

Distorting effect of litigious hindsight

***Commissioner of Main Roads v Jones* [2005] HCA 27 delivered 20 May 2005**

By Rebecca Sorgiovanni

The respondent was the driver of a vehicle who was injured on 11 May 1992 when his car collided with a wild horse on the Great Northern Highway in the Kimberley region of Western Australia.

The respondent was unable to give evidence by reason of his injuries and his wife conducted the claim. He alleged that the Commissioner of Main Roads had a duty of care to warn him of the likelihood of animals in the locality and to reduce the speed limit from 110km/hr to 80km/hr. His statement of claim alleged that within 500 metres of the particular section of road upon which the accident occurred there were watering holes, and about 1.5 to 2kms from that site a water bore, which were likely to attract wild animals including horses.

The district court trial judge found that the respondent had been speeding at about 140km/h for most or all of the journey, that he had ignored 90km/hr signs in Turkey Creek a mere 6km from the place of the accident, and that it was therefore unlikely that he would have taken any notice of any signs warning of animals or reducing speed limits had they been placed there by the appellant. In other words, he failed to establish causation.

Further, the respondent had also failed to establish negligence on the part of the appellant, as the risk that had materialised was only one of a number of risks. The Great Northern Highway proceeded unfenced through

many cattle stations along its length, which the respondent knew, and he hadn't established that the danger was any greater at the particular section of road where the incident occurred than anywhere else along the length of the highway.

The respondent appealed to the WA Supreme Court which found (Steytler and Malcolm CJ, Murray J dissenting), that the trial judge didn't draw the appropriate inferences from the evidence before him. The WA Supreme Court set aside the decision of the District Court and made an order that the appellant was liable to the respondent for 50% of the damages he sustained (on the basis of 50% contributory negligence).

As to causation, it noted that the respondent's wife (not a passenger), and a passenger who had been asleep at the time of the accident gave evidence that the respondent habitually adjusted his speed to warning signs. As to liability, locals gave evidence as to their perception of the dangers of animals on that particular section of road.

The Commissioner of Main Roads appealed to the High Court. The question before the High Court was whether the WA Supreme Court was justified in interfering with the trial judge's verdict. All five members of the High Court found that it was not, and restored the verdict of the trial judge. Gleeson CJ, McHugh and Callinan made their findings on causation, although Gleeson agreed also that the

trial judge's finding on liability should stand, and Gummow and Hayne JJ, in a joint judgment, made their findings on liability.

New evidence as to liability was discovered by the appellant after the trial, but before the Supreme Court appeal. All justices agreed at Supreme and High Court level that this new evidence would not have affected the outcome, although the appellant was criticised for late discovery.

Interestingly, Gleeson CJ and Callinan referred to the distorting effect of litigious hindsight in *Rosenberg v Percival* (2001) HCA 18 (5 April 2001) at 16 noting that "A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies."

Also of note, though the High Court made no comment, was that the appellant's defence included a *non-feasance* plea which the trial judge would have upheld, had he not found that the real cause of the accident was the respondent's negligence. ■

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