SUPREME COURT OF QUEENSLAND

CITATION:	*Miles v Williams & Anor* [2013] QSC 162
PARTIES:	**TERENCE PHILLIP MILES** **(plaintiff)** **v** **BROCK GARRICK WILLIAMS** **(first defendant)** **SUNCORP METWAY INSURANCE LIMITED ACN 075 695 966** **(second defendant)**
FILE NO:	BS2193 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	21 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2-4 April 2013
JUDGE:	Mullins J
ORDER:	**Judgment for the plaintiff**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – PARTICULAR PERSONS AND SITUATIONS – MOTOR VEHICLE CASES – where the plaintiff sustained injury when struck by a motor vehicle – where there was a foreseeable risk of injury to the plaintiff – where the risk was not insignificant – whether a reasonable person in the position of the driver of the motor vehicle would have taken precautions against the risk of harm to the plaintiff – whether the driver's operation of the motor vehicle was reasonable – whether the plaintiff voluntarily assumed the risk of harm from being struck by the motor vehicle by standing near the motor vehicle TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – where the driver of the motor vehicle did not exercise reasonable care – where the driver's negligence was a necessary condition of the occurrence of the injury to the plaintiff – whether it is appropriate for the scope of the liability of the driver of the motor vehicle to extend in the circumstances to the plaintiff's injury TORTS – NEGLIGENCE – CONTRIBUTORY

NEGLIGENCE – GENERALLY – where the plaintiff was struck by a motor vehicle in the car park of the tavern after he had been drinking alcohol at the tavern – whether the plaintiff's capacity to exercise proper care and skill for his own safety was impaired – whether the plaintiff's intoxication contributed to the injury suffered by him – whether by standing near the motor vehicle the plaintiff failed to take precautions against the risk of being struck by the motor vehicle when it moved from a stationary position

Civil Liability Act 2003, s 9, s 11, s 12, s 13, s 14, s 23, s 45, s 47
Criminal Code 1899, s 355

Abdallah v Newton (1998) 28 MVR 364, considered
Imbree v McNeilly (2008) 236 CLR 510, followed
Leishman v Thomas (1957) 75 WN (NSW) 173, considered

COUNSEL: J A Griffin QC and K F Boulton for the plaintiff
R J Douglas QC and R D Green for the defendants

SOLICITORS: Hunter Solicitors for the plaintiff
Eardley Motteram for the defendants

[1] The first defendant was the driver of a 1996 green Ford Festiva manual motor vehicle (the sedan) when it ran over the plaintiff in the car park of the Robina Tavern just before midnight on 14 January 2006 (the incident). The plaintiff sustained serious injuries to his right and left legs. The second defendant is the licensed insurer under the policy of insurance that applied to the sedan pursuant to the *Motor Accident Insurance Act* 1994.

[2] The plaintiff sues the defendants for damages for negligence. Quantum has been agreed, but liability is in issue.

[3] The first defendant drove the sedan to the tavern to enable at least one of his passengers to buy alcohol at the bottle shop. The sedan was in the car park only for a few minutes when the incident occurred. Extensive evidence was given by seven witnesses of the events occupying these few minutes. There were many differences in the versions of the events. That is not surprising when the events unfolded quickly, some of the witnesses were affected by alcohol, and the evidence was given more than seven years after the incident. The credit of the witnesses is critical. In order to express conclusions on credit and make relevant findings of fact, it is necessary to summarise the evidence of the witnesses.

[4] Each of these witnesses gave evidence by reference to an aerial photograph of the Robina Tavern, car park and liquor barn and drive in bottle shop (exhibit 3). The photograph was oriented to accord with the actual orientation of the site. The tavern is therefore at the north of the photograph. Cheltenham Drive is at the south of the photograph and provides the southern boundary of the site. There is a driveway on the western boundary of the site and the internal roadway on the eastern boundary runs from the north-west to the south-east.

[5] The aerial photograph was supplemented by a plan (exhibit 4) that shows the dimensions of the car park between the western driveway and the building occupied by the liquor barn and bottle shop. The bottle shop driveway measures 52 metres across from the point on the ground that corresponds to the western edge of the roof of the bottle shop to the eastern edge of the western driveway. The western driveway is 6.5 metres wide in the vicinity of where the incident occurred. The width of the bottle shop driveway bounded to the north and the south by cement curbing of gardens that appear like traffic islands is 8 metres. The length of the traffic island that forms the southern border of the bottle shop driveway measures from the eastern edge of the western driveway is 31 metres.

The evidence of the plaintiff's witnesses

The plaintiff

[6] The plaintiff describes himself as six feet one inch tall and weighing between 125 and 130kgs at the date of the incident. He was 22 years old at the date of the incident. He arrived at the tavern about 7pm for a friend's birthday party. He had drunk two schooners of full strength beer in the afternoon over an hour from about 2:30pm at the Broadbeach Hotel where he was gambling. He had no other alcohol to drink until he went to the party where he drank up to eight schooners of full strength beer at the party. He did not believe he was "too impaired." At the party the plaintiff had played pool or snooker and had snack foods, such as sandwiches, dim sims and hot chips. His brother Troy and a friend Kenny were also at the party and the plaintiff intended to travel home with them. Troy was more affected by alcohol than the plaintiff.

[7] Troy and Kenny left the tavern and were in the car park, when the plaintiff left soon after last drinks were called at about 11:45pm. As the plaintiff left the tavern he heard drunken shouting between Troy and Kenny and the occupants of a green hatchback (and it is not in issue that it was the sedan). The plaintiff cannot recall what was being shouted. He then saw the sedan travel towards the tavern and lost sight of it. Troy and Kenny were walking in a southerly direction along the western driveway of the car park and the plaintiff was walking to catch up to them.

[8] When Troy and Kenny were not far from the Cheltenham Drive exit, the plaintiff observed that the sedan seemed to have driven through the bottle shop driveway and stopped near where the bottle shop driveway intersects with the western driveway. When the plaintiff was about 10 metres from the sedan, an occupant shouted to him "What's your mate's fucking problem?" The plaintiff replied "Just please keep driving. We don't want any trouble." The occupants of the sedan then started yelling in Troy's direction and Troy proceeded to walk north towards the sedan. The plaintiff put his hand up and told Troy to stop and said "Don't come over here. These guys are going." Kenny did not come towards the sedan. The plaintiff estimated that he got about two to three metres away from the sedan and no closer than two metres from the stationary sedan. The plaintiff was standing in the western driveway near where it meets the bottle shop driveway, close to the traffic island that forms the northern border of the bottle shop driveway. The plaintiff was not in the direct path of the sedan, but looking at it from the driver's perspective, he was in front of the right-hand side of the sedan and to the right at close to a 45 degree angle when he stopped walking. The front driver's side corner of the sedan was the nearest part of the sedan to him. The sedan was facing west in one of the

lanes from the drive through bottle shop with the wheels turned to the right (in the direction of the tavern).

[9] There was continuous shouting between the occupants and Troy as the plaintiff stood where he was. The next thing the plaintiff heard was the sedan "rev", and he saw the sedan jump and it hit him. The plaintiff did not hear any words of warning from the defendant that he should move out of the way. The sedan travelled in the direction its wheels had been turned. It all happened very quickly, the plaintiff was unable to get out of the way of the sedan, the sedan hit his legs, the front driver's side wheel went over the plaintiff and then the back driver's side wheel went over the plaintiff. The plaintiff was trapped under the back wheel, as the sedan had trouble getting over him and it was rocking over him back and forth. He estimates that it went back and forth over him five or six times. The sedan turned right into the western driveway and travelled north along the western driveway (towards the tavern).

[10] Immediately prior to the sedan taking off, the plaintiff had not observed anyone throw any glass into the sedan and did not observe anyone try to punch the driver. He did neither of those things. The plaintiff estimated that there was no one near him when the incident occurred and his brother who was walking towards him was five to 10 metres away from the sedan when it took off. There was nothing that prevented the sedan from turning left and exiting at Cheltenham Drive. There were no other vehicles in the driveway at the time of the incident.

Ms Schestakov

[11] Ms Schestakov had also been at the same birthday party at the tavern as the plaintiff, but before the incident only knew of him. She arrived at the party at 7pm or 8pm and had drunk no more than four drinks of vodka with a mixer. At about 11:30pm she left the party with her friend Ms Hargreaves. They walked in a southerly direction through the middle of the car park from the tavern to the driveway for the bottle shop. When she first saw the sedan, it was travelling in the western driveway from the north to the south. When the incident occurred, she was about five to 10 metres away from the sedan, standing in the bottle shop driveway, but closer to the liquor barn than the other two people who were between her and the sedan. Ms Schestakov thought there were around eight people in total in the vicinity who had come from the same party (including the plaintiff and Troy Miles), but the other people were not in close proximity to the sedan, "but they were scattered around."

[12] Ms Schestakov saw the sedan driving very slowly, creeping forward, with the occupants in the sedan yelling out abuse and swear words at the plaintiff who was standing at the driver's side front end. She saw the car accelerate suddenly and jolt forward and the plaintiff was tapping on the sedan saying "Hey, fuck, hang on a minute, stop" and screaming, as if he was in pain. The plaintiff was tapping on the windscreen for a split second, as the sedan was accelerating on him and hit him. Ms Schestakov conceded that she could have been mistaken about the tapping on the windscreen and that it could have been that the plaintiff was tapping the bonnet of the sedan. The sedan kept going and stopped while it was on top of the plaintiff and then the sedan accelerated over the top of him.

[13] Ms Schestakov did not see anyone outside the sedan punch or attempt to punch the driver through the driver's side window and did not see any glass thrown through the driver's side window. Ms Schestakov had the sedan travelling in a southerly direction along the western driveway when the incident occurred.

[14] At the time the plaintiff was struck by the sedan, Ms Schestakov said he was about two metres away from another person, although in cross-examination she estimated that the other men were about a metre away from the plaintiff. Ms Schestakov and Ms Hargreaves went over to the plaintiff to assist him. Ms Schestakov got a jacket that she wrapped around his foot and that Ms Hargreaves held, while Ms Schestakov called the police.

[15] Ms Hargreaves was not located for the purpose of giving evidence at the trial. One of the attending police officers, Constable Munkley, took down a statement from Ms Hargreaves which she signed in his police notebook. Constable Hays who gave evidence took a statement from Ms Schestakov and was present while Constable Munkley took the statement from Ms Hargreaves. Constable Hays does not have any specific recollection about whether Ms Schestakov and Ms Hargreaves were affected by alcohol, but he could state that he did not normally take a statement from a person who was clearly affected by alcohol. The relevant pages of Constable Munkley's notebook are exhibit 20. The statement records:

> "It all happened fast. The car was in front of me to the left. It was green 2 door. I heard boys yelling. I saw 2 males out the window of the right of the (*sic*) yelling and swearing. Other boys 2 metres to the side were yelling back to them. I saw the car move forward. It went over the bump then took off quickly. People starting screaming and I saw a guy on the ground wearing shorts light polo shirt. He was screaming 'Help me what's happening.' I went over and put a shirt around his ankle to stop the blood. I did not see anything being thrown at the car or thrown from the car."

Troy

[16] Troy was 18 years old at the date of the incident. He had a couple of drinks before he arrived at the birthday party around 7:30pm, was drinking at the hotel, and described himself as "a little bit intoxicated." He and Kenny did not take any glass from the hotel. They left through the western exit of the tavern and walked in a southerly direction and had not got very far from the tavern when they had a "little bit of an altercation" with the occupants of the sedan.

[17] Troy said that abuse was yelled at Kenny and him to the effect of "Fuck you, you faggots." He responded "Piss off" and "Keep going." Neither Troy nor Kenny spat into the sedan. Troy and Kenny were standing on the passenger side of the sedan. Troy did not kick the sedan. The sedan then drove off. Troy and Kenny then proceeded to walk south along the western driveway. They were headed towards the bottle shop to buy cigarettes. As they reached the driveway for the bottle shop, they turned left into that driveway and Troy saw the sedan driving around the southern side of the bottle shop and liquor barn towards them and the vehicle passed them and stopped in the driveway leading from the bottle shop. Troy and Kenny stopped at the traffic island that forms the southern border of the bottle shop driveway. Words were exchanged again between Troy and the occupants of the sedan.

[18] Troy noticed that the plaintiff was behind them, walking down the western driveway and was yelling out "What's going on? Just keep going, keep driving, don't worry about it." The plaintiff was in front of the sedan and standing near the traffic island that forms the northern border of the bottle shop driveway where the driveway from the bottle shop intersects with the western driveway. The plaintiff was not touching the sedan, but was one and a half metres or a couple of metres from the sedan. Troy and Kenny were standing on the southern side of the sedan about five metres away, when suddenly the sedan "revved," knocked the plaintiff over, ran over him, and then took off around the corner into the western driveway, travelling north towards the tavern. Troy did not notice any other people in the vicinity. Before the sedan moved off, Troy did not see anything thrown through the driver's window and did not hear any glass smashing. Troy did not strike the first defendant in the face and did not see anyone else do so.

Kenny

[19] Kenny arrived at the party about 7pm and had no more than four schooners of Carlton Draught and was "a little bit" affected by alcohol, but not too intoxicated. He left the party with Troy intending to buy cigarettes. They left through the western exit of the tavern and were heading south. They reached the circular driveway that abuts the tavern when the sedan stopped in front of them and the people in the car called them "faggots." Kenny and Troy responded with abusive language. Neither he nor Troy spat at anyone in the car. Troy did not kick the side of the sedan. The sedan drove off in the direction of the service station.

[20] Kenny and Troy then walked south to the bottle shop to buy cigarettes and turned left into the driveway to the bottle shop. Kenny saw the sedan again when it was on the southern side of the bottle shop. It was travelling in a westerly direction towards Kenny and Troy and it stopped near them. Kenny and Troy were facing south and on the driver's side of the sedan. Troy was closer to the sedan than Kenny and about a metre away from Kenny. Kenny was about two to three metres from the driver's side door and near the gutter of the traffic island that forms the northern boundary of the bottle shop driveway.

[21] Words were exchanged again, but Kenny cannot recall what they were apart from "a bit of swear words." Neither Troy nor Kenny assaulted the first defendant or threw anything into the sedan. Kenny did not hear the driver of the sedan call out to get out of the road. When the sedan drove off, it was "revving," it turned right and hit the plaintiff at the corner where the driveway from the bottle shop meets the western driveway. Kenny did not see the plaintiff until he got run over. There were no other vehicles in the bottle shop driveway at the time and there was no impediment to the sedan reversing and driving out another way. There was also no impediment to the sedan turning left into the western driveway and driving out the Cheltenham Drive exit.

[22] The sedan sped off in a northerly direction on the western driveway.

The evidence of the defendants' witnesses

The first defendant

[23] The first defendant had just turned 17 years old and had his driver's licence for only a couple of days before the incident occurred. He was the owner of the sedan. He had never driven to the tavern before the incident.

[24] On the night of the incident the first defendant had been visiting his girlfriend Ms Anthony at her parents' home at Mudgeeraba. He was not drinking alcohol at all. His girlfriend's father and brother wanted some alcohol and he drove his girlfriend, her brother and her brother's school friend Sam to the tavern. Ms Anthony was in the front passenger seat. Her brother and Sam were seated in the back of the sedan.

[25] The first defendant drove into the tavern premises from Cheltenham Drive and was driving north along the western driveway, when the first defendant saw two people on the side of the driveway, walking from the direction of the tavern. The front windows of the sedan were down, as it was hot and the sedan was not air-conditioned. The sedan was moving slowly through the car park over the speed bumps, as the sedan had a body kit on the front that lowered the sedan to the ground. The first defendant saw one of the men lean in through the front passenger's window and spit at his girlfriend. The occupants of the sedan yelled out at the two men. The first defendant denied that the abuse was initiated by those in the sedan yelling out to the two men things such as "faggots." The first defendant also saw the man move towards the car with a forward thrust and kick the sedan. The first defendant did not stop the sedan, but turned right and drove it across the car park, where Ms Anthony changed seats with her brother, so that her brother was then in the front passenger seat.

[26] The first defendant and those with him decided not to buy any alcohol. The first defendant then drove the sedan back through the car park to the west of the liquor barn and into the driveway leading from the drive in bottle shop, as he intended to leave via the Cheltenham Drive exit (which was the only exit he was familiar with), but he stopped the sedan, as one of the two men who had been on the side of the western driveway was standing on the gutter line with a friend and had a beer in his hand. This man was about five or six metres from the driver's side window of the sedan. The first defendant wanted to know why the man had spat through the window and asked him "What was with your mate?" The man responded "Sorry, mate, we just got kicked out of the pub, and to that extent I apologise." The first defendant then saw two people run out from the bushes directly in front of where he had stopped the sedan, one of whom he was able to identify as the plaintiff. The plaintiff stopped in front of the car in line with where the first defendant was seated and the second man ran around to the driver's side window.

[27] The plaintiff put his hands face down on the bonnet, banged his hands on the bonnet, and said three or four times "Get out of the car" and "You're not going anywhere. Get out of the car." The first defendant responded "Get out of the fucking road." The first defendant said that two or three times and also said "I'm going. Get out of the road." The first defendant "revved" the sedan two or three times. The plaintiff did not move from his position at the bonnet of the car.

[28] The second man threw three or four punches to the right side of the first defendant's head through the driver's side window and then some glass came through the window, landed on the gear stick, and smashed where his left hand was placed. The first defendant saw it come through the window, but is not sure who threw it. The first defendant felt pain and there was blood spurting everywhere. He was aware of

glass in the sedan and a lot of screaming from his girlfriend. The first defendant said he warned the plaintiff once more, but the plaintiff replied "Get out of the car, you're not going anywhere," and then the first defendant drove off.

[29] The first defendant realised that he had run over the legs of the plaintiff. There were two bumps, as he drove over the plaintiff. He did not stop his vehicle because "… we were getting attacked… . I feared for our lives. I couldn't stop."

[30] The first defendant drove to the Mudgeeraba Police Station, but it was closed. He then returned to his girlfriend's parents' place and made a 000 call. In the course of that call, when the operator asked whether he wanted to make a complaint, the first defendant responded:

> "I don't know, I just want to ring because I don't want to get in trouble it was only his leg, but he jumped in front, 2 jumped in front of my car and like there was another guy over throwing bottles in my window when I had to take off coz we were going to get the shit beaten out of us..."

[31] The first defendant described to the operator the men who had been involved in the confrontation with him as "big Maoris." The first defendant concedes that his description to the operator of the plaintiff's jumping in front of the sedan was incorrect, as the plaintiff did not jump, as he had run to the front of the sedan and stayed in that position the whole time.

[32] The police attended at Ms Anthony's parents' place and the sedan was impounded. Photographs were taken of the sedan (exhibits 27 to 29) which showed blood in the vicinity of the gearstick and broken glass, including the base of a broken schooner glass.

[33] The first defendant attended the Tweed Heads Hospital where he had 10 stitches to his left little finger. The first defendant described his injuries as "severed tendons and arteries down my finger and bruising on the side of my face."

Ms Anthony

[34] Ms Anthony was the first defendant's girlfriend at the date of the incident. She was then 16 years old. They had spent the evening at her parents' home, when Ms Anthony travelled in the first defendant's car with the first defendant, her brother and his friend Sam to the tavern. Ms Anthony had not been drinking alcohol on the evening and was seated in the front passenger seat. The front passenger window was down, as it was hot.

[35] The first defendant drove the sedan into the tavern car park from Cheltenham Drive and drove along the western driveway about halfway through the car park when Ms Anthony saw a man walking towards them on the passenger side of the sedan. The sedan was driving slowly. This man spat through the front passenger window and it sprayed onto Ms Anthony. Ms Anthony could also hear someone kicking the side of the front of the sedan.

[36] The first defendant then drove the sedan across the car park and it stopped on the other side of the car park to enable Ms Anthony to change seats with her brother. The sedan was then driven on the western side of the liquor barn and turned right into the driveway leading from the bottle shop. The sedan came to stop where there

were at least three men. One was to the side of the car and yelled out "Look, don't worry, it's fine. Thanks, see you later." One was in front of the driver's side of the sedan roughly above the headlight, with his hands face down on the bonnet of the car. Another man was standing in the middle of the path to exit out of Cheltenham Drive.

[37] The man at the front of the car said "Get out of the car, you're not going anywhere." The first defendant yelled out repeatedly "Move, move, we're going to go, we're going to go." A glass came through the driver's window and smashed on the first defendant's left hand, but Ms Anthony did not see who threw it. There was blood everywhere on the first defendant and in the sedan. It was suggested to Ms Anthony in cross-examination that there was no punching, and Ms Anthony responded "I was in the back seat, so I … didn't see that." The first defendant "revved" the sedan and drove off, striking the person who was injured with the front driver's side of the sedan in the region of the headlight and driving over him, before driving out the Cheltenham Drive exit. Ms Anthony saw the bottom piece of the schooner glass in the sedan when they got home.

Mr Anthony

[38] Mr Anthony and his friend Sam had been out at a birthday party. He had been drinking alcohol. He wanted to buy alcohol before the tavern shut at midnight.

[39] The first defendant drove Mr Anthony, his friend Sam and his sister in the sedan to the tavern, entering from Cheltenham Drive. The sedan drove along the western driveway and had almost reached the circular part of the internal road immediately adjacent to the tavern, when Mr Anthony saw a man walking on his own on the passenger side of the sedan. Mr Anthony looked up and saw that this man had spat towards the passenger side window of the sedan where his sister was sitting and heard a sound like the kicking of the door. Mr Anthony did not think that he and the other occupants of the sedan yelled out words like "faggots," and "fuck you." The first defendant did not stop the sedan, but drove it past the tavern to the eastern roadway and then re-entered the car park, where Mr Anthony changed seats with his sister.

[40] The first defendant then drove the sedan past the western side of the liquor barn and turned right into the driveway leading from the bottle shop. Mr Anthony wanted to have a look at the man who had spat and kicked the sedan. The sedan stopped near people to whom Mr Anthony addressed the question "What's the go with that guy?" It was possible the first defendant also yelled out something to the effect of "What's wrong with your mate?"

[41] Mr Anthony first saw the plaintiff when he was in front of the driver's side on the bonnet with his hands on the bonnet, saying "Get out of the car." Both Mr Anthony and the first defendant were saying "Get out of the way." A glass came through the window and Mr Anthony told the first defendant that he had to get them out of there. Mr Anthony did not see who threw the glass, but he saw it thrown, it shattered, glass went everywhere and the first defendant's hand was cut. Mr Anthony was not asked and did not give any evidence about observing any punch to the first defendant's head.

[42] When the first defendant drove the sedan away, it looked like the plaintiff had one leg around the wheel at the corner of the sedan with his hands on the bonnet. The

first defendant "revved" the sedan before he pulled away. The plaintiff went up over the bonnet and down the driver's side of the car. The sedan left the car park via the Cheltenham Drive exit.

Credit

[43] There is no one witness of the incident whose account was entirely credible and reliable. Although Ms Schestakov was in error as to the direction in which the sedan was facing at the time of the incident, she was an independent witness and I found her observations otherwise generally helpful in assessing the versions of the other witnesses. In estimating what weight should be placed on Ms Hargreaves' statement, I take into account that Ms Hargreaves was not available for cross-examination, so that her statement was not tested or clarified, but that her statement had the advantage of having been taken very shortly after the incident which she was in a position to observe from where she stood with Ms Schestakov and she was not noticeably affected by alcohol (as her statement would not have been taken). I am satisfied as to the accuracy of her statement that had her as an eyewitness to the exchange of abuse between the occupants of the sedan and "other boys" whom she placed at two metres to the side of the sedan, when she saw the car move forward, go over "the bump" and then take off quickly.

[44] The ability of a witness to observe and then recall events may be affected by the witness' level of intoxication at the time. The defendants submit that the plaintiff's conduct was consistent with him being intoxicated, but that depends on the findings that are made about the plaintiff's conduct. The plaintiff was frank about drinking up to eight schooners of full strength beer at the party. The medical evidence (exhibit 17) suggests that, on the basis his body was eliminating alcohol at the rate of 0.02 per cent per hour, his blood alcohol concentration at the time of the incident was about 0.04 per cent. This was described by Dr Mahoney as a "low reading" and that "One can't be certain that the ability of an individual to make decisions and exercise proper care was likely to be impaired at this level." By its very nature Dr Mahoney's evidence is not definitive of the issue of the plaintiff's level of intoxication, but it is supportive of the plaintiff's evidence about his state. That the plaintiff was able to give a cogent and consistent account of what occurred that evening and detailed observations of what happened from the time he left the tavern also suggests that his level of intoxication was not such as to impair his ability to recall the events.

[45] The focus of the plaintiff as the events unfolded was his brother. He was following his brother down the western driveway and walked quickly in the direction of the sedan, as the occupants were engaged in a verbal exchange with his brother. What was described by the occupants of the sedan as aggression on the part of the plaintiff in moving towards the sedan was explicable by the plaintiff's fraternal concern.

[46] The plaintiff was cross-examined on a posting he made on his Facebook page in January 2012 on the basis that it showed that he was angry about the actions of a driver at that time. The fact that such a posting was made by the plaintiff six years after the incident in relation to an unrelated matter did not assist at all in evaluating the plaintiff's evidence relating to the incident.

[47] There were many parts of the plaintiff's evidence that were supported by other evidence: his observations made at a distance of the first altercation, and where he was positioned and what he was doing when the sedan moved off and struck and ran over him. There were some details of the plaintiff's evidence that conflict with other evidence, such as the distance Troy and Kenny were from the sedan when it moved off, where I will indicate by my findings that I preferred the other evidence. These conflicts were not in respect of critical findings and overall the plaintiff satisfied me that his evidence was for the most part an honest and reliable recollection.

[48] Each of Troy and Kenny had less detailed recollections or had made less observations of the incident than other witnesses. This was not surprising in respect of Troy as he was intoxicated at the time of the incident. Although Kenny may not have been intoxicated, he was oblivious to the plaintiff's presence until he was run over, and that affected his perspective of what occurred immediately before the incident. I have therefore looked for support in other evidence, before accepting any evidence of Troy or Kenny.

[49] The focus of the first defendant and Mr Anthony when the sedan stopped in the bottle shop driveway was to follow up on the first altercation. Their perception was that the man who spat at the vehicle had behaved aggressively towards them and they wanted to find him or explore why he had behaved in the manner he did. The first defendant's account of what happened while his sedan was stopped in the bottle shop driveway and before he drove away showed signs of exaggeration, as did his account of what had happened to the 000 operator.

[50] Mr Anthony's judgment was clearly affected by his intake of alcohol that evening which was manifested in his encouraging the first defendant as a newly licensed driver to drive the sedan to a position in the car park where they could take a look at the man involved in the first altercation. His reliability was affected by his perspective of the events and his intoxication.

[51] Ms Anthony had the advantage of not being affected by alcohol, but her reliability after the first altercation was affected by her reaction to the first altercation, when she became upset and hysterical and moved to the back seat of the sedan.

[52] The first defendant's evidence was wrong on two critical aspects to his account and I reject his evidence on those two aspects. The first was alleging that the plaintiff with another man ran out of the bushes to the sedan. The second was his claim that the man with the plaintiff punched him in the head through the driver's window. It may be that the first defendant as a newly licensed driver found himself in control of the sedan in a situation where he was panicking and has convinced himself that these things occurred, in order to rationalise his extreme response in driving the sedan in the manner, so that it struck and ran over the plaintiff. Because of these errors and the first defendant's tendency to exaggerate, I have taken a cautious approach to the rest of his evidence.

Findings in relation to the incident

[53] I accept the plaintiff's evidence as to what alcohol he had to drink on 14 January 2006 and his description of the state he was in when he left the tavern for the reasons that I have identified in dealing with his credit.

[54] Although Troy and Kenny denied that Troy spat into the sedan when they first encountered the sedan, their evidence on this aspect was unpersuasive, in light of the clear evidence of Ms Anthony who was immediately affected by the spraying of something into the sedan and whose evidence was supported by the first defendant and Mr Anthony. Spitting or spraying something into the sedan was despicable conduct on any view of the events and it is not surprising that Troy and Kenny denied that some conduct of that nature occurred. I accept Ms Anthony's evidence that during the first altercation, the man (identified by other evidence as Troy) spat or sprayed something through the front passenger window of the sedan.

[55] I accept the plaintiff's evidence that after he observed the first altercation he was walking by himself down the western driveway, in order to catch up with Troy and Kenny, when he saw the sedan stop in the bottle shop driveway. I find the plaintiff continued walking, which was in the direction of the sedan, saying the words he recalled in evidence and also yelling to Troy to keep him from walking towards the sedan. I find that the plaintiff had stopped in the position in the western driveway near the traffic island that he described in his evidence and was therefore not directly in front of the sedan, but at the angle he described to the right hand front side of the sedan which was stationary and about two metres from the sedan.

[56] It may be that the words the plaintiff yelled out to Troy as he put up his hand to Troy were misinterpreted by the first defendant and Mr Anthony as being directed to them. The plaintiff had not been part of the first altercation, was aware that Troy had been involved in that altercation, and was trying to keep his brother away from the sedan.

[57] I find that Troy and Kenny were the two men on the driver's side of the motor vehicle who were engaged in an exchange of abuse with the first defendant and Mr Anthony, before the sedan moved off. Kenny placed Troy and himself on the driver's side of the sedan and that was supported by Ms Hargreaves' statement and Ms Schestakov's evidence. The plaintiff was not participating with Troy and Kenny in shouting abuse at the occupants of the sedan.

[58] I also accept the plaintiff's evidence that he did not hear any warning directed at him before he heard the sedan "rev" and suddenly move off. Even if the first defendant and Mr Anthony had yelled out to the plaintiff to get out of the way, that would not relieve the first defendant of the responsibility of driving the sedan, so that it did not strike the plaintiff.

[59] I accept the plaintiff's evidence that he was not touching the sedan, before it moved and hit him. That was also how Ms Schestakov saw the incident. Although she accepted that the plaintiff either tapped the windscreen or the bonnet, it was a momentary action as he was being hit by the sedan. The words she heard the plaintiff say were those when he was struck by the sedan, and he was then knocked down and run over. I reject the evidence of the first defendant and Mr Anthony that the plaintiff was shouting at them to "get out of the car" or the like. Apart from the fact that the plaintiff was not in the position that the first defendant and Mr Anthony claimed, they have wrongly included him as a party to the abuse emanating from Troy and Kenny. Ms Anthony's evidence was also mistaken. At the time she said this occurred, she had one man standing in the middle of the path to exit out of Cheltenham Drive which was not the case, as the plaintiff's position in the western driveway did not impede the path from the bottle shop driveway to the Cheltenham

Drive exit. I find that the plaintiff was not using his body to stop the sedan before it moved off. His contact with the sedan was as a result of his not being able to get out of its path, as it suddenly moved off, without changing the direction from which its wheels were turned.

[60] The plaintiff's position at the time of the incident is verified by the photographs taken by the police which show debris and blood in the western driveway near where it intersects with the lane of the driveway from the bottle shop that is closest to the curb that is the northern border of the bottle shop driveway (exhibits 6, 9 to 12, 14 and 15).

[61] It was not suggested to any of the occupants of the sedan who gave evidence that the broken piece of the schooner glass and other glass fragments were planted in the sedan after the incident. The photographs of inside the sedan after it was seized by the police which show the remnants of the glass support the evidence that before the sedan drove off, a glass had been thrown through the driver's side window and shattered. What can be inferred, however, from the position of the plaintiff in front of the sedan, is that he had nothing to do with the throwing of the glass and I accept his evidence that he did not throw the glass or see it thrown.

[62] The dimensions of the bottle shop driveway show that it was a relatively large area in comparison to the size of the sedan. There were no other motor vehicles in the driveway at the time of the incident. Although Ms Schestakov spoke of about eight people from the party being in the vicinity, the persons other than the plaintiff, Troy and Kenny were not in close proximity to the sedan. Neither the plaintiff, Troy or Kenny were in a position that impeded the path the sedan had to take to leave the car park via the Cheltenham Drive exit or to reverse and take another path to the eastern side of the car park. In view of the fact that one of the reasons that the first defendant had driven the sedan to the bottle shop driveway was to take the Cheltenham Drive exit, it is curious that when he drove the sedan off, he steered the sedan to turn right into the western driveway away from the Cheltenham Drive exit. I find there were other possible paths for the sedan to take when it moved off than the path of travel that took the sedan to where the plaintiff was standing and the first defendant failed to steer the sedan away from the plaintiff.

[63] It is not in issue that the first defendant's front wheel on the driver's side and the back wheel on the driver's side went over the plaintiff's legs, as the sedan drove off. It is likely that the first defendant did find it difficult to drive over the plaintiff's legs, because of the body kit on the sedan. The plaintiff suffered fractures of the left leg and the right ankle. In fact, the severity of the injuries as they presented to the paramedics who responded to the incident is shown in their description in the ambulance report of "partial amputation of right foot" (exhibit 19).

[64] I accept the first defendant's evidence that his finger was injured by the glass thrown through the driver's window of the sedan.

Issues

[65] The plaintiff seeks to prove the first defendant liable for his injuries on the basis of the common law of negligence as modified by the application of the *Civil Liability Act* 2003 ("the Act").

[66] The defendants concede for the purpose of s 9(1) of the Act that there was a foreseeable risk of injury to the plaintiff if the sedan moved off and the risk was not insignificant. The defendants contend that the plaintiff cannot prove, as required by s 9(1)(c) of the Act that, in the circumstances, a reasonable person in the position of the first defendant would have taken precautions against the risk of harm to the plaintiff. Section 9(2) of the Act provides:

> "In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)-
>
> (a) the probability that the harm would occur if care were not taken;
> (b) the likely seriousness of the harm;
> (c) the burden of taking precautions to avoid the risk of harm;
> (d) the social utility of the activity that creates the risk of harm."

[67] The issues raised by the defendants are whether:

(a) the plaintiff voluntarily assumed the risk of harm from being struck by the sedan in the circumstances;
(b) the first defendant's operation of the sedan in the circumstances was reasonable;
(c) causation is not proved, having regard to s 11 of the Act;
(d) any causative liability proved is exempted under s 45 of the Act;
(e) the plaintiff contributed to his own injuries by reason of his intoxication and/or conducting himself in the manner in which he did leading up to the collision.

Assumption of risk

[68] The defendants plead that the plaintiff voluntarily assumed a risk of harm from being struck by the sedan, if it moved towards him, when he was in the path of travel of the sedan. Under s 14(1) of the Act, where a defence of voluntary assumption of risk is raised and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless he proves, on the balance of probabilities, that he was not aware of the risk. That provision depends on proof that there was such an obvious risk in the circumstances of this matter. The meaning of "obvious risk" is found in s 13 of the Act.

[69] The defendant submits that a reasonable person in the position of the plaintiff would have formed the view that he was at risk in maintaining himself in the position he was at the front of the sedan, as at any time it could have pulled away, and a reasonable person would have realised that the first defendant was under extreme pressure in the circumstances.

[70] The plaintiff submits that a pedestrian walking or standing in front of a vehicle who was "unarmed" in the sense of being unprotected compared to the driver of the motor vehicle does not assume the risk of a breach of duty of care of the kind that occurred in the incident, where the first defendant steered the sedan from a stationary position in the direction of the plaintiff.

[71] The defendant's submissions lose force in view of the finding that I have made that the plaintiff was not positioned directly in front of the sedan before the sedan moved off. The first defendant did not have to hit the plaintiff with the sedan, but could have reversed the sedan or steered it in such a way that it did not strike the plaintiff.

It would not have been obvious to a reasonable person in the position of the plaintiff that the first defendant would have driven the sedan on the path that resulted in striking the plaintiff, where there were other routes through the car park that the sedan could easily have taken when it drove off. Section 13 of the Act does not require the existence of an obvious risk to be assessed by a reasonable person in the position of the plaintiff speculating on the subjective pressures on the driver of the sedan.

[72] The defendants are unable to prove that the risk of injury to the plaintiff in the circumstances was an obvious risk. The defendants therefore have failed to prove that the plaintiff voluntarily assumed the risk of harm from being struck by the sedan.

Whether the first defendant's operation of the sedan was reasonable

[73] The standard of care by which the first defendant's driving must be judged is that owed by any person driving a motor vehicle to take reasonable care to avoid injury to others and is not qualified by the first defendant's limited experience at the time of the incident: *Imbree v McNeilly* (2008) 236 CLR 510 at [10], [27], [53], [72] and [182].

[74] The plaintiff bears the onus of proving that the first defendant did not exercise reasonable care while driving the sedan when it struck the plaintiff.

[75] The defendants plead that reasonable care was exercised by the first defendant in response to a crisis or sudden emergency without the opportunity for calm reflection and where the first respondent had the responsibility of the safety of the occupants of the sedan. The defendants rely on the principle of "agony of the moment" referred to in *Leishman v Thomas* (1957) 75 WN (NSW) 173, 175:

> "This so-called principle of acting in the 'agony of the moment' is merely an application of the ordinary rule for ascertaining whether or not the conduct of any party has been negligent by looking to all the surrounding circumstances and ascertaining whether the defendant behaved in such a fashion as a reasonably prudent man, in the light of those circumstances, would not have behaved. It is a circumstance, and one possibly of great importance, that the defendant, charged with negligence, may have been forced to act in a sudden crisis or emergency, unexpected and unheralded, without that opportunity for calm reflection which makes it easy after the event to suggest that it would have been wiser if he had done something else. The jury are required to judge his conduct in the light of the happenings of the moment, and a man is not to be charged with negligence if he, not being the creator of the crisis or emergency which has arisen, finds himself faced with a situation which requires immediate action of some sort and if, in the so called 'agony of the moment', he makes an error of judgment and takes a step which wiser counsels and more careful thought would have suggested was unwise."

[76] The defendants rely on the application of *Leishman* in *Abdallah v Newton* (1998) 28 MVR 364. Stein JA stated at 366:

> "I am unable to agree that the actions of the respondent, … were unreasonable in the circumstances. The respondent was in a situation that was not of his making. Undoubtedly, if he had not felt threatened and if his mirror had not been smashed, he would have taken greater care in driving off. However, he was intimidated and believed the situation required immediate action. His reaction was entirely reasonable. It is true that the action which he took resulted in the collision. However, given the circumstances he faced, his actions were perfectly reasonable and accorded with the conduct of a reasonably prudent person."

[77] The conclusion reached in *Abdallah* was made on facts that are easily distinguishable from this matter. The respondent in that case was driving on the motorway when another vehicle swerved in front of him bumping the front of his vehicle. Shortly after the respondent took an exit ramp and the vehicle which had cut him off was on the ramp. He stopped about five metres behind that vehicle and the driver of that vehicle got out and approached him wielding two karate sticks. The driver smashed the respondent's vehicle's external wing mirror and began striking the vehicle. The respondent feared for his safety and in his haste to get away struck the attacker's vehicle and the passenger of that stationary vehicle claimed she was injured as a result of the respondent's striking the rear of that vehicle.

[78] It is in respect of considering whether the first defendant's operation of the sedan in the circumstances was reasonable that the plaintiff must prove the condition required by s 9(1)(c) of the Act that in the circumstances, a reasonable person in the position of the first defendant would have taken the precautions against the risk of striking the plaintiff, as he drove the sedan away.

[79] The first defendant may have succumbed to the pressure of the situation arising from his and Mr Anthony's exchanging words of abuse with Troy and Kenny, but his reaction in driving the sedan so that it struck the plaintiff (of whose presence he was aware) could not in any way be characterised as reasonable or excused by the agony of the moment, when he and the occupants of the sedan had the protection of being in the sedan, it is common knowledge that a motor vehicle that strikes a pedestrian can cause significant injury, and he could easily have avoided the plaintiff by steering the sedan away from the plaintiff and taking a different path by simply turning left instead of right into the western driveway or reversing the sedan, in order to change the direction of travel toward the eastern side of the car park. A reasonable person would have taken precautions against the risk of striking the plaintiff in the circumstances. I therefore find that the first defendant's operation of the sedan was not reasonable and he breached the duty of care that he owed to the plaintiff.

Has causation been proved?

[80] Under s 12 of the Act, the plaintiff bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation. Section 11(1) of the Act provides:

> "A decision that a breach of duty caused particular harm comprises the following elements-

(a) the breach of duty was a necessary condition of the occurrence of the harm (***factual causation***);
(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (***scope of liability***)."

[81] It follows from the conclusion that the first defendant did not exercise reasonable care in driving the sedan when he struck the plaintiff that the first defendant's negligence was a necessary condition of the occurrence of the injury to the plaintiff and the plaintiff has proved factual causation required under s 11(1)(a) of the Act.

[82] The second element that must be proved by the plaintiff in order to establish the first defendant's breach of duty caused the harm suffered by the plaintiff requires the court to consider whether or not and why responsibility for the harm should be imposed on the first defendant: s 11(4) of the Act.

[83] In the normal course it is appropriate that the scope of the liability of the driver of a motor vehicle be extended to the injury caused to a pedestrian struck as a result of the manner of driving of the motor vehicle. In view of the findings that I have made about the plaintiff not being involved in the exchange of abuse between the occupants of the sedan and Troy and Kenny, there is no good reason to restrict the scope of the liability of the first defendant for the injury caused to the plaintiff. The mere fact that the plaintiff was the brother of Troy and also knew Kenny who were both involved in the exchange of abuse with the first defendant is not relevant for reducing the responsibility of the first defendant for his breach of duty.

[84] Taking into account the requirements of s 11 of the Act, the plaintiff has proved that the first defendant's breach of duty caused his injuries in the incident.

Was the plaintiff engaged in criminal behaviour?

[85] Where liability is otherwise proved, s 45 of the Act provides for an exemption from liability where the breach of duty happened while the person who suffered harm was engaged in conduct that is an indictable offence and the person's conduct contributed materially to the risk of the harm. The onus of proof under s 45(1) lies with the defendants. The defence identifies numerous indictable offences that it is alleged the plaintiff was committing at the time he was injured. These include deprivation of liberty, unlawful wounding and unlawful assault. By the conclusion of the trial, the defendants allege only that the plaintiff was engaging in conduct that amounted to deprivation of liberty under s 355 of the *Criminal Code* 1899 when he was struck by the sedan.

[86] In view of the findings of fact that I have made about the position and conduct of the plaintiff before he was struck by the sedan, the defendants have failed to prove that the plaintiff was committing the offence of deprivation of liberty (or any indictable offence) when he was injured by the first defendant.

Contributory negligence

[87] The defendants allege that the plaintiff was intoxicated at the time of the breach of duty by the first defendant and rely on the presumption of contributory negligence under s 47(2) of the Act. Apart from that provision, the defendants allege that the plaintiff contributed to the injury suffered by him by reason of his intoxication.

[88] In addition to intoxication, the defendants submit that the conduct of the plaintiff in standing where he had stopped walking put himself in danger and a reasonable person in his position in the circumstances where he observed and heard the conduct of the first defendant and Troy and/or Kenny would have realised there was the prospect that the sedan could pull away at any time.

[89] The defendants submit that (with or without intoxication) the plaintiff should bear the greater proportion of responsibility for the incident (somewhere between 50% and 80%).

[90] The defendants only obtain the benefit of the presumption under s 47(2) of the Act if the condition in s 47(1) of the Act is satisfied that the plaintiff was intoxicated at the time of the breach of duty. For the purpose of s 47 of the Act, the term "intoxicated" is defined in schedule 2 of the Act to mean "that the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired." In view of the findings that I have already made about the plaintiff's level of intoxication at the time he left the tavern and his conduct immediately before being struck by the sedan, I am satisfied that the plaintiff was not affected by the alcohol he had drunk that evening to the extent that his capacity to exercise proper care and control for his own safety was impaired. There is no basis for applying s 47 of the Act to the plaintiff.

[91] In evaluating whether the plaintiff has been guilty of contributory negligence other than under s 47 of the Act, the application of s 23 of the Act must be considered. The principles that are applicable in deciding whether a person has breached a duty apply in deciding whether the plaintiff has been guilty of contributory negligence in failing to take precautions against the risk of the harm from which he suffered, where the standard of care required is that of a reasonable person in the position of the plaintiff and the matter must be decided on the basis of what that person knew or ought reasonably to have known at the time.

[92] My finding in relation to the fact that the plaintiff's alcohol intake on that evening did not impair his capacity to exercise care and control for his own safety means that the issue of contributory negligence is limited to the position the plaintiff was standing in at the time the sedan moved off. The defendant's vigorous submissions on contributory negligence depended on a finding in their favour that the plaintiff was directly in front of (and abutting) the sedan when it moved off. I have found otherwise. The plaintiff was not directly in front of the sedan, when it moved off, but because the first defendant failed to steer the sedan away from the plaintiff, the plaintiff was struck. The defendants sought to make much of the plaintiff's answer in cross-examination that he thought it would be dangerous for him to walk in front of the sedan, because it might pull away. That was not the circumstance in which the plaintiff was struck. A pedestrian who was not in front of a motor vehicle that had its engine running while stationary in a car park would not expect the vehicle to be driven into him. I am therefore not satisfied that there should be any apportionment against the plaintiff for contributory negligence.

Orders

[93] There should be judgment for the plaintiff. I will give the parties the opportunity to advise the amount for which judgment should be entered and to make submissions on the costs of the proceeding.