

# SUPREME COURT OF QUEENSLAND

CITATION: *Downie & Anor v Spencer* [2019] QCA 212

PARTIES: **NOEL STANLEY DOWNIE**  
(first appellant)  
**AAI LIMITED**  
ABN 48 005 297 807  
(second appellant)  
v  
**CHRISTOPHER JOHN SPENCER**  
(respondent)

FILE NO/S: Appeal No 4993 of 2019  
SC No 12677 of 2016

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Rockhampton – [2019] QSC 98 (Crow J)

DELIVERED ON: 11 October 2019

DELIVERED AT: Brisbane

HEARING DATE: 30 August 2019

JUDGE: Morrison and Philippides JJA and Boddice J

ORDERS: **1. The appeal be dismissed.**  
**2. The parties have leave to deliver any submissions on costs, within seven days.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE’S FINDINGS OF FACT – where the respondent sustained personal injuries after he lost control of his motorcycle whilst travelling along a highway – where the respondent alleged that he lost control of his motorcycle as a consequence of having to avoid a collision with a vehicle being driven negligently by the first appellant – where the respondent alleged the second respondent was liable as the insurer – where the respondent filed a claim and statement of claim claiming damages for personal injuries from both appellants – where the primary judge gave judgment in favour of the respondent finding that his personal injuries were occasioned by the negligence of the first appellant – where the primary judge also found the respondent was not contributorily negligent – where the appellants appeal those findings – whether the findings are inconsistent with the evidence and

compelling inferences to be drawn from that evidence

*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, cited  
*Lee v Lee* (2019) 93 ALJR 993; [2019] HCA 28, cited  
*Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679;  
 [2016] HCA 22, cited

COUNSEL: G W Diehm QC, with K J Kluss, for the appellant  
 B Walker SC, with P L Feely, for the respondent

SOLICITORS: McConaghy Lawyers for the appellant  
 McInnes Wilson Lawyers for the respondent

- [1] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the orders his Honour proposes.
- [2] **PHILIPPIDES JA:** I agree with the orders proposed by Boddice J for the reasons given by his Honour.
- [3] **BODDICE J:** On 21 February 2013, the respondent sustained personal injuries after he lost control of his motorcycle whilst travelling along the Burnett Highway near Eidsvold in the State of Queensland (“*the incident*”).
- [4] On 6 December 2016, the respondent filed a claim and statement of claim claiming damages for personal injuries from the first and second appellants in respect of the incident. The respondent alleged that he lost control of his motorcycle as a consequence of having to avoid a collision with a Kenworth T401 truck and dog trailer being driven negligently by the first appellant. The respondent alleged the second respondent was liable as the insurer of that truck and trailer.
- [5] On 12 April 2019, the primary Judge gave judgment in favour of the respondent finding that his personal injuries were occasioned by the negligence of the first appellant. The primary Judge also found the respondent was not contributorily negligent.
- [6] The appellants appeal those findings. At issue is whether the findings are inconsistent with the evidence and compelling inferences to be drawn from that evidence.

### **Background**

- [7] The respondent is a 51 year old electrical tradesman. He was aged 45 at the time of the incident. He was an experienced motorcycle rider.
- [8] The first appellant is a truck driver with over 45 years’ experience, driving all types of trucks from body trucks to B doubles. At the time of the incident he was working for a fuel company delivering fuel in central Queensland. On the day of the incident he was driving a loaded fuel truck with an attached dog trailer.
- [9] The incident occurred on a straight stretch of road adjacent to the entrance to a private property being operated as a fuel depot. The respondent came to rest in a drain located on the side of the road near the driveway into that private property.
- [10] At trial, it was not in dispute that at the time of the incident the first appellant was intending to turn right from the highway into the driveway entrance of that private

property. It was also not in dispute that the respondent came to rest in the drain as a consequence of having lost control of his motorcycle.

- [11] At issue was whether the respondent lost control of his motorcycle when the first appellant commenced to enter the right-hand lane of the highway without indicating his intention to do so, or whether the respondent lost control of his motorcycle as a consequence of travelling at excessive speed and over-breaking when he realised the first appellant had his indicators on, signalling his intention to turn right.

### **Pleadings**

- [12] The respondent pleaded the following version of the incident in the Statement of Claim:

“At or about 7.45am on 21 February 2013 (“date of accident”):

- (a) The Kenworth T401 was travelling in a southerly direction on the Burnett Highway near Eidsvold;
- (b) The Yamaha motorcycle was travelling in a southerly direction along the Burnett Highway behind the Kenworth T401;
- (c) As he came up behind the Kenworth T401 the Plaintiff moved towards the centre line and checked the path ahead to determine whether it was safe to overtake the Kenworth T401;
- (d) There were no vehicles travelling the Northbound Lane;
- (e) As it appeared to be safe to overtake, the Plaintiff activated the right indicator on the Yamaha motorcycle and commenced to overtake the Kenworth T401 and trailer on the right hand side;
- (f) As the Plaintiff commenced to overtake the Kenworth T401 and trailer, the First Defendant caused the Kenworth to start a right hand turn toward a private driveway on the western side of the Burnett Highway;
- (g) After observing the Kenworth T401 and trailer starting to turn to the right, the Plaintiff braked heavily to avoid a collision with the Kenworth T401 and lost control of the Yamaha motorcycle;
- (h) The Yamaha motorcycle skidded off the right hand side of the road and landed in a drain on the side of the road and the Plaintiff suffered personal injuries.”

- [13] By way of defence, the appellants admitted each of the allegations in (a), (b), (d) and (h) in the preceding paragraph but did not admit paragraphs (c), (e) and (g). The appellants denied paragraph (f) stating:

“Deny that the First Defendant commenced a right turn as the Plaintiff commenced the subject overtaking manoeuvre on the grounds that the First Defendant had not commenced the right turn (but had indicated an intention to do so) prior to the Plaintiff attempting the overtaking manoeuvre. The Defendants admit that the First Defendant’s intention was to execute a right-hand turn into a private driveway on the Burnett Highway.”

[14] The respondent's pleaded case in negligence was that the incident was caused by the negligence of the first appellant in:

- “(a) Failing to activate the right indicators on the Kenworth T401 and trailer in order to indicate his intention to other road users, especially any following vehicles;
- (b) Failing to keep any or any proper lookout for vehicles behind the Kenworth T401 and trailer by use of rear view mirrors or otherwise generally and, in particular, before commencing to turn right to ensure it was safe to do so, especially in a 100 kilometre per hour zone on a highway;
- (c) Attempting to turn into private property when it was not safe to do so;
- (d) Failing to exercise proper care and control in the driving and management of the Kenworth T401 and trailer.”

[15] The appellants denied that the first appellant was negligent, alleging:

- (a) The First Defendant activated the right indicators of the Kenworth T401 prior to commencing the right-hand turn;
- (b) The First Defendant kept a proper lookout for vehicles behind the Kenworth T401 prior to commencing the right-hand turn;
- (c) The First Defendant turned into private property only when satisfied that it was safe to do so and after the Plaintiff's Yamaha motorcycle had skidded off the right-hand side of the road and landed in the drain on the side of the road;
- (d) The First Defendant exercised proper care and control in the driving and management of the Kenworth T401 and complied with the relevant road rules at all times;
- (e) The accident was caused solely by the negligence of the Plaintiff particulars of which are as follows:
  - (i) Attempting an overtaking manoeuvre in circumstances where it was unsafe to do so;
  - (ii) Travelling at a speed which was excessive in the circumstances;
  - (iii) Failing to observe the right indicators displayed by the Kenworth T401;
  - (iv) Failing to maintain control or any proper control of the Yamaha motorcycle.

### **Evidence**

[16] The respondent gave evidence that on the day of the incident he was travelling from his home to his place of employment. He had left home about 10 minutes later than he wanted to leave and travelled down the Burnett Highway, taking his usual route. There was very little traffic. He estimated he had passed one other vehicle.

- [17] As the respondent came around a bend, approaching Eidsvold, he noticed a truck about 100 to 200 metres ahead. He could not estimate its speed. He described events thereafter:

“Came up behind the truck for split-second, I guess, slowed down, I didn’t have to brake, came up behind it for a split-second, noticed no brakes or indicators on the truck, put my indicator on before looking – because I had pulled behind the truck because there’s a dip just down the road which can potentially hide a car, so thus me not overtaking the truck straightaway. So I briefly pulled in behind the truck, saw that there was no cars in that dip, put my indicator on, proceeded to – accelerated – proceeded to overtake the truck. As I got just before the back of the truck, about level with the wheels of the dog on the truck, I noticed that the front of the truck was starting to encroach into my lane as I was overtaking. I look at that split-second to make sure that there was no indicators on, he wasn’t just wandering and then I saw the farmer’s driveway and I thought “Oh my God, this guy is going into this driveway”. That’s when I thought I was going to head straight under the truck, so [I] applied the brakes and tried to steer out of the way because I knew the front of the truck was going to end up right in front of me. At some point, the bike must have fallen over and I must have lost consciousness because I don’t remember anything after that except for getting walked out of the ditch.”<sup>1</sup>

- [18] The respondent confirmed in evidence in chief that his most recent recollection prior to losing control was “looking for indicators on the truck and watching the front of the truck come across the white line in front of me”. He was “confident” he saw those things.<sup>2</sup>
- [19] In cross-examination, the respondent accepted that when he was later interviewed by police (whilst in hospital), he told police he was running late but said he was running late every morning. He accepted he had told police he was not sure of the speed limit on that part of the road but said it was a main road and “it’s always 100”.<sup>3</sup> The respondent also accepted he told police he had passed another vehicle prior to the incident, which he estimated was doing 90 kilometres per hour.
- [20] The respondent agreed he had accepted a suggestion from the police officer that the respondent could have been doing about 120 kilometres per hour when he overtook that vehicle which was some distance from the incident.<sup>4</sup> The respondent said he could possibly have done that speed “for that split second while I went past him”.<sup>5</sup> He agreed his speedo cable was broken at the time. He accepted his motorcycle probably could travel at 180 kilometres per hour maybe even faster.
- [21] The respondent accepted that the vehicle he had overtaken at that time was a car and trailer. He did not accept he overtook it on a bend, crossing over double white lines

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<sup>1</sup> T1-10/5-10.

<sup>2</sup> T1-15/25.

<sup>3</sup> T1-72/33.

<sup>4</sup> T1-75/23.

<sup>5</sup> T1-75/29.

whilst raising up on one wheel. The respondent had “never done one in my life and going on the bend would have been even a greater feat”.<sup>6</sup>

- [22] The respondent did not accept that he told the police officer at the hospital that he had had to slow down behind the truck before he could get to the straight to overtake him. He denied following the truck for some distance or that he came across it suddenly. The respondent said as he came around the corner, the truck was between 150 and 200 metres further down the road. He denied the truck was 500 metres away and stationary near the driveway when he came around the corner.
- [23] The respondent said he told the police officer he was travelling at 90 kilometres per hour as he was passing the truck. The respondent may have slowed down to 40 or 50 kilometres per hour before commencing to overtake the truck. He was only behind the truck for one second or a split second, just enough to have a clear view of the road ahead.
- [24] The respondent accepted his braking left a skid mark on the roadway. The start of the skid mark was just to the right of the centre dotted white line. It was possible the truck was further over towards the grass and that was why the respondent was so close to the white line in the first place. The respondent said it would not be uncommon for somebody to pull over to the left to do a right-hand turn. The respondent did not accept the truck and dog trailer would have taken up most of the left hand lane of the roadway.
- [25] The respondent denied that he was within centimetres of colliding with the side of the truck. The respondent denied that at the time of losing control the truck was stationary waiting to turn into the driveway. The truck and trailer had started a turning manoeuvre. The respondent denied leaving a long skid mark in the centre of the lane some 200 metres back from the driveway to the private property. He denied the truck had its right-hand indicators flashing at that time.
- [26] The respondent accepted he left a continuous skid mark close to the driveway. The motorcycle flipped on its side, knocking him unconscious, at about the point at which the skid mark ended, which was shortly prior to the driveway entrance. The respondent accepted that, in his interview, police indicated there was a “real flat spot” in his back wheel which had gone through to the metal.<sup>7</sup> That suggested his tyre had locked up. A motorcycle would not usually leave skid marks once it has laid down on the roadway.
- [27] The first appellant gave evidence that on the day of the incident he was carting fuel in the Kenworth T401 tanker with attached dog trailer. He estimated the length of the entire vehicle (with trailer) at 30 to 33 metres. The vehicle was about eight foot wide. The combined unit was carrying 28,000 litres of fuel.
- [28] The first appellant said he regularly travelled to that private property. He would go there every week with fuel. On occasions, he left the dog trailer at that property whilst he undertook farm deliveries. He had been travelling to Eidsvold and Mundubbera for 40 years. He had driven along that highway nearly every day of every working week. He agreed he had undertaken that journey some thousands of times. As he was driving

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<sup>6</sup> T1-82/2-3.

<sup>7</sup> T1-91/5-6.

a dangerous vehicle, he undertook a pre-start check every morning, including checking the indicators. He described the truck as in “Mickey Mouse condition”.<sup>8</sup>

- [29] The first appellant said he left Monto at about 6.20 or 6.30 on the morning in question. The private property was his first stop. He arrived at it at about twenty or quarter to eight that morning. The property was about three quarters of the way along a long straight of the highway, a distance of about 500 metres from an earlier bend in the road. He would have been travelling at about 70 kilometres per hour when he came around that bend. When asked what he did next, the first appellant replied, “Well you just go back a gear and you put the engine brakes on and start slowing down because you know you’re going to turn off”.<sup>9</sup> The first appellant said, “that’s what I would have done” that day.<sup>10</sup>
- [30] The first appellant said the turn into the private driveway was not easy with an attached dog trailer. It was necessary to slow down and be nearly stopped so that you could go straight into the driveway. If you turned too sharply the weight of the dog trailer would push you out of focus. When asked whether he had at some stage applied the right-hand indicators, the first appellant replied, “You apply the right before you turn off, probably 200 metres before”.<sup>11</sup> The first appellant said he recalled doing that that day. There were 14 LED flashing type indicator lights on the truck and dog trailer combined, representing seven indicator lights on each side of the truck.
- [31] The first appellant said when he applied the indicators there were no other vehicles coming in either direction. He first noticed another vehicle when the motorcycle was beside him. At that stage, his truck was probably 100 metres from the driveway entrance. He would have been doing about 10 kilometres per hour. The first appellant said he noticed, when he was slowing down, a motorcycle coming beside him. The next minute it was laying over on its side and skating down the road.
- [32] The first appellant estimated his truck and dog trailer would have been located probably 300 millimetres from the centre line. His vehicle took up most of its lane. He first saw the motorcycle when the front of his truck was about 25 to 35 metres back from the commencement of the skid mark left by the motorcycle. When he first observed the motorcycle, he could see it come up behind him fairly quickly and the next thing it went beside him and the motorcyclist “just lost control and skated down the road”.<sup>12</sup>
- [33] It was like the motorcyclist was losing control of it. The motorcycle was wobbling a bit, like the rider could not pull up behind him. The rider then went out to go around the first appellant’s truck and trailer. The motorcycle was adjacent, just behind his driver’s door when it went over on its side. At that stage, his vehicle was nearly stopped to go into the driveway of the private property. At that stage, no part of his vehicle had moved over the dotted white line.
- [34] The motorcycle ended up in the gutter of a table drain, hitting the gutter with speed. The rider went into the drain. There was water located in that drain. The first appellant said he moved his truck off the road and into the driveway. At that point, the librarian

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<sup>8</sup> T2-7/33.

<sup>9</sup> T2-8/17.

<sup>10</sup> T2-8/21.

<sup>11</sup> T2-9/1.

<sup>12</sup> T2-11/17.

arrived at the scene, as did another person, Doug Leifels. They helped him out of the drain.

- [35] In cross-examination, the first appellant accepted it was now over six years since the incident. His memory may have been better closer to that point of time but he said he would never forget the incident. He estimated he first saw the motorcycle when it was about 30 or 40 metres behind the back of the dog trailer. He agreed the motorcyclist travelled a distance of about 55 metres before he lost control of the motorcycle.
- [36] The first appellant accepted he gave a version of events to police on the day of the incident, whilst at the scene. He gave subsequent versions to loss adjusters in or about July 2014 and as part of a statutory declaration dated 20 January 2016.
- [37] The first appellant accepted he told police on the day of the incident that he activated his indicator lights at least 500 metres before the driveway entrance. The first appellant said you start putting your indicators on “as soon as you come around the corner”.<sup>13</sup> The first appellant accepted he had given evidence at trial that he first activated his indicators about 200 metres prior to the entry to the private property. He accepted those answers constituted “a pretty big difference”.<sup>14</sup> He denied telling fibs to police to try and exculpate himself. The first appellant said:
- “As soon as you come around the corner, you put your flicking lights on and I actually thought it would have been four, five hundred metres. ... It’s just a natural thing you put them on when you’re coming down the straight and, like, you’ve got to be careful when you put them on too early because people try and pass you.”<sup>15</sup>
- [38] The first appellant accepted he had given evidence in chief that in order to slow down he would go down a gear, using the integrated brake system. The integrated brake system does not bring on the brake lights of the vehicle. The first appellant said “you use your brakes at least 200 metres before the turn-off slowing it down to slow down”.<sup>16</sup> The brake lights are only activated when you put your foot on your foot brake. The first appellant said he did apply the foot brake prior to the incident.
- [39] The first appellant accepted that in the statutory declaration dated 20 January 2016 he was asked, “Did you look into your rear view or side mirror prior to commencing your turn into the entrance to the driveway? If so, when did you first look into this mirror?”, to which he replied, “I did, and this was when I saw the claimant sliding alongside my truck on his stomach and he was in the other lane”.<sup>17</sup> In evidence, he had said that he first saw the motorcyclist when he was upright approximately 30 metres behind the dog trailer. The first appellant said that was when the motorcyclist was slowing down behind the truck and he just could not pull up.
- [40] When asked why he had said in the statutory declaration that he had first seen the motorcyclist when he was on his stomach sliding beside the truck, the first appellant replied, “Well, I seen him come around the corner of the back of the trailer and he just

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<sup>13</sup> T2-16/40.

<sup>14</sup> T2-17/1.

<sup>15</sup> T2-17/21-23.

<sup>16</sup> T2-17/44-45.

<sup>17</sup> T2-18/14-21.

started sliding ... [a]nd he lost control and he was just sliding down beside the cab”.<sup>18</sup> When asked why he had given a different version in evidence to that in his statutory declaration, the first appellant replied, “Just that things happened so quickly”.<sup>19</sup>

- [41] The first appellant accepted he did not see the motorcycle rider 200 metres behind him. The first appellant said the motorcyclist “was coming down the straight and he would have been behind the tanker. You wouldn’t see it from the driver’s side cab”.<sup>20</sup> The first appellant accepted he did not have any reason to apply his indicators to warn other vehicles as there was no other vehicle in the vicinity but said, “you put your blinker lights on to slow down to turn in. It’s a habit. You’ve got to do it.”<sup>21</sup>
- [42] The first appellant denied having commenced his turn into the driveway before he first observed the motorcycle and its rider behind him. He denied having commenced his right-hand turn at any time before the motorcycle rider lost control. At all times, his truck and dog trailer remained straight on the highway.
- [43] The first appellant denied he had never activated his indicators at any time before the respondent lost control of his motorcycle. The first appellant denied the respondent lost control at a point in time immediately after the first appellant commenced a right-hand turn across the broken centre line of the highway in order to access the driveway to the private property. When asked why the respondent would lose control of the motorcycle if he was only confronted by a vehicle going straight on the highway, the first appellant replied, “my theory is that he – he couldn’t pull up behind and he just went around the side and lost control and he skated down the road”.<sup>22</sup>
- [44] The first appellant accepted that in his statement to loss adjusters in 2014 he said:
- “I recall that as I was about to commence my right-hand turn into Oppermanns Transport, I suddenly observed in my right mirror the motorcycle ridden by the claimant come alongside my vehicle on the right-hand side and appear to lose control and slid into the drain on the southern side of the driveway into Oppermanns.
- I recall that I was stationary at the time or may have just commenced to accelerate to commence my right-hand turn.”<sup>23</sup>
- [45] That description was when the motorcyclist was in the course of losing control, not after he had lost control.
- [46] Douglas Liefels, a retired transport driver with over 38 years’ experience, was driving along the highway on the morning of the incident. When he was approximately seven kilometres from Eisvold, a motorcycle came up behind him and attempted to pass him on the corner. At that stage, Liefels estimated he was doing about 80 kilometres per hour. When the motorcyclist went around the corner and saw he had free access, he “took off”.<sup>24</sup>

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<sup>18</sup> T2-18/32-34.

<sup>19</sup> T2-18/37.

<sup>20</sup> T2-19/1-3.

<sup>21</sup> T2-19/8-10.

<sup>22</sup> T2-19/46 - T2-20/2.

<sup>23</sup> T2-20/33-36.

<sup>24</sup> T2-25/15.

- [47] The motorcyclist overtook him on the corner. The motorcyclist went over dual double white lines at that time. The motorcyclist was doing a greater speed than Liefels. After he overtook Liefels, the motorcyclist “gave the bike a bit of throttle and probably rose up on one wheel a little bit”.<sup>25</sup> The motorcyclist got faster as he disappeared into the distance.
- [48] Liefels said the next thing he noticed was a truck driver running out of the driveway to the private property. When the truck driver flagged him down, he requested he obtain an ambulance. Liefels could see a motorcycle in a culvert. He did not see the rider of the motorcycle. Liefels immediately left to go to Eidsvold.
- [49] In response to a leading question, Liefels accepted that when he went past the incident scene the next day he saw skid marks on the roadway, about 200 metres from the entry into the private driveway. The skid marks started from a bump in the middle of the road and then disappeared. They were 10 or 20 metres in length. There was another skid mark closer to the driveway entrance. Liefels described it as one single skid mark line “just sort of straight”.<sup>26</sup> He did not measure its length.
- [50] In cross-examination, Liefels accepted he had not seen the skid mark located closer to the driveway entrance on the day of the incident. It could quite possibly have been placed on that roadway on the following day. It could have been on the roadway for a period of time prior to the day of the incident.
- [51] Liefels accepted that in evidence in chief he had said the motorcyclist “probably” lifted his front wheel up.<sup>27</sup> Liefels said the motorcyclist did lift his front wheel up, after he gave some throttle. He could not explain why he had used the word “probably”. He denied that meant the motorcyclist possibly did not lift his front wheel up. He did not accept that in evidence, when he estimated that the motorcycle was over the central line, he was unsure about that evidence. He did not know whether the motorcyclist was speeding at the time. Liefels did not say the motorcyclist was exceeding the speed limit. He simply said he sped off.

### **Primary Judge’s reasons**

- [52] The primary Judge found that the incident and the consequent personal injuries were occasioned by the first appellant’s negligence:
1. in failing to activate the right-hand indicators on the Kenworth truck and trailer;
  2. in failing to keep a proper lookout for vehicles behind his Kenworth truck and trailer prior to commencing the right-hand turn; and
  3. in attempting to turn into the private property when it was not safe to do so because of the respondent’s motorcycle.
- [53] The primary Judge further found that the respondent was not contributorily negligent. In particular, the respondent:
1. did not attempt to overtake in circumstances that were unsafe to do so;

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<sup>25</sup> T2-22/43

<sup>26</sup> T2-25/15.

<sup>27</sup> T2-27/24.

2. was travelling at a speed in the vicinity of 100 kilometres per hour which was not excessive in the circumstances;
3. did not fail to observe the right-hand indicators on the Kenworth T401 as the first appellant did not activate the right-hand indicators; and
4. did not fail to maintain control or any proper control of the motorcycle as he was faced with an emergency which had been caused absent of any fault on his behalf.

[54] In reaching these conclusions, the primary Judge accepted the respondent's evidence as reliable and credible and rejected the evidence of the first appellant, finding it was neither reliable nor credible.

[55] In making findings adverse to the first appellant, the primary Judge found that the first appellant's version of events was reconstruction based on past common practice rather than actual evidence of what he did or did not do at the time of the incident. Further, the first appellant's evidence contained substantial inconsistencies, including differing versions of the time at which he had activated his indicators and the position of the respondent when the first appellant first observed his motorcycle.

[56] The primary Judge found that the first appellant did not look in his side vision mirrors until just before he commenced to turn into the private property. That was the first time the first appellant ever observed the respondent's motorcycle. At that point, the respondent's motorcycle was beside the truck and trailer beginning to lay over on its side and skate down the roadway.

[57] In addition to those adverse findings as to credit, the primary Judge accepted it was unlikely the respondent attempted an overtaking manoeuvre of a truck and dog trailer whilst that truck and dog trailer was indicating its intention to turn right. The primary Judge concluded that it was far more probable that the respondent was correct in his assertion that the right-hand indicator lights of the truck and trailer were not activated at or near the time of the incident.

### **Appellants' submissions**

[58] The appellants submit that a review of the evidence as a whole supports a conclusion that the primary Judge erred in drawing inferences adverse to the first appellant. That conclusion flows from a consideration of the length and nature of the truck and trailer being driven by the first appellant, the first appellant's evidence as to the method of driving necessary to manoeuvre such a vehicle into the driveway of the private property and the first appellant's evidence of an inability to observe a motorcycle behind his vehicle for a distance of 200 metres.

[59] The appellants further submit that the primary Judge's acceptance of the respondent's account was inconsistent with the length and nature of the skid mark left by the respondent's motorcycle and the distance the respondent must have travelled (on his own speed estimate) between noticing the movement of the first appellant's truck and the commencement of the skid mark.

[60] The appellants submit the primary Judge's criticism of the first appellant's evidence was based on a misconception of the evidence as a whole. The proper inferences from

the first appellant's evidence was an acceptance that he first saw the respondent in his rear mirror about 30 metres behind the back of the dog trailer at a time when the respondent was already losing control of the motor vehicle, wobbling under an attempt to pull up before locking the brakes and ultimately losing control of the motorcycle. It was also unsurprising the first appellant would give evidence by reference to his usual practice or that his evidence contained variations.

- [61] In any event these matters could not overcome the first appellant's unchallenged evidence and his consistent insistence that he had activated his indicators well prior to commencing a turn into the driveway. These pieces of evidence supported a conclusion that the incident and the respondent's injuries were occasioned by the respondent's manner of driving and a loss of control consequent upon the respondent seeking to avoid being unable to pull up behind the first appellant's slow-moving but turning vehicle.
- [62] Finally, the appellants submit that if there was negligence on the part of the first appellant, the primary Judge erred in failing to find the respondent was contributorily negligent.

### **Respondent's submissions**

- [63] The respondent submits there was no error on the part of the primary Judge. The primary Judge correctly found that a resolution of the issues depended on the credibility and reliability of the competing versions of events of the first appellant and of the respondent.
- [64] Whilst there was no dispute as to the length and nature of the truck and trailer being driven by the first appellant or of the skid mark left by the respondent's motorcycle, or of the nature and length of the roadway in the vicinity of the incident, many other aspects of the evidence were in dispute.
- [65] Against that background, it was a matter for the primary Judge who had the benefit of seeing and hearing the witnesses give evidence, to assess the credibility and reliability of each witness's evidence. Allowing for that significant advantage, the reasons given by the primary Judge amply supported his conclusions that the first appellant's evidence was neither credible nor reliable. Those reasons also supported the primary Judge's acceptance of the respondent's account of the incident and, in particular, the findings that the first appellant did not activate his indicators prior to commencing to turn into the private driveway, that the first appellant failed to keep a proper lookout in all the circumstances, and attempted the turning manoeuvre when it was unsafe to do so.
- [66] The respondent submits the primary Judge had good reason to find against the first appellant's account of the events and his credit generally. The first appellant's evidence was not based on actual specific recollection. It amounted to reconstruction, based on his usual practice. The first appellant was also evasive, or at least unresponsive, and in many of his answers gave notably inconsistent versions of key matters, such as at what point he activated his indicators and at what point he first saw the respondent. He also gave evidence, for the first time in cross-examination, that he had used his footbrake and brake lights. These circumstances supported adverse inferences in respect of his reliability and credibility.

- [67] The respondent submits that a consideration of the evidence as a whole demonstrates that the primary Judge’s findings of fact were consistent with the evidence. None of those findings or conclusions were “glaringly improbable”. Further, on the basis of those findings, the primary Judge correctly found that there was no contributory negligence.

### **Consideration**

- [68] Determination of this appeal requires this Court to conduct a “real review” of both the evidence at trial and of the primary Judge’s reasons for judgment to determine whether there was error in fact or law.<sup>28</sup> Factual findings likely to have been informed by impressions about credibility and reliability of witnesses as a result of the primary Judge’s benefit of having seen and heard those witnesses give evidence are not to be interfered with, unless they are “glaringly improbable” or “contrary to compelling inferences”.<sup>29</sup>
- [69] In the present case, the primary Judge’s reasons for judgment contained specific factual findings crucial to a resolution of the issues in dispute. Those factual findings were informed by the primary Judge’s impression of the reliability and credibility of the first appellant and of the respondent as witnesses. A consideration of the evidence as a whole supports a conclusion that those findings were neither glaringly improbable nor contrary to compelling inferences.
- [70] The first appellant gave conflicting accounts as to the activation of the indicators. In evidence, he proffered, in response to a leading question, an answer, “you apply the right before you turn off probably 200 metres before the ...”<sup>30</sup> When asked if he recalled doing so on the day in question the first appellant replied, “Yes”.<sup>31</sup> Such answers suggest reconstruction, based on past common practice, rather than actual recollection.
- [71] That suggestion was supported by the version the first appellant gave to police following the incident. That version was that the first appellant had activated his indicators “at least 500 metres” before the entry to the private property.<sup>32</sup> That discrepancy was startling, if the first appellant genuinely had a recollection of the events on the day of the incident.
- [72] The first appellant’s explanation for that discrepancy, namely that it was “just a natural thing you put them on when you’re coming down the straight and, like, you’ve got to be careful when you put them on too early because people try and pass you” was itself supportive of a conclusion that the first appellant’s evidence was based on reconstruction, not recollection.<sup>33</sup>
- [73] This conclusion was further supported by the first appellant’s proffering, in cross-examination, for the first time, that he illuminated his brake lights at least 200 metres

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<sup>28</sup> *Fox v Percy* (2003) 214 CLR 118, 126-127 at [25]; *Lee v Lee* [2019] HCA 28 at [55].

<sup>29</sup> *Fox v Percy* (2003) 214 CLR 118, 128 [29]; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679, 687 at [43].

<sup>30</sup> T2-19/1-2.

<sup>31</sup> T2-9/4.

<sup>32</sup> T2-15/43.

<sup>33</sup> T2-17-21.

before the entry to the private driveway. Again, that version was in the form of usual practice, “you use your brakes at least 200 metres before the turn-off to slow down”.<sup>34</sup>

- [74] By contrast, the respondent’s evidence as to there being no indicator lights was consistent. Indeed, when first interviewed by police he expressly said he was angry as he did not see indicator or brake lights.
- [75] To the extent that his version to police may have contained an inconsistency, that version was properly to be rejected having regard to the circumstance that the respondent did not accept its accuracy and there was evidence that the respondent had been rendered unconscious in the incident, had been given considerable quantities of morphine and the nurse attending to him at the time of the interview had expressed specific concern as to the appropriateness of police speaking to him at that time due to those circumstances.
- [76] The respondent’s evidence also did not bespeak of reconstruction. His reliability and credibility was supported by his acceptance in evidence that he may have accelerated above the speed limit when passing Liefels’ vehicle. Significantly, Liefels did not venture any assertion of excessive speed on the part of the respondent. Further, Liefels’ evidence of the respondent “probably” performing a wheel-stand on acceleration was itself suggestive of a lack of accurate recollection. The primary Judge’s rejection of that evidence, in the face of an accepted denial by the respondent, was neither glaringly improbable nor inconsistent with compelling other inferences.
- [77] The appellants’ submissions that contrary inferences supported a rejection of the respondent’s account are without merit. Those contrary inferences only arise if there is an acceptance of propositions which are based on inexact suppositions not supported by the evidence. Such propositions cannot displace findings of fact properly available on the respondent’s evidence.
- [78] For example, the inference said to be drawn as to the distance that must have been traversed by the respondent at his estimated speed, after noticing the movement of the truck, is based on acceptance of a supposition that his reasoning process would take at least two seconds. The respondent’s own evidence was that he looked “at that split second” for indicators before applying the brakes and attempting to avoid the collision.<sup>35</sup> There was no reason to reject the accuracy of that account.
- [79] Similarly, the relevance of the position of the start of the skid mark is dependent upon a supposition that at that point the rear of the truck and trailer was itself located close to the centre line. The respondent, in evidence, expressly raised the possibility that at that stage the truck and trailer was further towards the grass because the first appellant was planning on turning into the driveway.
- [80] Finally, the appellants’ criticism of the primary Judge’s reasoning concerning the visibility of the respondent’s motorcycle misconceives the significance of the first appellant’s differing accounts as to the respective positioning of the motorcycle and truck and trailer at a time when the respondent would have been first visible to the first appellant, had he been keeping a proper look out.

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<sup>34</sup> T2-17/44-45.

<sup>35</sup> T1-10/15.

- [81] On the first appellant's evidence his truck and trailer were travelling at a very slow speed close to the entrance to the private driveway when he first observed the motorcycle. Whether that first observation be either when the motorcycle was beside his truck or when the motorcycle was 30 metres behind the dog trailer, the primary Judge rightly observed by that point the motorcycle had travelled a considerable distance from the bend during which period the first appellant would have had an opportunity to observe the motorcycle had he been keeping a proper look out.
- [82] The fact that the respondent estimated the truck and trailer was between 150 and 200 metres down the road as he came around the bend did not undermine the legitimacy of the primary Judge's observations. Those observations were in reference to an assessment of the reliability and credibility of the first appellant's accounts of the incident.

### **Conclusion**

- [83] A real review of the evidence as a whole establishes there is good reason to prefer and accept the respondent's evidence as to the circumstances of the incident, and to reject the version of the incident given by the first appellant. That conclusion supports a finding that the incident and the respondent's personal injuries were occasioned by the first appellant's negligence in failing to activate his indicators, in undertaking a turning manoeuvre without first notifying of his intention to do so, and in undertaking a turning manoeuvre when it was unsafe to do so.
- [84] An acceptance of the respondent's account as reliable and credible also supports a conclusion that there was no contributory negligence on the part of the respondent. The respondent was attempting to overtake a slow-moving truck on a long, straight stretch of road when, without warning, that truck commenced a manoeuvre to turn right into a private driveway.
- [85] A consideration of the evidence as a whole, and of the primary Judge's reasons, establishes there was no error law or fact. The findings made and conclusions reached from those findings were consistent with the evidence and the competing inferences. None of those findings were glaringly improbable or contrary to compelling inferences.

### **Orders**

- [86] I would order:
- (1) The appeal be dismissed.
  - (2) The parties have leave to deliver any submissions on costs, within seven days.