SUPREME COURT OF QUEENSLAND

CITATION:	*Jetcrete Oz Pty Ltd v Conway & Anor* [2015] QCA 272
PARTIES:	**JETCRETE OZ PTY LTD** ACN 137 775 903 (appellant) **v** **AUSTEN JOHN CONWAY** (first respondent) **MOUNT ISA MINES LIMITED** ACN 009 661 447 (second respondent/not a party to the appeal)
FILE NO/S:	Appeal No 6518 of 2015 SC No 5450 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 11 June 2015
DELIVERED ON:	11 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2015
JUDGES:	Fraser JA and Applegarth and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The appellant pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the respondent was injured while driving a truck down a service road in a mine – where the respondent brought proceedings for personal injuries against the supplier of the truck – where the respondent sought to make various amendments to the statement of claim after the limitation period had expired – where the appellant alleged that some of the amendments raised a new cause of action – where the primary judge found that the amendments constituted further and better particulars of an existing cause of action – whether the primary judge erred in allowing the amendments *Uniform Civil Procedure Rules* 1999 (Qld), r 376(4)

Borsato v Campbell [2006] QSC 191, cited
Draney v Barry [2002] 1 Qd R 145; [1999] QCA 491, cited
James v The State of Queensland [2015] QSC 65, cited
Murdoch v Lake [2014] QCA 216, cited
Pianta v BHP Australia Coal Limited [1996] 1 Qd R 65, cited
Thomas v State of Queensland [2001] QCA 336, cited
Westpac Banking Corporation v Hughes [2012] 1 Qd R 581; [2011] QCA 42, cited
Wolfe v State of Queensland [2009] 1 Qd R 97; [2008] QCA 113, cited

COUNSEL: A P J Collins, with J P D Trost, for the appellant
G F Crow QC, with E J Williams, for the respondent

SOLICITORS: HBA Legal for the appellant
Slater & Gordon Lawyers for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Applegarth J and the orders proposed by his Honour.

[2] **APPLEGARTH J:** The respondent, Mr Conway, was injured on 25 December 2010 when he was driving a cement truck down an unpaved service road in a mine. The truck was supplied by the appellant, Jetcrete. In his Notice of Claim and in his proceeding for personal injuries, Mr Conway describes how he came to hit his head on the roof of the cabin of the truck, causing serious injuries to his cervical spine. In essence, his case is that his injuries were caused by two conditions: the state of the road and the state of the truck.

[3] The primary judge considered various amendments Mr Conway proposed to make to his pleading. There was no dispute that some of the amendments raised a new cause of action and required leave under r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld). There was, however, a dispute over whether some of the amendments raised a new cause of action or were, instead, in the nature of further and better particulars of an existing cause of action. The principal issue in the appeal is whether the primary judge erred in concluding that new subparagraphs in a pleading of negligence were in the nature of further particulars of an existing allegation of breach of duty.

Background

[4] Mr Conway says that the Jetcrete truck hit a large rock area which caused him to be bumped off the seat of the truck. He says he hit the retarder brake to 75 per cent and as a result of this action, as well as striking another rock, he was pushed forward, fell back onto the seat and then ricocheted up, hitting his head on the roof of the cabin. After the incident emergency services were called, as was Jetcrete's Site Supervisor, Mr Shipley, who went to the scene. He found the seat in the truck was set to maximum pressure, which would have caused excessive bouncing on rough roads.

[5] An investigation team, which included a Jetcrete representative, was established. Mr Shipley gave a statement to it on 7 January 2011 which described the seating arrangement in the truck, which includes a height adjustment feature. He said that after the incident he noticed that the seat that Mr Conway was in was "pumped to the max, like you couldn't get it any higher or stiffer and as soon as I jumped in the [agitator]

I saw that it was a little too higher [sic] for me and I'm only short." He explained that the seat should be adjusted so that it was not too low and not too high. According to Mr Shipley, Mr Conway's seat was "pumped to the complete max, and if he's hit a bump with the seat being to the max when it goes down, it's just going to shoot you straight up."

[6] The Investigation Report was based upon inquiries of witnesses and investigations into the state of the decline and other conditions, including the tyres on the truck. Ply tyres on the truck had been replaced by more rigid radial tyres. Engaging the retarder to 75 per cent caused an energy transfer to the seated operator. The seat had not been adjusted to suit the operator's weight. The investigation found that "seat adjustment to maximum weight did not allow absorption properties of the seat to occur to its potential". The report recommended a number of corrective and preventative actions. They included "provide training to Jetcrete operators on the adjustment of the pneumatic seats", and to include "in prestart checks a requirement to adjust the seat to operator weight".

[7] In May 2011 Jetcrete held a meeting at its head office in Western Australia which was attended by numerous managers from throughout Australia. The meeting was held because in the previous three years serious injuries had been associated with the seating in its agitators. One incident was in November 2008, another was the incident involving Mr Conway and a third occurred in May 2011. All the units were fitted with inertia lap-style seatbelts. The meeting addressed seat configurations and seatbelt design and decided to implement a retractable harness-style seatbelt to prevent vertical movement in the event of the vehicle bouncing over an obstacle.

[8] In early August 2011 Mr Conway's then-solicitors forwarded a Notice of Claim in accordance with the *Personal Injuries Proceedings Act* 2002 (Qld). In describing the incident the notice stated: "It is supposedly the responsibility of Jetcrete to ensure the Claimant is properly trained." In detailing the reasons why Mr Conway believed that Jetcrete caused the incident he nominated six matters. They included an alleged failure to provide any adequate training to him and a failure to provide adequate safety equipment to avoid injury whilst driving in and out of the mine.

[9] Proceedings for negligence were commenced against Mount Isa Mines Ltd and Jetcrete on 13 September 2012. Paragraph 5 of Mr Conway's pleading alleged that on 25 December 2010 in the course of his employment and at the direction of Mount Isa Mines Ltd and/or Jetcrete:

- he was driving a concrete truck down the decline at the mine and was applying the retarder brake;
- the concrete truck hit a large rock area which caused him to be bumped off the seat of the truck;
- he hit the retarder brake to 75 per cent and as a result of this action, as well as striking another rock, he was pushed forward, fell back down onto the seat and then ricocheted up into the air and hit his head on the roof of the cabin, causing serious injuries to his cervical spine.

Paragraph 8 of the pleading particularised the negligence of Jetcrete which was alleged to have caused his personal injuries, loss and other damage as follows:

> "(a) Permitting the plaintiff to drive the concrete truck down the decline which was in an unsatisfactory condition;
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> (b) Failing to take steps to ensure that the decline of the said mine was in a satisfactory condition;

(c) Failing to take steps to remedy the unsatisfactory state of the decline;

(d) Failing to take reasonable precautions to avoid foreseeable risk of injury to the plaintiff whilst he was undertaking work at the said mine."

[10] The proceedings were protracted over the following few years. Mr Conway's present solicitors assumed the conduct of his matter and the file was transferred to their office in Townsville in early 2015. In March 2015 Mr Conway's solicitors advised the solicitors for each defendant that he would be applying to further amend his claim and his pleading. The claim was to be amended to include a claim for breach of statutory duty against each defendant on the basis of duties defined in the *Mining and Quarrying Safety and Health Act* 1999 (Qld). A number of amendments contained in the proposed second further amended statement of claim related to this new cause of action. The pleading spelt out each defendant's alleged common law duty as well as alleged statutory duties under the Act. There were various other amendments.

[11] Most relevantly for present purposes was the addition of the following subparagraphs to paragraph 8:

"(e) Failing to train and/or devise a suitable work instruction so that the plaintiff knew how to make suitable adjustments to the driver's seat in the concrete truck prior to operating;

(f) Failing to provide a driver's seat that can be easily adjusted by the plaintiff to accommodate his height and weight;

(g) Failing to ensure that the concrete truck had adequate seatbelt/restraints to prevent the plaintiff from 'bouncing' off the driver's seat;

(h) Permitting the use of 'Telliborg' radial tyres on the concrete truck when they are inferior to those tyres recommended by the OEM;

(i) Requiring and/or permitting the plaintiff to operate a concrete truck without any or any adequate suspension."

[12] Rule 376(4) applies to an application for leave to make an amendment if a relevant period of limitation, current at the date of the proceeding was started, has ended.[1] Rule 376(4) provides:

"(4) The court may give leave to make an amendment to include a new cause of action only if –

(a) the court considers it appropriate; and

(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment."

[13] The frequently-cited judgment of McMurdo J in *Borsato v Campbell*[2] considered the term "cause of action" in r 376. His Honour also stated:

"The dividing line is between the addition of facts which involve a new cause of action and those which are simply further particulars of

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1 Rule 376(1).

2 [2006] QSC 191.

> the cause already claimed, and its location involves a question of degree which can be argued, one way or the other, by the level of abstraction at which a plaintiff's case is described."[3]

Not every newly pleaded fact raises a new cause of action.

[14] As was observed in *Thomas v State of Queensland*,[4] there will commonly be three separate questions to consider in an application for leave to amend:

(a) Is there a new cause of action?

(b) Arising out of substantially the same facts?

(c) Prejudice.

In some applications or in respect of some amendments, an applicant may acknowledge that an amendment raises "a new cause of action". So much was acknowledged in this matter in respect of the inclusion of a new cause of action for breach of statutory duty.

[15] A significant issue before the primary judge was whether Mr Conway required leave under r 376 to make the amendments contained in subparagraphs 8(e) to (i). Jetcrete argued that they introduced a new cause of action. The primary judge was not persuaded of this.

[16] After referring to the authorities, and taking into account the description of the accident in paragraph 5 of the pleading, the primary judge concluded that subparagraphs (e) to (i) could properly be described as particulars of the existing allegations of negligence. If, for example, Jetcrete had sought further and better particulars of the allegation in subparagraph 8(d), the further allegations in subparagraphs 8(e) to (i) could have been given as further and better particulars of the existing cause of action which had been alleged in subparagraph 8(d).

[17] Having reached this conclusion, the primary judge went on to consider whether any new cause of action arose out of the same facts or substantially the same facts as the cause of action for which relief had already been claimed in the proceeding, and the issue of prejudice that had been argued before him.

Did the primary judge err in his conclusion about the nature of the amendments made by subparagraphs 8(e) to (i)?

[18] Jetcrete submits that paragraph 5 of the pleading "was clearly directed to the injury which occurred as a consequence of 'the state of the decline' and nothing else." It submits that subparagraph 8(d) could only be read in that context and having regard to subparagraphs 8(a), (b) and (c). I am unable to agree that paragraph 5 was directed to the state of the decline and nothing else. It referred to the decline and the truck hitting a large rock area which caused the plaintiff to be bumped off his seat. It then described conditions in the cabin and how the plaintiff was pushed forward, fell back down onto his seat, then ricocheted up into the air. Paragraph 5 described more than road conditions. It described conditions in the truck cabin, including how the seat allowed Mr Conway to ricochet up and, in the absence of effective restraint, hit his head on the roof of the cabin. The story being told in paragraph 5 was how the state of the road and the state of the truck combined to cause Mr Conway's injury.

[19] Jetcrete's related submission that paragraph 5 and paragraph 8 of the previous pleading "were clearly directed only to 'the state of the decline'" should not be accepted.

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3 At [8].

4 [2001] QCA 336 at [19].

Jetcrete's particulars of negligence were pleaded in subparagraphs 8(a) to (d) of the previous pleading. Subparagraphs (a) to (c) may be said to relate to the location of the incident and Jetcrete's alleged breach in permitting Mr Conway to drive down the decline when it was in an "unsatisfactory condition". By contrast, subparagraph (d) may be said to relate to the absence of reasonable precautions if he was to be permitted to drive on a road that was in such a condition.

[20] Read in the context of paragraph 5, subparagraph 8(d) of the previous pleading extended to the physical condition of the truck and the absence of reasonable precautions to prevent Mr Conway's body from moving and his head hitting the roof of the cabin when the truck hit a large rock area, a rock or other road conditions on the decline.

[21] It was appropriate for the primary judge to have regard to the description in paragraph 5 in deciding the cause of action which had been alleged in subparagraph 8(d). If further guidance had been required, it would have been permissible to have regard to the Notice of Claim which, as noted, alleged failures in relation to training and instruction and the provision of adequate safety equipment. However, it is sufficient for present purposes to conclude that subparagraph 8(d) was not directed only to "the state of the decline". I consider that it was open to the primary judge to conclude that the new subparagraphs of paragraph 8 were in the nature of further particulars of subparagraph 8(d) of the existing pleading, rather than the addition of a new cause of action. Jetcrete has not established that the primary judge erred in reaching the conclusion which he did concerning the addition of those subparagraphs.

[22] The present issue, namely whether the primary judge erred in his characterisation of the amendments made by subparagraphs 8(e) to (i), is not directly concerned with whether subparagraph 8(d) was deficient due to its lack of particularity. Rule 157 requires a pleading to include particulars necessary to define the issues for, and prevent surprise at, the trial and to enable the opposite party to plead. The primary judge described subparagraph 8(d) as a "broad allegation" but one given in a particular context. Such a broad allegation warranted further particulars in the original pleading. The absence of such further particulars might have resulted in a request for further and better particulars or an appropriate application. On the view taken by the primary judge, the proposed amendments to paragraph 8 addressed the absence of particulars.

[23] If, instead, the primary judge had concluded that subparagraphs 8(e) to (i) did raise a new cause of action, and could not have properly been described as particulars of subparagraph 8(d), then further issues would have arisen. One would have been whether the new cause of action arose out of substantially the same facts as a cause of action for which relief had already been claimed. In considering that issue the breadth of paragraph 8(d) would have assumed significance. This is because an applicant for leave to amend to include a new cause of action may encounter real difficulty in establishing that the new cause of action arises out of the same facts or substantially the same facts as an existing cause of action. The inclusion in a pleading of a vague allegation raising no identifiable cause of action cannot be relied upon to allege that a new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding.[5]

[24] The present issue is different and concerns the prior question of whether subparagraphs 8(e) to (i) raised a new cause of action or were further particulars of

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5 *Westpac Banking Corporation v Hughes* [2012] 1 Qd R 581 at 588 [17] – 589 [18]; *Murdoch v Lake* [2014] QCA 216 at [93].

the cause of action already claimed. As *Borsato v Campbell* states, questions of degree are involved in such a case.[6] Minds may reasonably differ about on which side of the dividing line additional facts introduced by amendment fall. This is a case, like others, in which the view could reasonably be taken that the relevant amendments "involve more detailed pleading of the same pathway to liability already pleaded."[7] The conclusion which the primary judge reached about the nature of the amendments made by subparagraphs 8(e) to (i) was one which was open. Error has not been demonstrated.

Substantially the same facts?

[25] Having dealt with the "new cause of action" issue in respect of subparagraphs 8(e) to (i), the primary judge turned to consider whether the new cause of action for breach of statutory duty (or the further allegations relating to "the condition of the truck and the nature of the restraints used in it to prevent the plaintiff from being bumped off the seat") arose out of the same facts or substantially the same facts as the existing pleading had set up. He concluded that they did. On appeal, Jetcrete points to what are said to be "entirely new matters",[8] and contends that the primary judge erred in finding that "the proposed amendments arose from the same facts or substantially the same facts as a cause of action for which relief has already been claimed".[9] It goes so far as to submit that virtually none of the matters now sought to be relied upon would have been relevant or admissible in the case as framed by the prior pleading.[10]

[26] In addressing the various new matters introduced by way of amendment in the proposed second further amended statement of claim, it is important to distinguish between amendments caught by the requirements of r 376(4), being an amendment to include a new cause of action, and amendments which are not.

New cause of action for breach of statutory duty

[27] Mr Conway applied to amend his claim to include a cause of action for breach of statutory duty against each defendant. The proposed second further amended statement of claim included a new cause of action for breach of duties alleged to be imposed upon Jetcrete by the *Mining and Quarrying Safety and Health Act* 1999 (Qld). In summary, new facts that were pleaded in paragraphs 3 and 8C included the fact that Jetcrete was a "service provider" within the meaning of s 44 of the Act and a "person at the mine" who may affect safety and health of persons at a mine or as a result of mining operations. These matters culminated in the allegation that, in accordance with s 40 and s 44 of the Act, Jetcrete was to ensure:

(1) "the safety and health of workers or other persons is not adversely affected as a result of the service provided"; and

(2) "the fitness for use of plant at the mine is not adversely affected by the service provided".

The pleadings defined them as "the second defendant's MQSH Act duty". Clearly, those amendments were intended to include a new cause of action for breach of statutory duty.

[28] The earlier pleading had not expressly pleaded Jetcrete's common law duty and its content. New paragraph 8B did so. Significantly, the same conduct of Jetcrete, described

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6 [2006] QSC 191 at [8].
7 *James v The State of Queensland* [2015] QSC 65 at [34].
8 Ground of Appeal para 3.
9 Ibid.
10 Cf *Wolfe v State of Queensland* [2009] 1 Qd R 97 at 100 [12].

in paragraph 8 as "the second defendant's breach conduct" was relied upon as constituting a breach of both Jetcrete's common law duty and its MQSH Act duty.

[29] One issue for the primary judge was whether the new cause of action for breach of statutory duty arose out of "substantially the same facts" as the cause of action for which relief had already been claimed. It is unnecessary to deploy metaphors about whether the additional facts arise out of "substantially the same story as that which would have to be told to support the original cause of action".[11] In some cases a useful test is to inquire what would have happened if, at trial, the plaintiff sought to lead evidence of a certain matter, without having made the amendment in question, and to ask whether the evidence would have been objectionable on the ground that it was simply irrelevant to the case of breach of duty raised by the pleading.[12] Jetcrete argues that the new pleading set up "an entirely different narrative" and emphasises that a judge, in determining an issue under r 376(4), should not use "too broad a brush".[13]

[30] I am not persuaded that additional details about the service Jetcrete provided at the mine and that Jetcrete was in a position to affect the safety and health of persons at the mine did not arise out of substantially the same facts as the existing cause of action. They might be said to have arisen out of substantially the same story as that which would have to be told to support the original cause of action. Further, it would not have been irrelevant to prove, as a matter of evidence, these things at trial in order to establish the existing cause of action for negligence. The fact that Jetcrete had certain statutory duties in the circumstances alleged would give content to its common law duty of care and allegations of negligence, even if a cause of action for breach of statutory duty was not claimed. In circumstances in which the same "breach conduct" was relied upon to support both the existing cause of action in negligence and the new cause of action for breach of statutory duty, the trial judge was correct to conclude that the new statutory cause of action fell within r 376(4)(b).

Allegations in relation to the condition of the truck

[31] New subparagraph 4(g) alleged that the concrete truck which was supplied and maintained by Jetcrete was not fitted with any suspension, was fitted only with a "lap belt" in the driver's seat and was fitted with radial tyres. These were new, additional details, but they can be said to be additional details of the story told in paragraph 5 of the existing pleading of how Mr Conway was bumped off the truck seat, fell back down onto it and then ricocheted up into the air so as to hit his head on the roof of the cabin. Part of the story in paragraph 5 was that he was not effectively restrained from doing so by a seatbelt and the existing reference to being *ricocheted* clearly raised the condition of the truck, and the state of its driver's seat in causing his injuries.

[32] The condition of the truck, and its seat and seatbelts in particular, were already part of the narrative because it was implicit in paragraph 5 that the seatbelt in the truck did not prevent Mr Conway hitting his head on the roof of the cabin when he was ricocheted off the seat and up into the air. The role played by the truck's suspension and radial tyres was not so apparent. There was no reference in paragraph 5 to the truck having radial tyres. However, the state of the truck's suspension was arguably implicit in paragraph 5(b) insofar as it was alleged that hitting a large rock area caused Mr Conway to be ejected from his seat. The lack of absorption or suspension provided by

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11 *Draney v Barry* [2002] 1 Qd R 145 at 164 [57].
12 *Wolfe v State of Queensland* [2009] 1 Qd R 97 at 100 [12].
13 *Thomas v State of Queensland* [2001] QCA 336 at [20].

the truck so as to prevent his being bumped off or bounced off his seat was implicit in paragraph 5. The amendments in paragraph 4(g) made explicit what was implicit, or provided additional details about how the condition of the truck caused him to be thrown around its cabin. The fact that the truck was fitted with a certain brand of radial tyres was an additional detail in the same essential story.

Allegations of knowledge and lack of training

[33] New allegations that Jetcrete's training module for the truck identified as a hazard "potholes or rocks [that] can cause a vehicle to bounce and swerve" was a new matter, but one which was relevant to the existing cause of action in negligence and Jetcrete's failure to take reasonable precautions to avoid foreseeable risk of injury. It was relevant to the common law duty and its content, and was not itself a new cause of action which Mr Conway had to establish arose out of the same facts or substantially the same facts as his existing cause of action in negligence. The same observation applies to the new allegation that the concrete truck which Jetcrete supplied and maintained was the subject of numerous complaints by operators that it had inadequate suspension and hence posed a danger to operators required to drive it in a mine. This was not a new cause of action but an allegation which sought to support existing allegations of a duty of care and its breach.

Breach conduct

[34] Once the primary judge reached the conclusion that subparagraphs 8(e) to (i) were, in effect, further particulars of an existing cause of action for breach of a common law duty of care, and not new causes of action, the issue about whether each of these allegations was a cause of action which arose out of the same facts or substantially the same facts as the existing cause of action fell away. In any case, Jetcrete's submission on appeal that the "previous allegations gave no hint or suggestion" of the matters raised in the amended paragraph 8 should not be accepted for the reasons previously given.

[35] This case is unlike others in which entirely new allegations are made. For example, in *Wolfe* the plaintiff alleged for the first time a duty on the part of the State in relation to the maintenance of the condition of the sub-surface of the highway, such that a new cause of action was pleaded in which the factual basis for the alleged breach of duty was substantially different from that previously pleaded. The new matters pleaded in subparagraphs 8(e) to (i) were capable of being characterised as specific allegations or particulars in relation to an existing cause of action. The case is unlike *Pianta v BHP Australia Coal Ltd*,[14] upon which Jetcrete relies, since in that case the applicant conceded that the facts constituting the breaches of duty were quite different. In this case, the existing pleading did not confine the content of Jetcrete's alleged duty of care and its breach to the state of the road and Jetcrete's conduct in permitting Mr Conway to drive down a road in such a condition. Whilst the existing pleading did not frame the duty of care and its breach at a high level of specificity, for example, by alleging a duty of care to install a certain kind of seatbelt, this does not mean that a new allegation in relation to the kind of seatbelt the truck was fitted with necessarily constitutes a new cause of action, necessitating an inquiry into whether the new cause of action arises out of substantially the same facts as the existing cause of action. Rather than plead duties of care and corresponding allegations of breach with a high degree of specificity, the unamended pleading alleged Jetcrete's various breaches of duty in a way which permitted the new allegations in subparagraphs 8(e) to (i) to be characterised as further and better particulars of the existing cause of action. As

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14 [1996] 1 Qd R 65 at 68.

a result, the specific allegations raised in those subparagraphs were relevant to the existing cause of action and evidence in relation to them admissible in support of the existing case.

[36] In summary, the primary judge was correct to conclude that the new cause of action for breach of statutory duty arose out of substantially the same facts as the existing cause of action. In addition, and although unnecessary for the decision of the primary judge in the light of his earlier conclusion in relation to the nature of subparagraphs 8(e) to (i), many of the other new allegations arose out of substantially the same facts as the existing case. They provided additional details in relation to the story told in the pleading about how the state of the road and the state of the truck combined to cause Mr Conway's injury and that the event, so described, occurred as a result of Jetcrete's breach of duty.

Prejudice

[37] Jetcrete appeals on the ground that the primary judge failed to give sufficient weight to the prejudice it would suffer by reason of the amendments in circumstances in which the truck was no longer in its possession. The evidence before the primary judge from Jetcrete's solicitor simply was that he was informed by its in-house counsel and believed that the vehicle in question was no longer in Jetcrete's possession. Nothing was said about its location or an inability to inspect it. More importantly, nothing was said by Jetcrete about its previous inspection of the seat and the truck immediately after the incident and its deliberations in May 2011 about the seat configuration and seatbelts. The primary judge referred to previous investigations before concluding, in the light of the discretionary considerations raised before him, that it was appropriate in terms of r 376(4)(a) to grant leave to amend.

[38] The fact that the vehicle was no longer is Jetcrete's possession, and the possibility that its seat and tyres were unlikely to be in the same condition as they were at the date of the accident, were not matters which warranted more weight than the primary judge gave to them. Any prejudice which Jetcrete might encounter stood to be assessed in the light of its previous inspections and investigations and the investigations undertaken by other parties. The fact that the amendments came at an advanced stage of the litigation, after significant costs had been incurred, and would result in additional costs in responding to them, did not necessarily make it inappropriate to grant leave to make the amendments for which leave was required under r 376(4). Wasted costs might be the subject of appropriate costs orders and directions could be made to ensure that the matter was ready for trial as soon as reasonably practicable.

[39] The primary judge's assessment of whether it was "appropriate" to grant leave was a discretionary judgment. Jetcrete has not established grounds upon which to interfere with such an assessment. It is not established that the primary judge erred in law in failing to give sufficient weight to relevant matters. His Honour took into account alleged prejudice to Jetcrete and reached a conclusion on appropriateness which was clearly open on the material.

Conclusion

[40] Jetcrete has not established the errors contended by it. I would make the following orders:

1. The appeal is dismissed.
2. The appellant pay the respondent's costs of and incidental to the appeal.

[41] **HENRY J:** I have read the reasons of Applegarth J. I agree with those reasons and the order proposed.