HIGH COURT OF AUSTRALIA

GLEESON CJ
KIRBY, HAYNE, CRENNAN AND KIEFEL JJ

PETER CHARLES COLLINS APPELLANT

AND

JOHN KIMBERLEY TABART RESPONDENT

Collins v Tabart
[2008] HCA 23
16 April 2008
S638/2007

ORDER

1. Special leave to appeal revoked.

2. Appellant to pay the respondent's costs.

On appeal from the Supreme Court of New South Wales

Representation

B M Toomey QC with G A Farmer for the appellant (instructed by Walker Smith Solicitors)

S G Campbell SC with J P Guihot for the respondent (instructed by TL Lawyers)

CATCHWORDS

Collins v Tabart

Appeal – Court of Appeal (NSW) – Conflicting versions of motor vehicle collision by appellant and respondent – Inconsistencies in evidence given at trial – Primary judge preferred version given by respondent – Court of Appeal rejected argument of material error at trial – Concurrent findings of facts relevant to liability – Difficulty of disturbing in High Court – Special leave revoked.

Negligence – Motor vehicle collision – Conflicting versions of collision – Findings by primary judge and Court of Appeal – Concurrent findings of fact – Special leave revoked.

Supreme Court Act 1970 (NSW), ss 45(4), 75A.

1 GLEESON CJ. In this matter I will ask Justice Kirby to give the first judgment.

2 KIRBY J. This appeal, by special leave, challenges a judgment of the Court of Appeal of the Supreme Court of New South Wales[1]. That Court, comprising Mason P, Beazley and Tobias JJA, unanimously dismissed an appeal by Mr Peter Collins ("the appellant") against a judgment of the District Court of New South Wales, constituted by Gibb DCJ. Her Honour had entered judgment at trial in favour of the respondent, Mr John Tabart, which the appellant contests in this Court.

3 The appeal arises out of a collision that occurred on 2 July 2002. The collision took place between a truck, driven by the appellant, and a silver Subaru sedan, driven by the respondent. The collision happened on a clear winter's day on a straight stretch of the F3 freeway, north of Sydney. Radically different versions of the events were given by the two drivers.

4 Put shortly, the appellant's case was that the respondent drove his vehicle across the lanes of traffic in front of his truck, from the second lane of traffic, through the first lane, towards the breakdown lane. According to the appellant, this movement caused him to swerve left, at which point he heard a thud, by inference the collision with the Subaru. The appellant's truck finished up going over the western embankment of the freeway, causing him to be seriously injured, allegedly as a result of negligence on the part of the respondent in his driving of the Subaru.

5 The respondent's case was that he was stationary in the breakdown lane at the time of impact. Upon this version of events, if accepted, there would be no relevant negligence on the part of the respondent. Accordingly, resolving where the truth probably lay was crucial to the outcome of the trial.

6 In her conclusions, the primary judge accepted that the version given by the respondent was to be preferred. She therefore entered judgment in favour of the respondent. She concluded that the appellant gave his evidence honestly, but that his evidence was unreliable, and the evidence of the respondent was to be preferred. The difficulty of disturbing such a conclusion on appeal is self-evident.

7 The Court of Appeal gave its reasons in the appeal in short form, as contemplated by the *Supreme Court Act* 1970 (NSW), s 45(4). The Court recognised its function under s 75A of that Act to conduct an appeal by way of rehearing. It made proper reference to the authority of this Court in *Devries v Australian National Railways Commission*[2]; *Fox v Percy*[3]; and *Waterways*

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1 *Collins v Tabart* [2007] NSWCA 78.

2 (1993) 177 CLR 472.

Authority v Fitzgibbon[4]. The Court of Appeal accepted that the primary judge had made two errors of fact finding in her reasons for judgment. However, it considered that these were not ultimately determinative of the correct outcome of the case.

8 In this Court, the appellant contested that conclusion. He argued that the errors found by the Court of Appeal, and other errors, demonstrated a flawed process of fact finding at trial which the Court of Appeal had erred in failing to correct, either by finding the facts accurately for itself or by remitting the case for retrial in the District Court.

9 As is usual in cases of this kind there are curiosities and inconsistencies in the evidence. Some of the evidence is difficult to reconcile, as the appellant has strongly argued before this Court. However, ordinarily, the process of reconciliation is the function of the trial judge unless the losing party can demonstrate error on that judge's part. The Court of Appeal was not convinced of material error. The appellant in this Court effectively faces, therefore, concurrent findings of fact against him, which, at the very least, it is difficult for him to overcome[5].

10 I have considered the written submissions of the parties and the Court has heard the appellant's oral submissions. It suffices to say that I am not convinced of any error on the part of the Court of Appeal that requires, or would justify, the intervention of this Court. In the end, I reach a conclusion similar to that expressed by the Court of Appeal which, being abbreviated, reads[6]:

> "Accordingly, although there were aspects of her Honour's reasons that possibly raised appellable issues, her conclusion was … correct. The success of the appellant's case depended upon his establishing that the respondent's vehicle moved unexpectedly in front of him. However, in our opinion … the evidence … established the contrary – namely, that at the point of collision, the respondent's vehicle was already in the breakdown lane."

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3 (2003) 214 CLR 118; [2003] HCA 22.

4 (2005) 79 ALJR 1816; 221 ALR 402; [2005] HCA 57.

5 See *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; 179 ALR 321; [2001] HCA 24; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 81 ALJR 1773; 238 ALR 761; [2007] HCA 42.

6 [2007] NSWCA 78 at [54].

11 I am not persuaded by the combination of matters to which the appellant pointed in argument that he did not have a proper consideration of his case at trial. Nor, having heard his argument more fully advanced in this Court, am I persuaded that his case was not sufficiently and appropriately considered and dealt with by the Court of Appeal. Accordingly, the proper course that this Court should take is to revoke the grant of special leave.

12 I therefore propose that special leave be revoked and that the appellant pay the respondent's costs.

13 GLEESON CJ. I agree with the orders proposed by Justice Kirby for the reasons he has stated.

14 HAYNE J. I also agree.

15 CRENNAN J. I also agree with Kirby J.

16 KIEFEL J. I also agree.