rump of the horse that the appellant was riding. Immediately before the collision, the horses were proceeding at about seven kilometres per hour. There was some dispute about the speed of the respondent's vehicle. However, the exact speed is immaterial. The primary judge accepted that it was not excessive to the circumstances[2].

---

**1** *Percy v Fox* [2001] NSWCA 100.

**2** *Barbara Fox v Megan Percy*, unreported, District Court of New South Wales (Herron DCJ), 5 November 1999 ("Reasons of the primary judge") at 9.

4 The impact between the van and the appellant's horse happened when they came upon each other as the van turned the corner in the road. The collision was unexpected to the parties. The point of impact between the van and the appellant's horse was roughly head-on. Because that horse, and Mr Murdoch's horse immediately behind it, were both large and heavy, their combined weight approximated that of the respondent's vehicle. The application of the brakes by the respondent together with the impact brought the Kombi Van to a sudden halt. Both horses were forced backwards. The appellant's horse became entangled in the Kombi Van. Subsequently, that horse released itself; but it had suffered fatal wounds and after taking a couple of steps it fell over dead. The appellant was thrown onto the roadway landing at a point immediately in front of the respondent's stationary vehicle.

5 Soon after the collision, an ambulance and the police were summoned to the scene. The ambulance attendants arrived and, as the primary judge recorded, they stated that, when they arrived, the stationary Kombi Van was on its correct side of the road[3]. The police officer who arrived (Constable Peter Volf) interviewed the appellant, Mr Murdoch and the respondent. He noticed, and recorded in a sketch in his notebook, that the respondent's vehicle was on its correct side of the road and that there were 10 metres of skid marks immediately behind it. Those skid marks suggested to Constable Volf "that the vehicle had at all material times … been on its correct side of the road"[4]. This discovery caused the constable to say to the appellant: "It looks like you were in the wrong"[5].

6 Both the constable and the respondent detected the presence of alcohol in the appellant[6]. This too was noted in the police record. The appellant declined to sign her statement in the police notebook, causing the constable to record that she had "refused to co-operate with Police in enquiries". In evidence, the appellant explained that she was interviewed whilst being helped into the ambulance and felt that the police officer was antagonistic towards her. Later, at the Bega Hospital to which the appellant was conveyed, a blood sample was taken from her. It revealed that, at the time the blood was exacted, the appellant had 0.122 grams of alcohol per 100 millilitres of blood. The primary judge concluded that there was "no doubt that this amount of alcohol in her blood would have affected

---

**3** Reasons of the primary judge at 9-10.

**4** Reasons of the primary judge at 3.

**5** Reasons of the primary judge at 14.

**6** Reasons of the primary judge at 14.

her"[7]. However, he also concluded that, if indeed she had been on her correct side of the road, her consumption of alcohol was irrelevant to the cause of the collision[8].

7 The appellant was a person who had a great deal of experience with horses, virtually from her childhood[9]. She was comfortable with the horse she was riding. She had acquired it a year earlier and had frequently ridden it. She was also very familiar with the road on which the collision had occurred. In her evidence, she adhered to her statement that she had been on the correct side of the road at the moment of impact. In her testimony, the respondent also adhered to her version of events. The primary judge was obliged to resolve this conflict of evidence.

The reasons of the primary judge

8 The primary judge accepted the police record, and in particular the discovery of the skid marks shown immediately behind the Kombi Van, wholly within the respondent's correct side of the road. However, his Honour concluded that there had been some animosity on the part of Constable Volf towards the appellant which, he felt, had "colour[ed] his investigation of the situation"[10]. In support of this conclusion, he instanced the fact that the officer had noted the clothing of the appellant, that she was "abusive towards police" and that she had tattoos on the right cheek and smelt of alcohol[11]. However, the printed form concerning "information to be obtained by police", accompanying the police notebook, records that a note should be taken of clothing and of "any distinguishing features" of persons interviewed.

9 At the trial, the appellant called Ms Christine Dzikowski as a witness. She had come upon the scene of the collision not long after the impact. She was adamant that, when she arrived, the Kombi Van was on its incorrect side of the road. However, the primary judge, whilst accepting that Ms Dzikowski gave honest evidence, also accepted that at its final point of rest, the vehicle was on its

---

**7** Reasons of the primary judge at 17.

**8** Reasons of the primary judge at 19-20.

**9** Reasons of the primary judge at 19.

**10** Reasons of the primary judge at 16.

**11** Reasons of the primary judge at 15.

correct side of the notional centreline of the road. He ascribed Ms Dzikowski's mistake to the very long delay between the events and the trial[12].

10 The judge recognised that the accepted position of the vehicle and the skid marks behind it constituted strong evidence against the appellant's version of events. Nevertheless, he concluded that the probabilities were that the collision had occurred when the respondent was driving on her incorrect side of the road. He said[13]:

> "I come to the conclusion … that despite the skid marks that the accident occurred on the plaintiff's correct side of the road; and of course in that I do not accept the defendant herself that the accident had happened on her correct side of the road."

11 In support of this conclusion the primary judge's reasons nominate three considerations. The first was his acceptance of the appellant's testimony (and thus the rejection of the respondent's). The second was his acceptance of the confirmatory testimony of Mr Murdoch. Thirdly, the judge said that he accepted the evidence contained in expert reports of Mr John Tindall, a traffic engineer.

12 Mr Tindall had been engaged by the appellant. He made two written reports. These were admitted into evidence and Mr Tindall gave no oral evidence. No reference was made to the skid marks in his first report. The record of the skid marks was only subsequently brought to his attention.

13 So far as Mr Murdoch was concerned, the judge accepted his evidence that, following the impact, his horse had been forced down an embankment which fell away from the road on the side on which the appellant and Mr Murdoch claimed they were proceeding. In his Honour's view this showed "that the probabilities are that his horse was juxtaposed to the horse ridden by the plaintiff in the way in which both he and the plaintiff say it was"[14].

14 So far as the expert reports were concerned, the primary judge preferred Mr Tindall's opinion to that of the expert called for the respondent. He accepted as correct Mr Tindall's assumptions about the movement of the vehicle and horses after impact. This led him to say[15]:

---

**12** Reasons of the primary judge at 13.

**13** Reasons of the primary judge at 16.

**14** Reasons of the primary judge at 20.

**15** Reasons of the primary judge at 12.

"I think that the probabilities are that the vehicle ended up on its correct side of the road for the reasons which Mr Tindall advances".

15 It was on this footing that the primary judge entered judgment in favour of the appellant, awarding her substantial damages. The respondent appealed.

The decision of the Court of Appeal

16 In the Court of Appeal, the judges divided. Fitzgerald JA rejected the appeal. He was critical of the growing practice of using experts in what he saw as basically a simple trial function. He acknowledged that rational minds could reasonably differ in analysis of the evidence[16]. However, having regard to the constraints upon interference in the trial judge's factual conclusions, including the "assessment of the credibility and reliability of the witnesses", he rejected the argument that the trial had not been properly and competently concluded[17].

17 The reasons of the majority in the Court of Appeal were given by Beazley JA (with whom Handley JA concurred). Her Honour analysed the foregoing evidence and the conclusions of the primary judge. She acknowledged the advantages which the primary judge had in observing witnesses and making findings of credit in favour of the appellant and Mr Murdoch and against the respondent. She referred to the series of decisions of this Court that restrict appellate interference in conclusions that are based on such findings[18].

18 Nevertheless, Beazley JA decided that the evidence of the police officer concerning the skid marks on the respondent's correct side of the road fell into the category of inconsistent facts "incontrovertibly established by the evidence"[19]. As the primary judge had accepted the testimony about the skid

---

**16** *Percy v Fox* [2001] NSWCA 100 at [82].

**17** [2001] NSWCA 100 at [83]-[84].

**18** [2001] NSWCA 100 at [64] referring to *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306; 160 ALR 588 ("SRA").

**19** [2001] NSWCA 100 at [71]. See *Devries* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ; *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57. In Canada, the Supreme Court has re-examined the principles of appellate review of factual conclusions made by a trial judge, emphasising a single standard of "palpable and overriding error" for

(Footnote continues on next page)

marks, and as they were in any case illustrated in the police notebook, her Honour concluded that the oral evidence of the appellant and Mr Murdoch did not suffice to sustain the final opinion that the primary judge had reached. She therefore regarded the primary judge's "core finding" as being based upon his acceptance of Mr Tindall's first report[20]. She pointed out that the appellant's counsel had disclaimed reliance on the opinion stated by Mr Tindall that the collision with the horse had occurred "anywhere along the 10 metres that the van skidded"[21]. She also drew attention to other defects in Mr Tindall's reports, the lack of proved evidence to sustain some of his assumptions and the fact that he had not been called to give oral evidence. On the basis of this last consideration, Beazley JA was of the opinion that Mr Tindall's evidence was unprotected by any principle restricting appellate review[22]. The Court of Appeal was in as good a position as the primary judge to evaluate the worth of Mr Tindall's written evidence.

19 It is clear that, for the majority in the Court of Appeal, the crucial fact was the 10 metre skid marks that were unexplained, or insufficiently explained, to warrant a conclusion adverse to the respondent's version of events. On this basis the judgment in favour of the appellant was set aside and judgment entered for the respondent. Now, by special leave, the appellant appeals to this Court.

The powers and functions of the Court of Appeal

20 Appeal is not, as such, a common law procedure. It is a creature of statute[23]. In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*[24],

---

both findings and inferences of fact: *Housen v Nikolaisen* (2002) 211 DLR (4th) 577 at 591 [25].

**20** [2001] NSWCA 100 at [65].

**21** [2001] NSWCA 100 at [66].

**22** [2001] NSWCA 100 at [69].

**23** *Attorney-General v Sillem* (1864) 10 HLC 704 at 720-721 [11 ER 1200 at 1207-1208]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 552-553; *CDJ v VAJ* (1998) 197 CLR 172 at 196-197 [91]-[95], 230 [184]; *SRA* (1999) 73 ALJR 306 at 322 [72]; 160 ALR 588 at 609; *DJL v Central Authority* (2000) 201 CLR 226 at 245-246 [40]; *Allesch v Maunz* (2000) 203 CLR 172 at 179-180 [20]-[22], 187 [44].

**24** (1976) 135 CLR 616 at 619-622. See also *Eastman v The Queen* (2000) 203 CLR 1 at 40-41 [130].

Mason J distinguished between (i) an appeal *stricto sensu*, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by way of a hearing de novo. There are different meanings to be attached to the word "rehearing"[25]. The distinction between an appeal by way of rehearing and a hearing de novo was further considered in *Allesch v Maunz*[26]. Which of the meanings is that borne by the term "appeal", or whether there is some other meaning, is, in the absence of an express statement in the particular provision, a matter of statutory construction in each case.

21 In New South Wales a right of appeal from a judgment of the District Court lies to the Supreme Court pursuant to the *District Court Act* 1973 (NSW), s 127(1). In the present case such appeal lay as of right[27]. Within the Supreme Court such an appeal is assigned to the Court of Appeal[28]. The character and features of the appeal are governed by the *Supreme Court Act* 1970 (NSW). Section 75A of that Act provides, relevantly:

> "(5) Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing.
>
> (6) The Court shall have the powers and duties of the court … from whom the appeal is brought, including powers and duties concerning:
>
> (a) …
>
> (b) the drawing of inferences and the making of findings of fact, and
>
> (c) the assessment of damages and other money sums.
>
> (7) The Court may receive further evidence.

---

**25** *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 620-621.

**26** (2000) 203 CLR 172 at 180-181 [23], 187 [44].

**27** *District Court Act* 1973 (NSW), s 127(3). See also s 127(2)(c)(i).

**28** *Supreme Court Act* 1970 (NSW), ss 48(1)(a)(iv) and 48(2)(f).

(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.

(9) …

(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires."

22 The nature of the "rehearing" provided in these and like provisions has been described in many cases. To some extent, its character is indicated by the provisions of the sub-sections quoted. The "rehearing" does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits. No such fresh evidence was admitted in the present appeal.

23 The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance"[29]. On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record[30]. These limitations include the disadvantage that the appellate court has when compared with 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[31]. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the

---

**29** *Dearman v Dearman* (1908) 7 CLR 549 at 561. The Court there was concerned with s 82 of the *Matrimonial Causes Act* 1899 (NSW) which provided that "on appeal every decree or order may be reversed or varied as the Full Court thinks proper": see (1908) 7 CLR 549 at 558.

**30** *Dearman v Dearman* (1908) 7 CLR 549 at 561. See also *Scott v Pauly* (1917) 24 CLR 274 at 278-281.

**31** *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637 per Lord Scarman with reference to *Joyce v Yeomans* [1981] 1 WLR 549 at 556; [1981] 2 All ER 21 at 26. See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25.

entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole[32].

24 Nevertheless, mistakes, including serious mistakes, can occur at trial in the comprehension, recollection and evaluation of evidence. In part, it was to prevent and cure the miscarriages of justice that can arise from such mistakes that, in the nineteenth century, the general facility of appeal was introduced in England, and later in its colonies[33]. Some time after this development came the gradual reduction in the number, and even the elimination, of civil trials by jury and the increase in trials by judge alone at the end of which the judge, who is subject to appeal, is obliged to give reasons for the decision[34]. Such reasons are, at once, necessitated by the right of appeal and enhance its utility. Care must be exercised in applying to appellate review of the reasoned decisions of judges, sitting without juries, all of the judicial remarks made concerning the proper approach of appellate courts to appeals against judgments giving effect to jury verdicts[35]. A jury gives no reasons and this necessitates assumptions that are not appropriate to, and need modification for, appellate review of a judge's detailed reasons.

25 Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task 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

---

**32** *SRA* (1999) 73 ALJR 306 at 330 [89]-[91]; 160 ALR 588 at 619-620 citing *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210; *Jones v The Queen* (1997) 191 CLR 439 at 466-467.

**33** *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-620; *SRA* (1999) 73 ALJR 306 at 322-325 [72]-[80]; 160 ALR 588 at 609-613.

**34** *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667 citing *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257-258, 268-273, 277-281.

**35** eg *Hocking v Bell* (1945) 71 CLR 430; (1947) 75 CLR 125 at 131-132; cf *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 271-272 [2], 274-275 [16], 282-283 [41]-[42], 288-290 [57]-[58], 310-311 [119]-[123].

make due allowance in this respect"[36]. In *Warren v Coombes*[37], the majority of this Court reiterated the rule that:

> "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it."

As this Court there said, that approach was "not only sound in law, but beneficial in … operation"[38].

26 After *Warren v Coombes*, a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate 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. Three important decisions in this regard were *Jones v Hyde*[39], *Abalos v Australian Postal Commission*[40] and *Devries v Australian National Railways Commission*[41]. This trilogy of cases did not constitute a departure from established doctrine. The decisions were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges.

27 The continuing application of the corrective expressed in the trilogy of cases was not questioned in this appeal. The cases mentioned remain the instruction of this Court to appellate decision-making throughout Australia.

---

**36** *Dearman v Dearman* (1908) 7 CLR 549 at 564 citing *The Glannibanta* (1876) 1 PD 283 at 287.

**37** (1979) 142 CLR 531 at 551.

**38** (1979) 142 CLR 531 at 551. See also *Taylor v Johnson* (1983) 151 CLR 422 at 426; *Jovanovic v Rossi* (1985) 58 ALR 519 at 522; cf *Moran v McMahon* (1985) 3 NSWLR 700 at 715-716 per Priestley JA.

**39** (1989) 63 ALJR 349 at 351-352; 85 ALR 23 at 27-28.

**40** (1990) 171 CLR 167 at 179.

**41** (1993) 177 CLR 472 at 479, 482-483.

However, that instruction did not, and could not, derogate from the obligation of courts of appeal, in accordance with legislation such as the *Supreme Court Act* applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.

28 Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons[42]. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings[43].

29 That this is so is demonstrated in several recent decisions of this Court[44]. In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable"[45] or "contrary to compelling inferences" in the case[46]. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own

---

**42** See discussion in *SRA* (1999) 73 ALJR 306 at 321 [61]-[64], 325-331 [81]-[93], 337-338 [132]-[137]; 160 ALR 588 at 606-607, 613-622, 629-630.

**43** eg *Voulis v Kozary* (1975) 180 CLR 177; *SRA* (1999) 73 ALJR 306; 160 ALR 588; cf *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 349-351.

**44** eg *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599 at 603 [15]-[16]. See also *SRA* (1999) 73 ALJR 306; 160 ALR 588.

**45** *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

**46** *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.

30 It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses[47]. Thus, in 1924 Atkin LJ observed in *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co* (*The "Palitana"*)[48]:

> "… I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."

31 Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances[49]. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.

---

**47** eg *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 per Samuels JA.

**48** (1924) 20 Ll L Rep 140 at 152. See also *Coghlan v Cumberland* [1898] 1 Ch 704 at 705.

**49** See material cited by Samuels JA in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 and noted in *SRA* (1999) 73 ALJR 306 at 329 [88]; 160 ALR 588 at 617-618.

The Court of Appeal made no error

32 With these established principles in mind, we now turn to the issue presented by this appeal. Under the Constitution, the appeal to this Court is in the nature of a strict appeal[50]. Our sole duty in this case is to determine whether error has been shown on the part of the Court of Appeal. This Court is not engaged in a rehearing. As such, it is not this Court's task to decide where the truth lay as between the competing versions of the collision given by the parties. Nevertheless, in considering the supposed error of the Court of Appeal, it is necessary to understand how, respectively, the primary judge came to his conclusion and the Court of Appeal felt authorised to reverse it.

33 The Court of Appeal was obviously aware of the principles, established by this Court, controlling the performance of its appellate function. Both Beazley JA (for the majority) and Fitzgerald JA (in dissent) referred to the applicable principles and the governing authorities. In particular, Beazley JA referred to the most recent, and detailed, analysis of the considerations to be weighed as expressed in this Court's decision in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)*[51]. There, this Court reversed a decision of the New South Wales Court of Appeal which had felt itself precluded from disturbing the decision of the primary judge that, it considered, rested on that judge's evaluation of the credibility of witnesses. This Court unanimously concluded that the Court of Appeal was not so precluded but was obliged, by the proof of objective documentary evidence, to give attention to all of the evidence of the case.

34 In the present case, the majority in the Court of Appeal did not repeat the error identified in *SRA*. Here, the incontrovertible evidence was not, as such, found in a series of documentary records. However, it was illustrated in an uncontested, contemporary document that verified the police evidence which the primary judge accepted as truthful. This was the evidence, shown in the notebook of Constable Volf, recording that, at the collision scene, he had observed 10 metre skid marks on the road immediately behind the point at which the respondent's vehicle had come to a halt and wholly within the respondent's correct side of the road.

---

**50** *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [16]-[17], 24 [68], 35 [111]-[112], 96-97 [290]; cf 81-82 [248]-[249], 123 [370]-[371].

**51** (1999) 73 ALJR 306; 160 ALR 588.

35 If this objective evidence correctly recorded the trajectory of the respondent's vehicle to the point at which it stopped, it afforded evidence that confirmed the respondent's version of the events immediately prior to the collision and contradicted the evidence of the appellant and Mr Murdoch.

36 There were other uncontested facts that tended to support the respondent's version of events. Thus the ambulance attendants confirmed the location of the vehicle in keeping with the respondent's version and contrary to the evidence of Ms Dzikowski. Constable Volf's statement to the appellant was also consistent with his immediate assessment, which the skid marks appeared to demand. Had Constable Volf reached the opposite conclusion, he would probably have been bound to charge the respondent with a driving offence. As the trial judge pointed out, the level of alcohol in the appellant's blood was not causative of the collision at the moment of impact. However, it was an objective fact. It could have explained how the appellant allowed her horse to proceed, uncontrolled, onto the incorrect side of the roadway. The respondent said that she was driving in second gear because of the steep fall of the road. Having regard to the fact that the bend in the road was to the left, any natural inclination on the part of a descending driver would probably have been to the left, not to the right-hand side where the road fell away. On the other hand, horses ascending the steep incline might, if uncontrolled, have had a tendency to cut the bend, veering to the right-hand side of the road where the respondent said the horses were.

37 In the end, it was not logic and the assessments of probable behaviour in the circumstances that persuaded the majority of the Court of Appeal[52]. Such considerations might not alone have warranted disturbance of the primary judge's conclusion. It was the objective fact of the skid marks which, to the close of the trial, remained unexplained, or insufficiently explained, by the appellant.

38 The only explanations offered by the appellant in that regard were, as Beazley JA pointed out, unconvincing. The direction of the skid marks, shown in the police sketch as virtually straight behind the respondent's vehicle, contradicted the only hypothesis offered to this Court to support the final resting place of the vehicle and the appellant. This was that, immediately following the collision, the respondent had corrected the position of her vehicle and returned it to the correct side of the road. If this were the explanation, the skid marks would have shown the angle suggested by such a corrective manoeuvre. They did not. It could not be accepted that the respondent delayed in applying the brakes causing the skid marks until after she was safely on her correct side. In the agony of the moment, there was no time to think of such things. The skid marks

---

**52** *Percy v Fox* [2001] NSWCA 100 at [71].

showed objectively the direction of the respondent's vehicle from the application of the brakes to the place of rest at the point of the collision with the appellant's horse. Alike with Beazley JA, we regard the skid marks as an incontestable fact that rebuts the claim of negligence propounded by the appellant. Clearly, it was open to the Court of Appeal, conducting the rehearing, to reach that conclusion. Once it did so, that Court was bound to give effect to its opinion.

39 The reasons of Beazley JA, disposing of the contrary arguments are also convincing. The evidence of Mr Murdoch, a friend of the appellant, is inconsistent with the skid marks. Against his oral testimony, the objective facts speak volumes, even disregarding the matters brought out in cross-examination of him. The suggestion that Mr Murdoch's horse took him over the embankment and then returned to the road is not, as the primary judge thought, decisive. It is also dependent on the accuracy of Mr Murdoch's recall. In any case, the road was comparatively narrow, the horse would have been extremely frightened and, following the collision, its independent movement could, indeed, have taken it over the side of the embankment.

40 So far as the evidence of the expert, Mr Tindall, was concerned, it was no more than a written report containing an opinion formed upon a brief which apparently had given to Mr Tindall an incomplete account of the primary evidence. Once the significance of the skid marks was appreciated, it was open to the Court of Appeal to prefer the inferences that it drew from that objective fact to the opinions stated in a report that was, in any case, somewhat partisan in its expression.

41 Therefore, the appellant had to rely before this Court on the advantages that the primary judge enjoyed in seeing the parties, and Mr Murdoch, give their evidence and in preferring the evidence of the appellant and Mr Murdoch to that of the respondent. The Court of Appeal was bound to make due allowance (as it did) for such advantages. The trial judge sat through four days of trial before giving his decision. He did so at a time when the impression made by the witnesses was still clearly in his mind[53]. The Court of Appeal was bound to afford respect to the endeavour of the judge to give the correct and lawful conclusion to the puzzle presented to him. Clearly, the Court of Appeal was right to reject the respondent's belated suggestion of bias, which should not, in our view, have been made. No doubt, the Court of Appeal also took into account the unexpressed considerations that went into the judge's conclusion. No judicial reasons can ever state all of the pertinent factors[54]; nor can they express every

---

**53** Reasons of the primary judge at 1.

**54** *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 per Lord Hoffmann.

feature of the evidence that causes a decision-maker to prefer one factual conclusion over another.

42 Nevertheless, in our view, within the stated principles, the majority in the Court of Appeal did not err in giving effect to the conclusion that they reached. The skid marks on the respondent's correct side of the road were incontrovertibly established. Their position, length, direction and terminus are inconsistent with the appellant's version of events. Having come to that decision, the majority in the Court of Appeal were correct to give effect to their conclusion and to set aside the judgment in the appellant's favour. In our view, the appeal should be dismissed.

The alternative possibility of a new trial

43 This conclusion relieves us of considering the alternative case that the respondent propounded. This was that, at the least, this Court would conclude that the primary judge's reasons were so unsatisfactory as to require a retrial. Whilst adhering to her contention that the judgment in her favour should be restored, the appellant embraced the proposal of a retrial as preferable to the judgment for the respondent entered by the Court of Appeal.

44 To conclude that the Court of Appeal was not warranted in substituting a judgment for the respondent is, in our view, inconsistent with the right and duty of that Court to discharge the appellate function in accordance with the legislation governing it. A principal purpose of providing for an appeal by way of "rehearing" is to ensure, within the appellate process, finality of litigation, correctly decided[55]. It is unlikely that, in a second trial, the present parties would alter significantly the testimony that they have severally given or that the other witnesses would change theirs. As the primary judge correctly observed during the cross-examination of Constable Volf (by the time of the trial a sergeant of police), the possibility of his having any independent recollection of events that took place seven years earlier, was negligible. His evidence was, and would remain, that recorded in the notebook entry made immediately after the collision and in particular his sketch of the accident scene. In a new trial, that record, and the features of the skid mark, would be unchanged.

---

**55** The power of the Court of Appeal to enter judgment for a party on an appeal by way of rehearing derives from s 75A(1) of the *Supreme Court Act* 1970 (NSW). Particular provisions appear with respect to a new trial because of subsequent matters (s 106) and the entry of substituted verdicts in certain circumstances (s 107). These provisions were not applicable to the present appeal.

45 All that stands in favour of a retrial is that it would permit another judge to re-evaluate the truthfulness of the witnesses. But that judge too would have to do so in the context of the objective evidence of the skid marks. All that would be gained would be the prospect of a reserved decision, with the benefit of transcript that was not available to the primary judge at the first hearing, and reasons that would address more convincingly the reconciliation of the oral testimony with the objective, contemporaneous record.

46 The Court of Appeal felt able to conclude the matter for itself. In doing so, in an unremarkable case, it did what is very commonly done, and properly done, in discharging the duty of deciding an appeal by way of rehearing. In our view, it was correct to do so within the powers that it enjoyed. We see no reason for this Court to substitute an order for a new trial. We would regard such an order as futile in the state of the evidence. The retrial of this matter, more than 10 years after the collision, could involve no improvement in the memory of any witness. In the end, the same factual analysis would be required. The self-interested recollections of the appellant, and those of her friend Mr Murdoch, could not overcome the objective evidence that so strongly favoured the respondent's version of events. At the least, it was open to the Court of Appeal to reach that conclusion. There being no error, this Court should not interfere.

Order

47 The appeal should be dismissed with costs.

48 McHUGH J. The question in this appeal is whether certain evidence, particularly the existence of skid marks on the respondent's side of the road, made "glaringly improbable"[56], or incontrovertibly denied, the appellant's case that she was on her correct side of the road when struck by a van driven by the respondent. Unless it did, the Court of Appeal of the Supreme Court of New South Wales erred in setting aside the appellant's verdict, which was based on the trial judge's acceptance of the evidence of the appellant, one of her witnesses and written reports prepared by her traffic expert.

49 In my opinion, this was one of those rare cases where the trial judge's finding that the skid marks were on the respondent's correct side of the road could not rationally be reconciled with the testimony of the appellant and her witness. Because that was so, and because the expert's reports were based on an incomplete account of the material facts, the Court of Appeal did not err in setting aside the appellant's verdict and entering a verdict for the respondent.

Statement of the case

50 The appellant, Barbara Fox, sued the respondent, Megan Percy, in the District Court of New South Wales for damages for negligence as the result of a collision between a van driven by Ms Percy and a horse ridden by Ms Fox. Herron DCJ, sitting without a jury, tried the action in the District Court at Moruya. After a four day hearing, his Honour found that the collision had occurred because of Ms Percy's negligence in being on her incorrect side of the road[57]. He awarded Ms Fox substantial damages.

51 The Court of Appeal (Handley and Beazley JJA, Fitzgerald JA dissenting) upheld an appeal by Ms Percy against the finding of negligence[58]. The majority found that, although Herron DCJ had accepted the evidence of Ms Fox and her witness, their evidence was inconsistent with the presence of skid marks – a fact incontrovertibly established by the evidence and the finding of the trial judge. They also found that reports prepared by an expert, that supported Ms Fox's evidence, were based on assumptions not proved in evidence. Their Honours entered a verdict in favour of Ms Percy. Subsequently, this Court granted special leave to appeal against that order of the Court of Appeal.

---

**56** *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

**57** Unreported, 5 November 1999.

**58** [2001] NSWCA 100.

The evidence and the trial judge's findings

52 Ms Fox was seriously injured on 11 April 1992, when the horse that she was riding collided with a Kombi van being driven in the opposite direction by Ms Percy. The collision occurred shortly after dusk on a blind bend on an unsurfaced country road that was about seven metres wide.

53 Immediately before the collision, Ms Fox and her partner, Mr Christopher Murdoch, were riding in an easterly direction up an incline in the road towards the blind bend. Ms Fox was riding a large half-draught horse. Mr Murdoch was riding behind her on a smaller, but still large, horse. They were travelling at about seven kilometres per hour. Both Ms Fox and Mr Murdoch had drunk alcohol earlier in the day. At the hospital, several hours later, Ms Fox had a blood alcohol content of 0.122 grams of alcohol per 100 millilitres of blood[59]. The trial judge found that, because of the nature of the accident, her level of intoxication was of little consequence[60].

54 Ms Fox testified that she was riding on her correct side of the road, on the left-hand side of the "middle rut" of the road. She said that her horse was "trotting"[61]. Ms Fox gave evidence that Mr Murdoch was "just at her rear" on her left side, and that it was still light when the accident occurred. She claimed that, when Sergeant Volf (who was a Constable at the time of the accident) arrived, he accused her of being on the wrong side of the road[62]. She said that her horse

---

**59** The police officer's notebook contained the note:

> "Black dress, red stockings, abusive towards Police. Tattoo's right cheek, breath smelt of stale rum, intoxicating liquor, appeared moderately affected by alcohol refused to co-operate with Police in enquiries".

**60** The trial judge made the following comments about Ms Fox's level of intoxication:

> "The fact is however that accepting the plaintiff as I do, there would not have been any hope of avoiding the accident, that is by moving the horse, in the few seconds which must have been involved in the collision itself. It would not matter if a president of the Temperance League was riding the horse Bright in this situation".

**61** She had previously told police that her horse was at a canter, but the trial judge found that this would not make much difference to the horse's speed, travelling, as it was, up an incline.

**62** The trial judge found that there was some "animosity emanating" from the police officer toward Ms Fox and Mr Murdoch because they adopted "an alternative lifestyle".

"wasn't sideswiped and [her] thrown" but that she had fallen directly in front of the vehicle. She said that, when the van came around the corner, she had no time to respond. She also said that there was no braking, no dust and no skid marks.

55 Mr Murdoch testified that he was riding directly behind Ms Fox on her left hand side, nearly a metre from the edge of the road. He said that Ms Fox's horse was two metres from the edge. In describing the collision, Mr Murdoch said that the Kombi van suddenly appeared, ran into Ms Fox's horse and pushed Ms Fox and her horse back onto his horse. He said that he was thrown over the edge of the embankment and that his horse flipped over him and landed on its feet. The horse jumped back up onto the road and pulled Mr Murdoch with it. Mr Murdoch gave evidence that, at this point, he saw Ms Fox's horse attached to the upper part of the roof of the Kombi and Ms Fox fall in front of the stationary Kombi[63]. The horse then stepped away from the van and died on the road. Mr Murdoch said that there were no skid marks. Mr Murdoch claimed that he observed "sideway drift marks" on the road, but these were beside, not behind, the van. He also claimed that he stepped out measurements as to the final location of the van, but his statement, as recorded in the police officer's notebook, made no mention of these measurements or the drift marks. In evidence, Mr Murdoch said that the statement in the police officer's notebook was inadequate. He claimed that he had pointed this out to the officer at the time[64].

56 In evidence, Sergeant Volf said that he observed and "stepped out" 10 metres of skid marks behind the Kombi. He sketched the location of the Kombi, the skid marks and the dead horse in his notebook. This drawing has the Kombi "straight on" on the correct side of the road with the skid marks directly behind it. Herron DCJ accepted his evidence that the skid marks were on the correct side of the road. His Honour rejected the evidence of another witness (Ms Christine Dzikowski) that the Kombi van came to rest on the wrong side of the road. Ambulance officers attending the scene also testified that the van was on its correct side of the road when they arrived. Sergeant Volf thought the skid marks suggested "that the vehicle had at all material times ... been on its correct side of the road". He said to Ms Fox, "It looks like you were in the wrong".

57 Ms Percy claimed that she was driving on the correct side of the road and that, as the light was dim, she had her headlights on. She said that when she saw the horse she applied the brake and the clutch. The vehicle slid a little, collided with the horse and then came to a stop.

---

**63** Ms Percy denied that the horse was ever attached to the Kombi van.

**64** Sergeant Volf did not recall Mr Murdoch complaining about his statement in the police notebook.

58 Both parties retained experts who provided reports on the accident. Although the reports were tendered as evidence, neither expert testified at the trial. Mr Tindall was Ms Fox's expert. In his first report, prepared before he became aware of the 10 metre skid marks, he gave the following explanation of the collision:

> "[Ms Percy's] vehicle could have slid outwards slightly towards the end of the curve, collided with the horses and rebounded slightly back to her left. She could also have steered more to the left when a collision appeared imminent. [Ms Fox's] body could have been carried an unknown distance on the front of the Kombi and fallen in front of it just before it stopped[65].
>
> It is my opinion that the probability that [Ms Fox] and her horse were on their correct side of the road was significantly greater than the converse probability."

59 In a subsequent report, after Mr Tindall became aware of the skid marks, he concluded:

> "The collision with the horse may have occurred anywhere along the ten metres while the van skidded or indeed before the skids, but it was most likely during the skids. Since the impact was relatively severe the impact was more likely to be in the early part of the skids. It was then that the position of the van was most important. … I caution against precise argument about the ability to locate the transverse position of the van relative to the centre of the road, at the impact point."

60 The trial judge accepted that Sergeant Volf had correctly observed the 10 metre skid marks on Ms Percy's correct side of the road. He also accepted that the vehicle ended up on Ms Percy's correct side of the road. However, despite this, the trial judge concluded that the accident occurred when Ms Percy was driving on the wrong side of the road and that the Kombi ended up on the correct side of the road for the reasons advanced by Mr Tindall:

> "I come to the conclusion, however, that despite the skid marks that the accident occurred on [Ms Fox's] correct side of the road, and of course in that I do not accept [Ms Percy] … that the accident had happened on her correct side of the road."

---

**65** Although, it should be noted that there was no evidence that Ms Fox's body ever came in contact with the Kombi.

The Court of Appeal

61 Beazley JA (with whom Handley JA agreed) noted that the trial judge's ultimate finding was based on acceptance of Mr Tindall's first report on the accident[66]. Her Honour identified a number of shortcomings with the report which the trial judge did not deal with in his reasons – most notably that the expert's report was based on several matters which were either not proved or not supported by the evidence. Accordingly, Beazley JA found that the trial judge erred in his acceptance of Mr Tindall's report. Her Honour said:

> "Mr Tindall's report was based on several matters which were either not proved in or not suggested by the evidence. To the extent that he accepted there were skid marks and made allowance for that in his report, he did so in a way contrary to the evidence. The only evidence of the skid marks was that they were on the correct side of the road. Mr Tindall opined they ended up on the right side of the road. There is a fundamental difference between the two.
>
> There were the other difficulties with his reports to which I have referred. In the circumstances, I consider the trial judge erred in his acceptance of [Mr] Tindall's explanation of the accident."

62 Beazley JA went on to say:

> "It follows that, in my opinion, the evidence of [Ms Fox] and [Mr] Murdoch that [Ms Fox] was on the correct side of the road when the accident happened should not have been accepted by the trial judge. I have referred to the protection their evidence, would, in normal circumstances have under the *Abalos*[67] principle. That protection is lost where '*the trial judge ... has acted on evidence … "inconsistent with facts incontrovertibly established by the evidence*"'[68] ... In my opinion, Sergeant

---

**66** The trial judge had said:

> "I think that in the circumstances the fact of the matter is that Mr Tindall was correct in the assumptions he made … I think that I would accept Mr Tindall and I think that the probabilities are that the vehicle ended up on its correct side of the road for the reasons which Mr Tindall advances."

**67** *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

**68** *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ.

> Volf's evidence of the skid marks on the correct side of the road falls into that category."[69]

63 Fitzgerald JA, in dissent, held that the trial judge's conclusion was properly open to him. His Honour said:

> "There was nothing in contest at the trial other than factual issues in respect of which there was conflicting evidence necessitating an assessment of the credibility and reliability of the witnesses as well as consideration of substantially undisputed facts concerning what was observed after the collision. In determining those issues, his Honour had to take into account that the evidence of the parties and [Ms Fox's] companion was almost certainly affected by the trauma of the collision, the imprecision with which ordinary people describe such events and the possibility that the evidence of most witnesses probably involved some reconstruction after a period of years."

64 Ultimately, Ms Percy failed to persuade Fitzgerald JA that the trial judge did not carry out his task properly. His Honour was satisfied that the trial judge's conclusions were properly open to him.

The scope of appellate review where the trial judge accepts the evidence of a witness

65 Whether an appellate court should intervene in a decision of a trial judge who has made findings based on the credibility or demeanour of a witness is governed by the principles stated in *Abalos v Australian Postal Commission*. In that case, I said[70]:

> "[W]here a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial judge by reason of having seen and

---

**69** In relation to the evidence of Mr Murdoch, Beazley JA stated:

> "I add in passing, that a reading of the transcript of [Mr] Murdoch's evidence presents an unconvincing picture. That would not have been sufficient to displace his Honour's acceptance of it. However, with respect to his Honour, it is not possible to rationalise his Honour's acceptance of [Mr] Murdoch's evidence when it is in direct conflict with Sergeant Volf's."

**70** (1990) 171 CLR 167 at 178, 179.

> heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion'[71].
>
> …
>
> [W]hen a trial judge resolves a conflict of evidence between witnesses, the subtle influence of demeanour on his or her determination cannot be overlooked."

66 Mason CJ, Deane, Dawson and Gaudron JJ, the other members of the Court, agreed with my judgment. *Abalos* was applied in *Devries v Australian National Railways Commission* where Brennan and Gaudron JJ and I said[72]:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact[73]. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage'[74] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'[75]."

67 There was nothing novel about these statements. They derived from principles in decisions of this Court and the House of Lords stretching over the best part of a century.

68 *Dearman v Dearman*[76] was one of the first cases in which this Court had to consider the powers of an appellate court to review findings of fact by a trial judge. In *Dearman*, the Court restored the trial judge's findings and verdict, which had been set aside by the Full Court of the Supreme Court of New South Wales. The judgment of Isaacs J contains a valuable passage that shows why

---

**71** *Watt or Thomas v Thomas* [1947] AC 484 at 488.

**72** (1993) 177 CLR 472 at 479.

**73** See *Brunskill* (1985) 59 ALJR 842; 62 ALR 53; *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos* (1990) 171 CLR 167.

**74** *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

**75** *Brunskill* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

**76** (1908) 7 CLR 549.

appellate courts must be wary of setting aside the findings of trial judges where demeanour may have played a part in making those findings, despite the appellate court's duty to make its own findings. His Honour said[77]:

> "So that the position is clearly laid down by the very highest authority that the primary duty, and in fact the whole duty, of every Court of Appeal is to give the judgment which in its opinion ought to have been given in the first instance. But there are natural limitations, that is to say, in some cases, where the evidence below is solely upon written documents, if for instance it is upon affidavit as it used to be in the old Court of Chancery, the appellate Court is in as good a position as the primary Judge to say what ought to have been the decision; *but where viva voce evidence is taken there is a large amount of material upon which the primary Judge acts that is altogether outside the reach of the appellate tribunal.* The mere words used by the witnesses when they appear in cold type may have a very different meaning and effect from that which they have when spoken in the witness box. A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence, will often lead a Judge to find a signification in words actually used by a witness that cannot be attributed to them as they appear in the mere reproduction in type. And therefore some of the material, and it may be, according to the nature of the particular case, some of the most important material, unrecorded material but yet most valuable in helping the Judge very materially in coming to his decision, is utterly beyond the reach of the Court of Appeal. So far as their judgment may depend upon these circumstances they are not in a position to reverse the conclusion which has been arrived at by the primary tribunal. Now it may be that in some cases the effect of what I call the unrecorded material is very small, indeed insignificant, and utterly outweighed by other circumstances. It may be, on the other hand, that it guides, and necessarily guides, the tribunal to the proper conclusion. If that is the case, as I have said before, *the Court of Appeal cannot say that the conclusion is wrong without disregarding the material which it knows must have been existent before the tribunal below*, and is necessary to a just conclusion." (emphasis added)

69 By 1953, the views expressed by Isaacs J in *Dearman* were regarded as settled – at all events Dixon CJ and Kitto J appear to have thought so in *Paterson v Paterson*[78] when they referred to the judgment of Isaacs J without criticism and with apparent approval.

---

**77** (1908) 7 CLR 549 at 561-562.

**78** (1953) 89 CLR 212 at 220.

70 The principles that Isaacs J expounded were developed in England shortly after legislation introduced the statutory right of appeal in civil cases concerned with findings of trial judges in the High Court of Justice[79]. They were developed to guide the exercise of the powers of appellate courts where the trial judge had accepted the evidence of a witness although other evidence contradicted it. In developing these principles, the appellate courts were guided by the decisions[80] of the Privy Council on questions of fact in admiralty cases. Such appeals had existed since 1833[81]. Significantly, the principles of appellate review were developed in respect of appellate powers of review conferred by legislation whose scope was no less extensive than that of s 75A of the Supreme Court Act 1970 (NSW).

71 It is erroneous to think that anything in *Devries* effectively elevates "the decision of a judge sitting alone to the level of a verdict of a jury"[82]. Juries give no reasons. Because that is so, appellate courts must act on the basis that the jury took that view of the evidence that was reasonably open to them and is consistent with their verdict. Nevertheless, in some cases no reasonable view of the evidence can support the verdict. In those cases the appellate court may intervene to set aside the verdict. But judges give reasons. Consequently, their factual findings are exposed and can be analysed and evaluated. This makes it easier to set aside a judge's finding of fact than it is to set aside a jury's verdict.

72 Nothing in *London Bank of Australia Ltd v Kendall*[83] is inconsistent with *Devries*. Indeed the reasoning of the Court in *Kendall* is entirely in accord with the principles expounded in *Abalos* and *Devries*. Significantly, Isaacs and Rich JJ, who gave the judgment of the Court in *Kendall* (with which Gavan Duffy J agreed), cited passages from *Ruddy v Toronto Eastern Railway*[84] and *Dominion Trust Co v New York Life Insurance Co*[85], both decisions of the

---

**79** *The Glannibanta* (1876) 1 PD 283 at 287-288; *Coghlan v Cumberland* [1898] 1 Ch D 704 at 705; *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 at 75.

**80** *The "Julia"* (1860) 14 Moo 210 [15 ER 284] and "*The Alice*" (1868) LR 2 PC 245.

**81** *The Judicial Committee Act* 1833 (UK) 3 & 4 Will IV c 41, s 2; cf *Paterson v Paterson* (1953) 89 CLR 212 at 219.

**82** Reasons of Callinan J at [148].

**83** (1920) 28 CLR 401.

**84** (1917) 86 LJ PC 95.

**85** [1919] AC 254.

Judicial Committee. In *Ruddy*, Lord Buckmaster, delivering the judgment of the Board, had said[86]:

> "From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an Appeal Court will not interfere with the decision of the Judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

73 In *Dominion Trust*[87], the Judicial Committee cited a passage from *Montgomerie & Co Ltd v Wallace-James* – a judgment of the House of Lords – where Lord Halsbury had said[88]:

> "[W]here a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. *It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness*, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court." (emphasis added)

74 Earlier in its Advice in *Dominion Trust*, the Judicial Committee had pointed out[89]:

> "that there must be discrimination as to what is the class of evidence being dealt with: whether the result arrived at depends on the view taken of conflicting testimony, or depends upon the inferences to be drawn from facts as to which there is no controversy."

75 In *Kendall*, Isaacs and Rich JJ applied these principles – the principles enshrined in *Abalos* and *Devries* – when they said[90]:

---

**86** (1917) 86 LJ PC 95 at 96.

**87** [1919] AC 254 at 257-258.

**88** [1904] AC 73 at 75.

**89** [1919] AC 254 at 257.

**90** (1920) 28 CLR 401 at 409.

> "So far as the conclusions depend on materials such as demeanour, which the learned primary Judge alone could have access to, we cannot say he was wrong. So far as the materials he possessed are equally before us, we are bound to form and express our own opinion."

76 The House of Lords continued to apply these principles throughout the 20th century. Lord Sumner's speech in *SS Hontestroom v SS Sagaporack* proved highly influential. His Lordship said[91]:

> "Watching the witnesses in the box and not merely perusing the shorthand notes, listening to what they say without any previous preparation of an adverse kind, free from the prepossessions which an opening by counsel occasions, a judge in the Admiralty Court watches the case as it is built up by the witnesses themselves. He reads their faces, not a shorthand note. He weighs their value as he goes along."

77 Later in his speech, Lord Sumner said[92]:

> "What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute ... It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

78 Subsequent decisions – including decisions of this Court – have frequently affirmed Lord Sumner's statement that, because an appellate court has not seen

---

**91** [1927] AC 37 at 46.

**92** [1927] AC 37 at 47.

the witnesses, it should reverse a trial judge's finding, depending on the trial judge's estimate of the witnesses, only when the judge has "failed to use or has palpably misused his advantage". In *Powell v Streatham Manor Nursing Home*[93], Lord Wright said that "the latest and fullest statement of the relevant principles is now to be found in the opinion of Lord Sumner (which was the opinion of the House) in *Hontestroom*". In *Powell*, the House of Lords unanimously restored the verdict of a trial judge who had decided the case on issues of credibility. Viscount Sankey expressly noted that the "appeal is by way of rehearing"[94] as did Lord Wright[95]. Similarly, Lord Macmillan noted[96] that "the Court of Appeal and this House have a duty to exercise their jurisdiction as tribunals of appeal on fact as well as on law". But they held that the advantage that the trial judge had in seeing the witnesses prevented them from affirming the Court of Appeal's decision to reverse the trial judge's verdict.

79 In *Watt or Thomas v Watt*[97], the House of Lords again unanimously restored a trial judge's verdict, based on credibility, which the Second Division of the Court of Session had reversed. Lord Thankerton said[98]:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

---

**93** [1935] AC 243 at 264.

**94** [1935] AC 243 at 249.

**95** [1935] AC 243 at 263.

**96** [1935] AC 243 at 256.

**97** [1947] AC 484.

**98** [1947] AC 484 at 487-488.

80 Lord Simonds expressly concurred[99] "in the three propositions stated by ... Lord Thankerton".

81 In *Paterson*, Dixon CJ and Kitto J examined the authorities on the role of an appellate court at considerable length. They cited, with evident approval, most of the above passage from Lord Sumner's speech in *Hontestroom* and the three propositions formulated by Lord Thankerton in *Watt.* They also cited with evident approval the judgment of Isaacs J in *Dearman*. Dixon CJ and Kitto J applied these principles to uphold the findings of the trial judge in that case. Their Honours said[100]:

> "When the rules, which are formulated in the foregoing cases with such variety of detailed expression but with such identity of substance, are applied to the present case they lead almost inevitably to the conclusion that this Court must abide by the finding of Barry J, that is unless it is vitiated by the erroneous admission of the evidence to which the respondent and co-respondent objected. The learned judge's estimate of the respondent and co-respondent was of first importance. His assessment not only of the general credibility of the witnesses for the petitioner but of the reliability of their detailed observation could hardly but be decisive. These are matters in which his opinion could not be reversed by a court of appeal notwithstanding its undoubted jurisdiction to re-examine the whole case."

82 One might have thought that, after *Paterson*, so settled were the principles by which an appellate court interferes with a trial judge's findings of fact, based on demeanour, that the issue would never again trouble this Court. But the tendency of intermediate appellate courts to perceive erroneous findings of fact from merely reading the notes of evidence appears to be so strong that several times in recent years this Court has had to intervene to restore the verdicts of trial judges and once again restate the principles.

83 In *Brunskill v Sovereign Marine & General Insurance Co Ltd*, Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ restored a trial judge's verdict, even though the judge "did not expressly say that his decision was based on the view which he had formed of Mr Wardrop's credibility"[101]. Their Honours thought that a passage in the judgment showed the trial judge had in fact based his

---

**99** [1947] AC 484 at 491.

**100** (1953) 89 CLR 212 at 224.

**101** (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

finding on credibility. In restoring the judgment, their Honours cited most of the passage from *Hontestroom* that I have already cited. Their Honours said[102]:

> "The question that then arises is whether the decision of the learned trial judge can be seen to be clearly wrong on grounds which do not depend merely on credibility; for example, on the ground that the evidence which was accepted was inconsistent with established facts or was glaringly improbable."

Their Honours held that no such ground existed.

84 In *Abalos*, this Court was again forced to intervene and restore a trial judge's finding of negligence which was plainly based on the impression that the judge had of witnesses in the case.

85 In *Dawson v Westpac Banking Corporation*[103], the majority of the Court (Mason CJ, Deane J and myself) again criticised the departure by an appellate court from the principles set down in cases such as *Brunskill*. Mason CJ said[104]:

> "Such a vague statement could not sustain the Court of Appeal's reversal of Bryson J's finding, especially when account is taken of his Honour's extremely adverse view of the credibility of Mr Smith as a witness. In this respect the Court of Appeal failed to respect the established principle that an appellate court should not depart from a finding of fact made by a tribunal of fact which is based on the demeanour or credibility of witnesses unless the finding of fact is inconsistent with admitted or proved facts or is 'glaringly improbable.'"

86 Finally, in *Devries*, this Court again had to intervene to restore a finding of negligence based on the trial judge's acceptance of the evidence of the plaintiff as to the circumstances in which his injury occurred. In doing so, Brennan and Gaudron JJ and I, in a joint judgment, simply applied the principles that final appellate courts in England and Australia had applied for nearly a century. In fact, the *ratio decidendi* of *Devries* was based on statements contained in *Hontestroom* in the House of Lords in 1926 and in *Brunskill* in this Court in 1985. There was nothing new about the case.

---

**102** (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

**103** (1991) 66 ALJR 94; 104 ALR 295.

**104** (1991) 66 ALJR 94 at 99; 104 ALR 295 at 304.

87 There is nothing in *Warren v Coombes*[105] that is inconsistent with *Abalos* or *Devries*. *Warren* decided[106] only that "whether the facts found do or do not give rise to the inference that a party was negligent" is not a matter that "should be treated as peculiarly within the province of the trial judge". In earlier cases[107], Barwick CJ and Windeyer J had suggested that the findings of trial judges were entitled to special deference, even when the findings were based on inferences drawn from facts found or admitted. *Warren* denied that proposition. In a joint judgment, Gibbs ACJ, Jacobs and Murphy JJ said[108]:

> "Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge *to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge.*" (emphasis added)

88 Thus, *Warren* was concerned with the approach of an appellate court in drawing inferences from facts admitted or found by the trial judge. *Abalos* and *Devries* were concerned with the approach of an appellate court where the trial judge had made a finding as the result of accepting the oral evidence of a witness that other evidence contradicted. The distinction between the two classes of case is fundamental and almost always decisive. It was recognised by this Court in *Brunskill*[109] where the Court said:

> "The authorities have made clear the distinction which exists between an appeal on a question of fact which depends upon a view taken of conflicting testimony, and an appeal which depends on inferences from uncontroverted facts."

In support of the first class of case, the Court cited much of the passage in *Hontestroom* that I have already set out. Significantly, the Court also cited –

---

**105** (1979) 142 CLR 531.

**106** (1979) 142 CLR 531 at 552.

**107** *Whiteley Muir & Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192; *Edwards v Noble* (1971) 125 CLR 296.

**108** (1979) 142 CLR 531 at 551.

**109** (1985) 59 ALJR 842 at 844; 62 ALR 53 at 56.

apparently in support of the first class of case – a passage in *Warren*[110] that cites the same passage in *Hontestroom*.

89 The issues in *Abalos* and *Devries* were quite different from that in *Warren*. That was why *Warren* was not cited in the judgments in *Abalos* or *Devries* – it was irrelevant to the issues that had to be determined in those cases.

90 It is a serious mistake to think that anything said in *Abalos* or *Devries* necessarily prevents an appellate court from reversing a trial judge's finding when it is based, expressly or inferentially, on demeanour. Those cases recognise – in accordance with a long line of authority – that it may be done. But there must be something that points decisively and not merely persuasively to error on the part of the trial judge in acting on his or her impressions of the witness or witnesses. Recently in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)*[111], for example, this Court held that undisputed and documentary evidence was so convincing that no reliance on the demeanour of witnesses could rebut it.

91 Legal doctrine is most likely to command the respect of the profession and, consequently, the public which the profession serves when it evolves by processes of induction and deduction from the experience of decided cases and the application of established legal principles to cover new situations. To now reject the doctrines to which *Abalos* and *Devries* give effect would be a revolutionary, not an evolutionary step.

92 A revolutionary change of legal doctrine is a step that should be taken only if compelled by social necessity. It may become obvious, for example, that a particular legal doctrine has taken a wrong turning with the result that it now produces undesirable or unsatisfactory consequences. If so, it may be legitimate – perhaps necessary – for an ultimate appellate court to take the revolutionary step of abandoning that doctrine and substituting a new doctrine based on an earlier stage of the law's development. In other cases, new social situations may arise that indicate that a current legal doctrine needs substantial amendment or abandonment. If it became routine for appellate courts to have access to a film or videotape of the trial, for example, it would probably be necessary to abandon the present rules of appellate review concerning demeanour.

93 But nothing has occurred that would justify abandoning the current doctrines of appellate review, doctrines that have remained unchanged for over a century. The nature of the materials that appellate courts act on remain the same

---

**110** (1979) 142 CLR 531 at 537.

**111** (1999) 73 ALJR 306; 160 ALR 588.

as they were in the last quarter of the 19th century when the principles of appellate review were formulated and developed. No persuasive research suggests that the interests of justice would be better served if appellate courts decided appeals on the printed record without regard to the advantage that the trial judge has in seeing and hearing the witnesses. No social necessity has arisen that would justify the revolutionary step of jettisoning doctrines that have served Anglo-Australian law well for more than a century. Nor do those who criticise those doctrines attempt to formulate practical rules as substitutes. Without workable rules to replace the time-honoured rules, appellate courts would be set adrift without guidance. In law as in other fields, it pays to remember the *dictum* of O W Holmes, Sr that "[r]evolutions do not follow precedents nor furnish them"[112].

The Court of Appeal correctly set aside the verdict of the trial judge

94 The judgment of Beazley JA shows that her Honour was well aware that findings of fact, based on credibility or demeanour, can only be reversed by an appellate court in exceptional cases. As her Honour recognised, findings based, expressly or inferentially, on the credibility of Ms Fox and Mr Murdoch could not be overturned merely because the evidence of Ms Percy seemed more persuasive than their evidence.

95 Standing against the evidence of Ms Fox and Mr Murdoch, however, were the following facts, accepted by the trial judge:

- The 10 metre skid marks being on Ms Percy's correct side of the road.
- The Kombi van ending up on the correct side of the road.
- The Kombi van being parallel to the roadway.
- Ms Fox coming to rest in front of the Kombi van.

96 No matter how unimpressive a witness Ms Percy appeared to be, these incontrovertible facts powerfully confirmed her testimony that she was on her correct side of the road. Conversely, no matter how impressive as witnesses Ms Fox and Mr Murdoch appeared to be, their testimony could not be accepted unless there was a rational explanation of these incontrovertible facts that was consistent with their testimony. The presence of the skid marks and the resting place of the van, in particular, pointed irresistibly to Ms Fox being on her incorrect side of the road.

---

**112** White, *Justice Oliver Wendell Holmes*, (1993) at 46.

97 Ms Fox relied on the evidence of Mr Tindall to give an explanation that would rebut the damning inference that arose from the skid marks and the resting place of the van. And the trial judge accepted his explanation as to how the case for Ms Fox could be reconciled with the skid marks. As I have indicated, however, Beazley JA found, correctly in my opinion, that Mr Tindall's reports were flawed and that the trial judge did not deal with those flaws in his reasons. Because Mr Tindall did not give evidence, the Court of Appeal was in as good a position as the trial judge to assess the value of his reports. Once Mr Tindall's theory of the collision was rejected, the evidence accepted by Herron DCJ made the version of events given by Ms Fox and Mr Murdoch glaringly improbable.

98 In my opinion, the Court of Appeal correctly held that the finding of negligence could not stand.

Was a re-examination of the facts by the Court of Appeal inappropriate?

99 In addition to arguing that the Court of Appeal had no right to interfere with the trial judge's findings, Ms Fox asserts that a re-examination of the facts by the Court of Appeal was inappropriate because no argument was raised at the trial that the state of the evidence prevented Herron DCJ from accepting Ms Fox's evidence. The issue is whether Ms Percy should have been permitted to raise issues on appeal about deficiencies in the evidence presented by Ms Fox if these issues were not raised at the trial.

100 In this regard, Fitzgerald JA (in dissent) noted:

> "Much of the 28 page written submission and approximately 2½ hour oral address by counsel for [Ms Percy] in this Court consisted of his lengthy criticisms of [Ms Fox's] accident analyst's views. Those criticisms extended not only to the expert's conclusion and reasoning but also attacked the factual assumptions upon which he proceeded. Counsel who represented the parties in this Court were different from those who appeared at trial. We do not know what, if any, arguments were addressed to the trial judge by the counsel who then appeared for [Ms Percy] in addition to those which appeared in [Ms Percy's] expert's report but we were advised by [Ms Percy's] counsel not to concern ourselves with such 'ivory tower' considerations.
>
> The fallacy in such an approach is manifest. For example, [Ms Fox's] expert's reports made it plain that he relied upon information with which he had been supplied by identified persons in specified statements, reports, statutory declarations, sketches etc. His reports were tendered without objection subject to the tender also of those documents on which he had relied which [Ms Percy's] then counsel required to be tendered. That was done. It appears that the documents required by [Ms Percy] at trial did not

> include the sources of [Ms Fox's] expert's information. *It is impermissible for [Ms Percy] to adopt a different attitude in this Court from that adopted at trial by asserting that [Ms Fox's] expert's opinion was based on assumptions of which there was no evidence.*
>
> After four days of evidence and addresses by counsel then appearing for the parties which no doubt dealt with the strengths and weaknesses of the respective expert reports, the trial judge, after only a brief adjournment, delivered a judgment in which he preferred the evidence of [Ms Fox] and her companion and her expert's opinion. Although this is an appeal by way of re-hearing in the sense in which that term is used in this context, there are significant constraints on this Court's power to interfere with the trial judge's factual conclusions, especially credibility findings." (emphasis added)

101 This point has caused me some concern. If the validity of Mr Tindall's reports depended on assumptions that were accepted at the trial, I do not think that the Court of Appeal could enter a verdict for Ms Percy. Indeed, it might be doubted whether it could set aside the verdict of Herron DCJ. As Fitzgerald JA noted, counsel for Ms Percy did not require the tender of the sources of Mr Tindall's information. However, I do not think this is a case that is comparable with one where a new point is taken on appeal that could have been cured by evidence at the trial, if objection had been taken.

102 In so far as the majority of the Court of Appeal rejected Mr Tindall's reports because they were based on assumptions that were not in evidence, those particular assumptions were based on "facts" that were contrary to the evidence. Indeed, Ms Fox's counsel abandoned one – or at all events, part of one – of these assumptions in the Court of Appeal. Mr Tindall doubted that the skid marks were wholly on Ms Percy's correct side of the road. The trial judge's finding was that they were. Moreover, in so far as Mr Tindall's opinion depended on the horse being pushed back 10 metres, it flies in the face of the position of the van, the skid marks and the position of Mr Murdoch's horse.

103 As Fitzgerald JA also noted, both sides tendered expert reports that were the subject of debate about their strengths and weaknesses. An assessment of the detail of the trial judge's findings was necessary for the Court of Appeal to determine whether there were facts incontrovertibly established, that were inconsistent with the trial judge's findings. This exercise necessarily required the Court of Appeal to consider thoroughly the evidence before the trial judge, including Mr Tindall's reports.

Should the appropriate remedy be a re-trial?

104 Another issue is whether the Court of Appeal should have ordered a re-trial. The majority of the Court of Appeal, by way of rehearing, determined

Ms Fox's case after a thorough investigation of the evidence that was before the trial judge. Their Honours concluded that Ms Percy was driving her Kombi van on her correct side of the road. This is not a situation where a substantial amount of evidence supporting Ms Fox's claims has not been dealt with in a satisfactory way[113]. A new trial is not warranted in the present case.

Order

105 The appeal should be dismissed.

---

**113** As was the case in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306; 160 ALR 588, where there was a mass of documentary material supporting the appellant's claims which had to be dealt with in the judge's reasons in some satisfactory way before the appellant's claim could properly be dismissed as unproved (per Kirby J at [94]). In addition, the parties in that case had proceeded on the basis that if the appeal was successful then there must be a retrial (per Callinan J at [155]).

106 CALLINAN J. Insufficient attention to two matters has necessitated consideration of this running down case at two appellate levels. The first is the reception by the trial judge of, and reliance by him upon a body of evidence in part at least misdescribed as expert evidence. The second is the failure by the trial judge to give effect to matters incontrovertibly established by objective evidence which contradicted the appellant's evidence and the so-called expert evidence.

Facts

107 The only substantive factual question which the trial judge had to answer in this case on the issue of liability was whether a horse that the appellant was riding, or a Kombi van with which it collided, was on the wrong side of the road immediately before and at the time of the collision.

108 For some time before dusk on 11 April 1992 the appellant had been drinking mixed rum drinks. Her claim was that she had consumed three only of these before setting off on her heavy, part-draught horse, accompanied by her companion Mr Murdoch who was riding a somewhat lighter horse beside, and slightly behind her. The appellant had eaten no food since breakfast that day. It is unclear whether at the relevant time she was trotting or cantering her horse. She and Mr Murdoch were proceeding in an easterly direction in the country on a curving gravel road up an incline.

109 Both the appellant and Mr Murdoch claimed to be to the left of the centre of the road. The respondent was driving a Kombi van towards them from the opposite direction. The appellant said that the respondent's van came around the curve and continued on the wrong side of the road at a speed of about 60 to 70 kilometres per hour before it came into collision with her and her horse. She suffered disabling and painful injuries that necessitated her admission to hospital.

110 The respondent's version was that the appellant was "charging up the road" on the former's side of it. A sample of the appellant's breath was taken from her some hours after the accident when she was in hospital. By then she had a blood alcohol reading of 0.122 grams of alcohol per 100 millilitres of blood. A pharmacologist was of the opinion that the amount of alcohol likely to have been in the appellant's bloodstream at the time of the accident was between 0.178 and 0.179 grams per 100 millilitres of blood. An investigating police officer observed skid marks about 10 metres long on the respondent's correct side of the road leading up to the stationary van which itself was on its correct side of the road.

111 The respondent said that she first saw the appellant's horse when she was coming around the corner on the bend. The van was in second gear and "fully on the left hand side of the road". She could not say how far in front of her the horse was. She said that the [natural] light was quite dim and that she had turned

on the lights of her vehicle. When she saw the appellant's horse she slammed one foot on the brake and the other on the clutch. "The car slid a little and that's when we collided". She said in evidence that she was travelling at a slow speed. She agreed that she told a police officer that her speed was 10-15 kilometres per hour, but that she had informed an investigator on another occasion that it was 40-50 kilometres per hour. She conceded that it was possible she was travelling at the higher speed but that her better estimate was the former. The respondent maintained that her van was on the correct side of the road throughout.

The trial

112 The appellant sued in the District Court of New South Wales for damages for personal injuries.

113 Each party retained expert traffic engineers. Mr Tindall was engaged by the appellant. He gave no oral evidence but made two written reports which were admitted into evidence. In the first, dated 21 October 1993, in reliance in large part upon what the appellant and Mr Murdoch had told him, he described the accident in this way:

> "The Kombi van struck [the appellant's] horse on the right front quarter. [The appellant's] horse was pushed backwards and to the left where it struck Murdoch's horse which fell over a bank. [The appellant] fell off her horse onto the front of the Kombi van."

114 He continued:

> "Both horses had been moving forwards at about 8 km/h and they were both pushed backwards by the impact. Such an impact could reduce the speed of the Kombi by a significant amount … Further the impact occurred between the right front of the Kombi and the right front of the horse. Therefore there would be some rebound or deflection of the Kombi to its left after impact and the horses were deflected in the opposite direction."

115 He referred to the damage to the van, the weight ratios in the first impact between the appellant's horse and the van, the weight ratios in the second impact (when the appellant's horse was pushed back on to Mr Murdoch's horse), and the fact that the speed of the van was greater than the speed of the horse. He went on to say:

> "[This] … indicate[s] that the relative speed at impact was greater than 40km/h and the speed of the Kombi after impact was greater than 20km/h. The Kombi would then take some metres to stop and with the deflection derived ... it would most likely reach its correct side of the road before stopping."

116 It followed, he wrote, that the appellant's statement that she and Mr Murdoch were on their correct side of the road "was reasonable", and continued:

> "That [the respondent's] vehicle was found stationary on her correct side of the road is insufficient proof that [her van was driven on the correct side of the road]."

117 Mr Tindall then purported to reconstruct the events immediately before and at the time of the impact in this way:

> "[The respondent's] vehicle could have slid outwards slightly towards the end of the curve, collided with the horses and rebounded slightly back to her left. She could also have steered more to the left when a collision appeared imminent. [The appellant's] body could have been carried an unknown distance on the front of the Kombi and fallen in front of it just before it stopped.
>
> … It is my opinion that the probability that [the appellant] and her horse were on their correct side of the road was significantly greater than the converse probability."

118 The trial judge (Herron DCJ) relied on Mr Tindall's opinion. He said:

> "I think that in the circumstances the fact of the matter is that Mr Tindall was correct in the assumptions he made … I think that I would accept Mr Tindall and I think that the probabilities are that the vehicle ended up on its correct side of the road for the reasons which Mr Tindall advances."

Although he accepted that the investigating police officer Volf had observed and measured 10 metres of skid marks on the correct side of the road his Honour was critical of him:

> "[T]here was prejudice which was emanating from the way in which these people presented themselves so far as the sergeant was concerned … and that to some extent must colour his investigation of the situation."

His Honour, apart however from noting what he thought to be an omission by the police officer to record the matter to which I next refer, did not demonstrate in his reasons how any apparent prejudice on the part of the officer could have influenced his objective observations after his arrival at the scene of the collision, or his recording of the respective versions of the accident in his notes of it.

119 The trial judge accepted that Mr Murdoch had paced the distance from the side of the road to the Kombi van notwithstanding that there was no entry in the policeman's notebook to that effect. His Honour adopted an explanation advanced by Mr Murdoch for the presence of the van on its correct side of the

road, that somehow the combined weight of the horses and riders had forced it there.

120 His Honour found for the appellant on liability:

> "I come to the conclusion, however, that despite the skid marks, that the accident occurred on the [appellant's] correct side of the road and of course in that I do not accept the [respondent] … that the accident had happened on her correct side of the road."

He then assessed damages and gave judgment for the appellant in a substantial sum of money.

Court of Appeal

121 Beazley JA (with whom Handley JA agreed; Fitzgerald JA in dissent) in the Court of Appeal was critical of Mr Tindall's report in several respects. Her Honour said:

> "First, there was no evidence that the [appellant's] body ever came into contact with the Kombi. [The trial judge] made no such finding and the only inference to be drawn from the evidence is that she did not. The evidence was that the horse hit the Kombi and the [appellant] fell off the horse in front of the van."

No reference was made by Mr Tindall to the skid marks of which apparently he was in ignorance. Nor did he advert to the respondent's claim that she had engaged second gear before the collision. There was no evidence that the appellant's horse "was pushed … to the left where it struck Murdoch's horse". Mr Murdoch's evidence was that the appellant's horse was "pushed … back into … my horse" and that he was deflected to the left. He did not say how far back the appellant's horse was pushed, but, as his and the appellant's evidence was that Mr Murdoch's horse's head was at the rump of the appellant's horse, it could not have been very far.

122 Another criticism of Mr Tindall is that he purported to express opinions far beyond his asserted expertise, of a speculative kind going directly to the issue itself[114], of little or no probative value, and objectively simply not credible. Two

---

**114** See *Naxakis v West General Hospital* (1999) 197 CLR 269 at 306 [110] per Callinan J, and corresponding footnote 137. See also s 80 of the *Evidence Act* 1995 (NSW) which now permits the reception of expert evidence going to the issue. Here no reference was apparently made by the parties to the section or to the question whether such evidence could and should have been received.

excerpts in which he purports to express opinions about the intelligence and propensities of both riders and horses are in point:

> "Assuming a reasonable expectation of other traffic on the road it would seem very unlikely that riders of horses would guide or allow their horses to walk on the wrong side of the road, anywhere, but particularly approaching a blind curve. Further, horses are not without some intelligence and can learn from experience or repetition that they should keep to one side of the road. Therefore there was some probability that without guidance from the riders the horses would automatically stay together and to one side of the road.
>
> …
>
> Horses, like cyclists must be allowed some 'wobble' ie some latitude in their path. Motorists must share some responsibility for not frightening horses by driving close to them wherever they are. In a different way motorists have to aim their vehicle from some distance away (eg 50 m) so as to avoid a hazard ahead by at least one metre. A car can be moved one metre laterally more quickly than a horse."

123 Beazley JA was critical of the second report prepared in September 1999 by Mr Tindall, after the presence of the skid marks had been drawn to his attention. In an attempt to accommodate this information, argumentatively and in exculpation of the appellant, he wrote :

> "It is noted that the police officer(s) reported a skid length of ten metres – a nicely rounded figure! One wonders if it was actually measured? How precisely were the start and ends located, some time after the event? And how was the centre of the gravel road identified for the purpose of stating that the skids were commencing and continuing wholly on [the respondent's] side of the roadway? While I accept the police evidence I caution against precise dependence on the facts.
>
> … I challenge that the police officer was able to be certain that the skids were wholly on [the respondent's] correct side of the road, without measurements, because there was no marked centre line. It is accepted that the ends of the skids near where the van stopped were on its correct side of the road because enough witnesses seem to agree with that fact."

Some further comments were also almost entirely argumentative and made no evidential contribution to the debate:

> "The collision with the horse may have occurred anywhere along the ten metres while the van skidded or indeed before the skids, but it was most likely during the skids. Since the impact was relatively severe the impact was more likely to be in the early part of the skids. It was then that the

position of the van was most important. To reiterate I caution against precise argument about the ability to locate the transverse position of the van relative to the centre of the road, at the impact point."

124 After justifiably criticizing Mr Tindall's reports Beazley JA said this:

"His Honour's finding, in part, was reached by accepting the evidence of the [appellant] and Murdoch over the evidence of the [respondent]. To that extent, it might be said that his Honour made findings of credit in favour of the [appellant] and Murdoch and against the [respondent]. That gives those findings prima facie protection from appellate interference on the principles enunciated by the High Court in *Abalos v Australian Postal Commission*[115]; *Devries v Australian National Railways Commission*[116] and *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)*[117]."

125 Her Honour went on to say that the trial judge's "core finding" was based upon Mr Tindall's first report and that he made no attempt to deal with the shortcomings in both reports to which reference has been made. She then identified some further problems in accepting Mr Tindall's evidence.

"If the [appellant] was correct as to where she ended up on the roadway, and if she and Murdoch are to be accepted as to where they were on the roadway prior to the collision, and Murdoch is accepted as to where the front of the Kombi ended up after the collision, the [appellant] would have been flung some 3 metres from her horse. None of the evidence suggests that was the case.

…

In [Mr Tindall's] first report, he had the [appellant's] horse being deflected to the left and the van to the right. In his final report he indicated the horse was pushed backwards up to 10 metres before the Kombi came to a stop and the [appellant] fell to the ground. It is difficult to see how the two propositions can sit together."

126 Having found that the trial judge had erred, her Honour said this:

---

**115** (1990) 171 CLR 167.

**116** (1993) 177 CLR 472.

**117** (1999) 73 ALJR 306; 160 ALR 588.

> "It follows that, in my opinion, the evidence of the [appellant] and Murdoch that the [appellant] was on the correct side of the road when the accident happened should not have been accepted by the trial judge. I have referred to the protection their evidence, would, in normal circumstances have under the *Abalos*[118] principle. That protection is lost where 'the trial judge ... has acted on evidence ... "inconsistent with facts incontrovertibly established by the evidence "': *Devries*[119]. In my opinion, Sergeant Volf's evidence of the skid marks on the correct side of the road falls into that category. I add in passing, that a reading of the transcript of Murdoch's evidence presents an unconvincing picture. That would not have been sufficient to displace his Honour's acceptance of it. However, with respect to his Honour, it is not possible to rationalise his Honour's acceptance of Murdoch's evidence when it is in direct conflict with Sergeant Volf's. There is nothing in Tindall's report which stood independently of the evidence as it should have been found.
>
> As this trial was very much fought as to who was on the correct side of the road, the conclusion which I have reached means that the appeal should be allowed with costs and there should be substituted for his Honour's verdict a verdict for the [respondent]."

The appeal to this Court

127 The appellant seeks to persuade this Court that the Court of Appeal wrongly intervened to reverse findings of fact based on an issue of credibility in respect of which the trial judge had the advantage of seeing and hearing the witnesses: that despite the objective evidence of the skid marks and the position at which the van came to a standstill, it is too much to say that it was incontrovertibly established that the respondent was on the correct side of the road at the time of the collision. In this connexion it is important to appreciate that both parties were content to accept that the statement from *Devries* quoted by Beazley JA correctly stated the law with respect to the role of a court of appeal in reviewing findings of fact, and that no attempt was made to argue that such an emphatically high test was not consistent with sub-ss 75A(6) and (10) of the *Supreme Court Act* 1970 (NSW) ("the Act") or other authority of this Court.

128 There is no doubt however that Mr Tindall's statements could provide no proper basis for any reliable finding of fact. Not only was it flawed in the respects to which reference has been made, but it also suffered from the deficiency of acceptance of matters stated by the appellant and Mr Murdoch

---

**118** *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

**119** *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ.

which were either not proved, or were shown to be highly improbable, such as the latter's conclusion that the appellant's horse became attached to the roof of the van on impact; and that the appellant's horse was forced back into his horse causing it to move to the left thereby indicating that the van was moving to the left after first impact and not to the right.

129 In submissions to this Court the respondent described the appellant's and Mr Murdoch's accounts of the accident as "glaringly improbable". Features which compound improbability are, for example: the appellant's contradictory claims as to whether her horse was trotting or cantering; and, the likelihood that her judgment would almost certainly have been impaired by the consumption of a very large amount of alcohol, in all likelihood, a great deal more alcohol than she claimed to have consumed. It is difficult to see why the trial judge, having said that there was no doubt that the amount of alcohol in the appellant's blood would have affected her, and that expert evidence was not required to tell him that this was so, would nonetheless so readily accept the appellant's account of the collision without qualification.

130 The test on appeal that Beazley JA applied was one of the three tests stated by Brennan, Gaudron and McHugh JJ in *Devries*[120]:

> "If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage'[121] or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'[122]."

131 A number of observations may be made about those tests but before doing so I should refer to four earlier cases in this Court. The first is an appeal in a divorce case, *Dearman v Dearman*[123]. There Griffith CJ said that where there has been a conflict of evidence, the Court of Appeal cannot reverse the judgment of a judge at first instance who has had the advantage of hearing the witnesses unless the appellate court "sees that the decision is *manifestly wrong*"[124]

---

**120** (1993) 177 CLR 472 at 479.

**121** *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47.

**122** *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

**123** (1908) 7 CLR 549.

**124** (1908) 7 CLR 549 at 553.

(emphasis added). In the same passage his Honour went on to distinguish between the verdict of a jury and of a judge to the former of which much greater weight should be accorded. He also said that in a case in which there has been conflicting evidence and a finding against the party upon whom the onus lay, it will be an almost hopeless task for that party to persuade a Court of Appeal that a different finding should have been made. His Honour also went on to cite with approval[125] a statement by Brett LJ in *Robertson v Robertson*[126] in which his Lordship had stated the "rule" as being that the decision at first instance should stand unless the appellate court could "see that the Judge in the Court below was *wrong*"[127] (emphasis added). Barton J agreed with the Chief Justice but added some words of his own[128]. In doing so, he cited some observations of Lindley MR, Rigby and Collins LJJ in *Coghlan v Cumberland*[129]:

> "...the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, *guided* by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen." (emphasis added)

---

**125** (1908) 7 CLR 549 at 554.

**126** (1881) 6 P 119.

**127** (1881) 6 P 119 at 124.

**128** (1908) 7 CLR 549 at 557.

**129** (1898) 1 Ch 704 at 704-705.

132 Isaacs J was the only judge in *Dearman* to state the rule in extreme terms by, saying that, in a case of viva voce evidence, a finding in respect of it "is altogether outside the reach of the appellate tribunal."[130] And with the greatest of respect to his Honour, I doubt whether many cases will truly turn, as he also contended, on a mere "gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence"[131]. Higgins J, the other judge in *Dearman*, said no more than that he was "glad to find that there is no difference as to the legal principle applicable between this Court and the Full Court [of New South Wales]."[132]

133 The second of the cases is *London Bank of Australia Ltd v Kendall*[133]. There, Isaacs and Rich JJ in language as apt today as it was then, again distinguished between a verdict of a jury and a decision of a judge sitting alone and emphasized the overriding obligation of an appellate court to do its duty to a statutory appellant by determining for itself the true effect of the evidence[134]:

> "[w]here the law says that the Court, and not a jury, is to determine the facts, and also says that an appellate Court can be asked to reconsider them, and therefore should reconsider them, it is the duty of the appellate tribunal (and it is the statutory right of the litigant who invokes it to require of it the performance of that duty) to determine for itself the true effect of the evidence so far as the circumstances enable it to deal with the evidence as it appeared in the Court of first instance."

134 The third of the cases is *Warren v Coombes*[135], an appeal from the Court of Appeal of New South Wales. It was a case which was concerned with the drawing of inferences but its relevance here is that in it Gibbs ACJ, Jacobs and Murphy JJ discussed and expressly applied s 75(A) of the Act. Their Honours said[136]:

---

**130** (1908) 7 CLR 549 at 561.

**131** (1908) 7 CLR 549 at 561.

**132** (1908) 7 CLR 549 at 565.

**133** (1920) 28 CLR 401.

**134** (1920) 28 CLR 401 at 407.

**135** (1979) 142 CLR 531.

**136** (1979) 142 CLR 531 at 537.

> "We are concerned, of course, with an appellate tribunal to which there is an appeal by way of rehearing ... and which has the powers and duties of the court from which the appeal is brought, including those of drawing inferences and making findings of fact... In other words the Court of Appeal is in the same position as the Court of Appeal in England and the Full Courts of the Supreme Courts of the other States. The appeal, although by way of rehearing, is conducted on the transcript of the evidence taken at the trial, and the witnesses are not called to give their evidence afresh, but the appeal is a *general appeal* and is not limited, for example, to questions of law." (emphasis added)

135 Although Aickin J (with whom Stephen J agreed) was of a different opinion from the majority as to the result of the appeal, he expressed no view on the correct approach to an appeal on a question of fact. His Honour thought it inappropriate to do so because he did not think that the matter had been investigated or fully argued by the parties.

136 Consideration was again given by this Court to the obligations of the Court of Appeal of New South Wales in reviewing findings of fact in the fourth of the cases, *Abalos*[137]. The leading judgment was given by McHugh J with whom Mason CJ, Deane, Dawson and Gaudron JJ agreed. It is relevant to note that the trial judge there whose decision was reversed by the Court of Appeal had enjoyed the advantage, not only of seeing and hearing the witnesses but also of some in-court demonstrations[138], a matter which McHugh J apparently thought to be of some significance. His Honour's statement of principle in the following passage was formulated no doubt on the basis of the particular facts, and advantages of the trial judge in that case[139]:

> "Consequently, where a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion'[140]."

---

**137** (1990) 171 CLR 167.

**138** (1990) 171 CLR 167 at 178.

**139** (1990) 171 CLR 167 at 178.

**140** *Watt or Thomas v Thomas* [1947] AC 484 at 488.

No reference was made in the reasons for judgment to s 75A of the Act, to *Dearman*, to *Kendall*, or to *Coombes*, although the last was cited in argument.

137 *Devries*, upon which the parties focused in this case was an essentially factual appeal from the Full Court of the Supreme Court of South Australia. Neither counsel nor any of the Justices of the Court who were divided as to the proper principle to be applied, referred to *Dearman*, *Kendall* or to *Coombes*. And once again no reference was made to the statutory provisions governing the appeal, s 50 of the *Supreme Court Act* 1935 (SA) which draws no distinction between appeals on questions of law and questions of fact.[141]

138 In *Devries*, Deane and Dawson JJ would have preferred a test simply of wrongness which is consistent with what was said in *Kendall*. They certainly did not embrace the extended test that appealed to Isaacs J in *Dearman*. Their Honours referred to the fact that the appeal was by way of rehearing. They also acknowledged that the trial judge enjoyed advantages denied to an appellate court but emphasized the risk of overstating those advantages. They said[142]:

> "An appellate court which is entrusted with jurisdiction to entertain an appeal by way of rehearing from the decision of a trial judge on questions of fact must set aside a challenged finding of fact made by the trial judge which is shown to be wrong. When such a finding is wholly or partly based on the trial judge's assessment of the trustworthiness of witnesses who have given oral testimony, allowance must be made for the advantage which the trial judge has enjoyed in seeing and hearing the witnesses give their evidence. The 'value and importance' of that advantage 'will vary according to the class of case, and, ... [the circumstances of] the individual case'[143]. If the challenged finding is affected by identified error of principle or demonstrated mistake or misapprehension about relevant facts, the advantage may, depending on the circumstances, be of little significance or even irrelevant. If the finding is unaffected by such error or mistake, it will be necessary for the appellate court to assess the extent to which it was based on the trial judge's conclusions about the credibility of witnesses and the extent to which those conclusions were themselves based on observation of the witnesses as they gave their evidence as distinct from a consideration of the content of their evidence. Judges are increasingly aware of their own limitations and of the fact that, in a courtroom, the habitual liar may be

---

**141** (1993) 177 CLR 472.

**142** (1993) 177 CLR 472 at 479.

**143** *Watt or Thomas v Thomas* [1947] AC 484 at 488 per Lord Thankerton.

> confident and plausible, and the conscientious truthful witness may be hesitant and uncertain. In that context, it is relevant to note that the cases in which findings of fact and assessments of credibility are, to a significant extent, based on observation of demeanour have possibly become, if they have not always been, the exception rather than the rule. Indeed, as Kirby ACJ pointed out in *Galea v Galea*[144], in many cases today, judges at first instance expressly 'disclaim the resolution of factual disputes by reference to witness demeanour'. However, this does not deny that in many cases a trial judge's observation of the demeanour of witnesses as they give their evidence legitimately plays a significant and even decisive part in assessing credibility and in making factual findings. Indeed, as will be seen, the present was such a case."

139 With respect I also doubt very much whether the practice and learning of the highly specialized Admiralty Courts provide a safe foundation for such a high test as *Devries* propounds. *The "Julia"*[145] was an appeal from the High Court of Admiralty of England constituted by the Right Hon Dr Lushington assisted by Trinity Masters, of whom the Right Hon Lord Kingsdown speaking for their Lordships said[146]:

> "But in these cases of appeal from the Admiralty Court, when the question is one of seamanship, where it is necessary to determine, not only what was done or omitted, but what would be the effect of what was done or omitted, and how far, under the circumstances, the course pursued was proper or improper, their Lordships can have but slender means of forming an opinion for themselves, and certainly cannot have better means of forming an opinion than the Judge of the Admiralty Court. They do not speak with reference to the distinguished person who now fills, and has so long filled, that office, though it would be impossible to imagine a stronger example of the truth of the remark; but any Judge who sits from day to day on such cases must necessarily acquire a knowledge and experience to which ordinary members of this Board cannot pretend. They must in such cases act entirely upon the advice of the Nautical Assessors, who form no part of the Court, whose opinion they can regard only as they might regard the advice of any nautical men out of Court. If they reverse in such cases, they must upon the authority of their Assessors overrule the judgment of the Trinity Masters, who form a part of the Court below, and they must do this without any certain means of knowing the comparative weight which is due to the two authorities, and without

---

**144** (1990) 19 NSWLR 263 at 266.

**145** *The "Julia"* (1860) 14 Moo 210 [15 ER 284].

**146** (1860) 14 Moo 210 at 236-237 [15 ER 284 at 293-294].

> hearing what reasons might be assigned by the Trinity Masters, if they were present, to justify the conclusion at which they have arrived."

140 It is also significant that his Lordship was at pains to distinguish Admiralty cases from common law cases with a jury, and in particular from judgments in equity, with which judgments in New South Wales may now, for the purposes of an appeal under s 75A of the Act, be relevantly equated[147]:

> "In a Court of Law, if the Judges are dissatisfied with a verdict as against the weight of evidence, they can send the case before another jury. In the Court of Chancery, when the Court of Appeal reverses the judgment of the inferior Court on the result of evidence, the Judges of the Appellate Court *are as capable as the Judge below* (and, indeed, are presumed to be more capable) of forming an opinion for themselves, as to the proof of facts and as to the inferences to be drawn from them." (emphasis added)

141 The subsequent admiralty case, *The "Alice" and the "Princess Alice"*[148] did no more than apply *The "Julia"*, and provides no basis for the same rules to apply to appeals in jurisdictions other than Admiralty. Perhaps the special features of Admiralty cases to which the Right Hon. Lord Kingsdown had referred in *The "Julia"* had been overlooked by the time that the *Hontestroom*[149] came to be decided but I doubt it. Rather the remarks of Lord Sumner in *Hontestroom*[150] should be taken as applying in the Admiralty context only, the context with which the Court was there concerned.

142 Statements made by appellate judges about findings of fact by trial judges repeatedly emphasize the advantages attaching to an opportunity to hear and see witnesses. They tend to understate or even overlook that appellate courts enjoy advantages as well: for example, the collective knowledge and experience of no fewer than three judges armed with an organized and complete record of the proceedings, and the opportunity to take an independent overview of the proceedings below, in a different atmosphere from, and a less urgent setting than the trial.[151]

---

**147** (1860) 14 Moo 210 at 236 [15 ER 284 at 293].

**148** (1868) LR 2 PC 245.

**149** *SS Hontestroom v SS Sagaporack* [1927] AC 37.

**150** [1927] AC 37 at 47 per Lord Sumner.

**151** cf discussion of credibility findings by Kirby J in *State Rail Authority (New South Wales) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 332 [93]; 160 ALR 588 at 621.

143 With respect, I therefore entertain grave doubts whether the statement of principle of the majority in *Devries* represents the law in relation to factual appeals by way of rehearing, and pursuant to statutory provisions such as s 75A of the Act and like provisions in other States for several reasons.

144 Neither *Kendall*, *Coombes* nor the relevant enactment was referred to in the reasons.

145 The treatment of findings of facts in issue with the very high degree of sanctity that appellate courts have from time to time since the inception of statutory rights of appeal finds no warrant in the language of the relevant statutes themselves. That treatment is questionable not only by reference to the words of the statute but also having regard to the fact that there are other enactments[152] which do confer rights of appeal on points or issues of law only, thereby clearly distinguishing between, and providing for different consequences to attach to, errors of fact and errors of law. Perhaps judges in earlier times were unduly defensive, particularly in jurisdictions in which trial judges from time to time also sat as appellate judges in rotation. Perhaps it was inevitably seen as being financially and otherwise practically inexpedient, indeed almost impossible to allow full factual appeals to proceed on a wholesale basis. Speculation as to that will achieve no purpose. It is to the words of the Act that I will now turn.

146 Section 75A of the Act imposes positive duties upon the State appellate court, the performance of which is in no way conditioned by judge-made rules stated in very different language, and to a substantially different effect from the plain meaning of the section which, by sub-ss 6 and 10 imposes affirmative duties on the Court of Appeal, including to do what the nature of the case requires. Section 75A provides:

> "**75A Appeal**
>
> (1) Subject to subsections (2) and (3), this section applies to an appeal to the Court and to an appeal in proceedings in the Court.
>
> (2) This section does not apply to so much of an appeal as relates to a claim in the appeal:
>
> (a) for a new trial on a cause of action for debt, damages or other money or for possession of land, or for detention of goods, or

---

**152** See for example *Land and Environment Court Act* 1979 (NSW), s 57; *Compensation Court Act* 1984 (NSW), s 32*; Medical Practice Act* 1992 (NSW), s 90.

(b) for the setting aside of a verdict, finding, assessment or judgment on a cause of action of any of those kinds,

being an appeal arising out of:

(c) a trial with a jury in the Court, or

(d) a trial:

(i) with or without a jury in an action commenced before the commencement of section 4 of the *District Court (Amendment) Act 1975*, or

(ii) with a jury in an action commenced after the commencement of that section,

in the District Court.

(3) This section does not apply to an appeal to the Court under the *Justices Act 1902* or to proceedings in the Court on a stated case.

(4) This section has effect subject to any Act.

(5) Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing.

(6) The Court shall have the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning:

(a) amendment,

(b) the drawing of inferences and the making of findings of fact, and

(c) the assessment of damages and other money sums.

(7) The Court may receive further evidence.

(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.

(9) Subsection (8) does not apply to evidence concerning matters occurring after the trial or hearing.

(10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires."

147 By the Act, the Court of Appeal was armed with all of the ample powers and duties of an appellate court under the *Equity Act* 1901 (NSW) (ss 81-89), and in particular the duty to rehear the case pursuant to s 82 which might even, for example, permit the Court to undertake a review in exceptional circumstances[153].

148 To impose the test stated in *Devries* is, I think, to do what was said to be impermissible as long ago as 1920[154], to elevate as a practical matter, the decision of a judge sitting alone to the level of a verdict of a jury. This is so even though judges are bound to give reasons[155] and those reasons are required to be able to withstand scrutiny. The value of that scrutiny will be much reduced if a statement in the reasons that the demeanour of a witness has been determinative of the first instance decision, is effectively taken to be conclusive of the outcome of an appeal by way of rehearing. The vast majority of the cases tried in this country are tried by judges sitting alone and depend upon their facts rather than upon the application of complex legal principles. To impose an unduly high barrier, and not one sanctioned by the enactment conferring the right of appeal would be to deny recourse by litigants to what the Parliament of the State has said they should have. Judges are fallible on issues of fact as well as of law; sometimes they are obliged to work under a great deal of pressure, and sometimes they are denied a timely transcript. In the days when rights of appeal were first enacted, notes and transcripts were much less complete and reliable than they now are. And today courts of first instance, in some jurisdictions at least, rely heavily on written statements, certainly of the evidence in chief, the oral adducing of which might on occasions have been as, or even more revealing than, evidence adduced from an honest but inarticulate or nervous witness in cross-examination. Occasional errors of fact are bound to be made. No litigant should be expected to accept with equanimity that his or her right of appeal to an intermediate court is of much less utility because it goes to a factual error that can be explained away by a judge-made rule, than an appeal on a question of law: or that although the trial judge was wrong on the facts, there was no incontrovertible fact against which the judge's error could be measured. This Court recently heard an appeal which provided an insight into the disposition of one New South Wales judge at least with respect to his task of deciding a

---

**153** *Attorney-General v Wheeler* (1944) 45 SR(NSW) 321.

**154** *London Bank of Australia Ltd v Kendall* (1920) 28 CLR 401.

**155** *Pettitt v Dunkley* [1971] 1 NSWLR 376.

personal injuries case. During the course of an application to dispense with a jury to which one party was entitled, and had requisitioned, he said[156]:

> "I'll tell you straight out, I would do away with all civil juries in the State, instantly and retrospectively. I think it leads to, quite frankly, perfectly obvious miscarriages of justice in these Courts every week, every single week ... I've been astounded here in the last six weeks calling this list, how many plaintiffs seek juries. I think it's prima facie evidence of professional negligence myself, for a plaintiff to seek a jury."

Demeanour based judgments in favour of plaintiffs following remarks of that kind are hardly likely to inspire confidence in persons wishing to defend claims against them. The test stated in *Devries*, in my respectful opinion, appears to go beyond some at least of the previous authorities in this Court. If faithful obedience henceforth to the statutory language might be seen as a departure from some other previous authorities of this Court, there would not be anything especially novel about that. This Court has made such departures in recent times on a number of occasions: examples are *Burnie Port Authority v General Jones Pty Ltd*[157], *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[158], *David Securities Pty Ltd v Commonwealth Bank of Australia*[159], *Mabo v Queensland [No 2]*[160], *Wilson v The Queen*[161], *R v L*[162], *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[163] and *Brodie v Singleton Shire Council*[164]. A test of "glaring improbability", "incontrovertible error" or "palpable misuse of an advantage" is not what the Act requires or all relevant previous decisions hold. Such a test pays, I am inclined to think, altogether too much deference to a trial judge's view of the facts and advantages,

---

**156** Quoted in *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828 at 832 [22] per Kirby and Callinan JJ; (2002) 188 ALR 353 at 359.

**157** (1994) 179 CLR 520.

**158** (1988) 165 CLR 107.

**159** (1992) 175 CLR 353.

**160** (1992) 175 CLR 1.

**161** (1992) 174 CLR 313.

**162** (1991) 174 CLR 379.

**163** (2002) 77 ALJR 40; 192 ALR 561.

**164** (2001) 206 CLR 512.

both actual and supposed. This is not to deny, however, that deference should be paid to first instance findings of credit. It is simply to prefer a test of wrongness, and to be guided by, rather than bound by findings on credit, or on the basis of demeanour.

149 I return to the facts of this case. Here Mr Tindall was described by counsel for the appellant as an "accident reconstruction expert". That is an ambitious claim. Three things may be said about the evidence in this case and running down cases generally. Rarely in my opinion will such evidence have very much, or any, utility. Usually it will be based upon accounts, often subjective and partisan accounts, of events occurring very rapidly and involving estimates of time, space, speed and distance made by people unused to the making of such estimates. Minor, and even unintended but inevitable discrepancies in relation to any of these are capable of distorting the opinions of the experts who depend on them. It is also open to question whether variables in relation to surfaces, weather, and the tyres, weight and mechanical capacities of the vehicles involved can ever be suitably accounted for so as to provide any sound basis for the expression of an opinion of any value to a court. The engagement of experts in running down cases, other than in exceptional circumstances, is not a practice to be encouraged.

150 The second matter is the reception, apparently without question, of the whole of the contents of the expert reports in this case. Some of the deficiencies to which reference has already been made would require that, either in law, or in the proper exercise of a discretion, much of them should have been rejected. In the long run the undiscriminating tender of inadmissible, unreliable or valueless evidence, the acquiescence in its tender by counsel on the other side, and its reception into evidence, will prolong and increase the costs of trials[165]. It will increase the margin for judicial error as occurred here, and will also lead to uncertainties and difficulties in courts of appeal. No court is bound to accept evidence of no probative value and evidence of slight probative value will rarely provide a foundation for any confident finding of fact, particularly if strong contrary evidence is available.

151 The third matter to which reference should be made is that touched upon by Beazley JA in the Court of Appeal, the adversarial stance taken by Mr Tindall. This is very much to be regretted. It also might have been basis enough for the rejection of his evidence. What was said in the tenth edition of *Phipson on Evidence* and earlier editions before enactment of the *Civil Evidence*

---

**165** *Evidence Act* 1995 (NSW): ss 135 and 136 confer very wide discretionary powers of rejection of evidence on courts.

*Act* 1972 (UK) , and notwithstanding the enactment of the *Evidence Act* 1995 (NSW) remains relevant[166]:

> "*Value of Expert Evidence*. The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of pre-conceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will.[167]"

152 There is an additional difficulty, of reconciling the three tests stated in *Devries*. For myself, a test of glaring improbability does not raise quite as high a threshold as inconsistency with an incontrovertible fact, or indeed of palpable misuse of an advantage. Experience tells that in human affairs there are many controvertible assertions, and, matters of science and mathematics apart, real disputation as to which facts may be and which may not be incontrovertible.

153 The question remains however as to how this Court should dispose of this appeal. The question of the correctness of the test agreed upon as the appropriate one was simply not argued or explored here. The appeal in the Court of Appeal was conducted on the footing that the correct test was of inconsistency with incontrovertible facts in accordance with one of the formulations of the majority in *Devries*. The parties having invited the Court of Appeal to deal with the appeal on that basis it would not be fair for this Court to apply a different test now.

154 The trial judge was on any view shown to be in error, particularly in his misplaced reliance upon Mr Tindall. There were three props for the trial judge's decision. Each was essential to it. One was Mr Tindall's evidence, the remaining two, the appellant's evidence (itself suspect by reason of her inevitably reduced capacity to observe and recount what had happened by reason of her earlier intake of alcohol), and Mr Murdoch's evidence, it also containing a number of improbabilities. The first of the props has clearly been displaced. Great doubt attaches to the soundness of the others. The high test posed by *Devries* has been satisfied. The skid mark and the position of the respondent's car after the accident were incontrovertible facts inconsistent with the appellant's factual claims.

---

**166** *Phipson on Evidence*, 10th ed (1963) at 481 §1286.

**167** *In re Dyce Sombre* (1849) 1 Mac & G 116 at 128 per Lord Cottenham [41 ER 1207 at 1212]; *The Tracey Peerage* (1838, 1843) 10 C & F 154 at 191 per Lord Campbell [8 ER 700 at 715]; *Lord Abinger v Ashton* (1873) LR 17 Eq 358 at 373-374 per Jessel MR.

155 I would dismiss the appeal and join in the orders proposed by the other members of the Court.