2022 MVA Case Review

ALA State Conference – Queensland

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District Court

Kickbusch v Lehane & Anor [2022] QDC 16

Byrne QCJ, delivered 14 February 2022

Facts

On 1 November 2016, the plaintiff was riding a motorcycle along Coronation Drive in Brisbane. He stopped behind a small truck towing a trailer, with both vehicles intending to make a right hand turn from Coronation Drive into Park Road. Park Road is a single lane carriage way, which after approximately 30 to 40 metres divides into two lanes heading in a northly direction, with two lanes heading south. The truck made a right hand turn into Park Road, and the plaintiff (on his 110cc motorcycle) followed behind. When on Park Road, and believing the truck was pulling over to the left, the plaintiff commenced to overtake the truck on the right-hand side. The plaintiff alleged that the truck then made a sharp turn to the right, colliding with the plaintiff's motorcycle causing him to crash. The evidence before the court was the impact between the two vehicles was not significant.

Decision

Judgment for the plaintiff in the sum of $173,085.25 with the court to have submissions on costs.

Ratio

The Judge found the plaintiff to be an honest witness, and did his best to recall events accurately, but said with respect to some of his evidence his reliability cannot be accepted without qualification. Both the first defendant and the passenger of the truck presented as being generally disinterested in participating in the proceedings and reluctant to testify.

The Judge noted many internal inconsistencies with their respective accounts of what had occurred also. By the defendant's (driver) own testimony, he did not look in his rear view mirror for the presence of any other vehicles on his right once he entered Park Road. The judge concluded that the plaintiff did turn right and attempt to pass the truck believing it was going to stop on the left hand side of the road. The judge found that at the time the truck was occupying more than 50% of the single lane width of Park Road. The judge accepted that the plaintiff maintained his line of travel on the right hand side of the lane at all times, and the that the truck has swung sharply to the right, and in executing that manoeuvre and not giving way to the plaintiff who was in the same lane, the judge was satisfied that there had been a breach of the Transport Operations Regulations 2009 by the defendant driver.

The Court held that both the plaintiff and the first defendant had a duty to take precautions against the risk of harm. Turning the truck sharply to the right in a single lane of travel without prior indication or checking for the presence of other vehicles or persons in the lane, meant that the driver of the truck had failed to take precautions against harm to others. The defendant's reliance on 'following vehicles cases' is not a complete answer to the decisive conduct in the collision in the sudden change of direction by the first defendant (driver of the truck).

The facts demonstrated that the defendant was on the left of the lane (Park Road) travelling slowly, and where there was knowledge of other traffic behind him turning into Park Road, and in circumstances where the lane on Park Road was wide enough for two vehicles to fit in and where a second lane was marked a short distance ahead and in circumstances where

the truck indicator light had not been reactivated after being automatically turned off in the course of initially turning into Park Road, there existed a risk that which the defendant ought reasonably to have known existed that another person or vehicle might have been in the lane adjacent to or close to him. That risk was not insignificant and the reasonable person in a position of the defendant would have taken precaution to guard against it by giving prior indication of an intention to turn, or by checking the rear-view mirrors or by taking and available steps to ascertain that there was no other person or vehicle likely to be affected by the sudden right-hand manoeuvre.

However, the judge was also satisfied that the plaintiff failed to take precautions against the risk of harm by turning into the then single lane of the Park Road and attempting to overtake the truck on the right hand side when he was not aware of the length of the truck and when it was too early for the turning truck manoeuvre to have been to totally completed to be assured of its path up Park Road. A reasonable person in the position of the plaintiff would have taken precautions that were not in fact taken, by example maintaining a position behind the truck, where directly behind it or not, and not commencing to overtake into the two marked lanes which commenced 35 metres up the roadway, or at least waiting longer to ensure that the presumed line of travel of the truck to the left of the lane was in fact maintained. The judge assessed the contributory negligence of the plaintiff at 40%.

Kickbush v Lehane [2022] QDC 166

Barlow QC DCJ, Delivered 14 July 2022

Facts

The plaintiff obtained judgment against Allianz Australia Insurance Limited (the second defendant) and ordered Allianz to pay the plaintiff's costs of proceeding on an indemnity basis.

The plaintiff's solicitors served a cost statement on Allianz.

Allianz applied for an order that the plaintiff provide it with a copy of any cost agreement between himself and his solicitors, including copies of any variations to that agreement from the time of his original instructions to the date of the application.

The basis for the request for the cost agreement was identified as enabling the solicitor for Allianz to prepare a Notice of Objection, and, more particularly, be in a position to advise Allianz as to whether the cost agreement was valid and enforceable, whether any items claimed pursuant to the cost agreement are objectionable, to properly raise objections pursuant to Rule 706 and 722 of the Uniform Civil Procedure Rules, and to be able to undertake a proper assessment of the costs and liabilities of the insurer (Allianz).

Decision

1. The plaintiff is to provide the insurer with a copy of any cost agreement between himself and his solicitors.

Ratio

The Judge commented that a cost assessment must be undertaken fairly and justly for both parties.

It was determined therefore that where a cost statement is based upon a cost agreement and is claiming indemnity costs pursuant to that cost agreement then, in order to contain

sufficient details to enable the party liable to pay the costs to understand the basis for the costs, to prepare an objection to the cost statement and to obtain advice about any offer to settle the costs, the cost statement must have attached to it the cost agreement upon which it is based.

The Judge observed that it would be entirely unfair to a party such as Allianz in this case, who is liable to pay costs, to have to prepare a Notice of Objection without the material upon which the costs claimed in the cost statement are based.

Lastly the Judge identified that in the circumstances of this particular case, but generally in the circumstances of any case in which indemnity costs are sought on the basis of a cost agreement, it is merely basic justice that the cost statement contains or have attached to it or provided with it, the cost agreement upon which it is based. In the Judge's view that was necessary in order for the cost statement to comply with Rule 705(2), at least in the circumstances of this case.

Rosily v QBE Insurance (Australia) Ltd [2022] QDC 100

Allen QC DCJ, delivered 29 April 2022 (ex tempore)

Facts

The self-represented plaintiff claimed damages for personal injuries allegedly sustained in a motor vehicle accident on 3 June 2019. She claimed that she was travelling down her driveway of 1-5 Crest Road, South Maclean through the exit from her property towards a gravel area situated between Mount Lindesay Highway and Crest Road. That gravel area was used as a bus stop by Bus Queensland which transported children to Beaudesert State High School.

The plaintiff claims that because of the negligence of the bus driver her vehicle either collided with the bus or came, or was forced to come, to a sudden stop and as a result suffered injury to her cervical spine.

The defendant's case was that there was no collision at all and the fact that the plaintiff had come to a sudden stop was not caused by negligence of the bus driver.

Decision

1. Judgment for the defendant.
2. The plaintiff pay the defendant's costs of the proceedings on the standard basis.

Ratio

The plaintiff was found to be a 'most unimpressive witness' and 'completely lacking in credibility', with reference to being non-responsive and evasive when giving evidence. Her version that she was proceeding down the driveway at a slow pace and was suddenly confronted with the bus heading towards her a short distance away was found to be entirely illogical and unacceptable. Instead, the court accepted the evidence of an independent witness that the plaintiff's vehicle was travelling at speed towards the gravel area and then came to a sudden stop, skidding towards the bus. This was consistent with the evidence given by the bus driver.

Ultimately the court held that the plaintiff had failed to establish on the balance of probabilities any breach of duty by the bus driver and failed to show that she sustained any injury as a result of negligence of the bus driver.

Ketchell v RACQ Insurance Limited [2021] QDC 307

Coker DCJ, delivered 16 December 2021

Facts

The plaintiff, Robin Ketchell, was outside the Royal Hotel in Ingham on the evening on 4 April 2014. A motor vehicle being driven along the Bruce Highway toward Ingham lost control and left the roadway, becoming airborne, and striking the plaintiff. The plaintiff was struck on his ankle and spun around onto his back, twisting his torso, and allegedly causing him to suffer immediate pain in his thoracic spine. The plaintiff brought a compulsory third party claim against the driver of the vehicle, for which RACQ Insurance Limited was the licensed insurer. Liability for the incident had been admitted by RACQ. RACQ was defending the plaintiff's action on the grounds of there being a dispute relating to the nature of the injuries sustained, and the quantum of the loss. RACQ was alleging the plaintiff's evidence and reporting to various medical practitioners was unreliable, identifying 25 or more anomalies.

Decision

1. Judgment for the plaintiff against the second defendant in the sum of $479,884.70.
2. Submissions as to costs to be made. Costs to be determined in chambers.

Ratio

The Court found that inconsistencies or inaccuracies in the plaintiff's reporting to various doctors and his evidence was more likely from "looseness", "imprecision" and "poorly chosen words" when answering questions rather than an attempt to mislead. The Court also rejected the argument that the plaintiff had failed to mitigate his loss, finding that he did attempt to engage with an occupational therapist in the hopes of getting back into the workforce.

Dr Maguire gave evidence that the plaintiff had sustained a disc protrusion with soft tissue injury to the thoracic spine, rather than an aggravation of a pre-existing degenerative disc condition, as opined by Drs English and Morgan. Drs English and Morgan relied upon a prior chiropractic attendance to conclude that the plaintiff was experiencing thoracic pain prior to the incident. The Court accepted the evidence of Dr Maguire over Drs English and Morgan, finding it more consistent with the description of the nature and location of the pain described by the plaintiff. The Court also found Dr Maguire's evidence more compelling and the assessment more recent.

The Court accepted the finding that the plaintiff had suffered a psychological injury, relying on the expertise of the two psychiatrists, Dr Lovell an Dr Caniato.

The Court considered the plaintiff's economic loss, accepting the plaintiff will be precluded from pursuing employment in the same areas as before the incident and, given his lack of higher education and office skills, his work history and now long-term employment, he would also be unsuited to sedentary work. The Court agreed with Dr Caniato's assessment that the likelihood of the plaintiff returning to work was 'grim' and found he has been left with no real employment capacity.

The plaintiff gave evidence that he had suffered an inability to participate in cultural activities such as fishing, hunting, and traditional dancing because of his injuries, which was accepted. The Court made an award for pecuniary loss for the plaintiff's inability to carry out traditional hunting and fishing for his family, resulting in more meat being purchased in substitution. That award was $30.00 per week to retirement, being $30,390.00.

Ketchell v Deacon & RACQ Insurance Ltd [2022] QDC 180

Coker DCJ, delivered 30 August 2022

Facts

The plaintiff received judgement in the sum of $479,884.70 (typo in judgement) against RACQ consequential upon injuries sustained in a motor vehicle accident.

RACQ made three offers to settle the proceedings, the first being the mandatory final offer pursuant to the MAIA, in the sum of $500,000.00, the second offer being a UCPR offer of $550,000.00, made on 9 December 2019 and a third offer, made under the UCPR, again for $550,000, but with conditions.

The plaintiff sought to advance an argument in respect of the Centrelink refund that could make a substantial different to the plaintiff's position. The plaintiff argued that had he accepted the second defendant's second offer, 50% of the settlement sum would have been used to calculate the amount required to be refunded to Centrelink. However, in respect of the judgement sum, the Centrelink refund is to be calculated only upon so much of the award that related to lost earnings or lost capacity had the potential to result in a lower refund to Centrelink, which by extension would have been required if the second offer had been accepted.

The basis of the plaintiff's argument was that having regard to the amount of the refund required after judgement as opposed to that required if the plaintiff had settled, in terms of a net result for the plaintiff, the judgement was far more favourable than the second offer. The plaintiff however, was not in a position to advance that argument at that time as a recovery notice had issued from Centrelink, the plaintiff had sought a formal review of the decision as to the amount of the charge, but Centrelink had not, at the time of the cost's argument, received a response. The plaintiff had sought a further extension of time to file Costs Submissions to await the outcome of the Centrelink review.

The Judgement amount was less than the offers and particularly the offers under the Uniform Civil Procedural Rules. The plaintiff argued that the MFO and the first offer contained requirements which would not have arisen and did not arise pursuant to the terms of the judgment and therefore rendered the offer less favourable than the judgment obtained, those requirements being that the terms of settlement were to remain confidential, and that the plaintiff acknowledged the second defendant (RACQ) did not admit injury, loss or damage.

RACQ argued that an offer put by RACQ in relation to the action did not forfeit its status as a compliant offer merely because it included a provision that the parties sign a release which might incorporate or include a confidentiality clause. The second defendant argued that the second of the offers was rejected by the plaintiff which led to the plaintiff receiving a judgment a little in excess of $70,000 less than what was offered.

Decision

1. That the second defendant pay the plaintiff's costs of the proceedings up to and including 10 December 2019; and
2. That the plaintiff pay the second defendant's costs of the proceedings from 11 December 2019.

Ratio

The Court, in determining the plaintiff's application for a further extension, pending a decision from Centrelink, refused that extension, finding that a determination should be made with consideration to the basic principles to be considered with respect to costs. In making that finding the court considered that notwithstanding the plaintiff's submissions there was no information before the Court with respect to the Centrelink enquires, nor any formal application made concerning the Centrelink review.

The Court accepted the second defendant's rhetorical question as to whether a judgment for $70,000 less than that which was offered containing a requirement that there be an acknowledgement that the second defendant did not admit injury, loss or damage is valued at greater than $70,000. The second defendant had submitted such contention was objectively implausible.

The Court stated it could not agree more. The situation that was that whilst an offer of $500,000, and therefore a little over $20,000 more than that which was found in the judgment was rejected, a second and subsequent offer acknowledging a greater amount being paid could not be seen to be noncompliant in any way or to be less favourable, because of the clauses contained within it.

The Court was satisfied it was a situation where the provisions of Rule 361 of the UCPR became relevant, noting that subrule (2) specifically required the court "must" order the defendant pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer and thereafter the plaintiff pays the defendants costs.

The Court acknowledged that whilst there may have been some strength in an argument relating to the original offer which was made in respect of the matter pursuant to the Motor Accident Insurance Act, such an argument clearly fell by the wayside when a more significant offer was made, notwithstanding that it may have included some additional terms, over and above what would arise pursuant to the requirements that may be placed as a result of a judgment being obtained.

Supreme Court

Murphy v Turner-Jones & Anor [2022] QSC 40

Crow J, delivered 31 March 2022

Facts

The self-represented 50 year old male plaintiff alleged that he sustained serious injury, namely 'an out of position whiplash injury and polytrauma at each level of his spine and pelvis' and a 'coup countrecoup injury' (bruising of the brain tissue) in a motor vehicle accident which occurred on 12 September 2017. A claim for damages in the sum of $10,249,234 (which included exemplary damages for $5,000) was made.

Liability had been admitted. The main issues between the parties were the nature, extent and impact of the injuries that the plaintiff sustained in the motor vehicle accident and any effect of the pre-existing non-compensable mental health issues.

The plaintiff's income tax returns and notices of assessments for the financial years ending 30 June 2014 to 2019 revealed that he had worked as a retail employee for Coles Supermarket in Rockhampton until early in the 2016 financial year. He qualified as a taxi

cab driver in October 2014 and conducted that work through a business called Camtra Pty Ltd. The plaintiff attested that he earned no income from July 2018 to June 2020 and from 1 May 2020 he had been in receipt of Job Seeker payments.

Decision

1. Judgment for the plaintiff in the sum of $200,776.07.

Ratio

The court accepted that the accident was a low speed minor impact causing minimal damage to both vehicles.

With respect to the nature and extent of the injury sustained, the court accepted Dr Fitzpatrick's diagnosis of a whiplash injury assessed at 0% whole person impairment and pain syndrome, with no organic pathology explaining the reported severe ongoing symptoms. In contrast, the court found that Dr Todman's categorisation of a DRE Category 2 injury was predominantly based on subjective complaints of pain rather than any examination findings.

Based on the specialist evidence, the injury was found to fall within item 89, minor cervical spine injury, which has a prescribed ISV range of 0 to 4; however with reference to Schedule 3 to the *Civil Liability Regulation 2014* (Qld) and particularly taking into account pain suffered and the negative impact on the plaintiff's life, the court allowed item 88, moderate cervical spine soft issue injury and an ISV at the top of the range of 10.

It was not accepted that the plaintiff was completely unemployable due to the neck injury; but he had genuinely suffered neck pain aggravated with prolonged driving or manual work.

Despite calculating a pre-injury net weekly wage of $470 net per week, the court found that but for the motor vehicle accident the plaintiff would have a reasonable earning capacity of $550 net per week. A full loss of $550 net per week was allowed for 35 weeks post-accident to May 2018 and thereafter 50% loss of economic capacity was allowed and then discounted further by 25% for the non-compensable mental health issues, making a total award of $59,675 for past economic loss.

Future economic loss was also calculated on 50% loss of earning capacity and discounted further by 35% due to the uncertainties of the comorbid mental health condition and prospect of some improvement in the future, totalling $107,786.

The claim for exemplary damages was rejected as it did not meet the requirements for the tort of breach of statutory duty.

Ford v Nominal Defendant [2022] QSC 179

Martin SJA, delivered 31 August 2022

Facts

On 11 March 2019, the plaintiff was riding his Honda motorcycle along Redland Bay Road in Capalaba. It was about 5:15pm in the afternoon, when a light truck passed him to his right and then moved into the lane in front of him. A small piece of wood fell from the back of the truck into the path of the plaintiff. The plaintiff swerved his motorcycle to avoid the piece of wood, with his front wheel clearing the piece of timber, but his rear wheel going over the top of it. The plaintiff identified the truck as being white in colour but saw no other identifying markings or signage on it.

At the time, the plaintiff believed he had suffered some sort of tortional force applied to his back, noting that at the time he was doing approximately 70km an hour. The plaintiff next saw the truck, from the timber had fallen, when it was making a right hand turn from Redland Bay Road into Seven Oaks Street. When he saw the truck in that position it was some 300-400 metres ahead of him, with the plaintiff starting to accelerate on his bike from 70km an hour towards 80km an hour.

The plaintiff conceded that he had the truck within his view for about 20 seconds, and in that period of time he could have obtained the truck's registration, but he had not done so. The plaintiff could not recall whether the truck turned right into Seven Oak Street or had executed a U-turn to proceed outbound back along Redland Bay Road.

The defendant noted that quantum in the matter had been agreed between the parties, and the only issue for determination was whether or not the plaintiff had satisfied s. 31(2) of the Motor Accident Insurance Act 1994, that is, had the plaintiff undertaken proper enquiry and search in order to identify the white truck from which the piece of timber had fallen.

Decision

1. The Claim is dismissed; and
2. Judge will hear the parties as to costs.

Ratio

The evidence before the court was that the plaintiff reported the incident to his supervisor the next day at work, and his employer went to the incident site to look for the piece of wood and take photographs of the area.

It was in October 2019 that the plaintiff sought legal advice, and thereafter notified the Police of the accident. He also attended on three businesses situated on Redland Bay Road near where the incident occurred in order to see if any CCTV footage of the day in question existed. None was found.

He then lodged a claim against the Nominal Defendant and engaged his own investigator to make enquiries but was unable to provide any useful information. The Nominal Defendant did likewise, including enquiries with people who lived on Seven Oak Street and the nearby vicinity. No useful information was gathered.

In cross-examination the plaintiff said that he had canvassed Seven Oaks Street and another nearby Street on many occasions in the months after the accident, but that evidence was not accepted by the court. The Judge referred to New South Wales decisions regarding 'proper enquiry and search', including the decision of the *Nominal Defendant v Meakes* (2012) 60 MVR 380.

Drawing on similarities in that case, the Judge noted that the capacity of the plaintiff in these circumstances to record the registration number was not as simple as that in Meakes. However, the plaintiff had 20 seconds in which to put himself in a position where he could have observed the number plate of the truck. There was nothing that would have prevented him from doing so. The Judge found that the plaintiff could have, without great difficulty, observed and remembered the number plate of the vehicle, and he was aware, immediately after his motorcycle passed over the piece of timber, that he had suffered an injury and could reasonably have been expected to obtain the relevant details at the time. But failing to attempt to obtain the number plate, he had failed to engage in any proper enquiry and search. The claim was dismissed.

The Judge also considered two propositions put by the Nominal Defendant. One was that proper enquiry and search would have required the plaintiff to return to the site of the incident for a few days at about the same time as the incident in order to observe the traffic and look for the vehicle. The Judge held that that would not have been reasonable given the traffic which passes along Redland Bay Road and the absence of any evidence to suggest that the vehicle might pass that way again. It was unrealistic and the plaintiff is not required to take steps which are no more than ritual and unlikely to be productive.

As to the second issue raised by the Nominal Defendant, that is that the plaintiff should have taken some reconnaissance of Seven Oak Street and nearby areas, the Judge agreed that that would have been appropriate within a short time after the incident but given that there was no unusual activity which might have alerted the residents of Seven Oak Street, the enquiry might not have borne fruit. However, those enquiries within a short period may well have constituted proper enquiry and search. The placing of notices seeking information in letter boxes in that Street would, for example, have been a reasonable step to take in the circumstances. To go back a good deal of time later would have been a triumph of enthusiasm over reason, because the period of enquiry which could have been made was when the "scent was cold".

Busch v Parker & Anor [2022] QSC 211

North J, delivered on 30 September 2022

Facts

The self-represented 56 year old male plaintiff claimed damages upwards of $2,000,000 for a cervical spine injury allegedly sustained in a rear-end motor vehicle accident which occurred on 10 March 2014. Liability was not in issue.

The plaintiff's evidence-in-chief was by way of a reading a prepared statement. He attested that he had ongoing aches and pains in his neck and severe headaches since the accident, managing with over the counter drugs, therapeutic massages, hot showers and pool exercises. At the time of the trial, he was purportedly experiencing constant pain and aching.

Evidence elicited during the trial revealed that the plaintiff had not missed any work in the days and weeks following the accident and continued with normal work duties until May 2014. For family reasons he then moved from Mt Isa to Townsville and did not seek further employment until approximately mid-2015. He continued to play touch football for in excess of three years post-accident and on 13 March 2017 specifically reported knee pain after having played six games of touch on the weekend.

Following the work event, the plaintiff worked in various heavy manual labouring positions 10 to 12 hours a day including as a maintenance boiler maker/welder, scaffolder, rigger and scaffold supervisor. He had denied having any issues with his neck in pre-placement medical questionnaires for two employers and pre-employment medical examinations revealed no functional issues. Evidence provided by supervisors from two prior employers was that the plaintiff had not been observed as having any difficulties performing his work duties referable to neck pain nor was there any complaints made about same.

Specialist medical evidence of Dr Jonathan, neurosurgeon, Dr O'Toole, occupational therapist, and Dr Pentis, orthopaedic surgeon, was considered by the court.

Decision

1. Judgment for the plaintiff in the sum of $5,000.
2. The parties be heard on the matter of costs.

Ratio

The court found the plaintiff to be an unimpressive and unreliable witness who grossly exaggerated the effects of the motor vehicle accident. It was accepted that he had suffered a very minor and transient soft tissue injury to the cervical spine which had resolved completely.

Court of Appeal

Mulivai v Utaileio & Anor [2022] QCA 173

Bond, Dalton and Flanagan JJA, delivered 9 September 2022

Facts

The plaintiff filed a Claim and Statement of claim on 4 February 2021 seeking damages for personal injuries he allegedly sustained while he was a passenger in a vehicle driven by the named first defendant that crashed into a parked prime mover on 14 March 2018.

The second defendant was the compulsory third party insurer of the first defendant and a joint defence on behalf of the first and second defendant was filed on 12 February 2021. Despite an affidavit dated 20 March 2018 and more detailed statement of the first defendant dated 1 February 2019 confirming that he was the driver of the vehicle, it was plead in the Defence that the plaintiff, and not the first defendant, was the driver of the vehicle.

The plaintiff maintained that the first defendant was the driver of the vehicle in a Reply.

On the first day of trial on 3 May 2022, counsel announced appearances on behalf of the Plaintiff. Despite being the legal representatives on record for both the first and second defendant, defendants' counsel only announced appearances on behalf of the second defendant (the CTP insurer). Later that day, the second defendant's counsel sought leave to amend the joint defence to include an alternative scenario, that is that if the first defendant was found negligent in the driving of the vehicle then the plaintiff caused or contributed to the accident by inferring he was going to vomit on the first defendant, placing his hand on the first defendant's arm and striking the first defendant.

The plaintiff argued against the amendments on the basis that it involved 'impermissible assertion of factually mutually exclusive cases' and prejudice. The primary judge allowed the amendment and, after the plaintiff suggested an intention to appeal that decision, adjourned the trial.

Decision

1. The leave to appeal was granted.
2. Appeal allowed.
3. Set aside the order of the District Court dated 5 August 2022 granting leave to amend.
4. The second respondent pay the applicant's costs of the application and of the appeal.

Ratio

It was unanimously held that the order granting leave to amend be set aside for the following reasons:

- Rule 154 of the *Uniform Civil Procedure Rules 1999* (UCPR) allows a party to plead inconsistent facts but only if pleaded as an alternative; however, such pleadings are liable to be struck out if it can be demonstrated that the falsity of one of the pleaded alternatives must be known by the party asserting it.
- If the defence had been a pleading on behalf of the second defendant only it would have been permissible for two positive cases in the alternative to be pled. Here, it was abundantly clear that the defence filed was a joint defence and therefore the first defendant must know the true position (ie. which set of inconsistent facts is false).
- The plaintiff should not have to meet allegations advanced in the joint defence which were embarrassing.

Sutton v Hunter & Anor [2022] QCA 208

Bond JA and Crow and Mellifont JJ, decision delivered 25 October 2022

Facts

The Plaintiff sustained soft tissue injuries and post-traumatic stress disorder (PTSD) following a motor vehicle accident on 15 February 2015. Liability was admitted.

At first instance, the Plaintiff was awarded the amount of $314,345.

When considering economic loss, the trial judge was persuaded by the opinion of Dr Chalk and accepted that the Plaintiff would have re-entered the workforce as a part-time employee gradually increasing to 3 days per week and earning an average income of $240 net per day (inclusive of super) and discounted by 15% for vicissitudes. Based on the opinion of Dr Chalk, the trial judge concluded that, by 2025, the Plaintiff would have been able to return to work without any diminution in earning capacity. Accordingly, future economic loss was only calculated up until 2025 at a loss of 2 days per week.

At the time of trial in 2021, the Plaintiff had not returned to any form of commercial employment despite Dr Chalk stating in his reports in 2017 and 2019 that the Plaintiff could return to some form of gainful employment, at least up to 20 hours a week.

The Plaintiff made a mandatory final offer (MFO) of $310,000 at the Compulsory Conference. The Defendant's MFO was $70,000. By virtue of s 51C of the *Motor Accident Insurance Act* 1994, the Plaintiff sought recovery of her legal costs on an indemnity basis given she 'beat' her MFO at trial.

In *Sutton v Hunter* (No 2) [2021] QSC 268, His Honour ordered costs on a standard basis noting that the medical evidence was substantially different at the trial. His Honour was also critical of the Plaintiff's extravagant claims prior to trial.

The plaintiff appealed the decision to the Court of Appeal.

Decision

1. The appeal is allowed.
2. Vary order 1 made by Freeburn J on 7 October 2021, by deleting the figure "$314,345" and inserting in lieu thereof the figure "$543,988".

3. Vary the chapeau of the costs order made by Freeburn J on 22 October 2021 so that it reads "The second defendant pay the plaintiff's costs on the District Court scale to be assessed on the indemnity basis, excluding".
4. The second respondent must pay the appellant's costs of the appeal, to be assessed on the standard basis.

Ratio

There were several grounds for appeal however the only grounds that the Appellant succeeded were in relation to the calculation of future economic loss and the award of costs.

In relation to future economic loss, the Court of Appeal held that any conclusion that the appellant would have improved to the extent that there would be no diminution in capacity after 2025 could not be supported by the evidence and therefore, the primary judge erred by not making an allowance and award for permanent impairment of earning capacity beyond 2025. Accordingly, the Court of Appeal calculated future economic loss from the time of trial to retirement at a 50% loss of capacity, being $600 per week, for 17 years discounted by 5% giving an amount of $307,000 instead of $77,357, being the amount awarded for future economic loss by the trial judge.

In relation to indemnity costs, the Court of Appeal considered the offers exchanged prior to trial and the differing medical opinions. They unanimously concluded that the respondent's rejection of the Appellant's MFO must have been based on a speculation that her chronic condition would significantly improve and that it was not reasonable or prudent to make that speculation.

Accordingly, the Appellant was entitled to recover her costs on an indemnity basis.

Stimpson v O'Toole & Anor [2022] QCA 194

Bowskill CJ, Mullins JA and Boddice J delivered 7 October 2022

Facts

The applicant's (plaintiff) de factor partner was struck by a motor vehicle while crossing a road on 8 October 2016 causing fatal injuries, from which he passed away the following day. The applicant brought a claim for damages for nervous shock as a result of the accident on 6 September 2019.

Protecting her limitation period, on 24 September 2019 an order was made granting leave to the applicant pursuant to section 57(2)(b) of the *Motor Accident Insurance Act 1994* (MAIA) to commence proceedings within 60 days of the occurrence of certain events (ie. conference and/or service of mandatory final offers). Liability for the accident was admitted on 22 October 2019.

On 15 July 2020 the applicant served another notice of accident claim form for a dependency claim arising from the accident. The reason for the delay in lodgement of same was that it was not until the applicant attended on her solicitors and barrister that she became aware of the possibility of such a claim. The second respondent (the CTP insurer) found the notice of accident claim form non-compliant on the basis that it was lodged outside the three year limitation period and refused to accept the applicant's argument that the order made on 24 September 2019 protected the limitation period for 'all claims' arising from the accident.

Accordingly, the applicant sought various orders, including a declaration that the order made on 24 September 2019 applied to the dependency claim or, in the alternative, leave be granted to amend that order pursuant to rule 376(4) of the *Uniform Civil Procedure Rules 1999* (UCPR) or section 16 of the *Civil Proceedings Act 2011* (CPA) or to amend the existing claim to include the dependency claim.

That application was dismissed, and an order made that the applicant pay the second respondent's costs. The applicant applied for leave to appear against that judgment.

Decision

1. Application for leave to appeal granted and appeal allowed.
2. Set aside the orders made by the primary judge on 29 October 2021.
3. Leave to the applicant pursuant to section 16 of the CPA to amend the claim and statement of claim.
4. The second respondent pay the applicant's costs of the initial application, the application for leave to appeal and the appeal.

Ratio

The first ground of appeal related to the consideration by the primary judge of 'a relevant period of limitation' referred to in rule 376(1) of the UCPR as relating to the three year limitation period of the dependency claim rather than the altered limitation period for the nervous shock claim as a result of the September 2019 order. The applicant argued that even though the only claim that had been made was for nervous shock at the time of the September 2019 order, the order extended to the dependency claim as it fell within the definition of 'motor vehicle accident claim' found in section 4 of the MAIA.

Ultimately the court found the applicant's argument to be inconsistent with the scheme of the MAIA and section 37(1), which required written notice of a claim before proceedings could be brought. Accordingly, the order of September 2019 applied to the claim for damages for nervous shock only and s57(2) did not allow extension of that limitation period for any other claim sought to be made. Therefore, the primary judge was correct in his finding that 'relevant period of limitation' in rule 376(1) of the UCPR referred to the limitation period of three years for the dependency claim that had expired on 8 October 2019

The second ground of appeal related to section 16 of the CPA, which 'replaced' section 81 of the *Supreme Court of Queensland Act 1991*. It was noted that the latter and its relationship with section 376 of the UCPR was considered in the decision of *Draney v Barry* [2002] 1 Qd R 145, which found that the court has general discretion to add a cause of action out time, but exercise of that discretion should have regard to the fact that the effect of allowing such addition evades the provisions of the *Limitation of Actions Act 1974* and accordingly adequate grounds to justify such amendment/s is required.

The parties were content to allow the court to exercise its discretion under section 16(2) of the CPA. In this regard, the applicant argued that the second respondent had notice within the relevant limitation period of her intention to bring a claim for damages (which put it on notice to undertake the necessary investigations), liability had been admitted and it was her solicitors who failed to inform her of the possibility of a dependency claim prior to the expiration of the limitation period. The second respondent argued the relevance of the applicant's inability to rely on rule 376 of the UCPR, the professional negligence claim that could be made against her solicitors and that it should not be denied a *Limitation of Actions Act 1974* defence to the claim.

Weighing up all of the factors argued, the court found that the interests of justice favoured the granting of leave to the applicant pursuant to section 16 of the CPA to amend the proceedings as requested.

Interstate Decisions

Davie v Manuel [2022] WADC 91

Petrusa DCJ, delivered 26 October 2022

Facts

On 26 June 2015, the Plaintiff was involved in a single vehicle accident when the car she was driving slid off a gravel road, causing her to suffer severe injuries. The vehicle was owned by the defendant who operated a backpacker's hostel where the plaintiff was staying. The defendant allowed the vehicle to be used by hostel residents. The Plaintiff contended that the defendant owed duty of care, whether under common law or under a contract, to ensure the vehicle was defect free. The plaintiff alleged the vehicle did not have a working speedometer (the defect) which caused or materially contributed to the accident.

Decision

The Plaintiff's claim was dismissed.

Ratio

The defendant owed the plaintiff a common law duty of care to ensure the vehicle would be property maintained such that it could be safely driven. There was no similar duty owed under contract as the contractual relationship did not extend to the provision of a vehicle.

The Court was satisfied that the speedometer was not working prior to the accident and that the defendant ought to have been (but was not actually) aware of this. The Court went on the conclude that the accident was caused by the plaintiff driving too fast to maintain control of the vehicle around a bend. However, the Court was not satisfied that any defect associated with the absence of a working speedometer caused or materially contributed to the accident.

In this regard, the plaintiff's evidence that she made decisions about the suitable speed based solely on the speedometer was rejected. The Court emphasised that a driver must drive to the conditions, taking into account a variety of factors. In the circumstances, the Court found that had the plaintiff had a working speedometer and knew her precise speed she would not have changed her manner of driving. On this basis, the defendant's breach of duty in loaning the car to the plaintiff without a working speedometer did not cause or materially contribute to the accident.

Glavocevic v Issa [2022] NSWDC 2022

Russell SC DCJ, delivered on 10 June 2022

Facts

The 55 year old male plaintiff brought a claim for damages for broken right tibia, lower back and right foot injury sustained in a motor vehicle accident on 30 November 2017. He was driving an eight ton truck in the course of his employment when a tipper truck coming

towards him lost control. The 'dog' of the tipper truck swung out and collided with considerable force with the front driver's side corner of the plaintiff's truck. As a result of the collision, the plaintiff's right leg became trapped between the damaged side of the truck and the steering column with his knee jammed between pieces of metal.

The plaintiff underwent an open reduction internal fixation of the fractured right tibial plateau with bone grafting and was completely non-weight bearing until late January 2018 when he was touch-down weight bearing while using two crutches. He underwent physiotherapy treatment and by late March 2018 was just using one crutch away from home. In early May 2018 he returned to sedentary work four hours a day two days a week while using a walking stick.

The plaintiff's evidence was that it was at the time when he returned to work that he first noticed pain in his right foot. Radiology revealed a Freiberg's (disease of the bone and form of avascular necrosis) infraction in the second metatarsal head with associated synovitis and early degenerative change. He then underwent a right second MTP joint hemiarthroplasty, which was funded by the workers' compensation self-insurer.

The major issue in contention between the parties was whether the right foot injury was causally related to injuries suffered in the accident.

Decision

1. Judgment for the plaintiff against the defendant for $831,502.31.
2. The Defendant pay the plaintiff's costs.

Ratio

The court accepted that there was no evidence of direct trauma to the right foot in the accident and it was plain that there was no pain in the right foot prior to May 2018 when the plaintiff graduated from crutches to a walking stick and returned to work.

With respect to causation, the court considered the evidence of three orthopaedic specialists and ultimately accepted the majority opinion that the plaintiff's altered gait pattern caused by the right knee and lower back injuries sustained in the accident could have led to development of right foot problems.

Osman By His Tutor Osman v Clement [2022] NSWDC 385

Abadee DCJ, delivered on 31 August 2022

Facts

The plaintiff was a 19-year-old provisional licence holder driving a blue Toyota Starlet Hatch. He drove his vehicle into an intersection after or around the time the lights changed from orange to red. It was not contested that he entered the intersection 'late'. The plaintiff was travelling straight through the intersection approximately one car length behind a white vehicle that safely proceeded through the intersection before him. The defendant was driving a 6.4 tonne Iveco Prime Mover. He was travelling in the opposite direction with the intention of turning right across the lane that the plaintiff was travelling.

The defendant was stationary in the centre of the intersection waiting for a gap in the traffic. The white vehicle passed through the intersection and, following this, the defendant proceeded across the intersection into the path of the plaintiff's vehicle causing the collision.

The defendant stated in his police statement shortly following the accident that he had a clear view of the plaintiff's car but thought that the car was going to stop.

The plaintiff suffered serious physical injuries, including a traumatic brain injury. He had no recollection of the accident.

Decision

1. The defendant breached his duty of care to the plaintiff;
2. The plaintiff was guilty of contributory negligence apportioned at 50%; and
3. Damages and funds management in the sum of $1,977,406 reduced to $988,703.

Ratio

The principal issues for the Court's determination were whether the defendant breached his duty of care and, if so, the extent to which the plaintiff was guilty of contributory negligence.

In relation to breach of duty of care, His Honour held that the proper focus was not on whether the plaintiff entered the intersection late but on the defendant's conduct in the circumstances he was faced with, which included his perception of the plaintiff's vehicle. His Honour held that the defendant saw the plaintiff's vehicle before it entered the intersection. It was noted that, given the height of his vehicle, the defendant had an unrestricted view and was, or should have been, aware of the plaintiff's vehicle and the possibility that it might proceed through the intersection. Also, given the position of the plaintiff's blue vehicle in relation to the white vehicle, and that the plaintiff was making no obvious signs that he was preparing to stop, the risk of injury from attempting the turn was both foreseeable and not insignificant.

The road rules require the defendant to only make the right turn in circumstances where he could safely do so. To safely turn right he must satisfy himself that he would not collide with vehicles travelling straight through the intersection. His Honour held that even if the plaintiff acted unreasonably in attempting to proceed through the intersection, this did not justify the defendant completing the right turn without satisfying himself, rather than assuming, that he could safely do so.

Accordingly, it was held that the defendant breached his duty by failing to keep a proper lookout when attempting to turn his truck.

Contributory negligence was apportioned at 50% after taking into consideration the conduct of each party and the comparative size of the vehicles. The plaintiff faced a significantly greater risk of harm relative to the driver of a prime mover and therefore the defendant's causal contribution was higher than the plaintiffs.

There was little dispute on quantum.

Collins v Insurance Australia Ltd [2022] NSWCA 135

Meagher JA, Kirk JA, Basten AJA, delivered 2 August 2022

Facts

Between about 1pm and 1:30pm on 17 August 2014, the driver of a motor vehicle crossed onto the wrong side of the road on the Kings Highway, south-east of Canberra, and collided with another vehicle. At about 2pm, Ms Collins was driving west on the Kings Highway, approximately 1km to 2km from the site of the original accident. After a long blind bend in the

road, she was confronted with a line of stationary vehicles that extended from the original accident. To avoid a collision with the rear-most vehicle, Ms Collins steered her vehicle up the embankment on the left side of the road, causing it to overturn. She suffered injuries.

By the time Ms Collins commenced proceedings in the District Court, the driver who caused the original accident had died. Her claim was brought against the driver's compulsory third-party insurer, Insurance Australia Ltd.

At trial, the primary judge held that the insurer was not liable for Ms Collins' injuries. The judge found that the insurance policy did not cover the claim because Ms Collins' injuries were not the result of a "dangerous situation caused by the driving of the vehicle" under s 3A(1)(d) of the Motor Accidents Compensation Act.

Ms Collins appealed. On appeal, the issues were:

The primary judge erred in finding that Ms Collins was 50-65m away from the rear-most vehicle when she first saw the queue of stationary vehicles;

Ms Collins' injuries resulted from a "dangerous situation" caused by the insured driver's driving of his vehicle;

The insured driver owed Ms Collins a duty of care;

The insured driver breached a duty owed to Ms Collins; and

Ms Collins was contributorily negligent.

Decision

1. The orders of the District Court were set aside.
2. Judgement for the plaintiff in an amount of $200,000 and for it to take effect on 2 August 2021.
3. The defendant pay the plaintiff's costs of the trial and that the respondent pay the appellant's costs.

Ratio

Distance of Vehicle

Basten AJA held (Meagher and Kirk JJA agreed) that the primary judge did not err in finding that Ms Collins was 50-65m away from the rear-most vehicle when she first saw the queue of stationary vehicles.

Dangerous situation

Basten AJA held (Meagher and Kirk JJA agreed) that the heavy traffic as a result of the original accident, caused by the insured driving, was a "situation" within s 3A(1)(d) of the Motor Accidents Compensation Act.

Whether a situation is "dangerous" is dependent upon the state of affairs immediately prior to the injury. It was found that the queue of stationary vehicles was not visible until within 50-65 meters, that the existence of the queue could not have been anticipated, it was not necessary for a driver to drive less than 60km/hr where the speed limit was 90km/hr, there was no sign advising a lower speed limit and a car driving at 60km/hr could not stop in time without difficulty, which consequently constituted a "dangerous situation".

Duty of care

Basten AJA held (Meagher agreed) that a negligent driver who causes a collision on a regional highway creates a risk of injury to others who were not involved in the original collision.

Kirk JA held that the insured driver created a dangerous situation by putting an obstacle in the path of subsequent vehicle. The insured driver owed a duty of care to other road user's, such as the appellant, despite the distance in time and space between the original collision and the appellant's accident.

Breach of duty

Kirk JA held that the trial judge focused on the precise mechanism by which harm occurred, but whether there was a geographic connection between two accidents was irrelevant to the likelihood of the foreseeable risk of harm eventuating. Basten AJA held (Meagher agreed) that the consequential risks from a collision on a two-lane highway were foreseeable and not insignificant and a reasonable person in the insurer driver's position, would have taken precautions.

Contributory negligence

Basten AJA held (Meagher and Kirk JJA agreed) that the driver of the rear-most vehicle in the queue and the vehicle behind the plaintiff were able to avoid a collision and injury, therefore the plaintiff was 20% contributorily negligent.

Reynolds v Patel [2022] VSC 211

Tsalamandris J, delivered 29 April 2022

Facts

The plaintiff was a cyclist riding in the designated bike lane eastbound along Olympic Boulevard, Melbourne. The plaintiff gave evidence that he was riding at the pace of someone running. At the time there was high congestion in the area as the Australian Open was on. An Uber vehicle driven by the defendant was also in the eastbound lane of Olympic Boulevard directly adjacent to the bike lane. Due to the heavy traffic congestion the vehicles travelling in this lane were either stationary or moving very slowly. Mr Luna had booked the uber to take him to 30 Olympic Boulevard.

The uber was stationary and had not reached the designated uber/taxi pull in lane. Mr Luna was seated in the rear left side of the uber. He asked the driver, 'Is this OK?' At this time the driver swiped his uber app to terminate the fare. The driver did not put on any hazard lights or indicators. Mr Luna then proceeded to open the rear left side passenger door directly into the path of the plaintiff. The plaintiff collided with the door and sustained injuries.

Decision

1. The defendant was found to be negligent, and the plaintiff was not contributorily negligent for this accident.

Ratio

This was a liability only trial.

Mr Luna gave evidence that the driver of the uber did not give him any warnings, advice or instructions before he exited the vehicle. The Court held that the defendant driver could see

the surroundings in the rear-view and wing mirrors and was in a position where he could have checked for any hazards. A reasonable driver would have given such warnings in the circumstances.

Further, it was held that a reasonable driver would have also put on the hazard lights or indicators to warn other road users of the passenger's intention to exit the vehicle.

The driver did not give evidence and therefore the rule in Jones v Dunkel (1959) 101 CLR 298 permitted the Judge to draw an adverse inference that his evidence would not have assisted his defence.

Accordingly, the driver did not take reasonable steps in response to a foreseeable risk of injury and his failure to do so constituted a breach of his duty of care to the plaintiff.

The defendant argued that the plaintiff was riding too fast for the circumstances. There was no evidence led by the defendant regarding the speed the plaintiff was travelling at. In the absence of any hazard lights, indicators or an ajar door, the plaintiff had no reason to anticipate that the door would open in front of him. Further, he was riding in the designated bike path. No discount was applied for contributory negligence.

Seward v Transport Accident Commission [2022] VSC 137

O'Meara J, delivered 23 March 2022

Facts

On 2 June 2015 the female plaintiff was driving on the Warburton Highway at Woori Yallock when her vehicle slid on oil or diesel on the surface of the road and collided with an oncoming vehicle. She brought a claim for personal injuries arising from the accident.

The salient matter for the court to consider was whether the substance on the highway was due to the negligence of the driver of an unidentified vehicle. While the plaintiff argued that the oil or diesel was unlikely to have occurred without negligence of the driver of an unidentified vehicle, the defendant argued that there were 'so many variables at play' that it was impossible for the court to make such a finding.

The four other users of the road gave their own suppositions as to the origin of the trail of oil, including coming from machinery on the back of a truck, bulldozer or similar on the back of a low loader, drums of diesel on the back of a truck or trailer or any number of other possibilities.

Decision

1. The plaintiff's claim be dismissed.

Ratio

The court noted that the claim was dependent on inferential reasoning as considered in the High Court in *Bradshaw v McEwans* (1951) 217 ALR 1, which held that:

> …. where direct proof is not available it is enough in the circumstances appearing in the evidence give rise to a reasonable and definitive inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture.

The parties also referred the court to several other decisions involving competing inferences and the *res ipsa loquitur* principle (RIL principle). In *Lafranchi v Transport Accident Commission* (2006) 14 VR 359 Maxwell P and Neave JA recognized conditions of the RIL

principle to be that there must be an absence of explanation of occurrence that caused the injury, the occurrence must have been of such a kind that it does not ordinarily occur without negligence and the instrument or agency that caused the injury must have been under the control of the defendant.

The court accepted that there was a significant trail of oil or diesel near the middle of the left hand lane over a distance of several kilometres of the road that must have been deposited by an unidentified vehicle shortly prior to the accident. It was noted; however, that from the possible origins of the oil or diesel postulated by the witnesses (which the court believed extended well beyond those identified) there were still a litany of reasons for how it came to be on the road not necessarily involving the driver of the unidentified vehicle (ie. fuel cap left off, damage in transit etc).

Ultimately it was decided that on the evidence there were too many potential scenarios consistent with the driver of an unidentified vehicle having no negligence in liability. The plaintiff had therefore failed to establish on the balance of probabilities that her injuries were a result of the negligence of an unidentified driver.

RBK v Montague [2022] VSCA 183

Beach, Niall and Macaulay JJA, delivered 31 August 2022

Facts

On 7 January 2012, the applicant was found unconscious in the backseat of a vehicle. The vehicle had been parked in a street in Brighton, near the address of Mr Montague, the first respondent.

In the two days prior, the applicant had purchased heroin from the first respondent and had injected it in his company. Within minutes of the injection, the applicant fell unconscious, and the first respondent moved her onto the back seat of the vehicle. The first respondent then drove to his residence and left the parked vehicle with its windows up. During the two days that the applicant lay unconscious in the vehicle, the outside air temperature exceeded 40 degrees.

The applicant alleged that she had suffered injuries as a result of being left in the vehicle including cardiac arrest, bilateral pulmonary emboli, heatstroke, multiple organ failure, hypoxic brain injury, and paraplegia.

Decision

1. Appeal allowed.

Ratio

In dismissing the applicant's proceeding at first instance, the trial judge had focused upon the fact that the applicant was sitting in the vehicle when she was injected with heroin. His Honour had described the vehicle as being used at that time as 'a place or receptacle in which to inject [the applicant] with heroin'; and noted that such an activity 'was not incidental to a normal use of the vehicle as a motor vehicle'.

At trial, it had been held that the agreed facts did not establish 'if or when [the applicant's] injuries were a cause of [her] unconscious and immobile state'. His Honour rejected the applicant's submission that she continued to use the vehicle as a passenger until she was

found on 7 January 2012. His Honour considered that the applicant did not remain in the vehicle on 6 and 7 January 2012 'as an incident of its use or a journey'.

The applicant's primary case was that her injuries arose out of the first respondent's use of the vehicle in driving the vehicle to the place where he parked it, in the open, with its windows up, exposing the applicant to the excessive heat generated inside the vehicle, and leading to the applicant suffering heatstroke and the other injuries she sustained. She contended that there was a non-coincidental nexus between the use of the vehicle and her injuries. She further submitted that, but for the first respondent driving the vehicle and parking it in the place he parked it and exposing her to the heat that parking it in that place exposed her to, she would not have suffered injury. She also submitted that, but for her use of the vehicle as a passenger as described above, again she would not have suffered injury.

The second respondent's position was that the trial judge was to reject the applicant's submission that she continued to use the vehicle as a passenger until she was found, correct when he distinguished Dickinson and May, and correct when he concluded that the applicant (unlike the injured children in Dickinson and May who were in their respective vehicles, either in the course of a temporarily interrupted journey, or in anticipation of a journey) was in the vehicle 'because she was abandoned there in an unconscious and immobile state'.

On appeal, the Court held that that whilst it might be said that injuries arose out of some non-normal use of a motor vehicle, it does not mean that the same injuries cannot also be said to have arisen out of some other (and, in this case, later in time) use of the vehicle as a motor vehicle. As was made plain in Dickinson, there must be a causal or consequential relationship between the use of the vehicle and the injury, but the search is not for a single, predominant, or main cause. The purpose of the words 'arising out of' is to expand the scope of the relationship and not merely replicate the words 'caused by'.

Similarly, a conclusion that the applicant's injuries arose out of her being abandoned in the vehicle, does not foreclose the question of whether they also arose out of some other use of the vehicle as a motor vehicle – such as, for example, the first respondent's use of the vehicle in driving it to the place where he parked it in Brighton.

The Court of Appeal formed the view that the applicant's injuries arose out of the first respondent's use of the vehicle in driving it to and parking it in the location in which it was parked in Brighton, resulting in the applicant being exposed to excessive heat within the vehicle and thereby causing injury to her. It was considered that the temperature within the car was plainly a consequence of the physical features of the vehicle and the driver's decision to park it outside and exposed to the elements. Their Honours saw no relevant distinction between the cases in Lamont and Hoffman involving instances in which cyclists collided with parked cars, and the appellant's case.

Further, the Court rejected the contention that the fact that the first respondent had been absent from the vehicle for more than some short period of time, caused an impediment to concluding that the applicant's injuries arose out of the first respondent's use of the vehicle.

The Court noted that it would have also concluded that the applicant's injuries arose out of her use of the vehicle as a passenger when it was driven to the place at which it was parked in Brighton — irrespective of whether the applicant was using the vehicle as a passenger from that time until the time she suffered injury. It was considered that the journey had not ended for the applicant as she had remained a passenger in the vehicle.

Walker v Smith [2022] VSC 188

Forbes J, delivered 14 April 2022

Facts

The plaintiff was a pedestrian struck by a vehicle in 2017. He sustained a significant injury to his left ankle and injuries to his right shoulder and arm. He had not returned to work as a welder/labourer at the time of trial. Quantum was agreed at $600,000.

In the hours prior to the accident, the plaintiff consumed approximately 16 pots of beer. His blood alcohol concentration was 0.228%.

He was walking home from the hotel along the left side of Station Street, Rushworth. He was walking with his back to the oncoming traffic and wearing dark clothing. This is the same road he frequently walked on to get home from the hotel. He gave evidence that he would walk on the edge of the road because there were no footpaths, and it was the easiest way to walk on this particular road. The edge of the road was poorly defined and dimly lit with streetlights. During the trial, there was a visit to the area of the accident.

The road was straight and level for approximately 150 to 250 metres before the point of impact. There were differing versions between the plaintiff and the defendant of where the incident occurred and how it happened.

The driver gave evidence that he was driving with his high beam lights on and travelling at 60 km per hour. He says that when he observed the plaintiff he was not walking, rather he was ‘just standing there’. He estimated that he first saw the plaintiff at 50m away. The defendant gave evidence that he tried to avoid hitting the plaintiff, but he was so late in observing the plaintiff that he couldn’t avoid hitting him or braking.

The plaintiff submitted that he was not moving laterally across the path of the vehicle. He was walking in the same direction as the defendant’s vehicle on the edge of the road. There was no sudden last-minute movement by the plaintiff to explain why the defendant did not observe him until the last moment.

Decision

1. Negligence of the defendant was apportioned at 30% with contributory negligence of the plaintiff at 70%.

Ratio

The case came down to identifying when a driver, keeping a proper lookout, ought to have become aware of the presence of the plaintiff on the roadway.

Given the plaintiff’s level of intoxication, Her Honour held that his evidence as to the precise details and location of the incident could not be preferred over that of a sober driver.

Her Honour applied simple calculations to the defendant’s evidence, namely that he was travelling at 60 km per hour and first saw the plaintiff at 50 metres. Based on this, she calculated that the defendant had a 3 second window to respond from when he first saw the plaintiff. The fact that the defendant described the pedestrian’s appearance as ‘sudden’ and he had insufficient time to brake suggests an observation period not much more than a fraction of a second.

This led Her Honour to conclude that the defendant was not keeping a proper lookout as to the road ahead immediately prior to the collision. Had he done so, he would have had opportunity to slow and swerve.

Singh v Ward [2022] VSC 155

Gorton J, delivered 29 March 2022

Facts

After spending the day in Sorrento and Queenscliff with family and a friend on New Years Eve 2014, the male plaintiff was driving back to Melbourne along Peninsula Link. His two year old daughter became unsettled and he pulled over in the emergency lane at a point where there was a gentle sweeping bend to the right so his friend to take over driving.

The plaintiff got out of the vehicle and as he was walking towards the front, he was struck from behind by a vehicle travelling at 100km/hr driven by the defendant.

The dispute between the parties was where the plaintiff stopped his vehicle and whether it was in a safe place and whether the defendant drove across the emergency lane or the plaintiff stepped into the northbound lane of the highway.

The plaintiff tendered a police photograph taken while he was being attended to by the ambulance officers which showed the right half of his vehicle in the emergency lane and the left half on the open grassed area to the left of the emergency lane. He gave evidence that this was the position his vehicle was in at the time he was struck, which was supported by the others in his vehicle and an independent witness.

The defendant asserted; however, that the plaintiff's vehicle had been approximately 300m back along the highway, where the left edge of the emergency lane meets a few feet of concrete and then a cable safety barrier.

Decision

1. Judgment for the plaintiff for the agreed amount of damages with a reduction of 10% for contributory negligence.

Ratio

Based on the evidence, the court found that the plaintiff has stopped in the emergency lane due to being distracted by his crying baby. The accident occurred at a point beyond the cable safety barrier where there was grass to the left of the plaintiff's vehicle and sufficient room for him to exit the vehicle entirely within the emergency lane. When he did exit, he remained in the emergency lane.

It was also found that the cause of the accident was momentary loss of concentration by the defendant, which caused his vehicle to drift from the northbound lane into the emergency lane. In this regard, the defendant failed to take reasonable care. Notably the court found that in whichever position the plaintiff's vehicle was parked, there was ample room for him to open the driver's door, get out and walk around the front of his vehicle without encroaching on the left lane of the highway (though with less space if it was parked as contented by the defendant).

Interestingly, while the court found that the plaintiff had not acted unreasonably in parking where he did, he could have moved the vehicle further to the left so that it was perhaps

almost entirely on the grass verge, tasking into account the risk arising from other drivers on the highway. Accordingly, a finding of 10% contributory negligence was made.