

# Will your witness stand up on appeal?

*Bugeja v Jarrett* [2017] NSWCA 219

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## Overview

Ms Jarrett was allegedly injured after braking urgently and colliding with the rear of a Hyundai Lantra driven by the independent witness in the case, Mr Lopez. The Lantra was in turn pushed by the impact into the rear of a Holden Rodeo driven by Mr Bugeja. This occurred in wet conditions during morning peak hour on 30 March 2010, soon after Mr Bugeja's Rodeo left a McDonald's restaurant driveway and entered the lane immediately in front of the Lantra driven by Mr Lopez.

Ms Jarrett was following Mr Lopez, heading west along Victoria Road, Drummoyne and going down the hill towards the Gladesville Bridge. She alleged that Mr Bugeja carelessly entered the roadway in front of Mr Lopez's Lantra, causing him to brake too suddenly and thus cause the collision and her injuries.

Mr Lopez testified that he had turned left onto Victoria Road at the top of the hill from Lyons Road. He gave unchallenged evidence that he slowed down and stopped his Lantra for several seconds to let Mr Bugeja's Rodeo enter in front of him. The Rodeo then joined the lane before Ms Jarrett's vehicle hit Mr Lopez's Lantra from behind. This account was supportive of Mr Bugeja's recollection, which was that he heard a bang (the Lantra being hit from behind) and then felt a small thud into the rear of his Rodeo.

The primary judge did not accept Mr Lopez's evidence on the basis that it was vague in some respects and generally unreliable. His Honour awarded Ms Jarrett damages (after making a 15% deduction for her contributory negligence) on the basis that Mr Bugeja had not exercised reasonable care when entering the roadway.

The Court of Appeal set aside the judgment and award of damages and substituted a judgment in favour of Mr Bugeja in holding that the collision was caused by Ms Jarrett's failure to keep a proper lookout, to drive at a safe speed and to keep a reasonable distance behind Mr Lopez's vehicle.

## Court of Appeal Findings

The primary judge found that Mr Bugeja did not have a good recollection of the events and that he qualified many statements by saying what he thought he *would* have done rather than what he actually remembered doing. His Honour preferred Ms Jarrett's evidence, which he found to be accurate and reliable except for two matters which he thought did not diminish the strength of her evidence. The first was her mistaken belief that the vehicle driven by Mr Lopez was a Mitsubishi Lancer rather than a Hyundai Lantra. The second was that she had followed Mr Lopez's Lantra on Victoria Road through the Lyons Road and Victoria Road intersection, whereas his Honour was satisfied that Mr Lopez had in fact entered Victoria Road at that intersection from Lyons Road.

The Court of Appeal considered that the second matter with respect to Ms Jarrett's evidence was material because it meant that she was a significant distance

behind Mr Lopez's Lantra as she drove down Victoria Road. This in turn lent credibility to Mr Lopez's recollection that he was stationary for five to seven seconds while allowing the Rodeo to enter the roadway from the McDonald's.

The Court also identified an inconsistency in the primary judge's findings, which Ms Jarrett conceded on appeal. The primary judge concluded initially that Mr Lopez first collided with Mr Bugeja's Rodeo. However, later in his judgment, when dealing with the issue of contributory negligence, he said:

...this in turn caused [Ms Jarrett's] vehicle to slide into [a] collision with the rear of Mr Lopez's vehicle, which in turn collided with [Mr Bugeja's] vehicle.

The Court considered Ms Jarrett's concession on this point to be significant as it suggested that her evidence on 'what may well be regarded as the most significant aspect of the case' was unreliable.

The Court disagreed with the primary judge's assessment that Mr Lopez's evidence was unduly vague. The Court noted that Mr Lopez's evidence about being stopped for a number of seconds before being struck was not challenged. The only challenge put to Mr Lopez was whether the road was clear before the accident and whether he braked suddenly, both of which he denied without hesitation.

While the Court of Appeal accepted that Mr Bugeja's evidence was 'in many respects unsatisfactory', they accepted that he had driven his Rodeo 10 to 15 metres down the road before he stopped, as this was consistent with Mr Lopez's evidence. Ms Jarrett, to the contrary, contended that the accident occurred just outside the McDonald's driveway, but it was not disputed that Mr Bugeja's Rodeo was not on an angle when it was struck; it was facing straight down the roadway. The weight of this objective finding meant that Ms Jarrett's account of where the collision occurred could not be accepted.

## Principles for Intervention on Appeal

This was an appeal by way of 'rehearing', a process defined by statute in which further evidence is not taken and in which the appeal court determines the matter on the

record'. This is the normal process under the *Supreme Court Act 1970* (NSW) when a District Court decision is taken on appeal.

The Court of Appeal was careful to observe at the outset in this case that this '...appeal turned entirely upon the correctness of the findings by the trial judge as to the facts'. The Court then noted the need in such a case '... to pay careful regard to both the function of the appellate court and the limitations on that function, with particular reference to the limitations of a 'rehearing', which is a process undertaken on the record and not a rehearing of evidence as if it were a retrial'.

The Court of Appeal described the approach required by referring to the considerations summarised in the 2015 decision of the court in *Nominal Defendant v Smith*.

In paragraph 10 of *Nominal Defendant v Smith* the Court of Appeal acknowledged the guidance given in 2003 by the joint reasons of the High Court in *Fox v Percy* in situations where a primary judge has made findings of fact after seeing and assessing the credibility of witnesses – the following passage from *Fox v Percy* was extracted in this regard:

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 conclusion.

Most tellingly in the present case, in paragraph 11 of *Nominal Defendant v Smith*, the Court of Appeal mentioned two further considerations, including the much older (1908) High Court authority of *Dearman v Dearman*:

There are two other factors to be borne in mind. The first is the observation of Griffith CJ in *Dearman v Dearman* that an appellate court may be more willing to intervene in circumstances where the trial judge has made a finding of fact in favour of the party bearing the onus of proof than where he or she has declined to make such a finding. Secondly, while recognising that

written reasons cannot provide a complete picture of the circumstances of the trial, or the considerations which may have led to the preferring of the testimony of one witness over another, nevertheless the appellate court is entitled to infer error from the manner in which the testimony was addressed in the reasons, including a failure to refer to factors which appear to the appellate court to be significant. (citation omitted)

## Implications

The present case turned on its facts and not surprisingly the independent testimony provided by Mr Lopez tipped the scales in Mr Bugeja's favour.

The case is a good example of how nuances and details in lay witness testimony when considered in the context of all of the evidence can be pivotal in determining the outcome of a factual dispute. The degree of care and judgement required to be exercised in the *preparation and presentation* of lay witness testimony can often be overlooked by parties to a dispute.

The case is also a reminder of the limitations on appeals and how those limitations can be tested and overcome when the errors made by a primary judge are cloaked behind findings of credit but nevertheless extend to conflicting detail that may be analysed on appeal with regard only to the written record of the hearing in the court below.

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