SUPREME COURT OF QUEENSLAND

CITATION:	*Nominal Defendant v Chaffey & Ors* [2011] QSC 088
PARTIES:	**NOMINAL DEFENDANT** (Plaintiff) v **RODNEY JAMES CHAFFEY** (First Defendant) and **TRANMORE HOLDINGS PTY LTD** **ACN 010 436 727** (Second Defendant) and **NORTHMOON PTY LTD** **ACN 082 576 921** (Third Defendant) and **NADIA GRAHAM** (Fourth Defendant)
FILE NO:	10542/08
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	18 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	30, 31 March 2011, 1 April 2011
JUDGE:	Philippides J
ORDER:	There be judgment against the first defendant and fourth defendant in favour of the plaintiff pursuant to s 60(1) *Motor Accident Insurance Act* 1994 (Qld) in the sum of $394,893.60.
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – QUEENSLAND – UNINSURED VEHICLES – NOMINAL DEFENDANT – application of *Motor Accident Insurance Act* 1994 (Qld) – where unregistered and uninsured motor vehicle involved in a motor vehicle accident – where Nominal Defendant deemed to be the insurer of the uninsured vehicle – statutory right of Nominal Defendant to recover costs reasonably incurred by it on a claim for personal injury in respect of the accident from the driver and owner of the uninsured vehicle as a debt pursuant to s 60 *Motor Accident Insurance Act* 1994 – dispute

as to ownership of the uninsured motor vehicle at the time of the accident – whether driver of the uninsured vehicle believed on reasonable grounds that the motor vehicle was insured – reasonableness of costs incurred by Nominal Defendant in settling the claim arising out of the accident.

Evidence Act 1977 (Qld); s 92; s 102
Fair Trading Act 1989 (Qld) s 36
Motor Accident Insurance Act 1994 (Qld); s 60
Supreme Court Act 1995 (Qld); s 47

Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374
Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd [1973] 1 WLR 828
Carlin Auction Services (Qld) Pty Ltd v Gonchee [2004] QDC 086
Chowdhary v Gillot [1947] 2 All ER 541
Everett's Blinds Ltd v Thomas Ballinger Ltd [1965] NZLR 266
George v Rocket (1990) 170 CLR 104
Hughes v McCutcheon (1952) 4 DLR 375
Lister v Romford Ice & Cold Storage Co Ltd [1957] AC 555
Smith v Bailey [1891] 2 QB 403
Soblusky v Egan (1960) 103 CLR 215
The Nominal Defendant (Qld) v Langman [1988] 2 Qd R 569
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 193 CLR 603; [1998] HCA 38

COUNSEL: KN Wilson SC for the plaintiff
JR Webb for the first, second and third defendants
MA Drew for the fourth defendant

SOLICITORS: Rodgers Barnes and Green for the plaintiff
Farrellys Lawyers for the first, second and third defendants
Connolly Suthers for the fourth defendant

The plaintiff's claim

[1] The plaintiff, the Nominal Defendant, brings a claim against the defendants pursuant to s 60 of the *Motor Accident Insurance Act* 1994 (Qld) (the MAIA), or alternatively, damages in the amount particularised in the statement of claim together with interest pursuant to s 47 of the *Supreme Court Act* 1995 (Qld) and costs.

[2] The plaintiff's claim pursuant to s 60 MAIA is to recover $394,893.60, as a statutory debt, for costs reasonably incurred by it on a claim for personal injury by Gregory Buckholz, arising out of a motor vehicle accident on 31 March 2004 involving an uninsured vehicle (a Ford hearse with Queensland registration plates 187 CTM) driven by the first defendant, Rodney James Chaffey, and a motor cycle driven by Mr Buckholz.

[3] The plaintiff alleges and it is not disputed that:

(a) On 31 March 2004 at approximately 11.10 am, Mr Buckholz was riding a motorcycle and travelling in a southerly direction along Gregory-Cannon Valley Road, Strathdickie, Queensland. The Ford was being driven by the first defendant in a northerly direction along the same road. The Ford and the motorcycle collided, when the first defendant commenced a right-hand turn into a driveway, crossing over the southbound lane and crossing into the path of the motorcycle.

(b) As at 31 March 2004, the Ford was unregistered and thus did not have compulsory third party insurance. Accordingly, for the purposes of the MAIA, the Ford was "an uninsured motor vehicle".

(c) Mr Buckholz suffered a personal injury as a result of the collision, which constituted a "motor vehicle accident" for the purposes of the MAIA.

(d) The plaintiff was deemed to be the insurer in respect of the accident, pursuant to s 31 MAIA.

[4] Mr Buckholz's claim in respect of his personal injuries was settled by the plaintiff for the sum of $340,000 together with costs of $27,202.13. In settling the claim, the plaintiff's own costs amounted to $27,691.47. The plaintiff thus incurred expenses totalling $394,893.60, which it alleges were reasonably incurred in settling the claim within the meaning of s 60 MAIA and which it seeks to recover from the defendants.

[5] The plaintiff's claim is brought against the first defendant as the driver of the uninsured vehicle. In addition, the plaintiff claims as against the second defendant (Tranmore Holdings Pty Ltd) and third defendant (Northmoon Pty Ltd) or, alternatively, the fourth defendant (Nadia Graham) as the owner of that vehicle at the relevant time. The second defendant and third defendant (of which the first defendant was a director), conducted a business under the name or style of "Guilfoyles Funeral Services" at Atherton, Queensland.

[6] It was not disputed that, up to 31 March 2004, the fourth defendant was the owner of the Ford, nor that on that day the first defendant negotiated, on behalf of the second and third defendants, to purchase the Ford from the fourth defendant for $25,000. What was disputed between the second and third defendants, on the one hand, and the fourth defendant, on the other, was whether the Ford was sold before or after the accident. The fourth defendant's case was that the Ford was sold before the accident, whereas the second and third defendants claimed that they only became the owners of the vehicle after the accident.

[7] Section 60 MAIA provides:

"**Nominal Defendant's rights of recourse for uninsured vehicles**

(1) If personal injury arises out of a motor vehicle accident involving an uninsured vehicle, the Nominal Defendant may recover, as a debt, from the owner or driver of the vehicle (or both) any costs reasonably incurred by the Nominal Defendant on a claim for the personal injury.

(2) It is a defence to an action by the Nominal Defendant under this section—

(a) as far as recovery is sought against the owner – for the owner to prove—
  (i) that the motor vehicle was driven without the owner's authority; or
  (ii) that the owner believed on reasonable grounds that the motor vehicle was insured; and
(b) as far as recovery is sought against the driver – for the driver to prove that the driver believed on reasonable grounds that the driver had the owner's consent to drive the motor vehicle and that the motor vehicle was insured.

(3) The Nominal Defendant may bring a proceeding for recovery of costs under this section before the costs have been actually paid in full and, in that case, a judgment for recovery of costs may provide that, as far as the costs have not been actually paid, the right to recover the costs is contingent on payment.

(4) This section does not affect rights of recovery that the Nominal Defendant may have, apart from this section, against the insured person."

[8] The matters that arise for determination in the plaintiff's claim are:

(a) whether the sum of $394,893.60 was reasonably incurred;
(b) whether the first defendant is liable to the plaintiff, pursuant to s 60 MAIA, as driver of the Ford, which centred on the issue of whether the first defendant believed on reasonable grounds that the motor vehicle was insured (s 60(2)(b));
(c) which of the second and third or fourth defendants was the owner at the relevant time.

Was the sum of $394,893.60 reasonably incurred?

Background

[9] Following the accident, Mr Buckholz delivered a Notice of Accident Claim on 19 May 2004. A compulsory conference was held on 7 June 2007, pursuant to s 51A MAIA, with mandatory final offers being exchanged pursuant to s 51C MAIA thereafter.

[10] By operation of s 44 MAIA, the plaintiff was obliged to undertake the conduct and control of negotiations and legal proceedings in relation to Mr Buckholz's claim and entitled to compromise the claim or legal proceedings. In its statement of claim, the plaintiff outlined that, in settling the Buckholz claim, it considered *inter alia*:

(a) Mr Buckholz's Notice of Accident Claim dated 7 May 2004;
(b) Mr Buckholz's additional information form dated 13 July 2004;
(c) the traffic incident report 04/8177 dated 31 March 2004;
(d) the written medical report of orthopaedic surgeon, Dr Greg Gillett, dated 31 July 2006;
(e) written records relating to Mr Buckholz of the Queensland Ambulance Service, Mackay Base Hospital and Queens Beach Medical Centre;

(f) the written reports of W and D Hansen and Associates Pty Ltd and Far North Investigations, being firms of loss adjustors engaged by the plaintiff;
(g) Mr Buckholz's taxation records in relation to the 2001-2006 financial years;
(h) the Short Form Assessment dated 31 August 2007 prepared by Hickey and Garrett, a firm of cost assessors, in relation to costs and outlays incurred by Mr Buckholz.

[11] By paragraph 6 of the Reply, the plaintiff also referred to counsels' opinion that had been obtained and contended that settlement of $340,000, plus costs, was a reasonable one, given that:

(a) depending on the evidence accepted at trial, Mr Buckholz might have succeeded 100 per cent on liability;
(b) prior to the acceptance of Mr Buckholz's mandatory final offer, the plaintiff had obtained counsel's opinion advising the likely range of damages was $385,091 to $403,491 plus costs;
(c) prior to the settlement, senior counsel had thought that at best the plaintiff would obtain 20 per cent contributory negligence from Mr Buckholz.

[12] The defendants accepted that the plaintiff was obliged to undertake negotiations in respect of the claim by Mr Buckholz and entitled to reach a reasonable compromise of the claim. The defendants did not dispute the reasonableness of the costs component claimed by the plaintiff, but maintained that the settlement of Mr Buckholz's claim for $340,000 was not reasonable, and those expenses were not reasonably incurred. The fourth defendant articulated the grounds for that assertion in paragraph 3(a) of its defence as follows:

> "The plaintiff made an erroneous assessment of the liability of Buckholz in respect of the cause of the accident in that the plaintiff should have assessed the cause of the accident as entirely due to the negligent riding of the motorcycle by Buckholz or, in the alternative, the injuries suffered by Buckholz were contributed to greatly in excess of 20% by the negligent riding of the motorcycle by Buckholz."

[13] Particulars of the negligence alleged against Mr Buckholz were:

(a) riding the motorcycle at a speed which was excessive in all the circumstances, including the circumstance that he exceeded the speed displayed on advisory speed signs on the road leading up to the place of the accident;
(b) failing to keep any or any adequate lookout;
(c) failing to stop, slow down or steer clear of the Ford;
(d) driving the motorcycle in an imprudent manner.

Evidence of Mr Lanyon-Owen

[14] The evidence of the solicitor who acted for the plaintiff in settling Mr Buckholz's claim, Mr Lanyon-Owen, a solicitor of some 22 years, was as follows.

[15] By letter dated 27 July 2004, Mr Lanyon-Owen provided an initial opinion on liability, investigations, compliance, quantum and estimate and recommended various liability and quantum investigations. He subsequently received instructions

from the plaintiff to carry out investigations dealing with both liability and quantum. Those investigations included enquiries via assessors, the issuing of liability questions to the claimant (Mr Buckholz), appointing a road accident expert to address issues to do with distances and speeds etc, obtaining documents from the Queensland Police, the pre-accident employer Queensland Rail and from QSuper, the superannuation insurer.

[16] In his initial advice dated 27 July 2004, Mr Lanyon-Owen opined that it was not beyond the realms of possibility that the claimant could fail completely on the basis of excessive speed, but suspected the more likely result would be an apportionment of liability and on the preliminary material considered that a likely apportionment might be 50/50. He indicated that this position would have to be reviewed when further investigations had been carried out.

[17] Mr Lanyon-Owen obtained the claimant's traffic history, which showed some history of excessive speed and Queensland Police photographs from the accident scene. He arranged for assessors to interview the ambulance officers regarding comments attributed to the claimant involving speed and obtained from the claimant's solicitors a statutory declaration by the claimant that he had no memory of the circumstances of the accident. Loss assessors were briefed to obtain information requested by the plaintiff's road traffic expert and a Road Accident Investigation Service report was obtained.

[18] In his letter dated 16 September 2005, Mr Lanyon-Owen gave the opinion that it was possible for the claimant to fail totally in respect of the claim or alternatively bear considerable contributory negligence (due to excessive speed) which would be in the order of 75 per cent contribution. He made recommendations about maintaining a denial of liability and briefing counsel to advise on liability.

[19] An opinion was obtained from senior counsel dated 9 November 2005. Senior counsel's advice was as follows:

> "In my opinion the evidence supports a number of conclusions which I anticipate a Court will make as its findings of fact, as follows:
>
> - Chaffey commenced his turn into the driveway from a rolling start. No estimate of his speed has been advanced but based upon one's driving experience, a speed of the order of 10 to 20 kilometres is likely for a turn of that kind;
> - at the moment of impact the hearse was angled across the south bound lane of the road but still occupying a substantial proportion of that lane;
> - the Claimant's motorcycle was within the range of Chaffey's vision when he commenced that turn and was approaching the point of impact at a speed of the order of 100 to 120 kilometres per hour;
> - the Claimant reacted to the developing emergency by braking, but did not substantially alter his line of travel: see the evidence of Jones. In my view it is inevitable that a finding will be made that the Claimant braked his motorcycle for an impact with the hearse at a speed at the order of 100 to 120 kilometres per hour in which he was thrown over the handle bars of the motorcycle would have placed his final position much further down the

road than the position described by Jones, and probably that impact would have caused him fatal injuries;

- while it is not possible to be precise as to the relative positions of the hearse and the motorcycle as each approached the point of impact, probably the hearse took of the order of 2 to 3 seconds from the commencement of its turn to reach the point of impact which, even at the higher estimate of the Claimant's speed, placed his motorcycle no more than 100 metres from that point when the turn commenced. That appears consistent with the evidence of Jones;
- the position of Jones' vehicle close behind the hearse and travelling at approximately 10 kilometres per hour when the hearse commenced its turn effectively blocked the north bound lane of the road and, in combination with the position of the hearse as it turned, offered the Claimant no real option for evasive action than to brake;
- there is no evidence that the headlight of the motorcycle was not operating immediately prior to the accident. I anticipate that the Claimant will say that in accordance with his usual practice, the headlight was operating [the road traffic expert's] suggestion that the motorcycle carrying the Plaintiff might be lost to one's vision as a result of its image blending into background foliage appears premised on the assumption the headlight was not operating. In any event, as Jones picked up the motorcycle when the hearse first commenced to turn, there is no adequate explanation for Chaffey's failure to see it as he had an unobstructed view in that direction; and
- That Chaffey crossed a continuous white line in the course of making his turn does not, in my view involve a breach of the Transport Operations (Road Use Management – Road Rules) Regulation 1999 as it was his intention to leave the roadway, albeit briefly, to effect the turn which he contemplated: see Road Rule 134(3)(a). However, that point is largely of academic interest. Chaffey has failed to yield way to an oncoming vehicle and has breached the Regulations in that respect. The state of the road markings is unlikely to be relied upon by the Claimant as an explanation for any conduct on his part as he approached the scene, as he now has no recollection of that, and as the evidence clearly establishes that Chaffey's intention to make the turn, whether it was a legal or an illegal turn, was well identified by the operating indicator of the hearse and its slow speed.

In my opinion Chaffey will be held guilty of causative negligence in failing to keep a proper lookout and in failing to yield way to the Claimant's motorcycle. There is a prospect that the Claimant will be held guilty of contributory negligence but that prospect is dependant upon establishing the reliability of his post-accident admission to Cramb and that he was travelling at a speed of approximately 120 kilometres per hour. The content of his statutory declaration to Querist confirms the records made in the causality department of the Mackay Base Hospital to the effect that he is now unable to recall the

> incident, and has been unable to recall it from a time soon after its occurrence. It may be that, when questioned by Cramb, the Claimant offered an estimate of speed based upon his well established habit of driving in excess of the speed limit: see his Traffic History. Alternatively, it may be that he extrapolated to the point of impact a speed at which he could recall travelling at an earlier time on the journey that day.
>
> It is possible that the Court will find a sequence of events which exculpates the Claimant for any contributory negligence. That will be so if the Court finds:
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> - that the Claimant was riding at a speed of 100 kilometres per hour: see the evidence of Kingston-Lee;
> - that as he approached the point of impact he would have become aware of the hearse indicating a right turn and slowing to a speed of the order of 10 to 20 kilometres per hour;
> - that he reasonably assumed that the driver of the hearse would yield way to his motorcycle;
> - that his first indication to the contrary was the commencement of the vehicle's turn across the road;
> - that his motorcycle was then no more than 3 seconds from impact;
> - that his reaction time would have been of the order of 1.5 to 2.5 seconds: see the report of [the Road Traffic expert];
> - that at the expiration of his reaction time he applied the brakes of his motorcycle to slow it substantially prior to impact, but by reason of the position of the hearse and Ms Jones' vehicle, he had no real opportunity for other evasive action."

[20] Senior counsel's advice was forwarded to the plaintiff under cover of a letter dated 11 November 2005. In that letter, Mr Lanyon-Owen addressed comments by senior counsel regarding discrepancies as to the location of the impact between the uninsured vehicle and the motorcycle. It was noted that senior counsel was not satisfied that the calculations in the road traffic expert report obtained had been carried out upon the correct location of the impact. Mr Lanyon-Owen observed that senior counsel's views were much more pessimistic as to the plaintiff's prospects than his own earlier opinion. Mr Lanyon-Owen also noted that senior counsel was of the view that the claimant would succeed on liability, but there were good prospects of obtaining 20 per cent contributory negligence against the claimant.

[21] Further quantum investigations were made and Mr Lanyon-Owen worked towards a compulsory conference. The claimant's solicitors provided a report from Dr Gillett, an orthopaedic surgeon and a draft statement of loss and damage from the claimant's solicitors which sought damages of some $614,898 plus interest and costs. By letter dated 12 March 2007, Mr Lanyon-Owen advised the plaintiff on the claimant's draft statement of loss and damage and made recommendations about further quantum investigations.

[22] By letter dated 4 April 2007, Mr Lanyon-Owen provided a review of the quantum of the claim and noted that the matter had been set down for a compulsory conference mediation on 7 June 2007. His assessment of quantum was within the range of $415,071 to $466,766 plus costs. On his assessment, the only significant

item in dispute was future economic loss and future superannuation. He indicated that he would make settlement recommendations for the compulsory conference after receiving junior counsel's opinion on quantum.

[23] Junior counsel provided an opinion on quantum dated 25 March 2007, which suggested that the likely range of damages was between $234,060 to $268,810. Future economic loss was assessed as between $85,000 to $100,000 plus superannuation. Counsel also identified a possible error in the claimant's statement of loss and damage which Mr Lanyon-Owen took up with the claimant's solicitors.

[24] Under cover of a letter dated 30 May 2007, Mr Lanyon-Owen provided a copy of junior counsel's opinion on quantum combined with Mr Lanyon-Owen's pre-compulsory conference mediation report. In the letter, Mr Lanyon-Owen recommended a strategy of emphasising the issue of the speed of the motor cycle in negotiations and commencing negotiations at a 25/75 apportionment of liability in the plaintiff's favour, but if need be, negotiating downwards to senior counsel's 80/20 opinion.

[25] In relation to the varying views offered on the issue of the apportionment of liability, Mr Lanyon-Owen gave evidence as follows:

> "While I had certain preliminary views about the liability that were different from that of [senior counsel], I gave great weight to the opinion of [senior counsel] on liability and was prepared to revise my opinion earlier reached and to recommend proceeding on settlement of liability upon the advice of [senior counsel].
> I would not lightly disregard [his] views. Certainly, it is not my role to rubber stamp counsel's opinions either. If I felt that counsel's opinion was manifestly wrong and violently disagreed with it, I would discuss the matter with counsel and certainly not 'rubber stamp' counsel's views.
> I carefully considered liability and [senior counsel's] views and was prepared to recommend to the Nominal Defendant to proceed upon the basis of [his] opinion rather than my earlier expressed views."

[26] Mr Lanyon-Owen's evidence was that he also took into account that senior counsel had experience of the road traffic expert in question giving evidence at trial and had formed views about his giving evidence and whether reports of the nature created by the expert would be admitted into evidence. He recommended settling based upon an 80/20 liability scenario in favour of the claimant, up to the top of junior counsel's range of $234,060 to $268,810. This equated, on an 80/20 apportionment of liability, to a range of $187,248 to $215,048. However, Mr Lanyon-Owen also cautioned that he felt that junior counsel's quantum advice was low in relation to future economic loss. Mr Lanyon-Owen's evidence was that he had assessed a figure that was twice as large for future economic loss. While he was concerned about junior counsel's figures being too low, he commented in his letter to the plaintiff that "where there are recovery rights involved, we should adopt the conservative approach on quantum provided by counsel rather than my own figures".

[27] The matter proceeded to a mediated compulsory conference on 7 June 2007. Senior counsel for the claimant advanced the view that there would be no finding of contributory negligence and made an opening offer of $627,715.96 plus costs. He

made various observations concerning quantum, in particular, raising matters going to an upward revision in economic loss. The claimant attended the mediation and readily answered questions. Mr Lanyon-Owen's evidence was that the claimant made a favourable impression and he considered that he would do so likewise at a trial. The matter did not settle at the mediation and mandatory final offers were exchanged. The claimant's mandatory final offer was $340,000 plus costs while the plaintiff's was $300,000 (inclusive of statutory refunds clear of the s 51 rehabilitation expenses) plus costs. Mr Lanyon-Owen considered that the main stumbling block at the mediation had been the component for future economic loss and recommended to the plaintiff that junior counsel be re-engaged to provide a supplementary opinion dealing with that aspect, particularly in the light of new information that had emerged at the mediation.

[28] In his supplementary opinion, junior counsel observed that, in the light of the additional information that had become available, an adjustment for past and future economic loss was warranted and arrived at a revised range of damages of $385,090 to $403,490 plus costs, not taking into account liability considerations. (Future economic loss was reassessed at $220,000 plus superannuation compared to the earlier calculations of $85,000 to $100,000 plus superannuation.)

[29] Mr Lanyon-Owen provided the supplementary advice to the plaintiff and by facsimile letter dated 12 June 2007, recommended that the claimant's Mandatory Final Offer which was due to expire on 21 June 2007 be accepted. In doing so, he made a number of observations, reiterating that senior counsel's opinion on liability was that, at best, the plaintiff would obtain a 20 per cent contributory negligence finding against the claimant, and that it was not beyond the realms of possibility that the claimant could succeed entirely. He noted that, taking the revised quantum figures and approaching the assessment of liability on an 80/20 basis, resulted in a range of $308,073 to $322,793 plus costs. Mr Lanyon-Owen concluded that the additional costs and risks of proceeding to trial did not justify litigating the matter further.

[30] Mr Lanyon-Owen's evidence was that, in advising the plaintiff to accept the claimant's offer, he was very conscious of the fact that there were costs and significant risks of going to trial, in the circumstances where mandatory final offers had been made. He was also very conscious of the relatively low gap between the claimant's mandatory final offer and the revised range that had been provided by junior counsel. Additionally, he was mindful of the possibility, depending on how the evidence were to pan out, that the claimant might succeed completely on liability. In his view, there was a significant chance of a far higher award for future economic loss and future care, in particular, being made at trial.

[31] On 12 June 2001, Mr Lanyon-Owen received an email from Mr Judd, the plaintiff's claims officer, stating that he had given the matter some thought and agreed with Mr Lanyon-Owen's conclusion. It made reference to "the risk of the claimant obtaining a very significant award for future economic loss" and instructed him to accept the claimant's mandatory final offer of $340,000 plus costs. It was noted that this would not occur until the last day, in case the plaintiff's own offer of $300,000 was accepted before then.

Authorities

[32] As to the approach to be taken in determining whether the plaintiff made a reasonable compromise of Mr Buckholz's claim, the plaintiff relied upon *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 193 CLR 603 (per Hayne J at 653, McHugh J at 618) and *The Nominal Defendant (Qld) v Langman* [1988] 2 Qd R 569 (at 572, 573).

[33] In *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 193 CLR 603 Hayne J said at 653:

> "Whether the compromise of a claim was reasonable must be judged objectively, not subjectively. Thus whether a party to litigation has received advice to settle may be important in deciding whether that person's conduct in settling the case was reasonable but, standing alone, the fact that a litigant was advised to settle at a particular figure reveals little or nothing about whether the settlement reached was reasonable. This is not to say that evidence may not be led that such advice was given and adopted; it may. But evidence of that kind does not conclude the issue. What will usually be much more important is the reasoning that supported the advice that was given for that will ordinarily reveal why it was thought reasonable to compromise the claim as it was.
>
> Next, the question whether the settlement was reasonable must be judged by reference to the material the parties had available to them at the time the compromise was reached. It is not to be judged according to whether material which was obtained later shows that the opposite party could or could not have prosecuted or defended the claim successfully but according to the assessment which could properly be made at the time of settlement of the chances of success or failure.
>
> Often that will require consideration of whether the party that later seeks to say that the settlement was reasonable had made sufficient inquiries and had sufficient information available to it to warrant reaching a compromise. In turn that may invite attention to whether the cost of seeking further information would outweigh the benefit that it was reasonable to expect may be obtained from doing so, but it does not assume knowledge of the opposite party's brief to counsel.
>
> All of these, and no doubt other, considerations may bear upon the question whether the settlement arrived at was reasonable. *And it is inevitable that there will be no single answer to the question 'for what amount was it reasonable to compromise this claim' – there will be a range of answers.* What is a reasonable compromise of the claim will almost always require consideration of the chances of the parties succeeding in their respective claims or defences and that prediction of likely outcomes must always be imperfect and imprecise. To state the obvious, that is why the compromise of a claim, which is a monetary claim that will succeed entirely or fail entirely, will usually fasten upon a figure that is less than would be recovered if the claim were to succeed and why it is that there will be a range of figures within which the reasonable observer may conclude that settlement of the claim would be reasonable." (emphasis added)

[34] In *The Nominal Defendant (Qld) v Langman* [1988] 2 Qd R 569 Thomas J observed at 572:

> "Frequently the expectations of the investigators are dashed, or the evidence in the brief of one or other of the parties comes out in court in a different way. The wise practitioner does not often pretend to be able to make accurate forecasts of factual findings, although he may make an astute assessment of the range of possible results, and perceive one of these to be more likely than the others. I do not think that this Court should be too astute to make microscopic examinations of compromise arrangements which save costs and which avoid the perils of litigation and which prima facie seem sensible. Of course a question of degree is involved. There will come a time when slipshod, inadequate preparation leads to an unnecessary surrender of rights, where the settlement could not be described as 'proper'. In such an event the evidence may show that the Nominal Defendant has not properly paid the money, and it would be unable to recover such money from the owner or driver of the uninsured vehicle."

The submissions

[35] Counsel for the plaintiff submitted that the evidence revealed that, in the circumstances of this case, an experienced solicitor, having taken advice from very experienced senior counsel, had reasonably recommended a settlement. The plaintiff's emailed instruction to settle for $340,000 plus costs showed that the plaintiff's claims officer had considered the risks and instructed settlement. The material tendered in evidence demonstrated that the claim was properly investigated. By no means was this a case of "inadequate or slipshod preparation". On the contrary, there was a very thorough investigation and diligent handling of the claim.

[36] In impugning the settlement as not reasonable, the defendants pointed to the difference between Mr Lanyon-Owen's initial advice and the more pessimistic view of senior counsel and argued that Mr Lanyon-Owen gave no critique of it in recommending it be followed. There are a number of difficulties with this proposition. Firstly, as counsel for the plaintiff submitted, the difference between senior counsel and Mr Lanyon-Owen's initial assessment of liability merely highlighted that a range of results was possible on the issue of liability, depending on the factual findings made at a trial. Senior counsel had opined that it was possible that Mr Buckholz might have succeeded entirely, but he was most unlikely to have lost entirely. Although Mr Lanyon-Owen initially held a more robust view on liability, his evidence was that when he received senior counsel's advice, he reviewed his own assessment, approaching the matter with a critical eye and was persuaded to recommend a settlement in line with counsel's advice. In doing so, he was fully aware that his role was not to rubber stamp counsel's advice. His advice and critique of counsel's advice, was made against the background that his client was a sophisticated and experienced litigant. I do not consider that there is any substance in this aspect of the attack on the reasonableness of the settlement concluded by the plaintiff.

[37] However, the principal argument pressed by the defendants was that the advice given by senior counsel as to apportionment of liability did not provide a reasonable

basis for settlement. The main focus of this argument was that a key factor against Mr Buckholz was the issue of his speed. Additionally it was submitted that senior counsel's advice was defective in the analysis as to whether the claimant was in the first defendant's line of vision when he commenced the turn and as to the inability of the claimant to take evasive action.

[38] Counsel for the plaintiff submitted that different minds might form different views as to the likely outcome on a liability contest, but the objective facts supported senior counsel's conclusions. The only evidence supporting a speed of 120 kph was a statement made to an ambulance officer after the accident, in circumstances where Mr Buckholz suffered some memory loss. Furthermore, there was evidence that the first defendant turned the long vehicle he was driving without stopping. Indeed, the independent witness Jones placed the hearse as across the roadway when the collision occurred, effectively providing a barrier to Mr Buckholz. Moreover, the witness Jones, by observing "a flash" out of the corner of her eye, placed Mr Buckholz in the first defendant's line of sight as he was turning.

[39] Counsel for the plaintiff also submitted that, in any event, although it was the plan of the plaintiff to settle on an 80/20 apportionment of its assessment of the likely quantum of Mr Buckholz's claim, that was not the test of whether the compromise was reasonable, bearing in mind the dicta in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 193 CLR 603. Here, the compromise was made reasonably given that it was made:

(a) at an early stage, before Court proceedings were commenced, at a conference mandated by the MAIA;
(b) in circumstances where the plaintiff was under a statutory obligation to try and resolve claims (s 41 MAIA);
(c) after a thorough investigation of the circumstances of the accident, including obtaining expert evidence;
(d) after obtaining senior Queen's counsel's advice on liability;
(e) after obtaining junior counsel's advice on quantum;
(f) after being told of the claim for quantum being made by Buckholz (see Statement of Loss and Damage and quantum schedule);
(g) having regard to the risks of litigation and the likely venue for the trial of the action;
(h) having regard to the costs of litigation;
(i) having regard to the consequences to the plaintiff if Buckholz did better than his mandatory final offer.

[40] It is submitted that, against that knowledge, the settlement was undoubtedly reasonable. I accept the submissions made by the plaintiff's counsel. It is not to the point that another view may also have been reasonably held on the evidence available at the time of the settlement. That offered by senior counsel and adopted by the plaintiff in settling the claim on the advice of Mr Lanyon-Owen represented a position that was reasonable in the circumstances and reached after an appropriately thorough consideration of the issues.

Liability of the first defendant as driver

[41] As mentioned, there is no dispute that the first defendant was the driver of the uninsured Ford. Section 60(2) MAIA provides for a statutory defence in certain circumstances. The driver must prove that he believed on reasonable grounds that

he had the owner's consent to drive the motor vehicle and that the motor vehicle was insured. No issue arises in this case that the vehicle was driven other than with the permission of the owner (irrespective of who that was). The critical issue in relation to the first defendant's liability concerned whether he had discharged the onus on him to establish that he believed on reasonable grounds that the vehicle was insured. In relation to the meaning of the phrase "believed on reasonable grounds", counsel for the plaintiff referred to *George v Rocket* (1990) 170 CLR 104 at 112, 116. In that case, it was observed that when a statute prescribes that there must be "reasonable grounds" for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

[42] The first defendant's pleaded case was that he had a reasonable belief that the vehicle was registered and insured based on:

(a) the fact that there were licence plates and a registration label on the Ford;
(b) the fourth defendant giving permission to the first defendant to a test drive of the Ford;
(c) the fourth defendant failing to inform the first defendant before the test drive that the Ford was not registered.

[43] The evidence-in-chief of Mr Chaffey pertinent to the issue was as follows:

> "Now, did you know whether vehicles have to be registered – did you then know whether vehicles had to be registered to go on the public roads?—Yes.
> You did know that?—Yes.
> Did you know if there were other requirements that went with registration?—Only that the vehicle has to be insured.
> Had you paid registration on a vehicle or vehicles before that?—Yeah, we have six other vehicles in our fleet, if you like to call it a fleet, but – which are all registered and insured.
> Was this vehicle carrying any registration plates?—It had rego plates and a sticker.
> Did you know if the sticker was current?—No.
> Did you look at the sticker at all?—No.
> Why not?—I just – wasn't concerned of mine at the time. I wasn't interested. I was just looking at the hearse and making sure things were going right there.
> Did you have any belief as to whether the vehicle was registered or not?—No. I just took it that it was an ongoing hearse that they were using and it didn't cross my mind that it wasn't registered or insured.
> That's a negative way of putting an answer, I suppose. Did Nadia Graham say anything that indicated it was not registered or not insured?—No.
> Would you have taken it on the road if you thought it was not registered or insured?—No.
> Why not?—Because it's a serious offence.
> You knew that, did you?—Yes.
> All right. Well, did you know then what the current colour was for that month or that year of registration labels?—No, I got no recall."

[44] Mr Chaffey gave evidence when cross-examined that he was aware that a person selling a registered motor vehicle was required to provide a Roadworthy Certificate and agreed that he did not see such a document or ask the fourth defendant for one.

[45] Mr Chaffey also gave the following evidence in cross-examination:

> "Well, can I suggest to you that the label, in fact, did have a '2' on it, the figure '2'?—Yeah.
> And, as you know, that means that the registration expires on the second month of the year, February?—That's right.
> And you were driving this at the end of the third month, that is the end of March?—That's right.
> I mean, the label is quite apparent, wasn't it, on the vehicle?—I noticed the label but I didn't notice what number was on it nor did I notice the colour.
> You say you didn't check ever?—I didn't.
> …
> See, could I suggest you took a bit of a risk here. You took a risk taking an unregistered vehicle out on the road to so call test drive it?—If I knew it was unregistered, it would've been a risk but I didn't know.
> You didn't look, did you?—No, I didn't.
> Therefore, you took a risk, did you not? You risked that vehicle mightn't have been registered. You took that risk?—That could be true but I'm no different to anybody else and that's it.
> We are talking about you not other people?—Yeah, and I did not check.
> Sorry?—I did not check."

[46] Also pertinent is the following exchange in cross-examination:

> "It is a fair summary of your evidence, is it not, that you didn't turn your mind to the question of whether the vehicle was registered or not on that day?—No, I didn't."

[47] Mr Chaffey gave the following evidence in response to questions from the Bench:

> "When you say you didn't turn your mind to it, are you talking about the registration of the vehicle or the registration label?—I didn't look at the label or – to see whether it was current or not.
> And did you turn your mind to the question of the registration of the vehicle?—Your Honour, it wasn't on mind at the time. I was just looking at the mechanics of the vehicle."

[48] Mr Chaffey gave the following response when re-examined by his counsel:

> "You gave evidence in chief that you'd seen the – the registration plates and the label?—That's right.
> And that you knew that it was an offence and you said certain things then?—Yeah, I knew it was offence, but it didn't – it didn't occur to me that that vehicle wasn't registered or insured. It just didn't cross my mind.
> That it was not?—That it was not.
> The negative. I see."

[49] The fourth defendant's case was that she specifically told the first defendant that the Ford was not registered and uninsured. Mr Chaffey denied that and Mr Liston's evidence was that he did not hear the fourth defendant say that. For reasons I will elaborate on below, I am not able to place much weight on any evidence that a warning was given that the Ford was unregistered.

[50] However, that is not the end of the matter. Counsel for the plaintiff submitted that the evidence indicated that the first defendant simply did not turn his mind to the critical matter of whether the vehicle was registered. It was submitted that an assumption by the first defendant that the vehicle was registered and insured, unless told otherwise, was not a belief on reasonable grounds, in circumstances where no thought was given to the matter by the first defendant and where it was not denied that the vehicle bore an expired registration label.

[51] In my view, the plaintiff's submission is clearly correct. The first defendant gave evidence that he spent some time inspecting the vehicle. His evidence was that his attention was directed to inspecting the mechanics of the vehicle. However, as a result of his inspection, he was aware of the registration label. He admitted that he was not told by the fourth defendant that the vehicle was registered. The effect of his evidence was that he quite simply did not direct his mind to whether the vehicle was registered. Proceeding on the basis of the first defendant's evidence that the fourth defendant did not say anything on the matter of the vehicle being registered, and given that he did not examine the registration label that he was aware was displayed on the vehicle, and which indicated that the registration had expired, I do not consider that the first defendant has proved that he had reasonable grounds to believe that the vehicle was insured at the relevant time. Accordingly, I find that the first defendant is liable to the plaintiff in the sum of $394,893.60 pursuant to s 60(1) MAIA.

Dispute as to ownership

The fourth defendant's case

[52] As already mentioned, the fourth defendant alleged that the Ford was sold to the second and third defendants on 31 March 2004, pursuant to a contract concluded prior to the collision. The fourth defendant's pleaded case, as outlined in the amended statement of claim, provided the following version of the events:

> "(a) the first defendant attended the fourth defendant's residence at Proserpine in the State of Queensland to inspect the Ford;
>
> (b) following the inspection referred to above and subsequent negotiations, the fourth defendant agreed to sell the Ford to the second and third defendants for the sum of $25,000.00;
>
> (c) the first defendant handed to the four the defendant some transfer documents which the fourth defendant immediately signed and returned to the first defendant;
>
> (d) in exchange for the return of the signed transfer documents, the first defendant handed to the fourth defendant a cheque in the amount of $25,000.00;
>
> (e) the first defendant told the fourth defendant that he intended to test-drive the Ford to see whether it was running correctly before he embarked on a journey in the Ford to the town of Atherton in the State of Queensland;

(f) the fourth defendant told the first defendant that the Ford was neither registered nor insured;
(g) the first defendant replied that he would only take the Ford for a short drive to see whether it was capable of being driven to Atherton;
(h) the first defendant got into the Ford and drove away;
(i) the Ford, while being driven by the first defendant, was involved in a collision with a motorcycle wherein the rider of the motorcycle suffered personal injuries as defined in the *Motor Accident Insurance Act* 1994 ('the Act') ('the collision');
(j) following the collision, the fourth defendant deposited the cheque given to her by the first defendant at a branch of the National Australia Bank in Proserpine."

[53] Dr Joice, who had known the fourth defendant for over 30 years and has been her attending general practitioner over the last 10 years, provided a medical report and gave evidence to the effect that the fourth defendant suffered from Alzheimer's disease and had done so for in excess of six years. His evidence was that the fourth defendant had no short term memory and very poor longer term memory and was unable by reason of her mental condition to give evidence.

[54] Mr Taylor, a solicitor who had acted for the fourth defendant on a number of matters, including in respect of correspondence with the plaintiff concerning the accident, gave evidence of five occasions when the fourth defendant consulted him regarding the accident. In a written statement, he outlined the nature of each consultation, and annexed the original file notes made recording the fourth defendant's instructions on each occasion that she attended on him. His statement was admitted into evidence pursuant to s 92 of the *Evidence Act* 1977 (Qld) without objection. During the course of the hearing, I ruled that the annexed file notes be admitted into evidence pursuant to s 92, notwithstanding that the fourth defendant was unable to give evidence due to her mental condition.

[55] Mr Taylor's evidence was that on 8 June 2004, the fourth defendant gave him initial instructions in relation to a letter received from the Nominal Defendant. Mr Taylor's file note of that occasion states:

"Interview with Nadia Graham
On 31/3/04 Nadia allowed Rodney James Chaffey test drive Ford Hearse 187CTM after receiving purchase price of $25k. Chaffey drove the vehicle from her place at Strathdickie toward Cannon Valley Road intersection then turned up a driveway, then reversed the vehicle – the vehicle was then hit by a man on a motorcycle – he was injured (broken leg).
At the time Chaffey drove the vehicle Nadia knew the vehicle was not registered and she told Chaffey the vehicle was not registered.
Chaffey and his mate flew down from Mareeba to look at the car and she thinks they were going to drive it back.
Police were called to the accident.
Rod Chaffey – Atherton Funerals".

[56] On 20 August 2004, the fourth defendant attended upon Mr Taylor again. This time it was in relation to the letter dated 16 August 2004 from the plaintiff's then solicitors. Mr Taylor's file note from that occasion states:

> "Interview with Nadia Graham. Client instructions.
> Driver Rod Chaffey.
> On 31/3/04 Rod came to client's home to purchase her Ford Hearse. She picked him up at the airport after he flew down from Atherton at about 9.00am.
> Rod went with client and inspected the hearse – she agreed to sell the vehicle for $25,000.00 – Rod gave her the cheque and she thinks she signed transfer papers – Rod and his friend then took the vehicle for a drive.
> Client told Rod it was unregistered and uninsured.
> Rod had an accident in the vehicle.
> After he handed over the cheque Rod said 'Well I suppose I'd better take it for a run now'.
> Guilfoyles Funeral Atherton – Rod Guilfoyle".

[57] On 26 August 2004, Mr Taylor telephoned the fourth defendant to obtain further instructions. The file note from this occasion states:

> "Telephoned Nadia Graham.
> I requested further instructions about circumstances of sale.
> Before Rod drove vehicle for a test run, he said 'we will finalise everything.' He gave her a cheque for $25,000.00 and they signed transfer papers.
> Rod said they would drive the hearse to Atherton and that they should take a drive in it to make sure it was running okay. She told Rod it was not registered or insured. Rod took hearse for a drive.
> Some time later he telephoned on his mobile to say he had been in an accident with the hearse. He said 'I have some bad news. I've had an accident but I will stand by you if you get into trouble. I will take full responsibility'. He asked if she would come and pick them up.
> She travelled to the accident scene and collected Rod and his friend. They did not return to the house.
> While she was waiting for them to come back *from the test drive* she sat at the house and played patience until the telephone call.
> She drove them into Murolo's smash repairs and left them in town.
> While in town she deposited the cheque to NAB."

[58] The file note of the interview conducted on 4 April 2008 records:

> "Interview with Nadia Graham
> Client instructs she advertised sale of the hearse.
> She told the funeral accessories supplier about hearse being for sale and he put the word around to funeral directors.
> She can't say how Ross Chaffey came to know the vehicle being for sale. Chaffey telephoned Nadia Graham to enquire about the purchase of the vehicle.
> Client is now suffering from Alzheimer's disease and has a limited memory."

[59] The final interview took place on 7 December 2009. Mr Taylor's file note of this interview states:

> "Interview with Nadia Graham and Jean Russell
> I ask Mrs Graham how her memory is – she states she cannot recall things.
> I asked her whether she remembers anything about the sale of her hearse. She cannot recall which hearse we are talking about. She says it is all too long ago.
> I asked when she thought it was – she thought 1959. When asked whether she remembered an accident she replied 'Was I driving or was he driving'."

The second and third defendants' case

[60] The second and third defendants' pleaded case was that the first defendant attended the fourth defendant's premises for the purposes of inspecting the Ford with a view to purchasing it for Guilfoyles Funeral Services. At the time of the collision, the first defendant was test driving the Ford with the fourth defendant's permission. After the collision, the first defendant agreed to purchase the Ford, with the fourth defendant agreeing to include a church truck and stretcher with the sale of the Ford. The first defendant then wrote and delivered a cheque for $25,000 to the fourth defendant.

[61] The evidence of Mr Chaffey was that he came to learn of the Ford being for sale and telephoned the fourth defendant who told him that it was for sale for $25,000. He arranged for a solicitor friend of his, Mr Liston, to fly him to Proserpine so that he could see the vehicle. The fourth defendant met Mr Chaffey and Mr Liston at the airport and drove them to her house where they inspected the Ford which was in a garage area under the house. Mr Chaffey's evidence was that there were other funeral related items including a church truck and stretcher also under the house. Mr Chaffey reversed the Ford out and inspected it and satisfied himself that it looked to be in good order. He asked the fourth defendant whether it was alright to take the Ford for a test run and she indicated that it was. Mr Chaffey then took the Ford for a drive during which time the accident occurred. Mr Chaffey's evidence was that, after the accident, he rang the fourth defendant on his mobile and told her that he had had an accident. His evidence was that she became very upset and said that she was ruined because the vehicle was unregistered and uninsured.

[62] Eventually, a tow truck arrived and transported the Ford to the fourth defendant's house. The tow truck driver also gave Mr Chaffey and Mr Liston a lift back.

[63] Mr Chaffey said that after the Ford was unloaded he went upstairs with the fourth defendant and had a cup of tea. A friend of the fourth defendant's was also present. He said he told the fourth defendant he would still buy the Ford. His evidence was that the cost of converting a Ford so that it would be suitable to be used as a hearse was in the vicinity of $185,000 and that he thought that the cost to repair the damage to the Ford would be about $5,000. His evidence was that the fourth defendant said she would throw in the church truck and stretcher for the sale price of $25,000. Mr Chaffey made out a cheque for that amount and gave it to her.

[64] Mr Chaffey said there was no discussion about driving the Ford to Atherton and that he had no intention of doing so, as it was his birthday and he had planned to fly back with Mr Liston to Atherton for a family party. He also gave evidence that no transfer documents were shown to him on that occasion. He also gave evidence that after he had handed over the cheque, the fourth defendant drove him, Mr Liston and

the fourth defendant's friend to the site of the accident, where photographs were taken of the scene. His evidence was that after that they all returned in the fourth defendant's car back to the fourth defendant's house where the fourth defendant's friend was dropped off and they then proceeded to the airport. On the way to the airport, the fourth defendant asked on about three occasions where she was taking them and Mr Chaffey said he had to keep telling her that she was taking them to the airport.

[65] In cross-examination, Mr Chaffey accepted that the fourth defendant had picked him up from the airport at about 9.00 am, but denied that he had agreed straight away to buy the Ford for $25,000 and that he thereafter told the fourth defendant, "I suppose I better take it for a run now", although he accepted that when he phoned the fourth defendant after the accident he said, "I've got some bad news. I have had an accident. But I will stand by you". Those were the statements recorded in Mr Taylor's diary note of 26 August 2004 as the fourth defendant's instructions. Mr Chaffey was unable to recall and did not think that he had also said, "I will take full responsibility" which were also recorded in the diary note.

[66] Mr Liston's evidence was that after they arrived in Proserpine, he removed the plane's battery as he was having a problem with it and asked the fourth defendant who was waiting for them with her vehicle to drop him off at a place where he was able to have the battery charged. They then proceeded to the fourth defendant's house. He accompanied Mr Chaffey to an area under the house of the fourth defendant where the Ford was located. He and Mr Chaffey inspected the Ford. The vehicle was driven out from under the fourth defendant's house. Mr Chaffey went upstairs briefly, returned and drove the Ford out on to the road.

[67] After the accident occurred, Mr Liston assisted the tow truck driver to get the Ford on to the tow truck and was then taken to the fourth defendant's house by the tow truck driver with Mr Chaffey. Mr Liston gave somewhat varying evidence about what occurred after this. He initially stated that after returning to the fourth defendant's house, he and Mr Chaffey proceeded upstairs where Mr Chaffey said to the fourth defendant, "look, I'm going to do the right thing. I'm going to buy that – I'm prepared to pay you the $25,000.00 you are asking for the hearse". Mr Chaffey then took out his cheque book and wrote out a cheque for $25,000 which he handed to the fourth defendant. He did not hear any discussion about any other funeral equipment being thrown in. The two men then asked the fourth defendant if she would take them back out to the accident site because they had not had a camera with them and wanted to take some photographs and have a good look at the scene.

[68] However, Mr Liston's later evidence was that the fourth defendant first took them back to the scene of the accident, where photographs were taken, and that they then returned to the fourth defendant's house, and it was then that he saw the first defendant write out a cheque and hand it to the fourth defendant. Mr Liston's evidence as to what was said when the cheque was handed over also changed, in that he said that the only statement made to the fourth defendant when the cheque was handed to her by the first defendant was, "Nadia, I'm going to give you the $25,000 you want for the hearse".

Finding as to ownership

[69] There is a stark contrast between the position of the fourth defendant and the second and third defendants as to whether the vehicle was sold before or after the accident.

While the diary notes were admitted pursuant to s 92 of the *Evidence Act*, the fourth defendant was not able to be called as a witness and was not able to be tested on the version recorded in those notes. Consideration is required to be given as to the weight to be attached to the statements admitted pursuant to s 92. Section 102 of the *Evidence Act* provides:

> "**Weight to be attached to evidence**
>
> In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—
>
> (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
>
> (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts."

[70] I note that the fourth defendant's recorded account that the sale of the Ford was concluded before the vehicle was taken for a drive remained consistent in the various diary notes. However, those notes were not contemporaneous with the events in question and reflect a version of events which benefited the fourth defendant in terms of not exposing her to liability.

[71] Counsel for the fourth defendant submitted that the first defendant's evidence central to the second and third defendant's case, that the contract was concluded after the accident when the cheque was delivered, ought not to be accepted. He submitted that the first defendant ought not to be accepted as a credible witness, given that he signed a registration application which recorded an incorrect valuation of the vehicle and conceded that the lower valuation was inserted so as to reduce liability to duty. Whilst that matter clearly reflects badly on the first defendant, I do not consider that the first defendant's evidence ought to be rejected as a whole; it remains that his version that the cheque was only handed over to the fourth defendant after the accident was corroborated by Mr Liston. And although Mr Liston gave slightly varying accounts of what occurred after the accident, he consistently maintained that the contract was concluded and the cheque was handed over after the accident.

[72] I also note as relevant the evidence of Dr Joice, that the fourth defendant had suffered from Alzheimer's disease for some time and that she was likely to have been suffering from Alzheimer's in 2004. Indeed, Dr Joice considered it likely that she was suffering substantial impairment of memory on the day of the accident if she required directions as to where to go. He did not consider the fact that she was able to drive a vehicle on the day in question as being inconsistent with that position. Dr Joice's evidence was that the defendant's mental condition would have fluctuated over that period. I balance the evidence of the fourth defendant's memory problems on the day of the accident against the evidence of Mr Taylor, who did not consider that the fourth defendant exhibited memory problems when she attended on him on the first three occasions in 2004 when file notes were made.

[73] Nevertheless, on the balance of probabilities, I prefer the evidence of the first defendant which is supported by that of Mr Liston and which was tested in cross-

examination. I conclude that no contract for the sale of the Ford was concluded prior to the accident and that at the time of the accident the fourth defendant was the owner of the Ford.

Third party action

[74] The fourth defendant brought third party proceedings against the first, second and third defendants, contending that the fourth defendant was entitled to be indemnified in respect of any liability to the plaintiff. The indemnification was sought on the basis of a bailment or implied terms arising from contract. A claim for contribution was not pressed in submissions.

[75] It was contended that, even if the second and third defendants were not the owners of the Ford at the time of the accident, they were bailees of the Ford and liable to indemnify the fourth defendant. It was alleged that there was a duty both to take reasonable care of the Ford and to take reasonable care for the safety of others while the Ford was being driven, which had been breached. Of course, the second and third defendants paid the purchase price sought by the fourth defendant, so no issue arises as to making good the damage sustained to the Ford. In making those submissions, the fourth defendant relied on *Chowdhary v Gillot* [1947] 2 All ER 541 and *Soblusky v Egan* (1960) 103 CLR 215, although in relation to the latter it was conceded that it was of little assistance, given that it concerned the regime relating to registered vehicles under the *Motor Vehicle Insurance Act* then operative. Reliance was also placed on *Carlin Auction Services (Qld) Pty Ltd v Gonchee* [2004] QDC 086 to contend that in the present case a bailment for reward arose. The fourth defendant placed particular reliance on the statement of principle set out in *Mazengarb's Law and practice relating to actions for negligence on the highway*, 1962, 4th ed, at 190 where, citing *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555 and *Hughes v McCutcheon* (1952) 4 DLR 375, it is stated that:

> "If in consequence of the bailee's negligent driving, the owner is required to pay damages to a third party, the owner may recover from the bailee the amount he had paid to the third party and also for any injury done to his own vehicle. This liability may arise either because the bailee is a servant or, less commonly, because he is an agent of the owner."

[76] Relying on *Carlin Auction Services*, it was also contended that the first defendant drove the Ford as the servant or agent of the second and third defendants pursuant to a contract with the fourth defendant. It was said that the consideration for the contract was that the test drive should be seen as being in part for the benefit of the fourth defendant as facilitating the ultimate sale. Implied terms were alleged, that the first defendant would take reasonable care for the safety of other persons while driving the Ford, such that any breach resulting in a statutory claim against the fourth defendant by the plaintiff constituted a breach of the term entitling the fourth defendant to be indemnified to the extent of the plaintiff's statutory claim. Additionally, it was alleged that there was an implied term that the fourth defendant be indemnified against claims for damages by anyone injured as a result of the first defendant's driving and claims by the first defendant "exercising its statutory function".

[77] In the present case, the fourth defendant's liability to the plaintiff is a statutory one which arises because the vehicle was uninsured and permitted to be driven while it

was to the fourth defendant's knowledge uninsured. Ordinarily, the fourth defendant as bailor would not be liable for injury caused to another by the bailee's negligent use of the bailed chattel for the bailee is not the agent of the bailor in this connection (*Smith v Bailey* [1891] 2 QB 403, *Everett's Blinds Ltd v Thomas Ballinger Ltd* [1965] NZLR 266, *Halsbury's Laws of England*, 4th ed, at [1588], *Palmer on Bailment*, 3rd ed, 2009, at [36-003]). In respect of the authorities relied on and the approach urged by the fourth defendant, I note the following observations of Tompkins J in *Everett's Blinds Ltd* at 271-272:

> "The next question is whether any other authorities justify the Court in implying in the contract of bailment an indemnity of the kind sought. Mr White quotes *Mazengarb's Negligence on the Highway*, 4th ed. 247, where the learned author says:
>
> > The bailor may also recover from the bailee the amount of damages he has been obliged to pay to a third party.
>
> But the two cases he quotes for that statement do not, in my opinion, provide any basis for the statement. In *Hughes v. McCutcheon* (1952) 4 D.L.R. 375 the owner of the car was held responsible to a third party for the negligence of the driver because he allowed the driver, while intoxicated, to drive the car. No question of a bailment arose. The other case quoted, *Lister v. Romford Ice and Cold Storage Co. Ltd. (supra)* is a case of a master suing an employee for an indemnity against damages he had to pay arising from the employee's negligence. It was held in that case that there must be implied in the contract of employment an obligation to his employers to exercise reasonable care in the performance of his duty as a driver. Mr White contended that if such a term could be implied in a contract of employment there was no reason why it should not be implied in a contract of bailment, because the employee was really a bailee of the employer's vehicle. I do not think that follows at all and there is certainly no authority for such a submission. The implied term in the contract of employment is that the employee would perform his duties with proper care; but this is a duty which is necessary to give efficacy to the contract of employment. The contract of bailment is a completely different one where the obligation is merely to take reasonable care to preserve and return the chattel entrusted to the bailee. A bailment is always defined as a delivery of goods to another otherwise than as a servant, see *2 Chitty on Contracts*, 21st ed., 63, and *Paton on Bailments*, 4. *2 Halsbury's Laws of England*, 3rd ed., 114, says:
>
> > A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor.
>
> …
>
> I think the duty of a bailee for reward who contracts to do work on a chattel is as stated above, and does not extend to indemnifying the bailor against claims of third parties for damage done by the negligence use of the chattel. I do not think that there is any implied duty on the part of a bailee to indemnify a bailor in respect of third parties' claims for damages."

[78] I agree with the analysis of Tompkins J. Moreover, there is a further difficulty in the fourth defendant's submissions which is insurmountable. The purpose of the

bailment was to allow the first defendant to test drive a vehicle, which was unregistered and uninsured, on a public road. Indeed, the fourth defendant was convicted on 30 May 2005 of permitting the Ford to be used on a road when unregistered and uninsured. Counsel for the first, second and third defendants contended that no bailment could be enforced in circumstances where its purpose was unlawful. In my view, that submission is correct and is fatal to the case put forward by the fourth defendant for indemnification. In the circumstances of the present case, the fourth defendant is not entitled to be indemnified, whether on the basis of a bailment or contract, which was for an unlawful purpose (*Ashmore, Benson, Pease & Co Ltd v AV Dawson Ltd* [1973] 1 WLR 828, *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374).

[79] The first, second and third defendants contend that the fourth defendant knowingly made the false representation that the Ford was registered and that the first defendant relied upon it, and that in doing so they have suffered a loss and may suffer further losses. Alternatively, they argue that a failure to warn of the fact that the Ford was unregistered and uninsured was negligent on the part of the plaintiff. Additionally, the fourth defendant, through offering the Ford for sale, was engaging in commerce. Her conduct in failing to advise the first defendant about the registration status of the Ford was in breach of s 36 of the *Fair Trading Act* 1989 (Qld) as it was misleading and deceptive, or likely to mislead or deceive. In my view, all of the allegations made against the fourth defendant by the first, second and third defendants are without substance. Given the evidence of the first defendant that the fourth defendant did not say that the Ford was unregistered and uninsured, and bearing in mind that the expired label was clearly displayed for inspection, I fail to see how it can be said that there was any false or misleading representation by the fourth defendant on the matter. Nor do I accept that there was, in those circumstances, a breach of any duty as alleged.

Orders

[80] I order that there be judgment against the first defendant and fourth defendant in favour of the plaintiff pursuant to s 60(1) MAIA in the sum of $394, 893.60. I shall hear the parties as to the issue of interest pursuant to s 47 of the *Supreme Court Act* and costs.