SUPREME COURT OF QUEENSLAND

CITATION:	*Allianz Australia Insurance Ltd v Swainson* [2011] QCA 136
PARTIES:	**ALLIANZ AUSTRALIA INSURANCE LTD** ACN 000 122 850 (appellant) **v** **GLENN SWAINSON** (respondent)
FILE NO/S:	Appeal No 11840 of 2010 DC No 199 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	21 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2011
JUDGES:	Fraser JA, Ann Lyons and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed;** **2. The parties are directed to lodge written submissions within 14 days as to the consequential orders that should be made to give effect to the Court's reasons for allowing the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE INFERENCES OF FACT INVOLVED – WHERE FACTS NOT IN DISPUTE – where the plaintiff was walking home at night when the first defendant's vehicle collided with him – where the trial judge held that the first defendant was negligent in failing to keep a proper lookout and failing to slow down and steer clear of the plaintiff – where the insurer argued that the trial judge drew inferences which were not open on the evidence and engaged in unwarranted and unsupported speculation – whether the trial judge erred in finding that the first defendant was negligent TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO LOOK OUT – PEDESTRIAN ACCIDENTS – where the plaintiff was intoxicated at the time of the collision – where the plaintiff chose to walk on the left hand side of the road

rather than on the concrete footpath provided – where the plaintiff was hitchhiking and took a small step onto the road – where the first defendant had limited opportunity to avoid the collision – where the insurer argued that the plaintiff's culpability was greater – whether the trial judge erred in apportioning responsibility for the incident

Civil Liability Act 2003 (Qld), s 47

Edwards v Nominal Defendant [2006] QCA 475, distinguished
Hawthorne v Hillcoat (2008) 51 MVR 523; [2008] NSWCA 340, cited
Manley v Alexander (2005) 223 ALR 228; [2005] HCA 79, cited
Pennington v Norris (1956) 96 CLR 10; [1956] HCA 26, distinguished
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR 492; [1985] HCA 34, considered
Swainson v Carruthers & Anor (unreported, DC(Qld), McGinness DCJ, No 199/09, 5 October 2010), considered
Teubner v Humble (1963) 108 CLR 491; [1963] HCA 11, distinguished

COUNSEL: S C Williams QC, with P L Feely, for the appellant
M Grant-Taylor SC, with R Trotter, for the respondent

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

[1] **FRASER JA:** The plaintiff in proceedings in the District Court claimed damages arising out of an accident which occurred at about 9.30 pm on 5 December 2006. The plaintiff had set out on a six kilometre walk from a hotel toward his home, having decided not to ride his bicycle because he had been drinking. Because he wished to hitchhike he walked on the left hand side of the road rather than on the dedicated footpath on the right hand side. After the plaintiff had walked about two kilometres he was standing just inside a fog line marked on the left lane of Springbrook Road at Mudgeeraba when he was hit by a car driven by the first defendant. The plaintiff was seriously injured in the collision.

[2] The trial judge found that the negligence of the first defendant was a cause of the collision but that the plaintiff had also failed to take reasonable care for his own safety. The plaintiff's damages were assessed at $266,354.63 (inclusive of interest). The trial judge reduced the damages by 40 per cent on account of the plaintiff's contributory negligence. Judgment was given in favour of the plaintiff against the second defendant insurer for $160,103.34. The insurer was also ordered to pay the plaintiff's indemnity costs of the action to be agreed or in default of agreement to be assessed.

[3] The insurer challenges the trial judge's conclusions that the first defendant was negligent and that his negligence was a cause of the collision. In the alternative, the insurer contends that the trial judge's apportionment of responsibility for the collision was too generous to the plaintiff.

Negligence

[4] The trial judge analysed the evidence in detail and made the following findings (I have added the numbers for ease of reference):

> "(1) The road where the collision occurred was in an urban/residential setting. The roadway was marked with double centre lines with spacing to allow access to driveways. There was one lane going in each direction. 'Fog lines' marked the boundary of each lane.
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> (2) The traffic lanes in the area of the collision were 3.3 metres in width.
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> (3) There was a concrete footpath on the other side of the road. There was no footpath on the left side of the road.
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> (4) The plaintiff was walking slightly to the left of the fog line on the left hand side of the road.
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> (5) The plaintiff was affected by alcohol but not to the extent that he could not walk properly.
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> (6) As the first defendant approached, the plaintiff turned to his right and took one step onto the road of about half a metre in length.
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> (7) The first defendant did not see the plaintiff until he was approximately 15 metres from him.
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> (8) The plaintiff was wearing a black top, floral board shorts, and a pale blue backpack.
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> (9) The first defendant's lights were on low beam. There were two streetlights. One 70 metres before the point of impact and one streetlight 30 metres past where the plaintiff was hit.
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> (10) The oncoming headlights of the approaching vehicle were in the first defendant's peripheral vision, therefore not in the vicinity of the point of collision. He was not dazzled by the approaching headlights.
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> (11) There was nothing to prevent the first defendant from seeing the plaintiff significantly earlier than he did.
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> (12) The first defendant should have seen the plaintiff significantly earlier than he did.
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> (13) The first defendant could have moved his vehicle to the right and past the plaintiff even after the plaintiff took one step, without crossing the double lines in the centre of the road.
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> (14) The first defendant did not do anything to react to the presence of the plaintiff, until the plaintiff took the step to the right by which time it was too late to do anything.

(15) If the first defendant had seen the plaintiff earlier and moved his vehicle to the right hand side of his lane and/or slowed down, then the collision would not have happened."[1]

[5] After referring to legal issues the trial judge made further findings of fact in relation to the first defendant's negligence in the following passage:

> "Returning to the present case, based on the damage to the first defendant's car on the left hand side, the first defendant's evidence that the plaintiff took one step only onto the road, the first defendant's evidence that the plaintiff was standing on or to the left of the fog line prior to the accident, it can be inferred that the first defendant hit the plaintiff just inside the fog line. A minor deviation in the path of travel by the driver would have avoided the impact. I reject the first defendant's evidence that his capacity to deviate was curtailed by oncoming traffic. I have regard to the width of the road and the inconsistencies in his evidence concerning the approaching vehicle.
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> It is true that in this case there is no independent evidence as to what distance ahead of the defendant's vehicle someone like the plaintiff would have been visible in low beam headlights. That does not prevent a finding being made that the plaintiff ought to have been seen by the defendant earlier than he was. In most of the decisions I have referred to there was no such evidence. In the absence of evidence, I am entitled to rely on my own experience of life, and on the evidence of the plaintiff as to the fact that he was aware of the defendant's lights illuminating the area in front of him before he began to turn. I accept that the plaintiff's step to the right, which I have found occurred, was in response to his becoming aware of the approach of the defendant's vehicle in this way. From that time, or very soon after it, the defendant should have been aware of the presence of the plaintiff ahead." [2]

[6] Some relevant additional facts are included in trial judge's findings about contributory negligence set out in [27] and [28] of these reasons.

[7] The trial judge held that the plaintiff had established on the balance of probabilities that the first defendant was negligent by failing to keep a proper lookout and by failing to slow down and steer clear of the plaintiff.[3]

[8] The insurer disclaimed any challenge to findings (1)-(10) quoted in [4] of these reasons, but challenged findings (11)-(15). The insurer argued that the latter findings were inferences which the trial judge derived from the primary facts in findings (1)-(10) and that those inferences were not open on the evidence. The principal argument was that the evidence did not justify the trial judge's conclusion that the first defendant should have seen the plaintiff in sufficient time to take evasive action to avoid the collision. The insurer argued that this conclusion, and the related finding that the first defendant was negligent, were unsustainable in

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1 *Swainson v Carruthers & Anor* (unreported, DC(Qld), McGinness DCJ, No 199/09, 5 October 2010) at [29].

2 Reasons at [43]-[44].

3 Reasons at [45].

the absence of evidence of: the range and throw of the headlights on the car driven by the first defendant; the extent to which and the time at which the plaintiff would have been illuminated as the car approached; and the time which was available to the first defendant to react after the plaintiff was sufficiently illuminated by the headlights. The insurer argued that the trial judge filled that gap in the evidence by engaging in unwarranted and unsupported speculation by relying on her "own experience of life"[4] and by engaging in hindsight reasoning.

[9] As the trial judge held in finding (13), there was sufficient space within the left hand lane for the first defendant to swerve to the right to avoid a collision with the plaintiff after he had stepped across the fog line. A police officer gave unchallenged evidence that the first defendant's car was 1.65 metres wide. There was also no challenge to findings (2) and (6), that the lane in which the first defendant drove his car was 3.3 metres wide and the length of the step which the plaintiff took onto the road was about half a metre. The first defendant could have swerved more than a metre to the right of the plaintiff and still have remained wholly within his lane. The critical factual question is whether the first defendant should have seen the plaintiff in sufficient time to take evasive action.

[10] The plaintiff gave evidence that it was a clear night, the moon was up, the lighting was good, and he could see the fog lines, but he conceded that the collision occurred on one of the darker stretches of the road. The first defendant's evidence was that it was overcast and the lighting where the accident took place was very poor. The trial judge did not make a clear finding about the illumination provided by the street lights, although one ground upon which her Honour distinguished a decision cited by the insurer[5] was the factual dissimilarity that it involved "non-functioning street lights near the point of impact".[6] On the other hand, [44] of the trial judge's reasons suggests that her Honour concluded that the first defendant reasonably might not have been able to see the plaintiff until he was illuminated by the car's headlights.

[11] In evidence in chief the first defendant said that he first saw the plaintiff when they were about 15 metres apart. The trial judge accepted that evidence in finding (7). Consistently with that evidence, in cross-examination the first defendant denied having seen the plaintiff from the points on the road from which photographs 8, 9, 10, 11 and 12 of Exhibit 2 were taken. The approximate distances between those points and the point of collision (represented on the photographs by a green wheelie bin) were 80 metres, 70 metres, 60 metres, 50 metres, and 40 metres respectively. Another photograph, photograph 13, was taken about 30 metres from the point of collision.

[12] The first defendant also gave evidence to the effect that he did not have sufficient time to do anything after the plaintiff was first illuminated by the car's headlights, but the trial judge did not accept that evidence. The insurer argued that the trial judge should have accepted the first defendant's evidence. It was submitted to be the only reliable evidence of the relevant events.

[13] However it is not accurate to describe all of the first defendant's evidence as "reliable". The trial judge referred to numerous matters concerning the credibility

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4 Reasons at [44].

5 *Hawthorn v Hillcoat* [2008] NSWCA 340.

6 Reasons at [42].

of both the plaintiff and the first defendant and the reliability of their evidence.[7] Her Honour held that, whilst the first defendant was more reliable than the plaintiff, the first defendant was not "a particularly reliable witness".[8] He was "somewhat vague, inconsistent and unconvincing" in his evidence concerning the moment when he first saw the plaintiff, the distance of the approaching car, and the plaintiff's clothing.[9] There is no ground upon which this Court could disregard those findings, which were plainly justified by the matters identified by the trial judge.

[14] Importantly, whilst the trial judge preferred the first defendant's evidence that the plaintiff stepped onto the road over the plaintiff's evidence that he would not have done so because he knew that a car was coming, her Honour expressly accepted the plaintiff's evidence that he was aware of the headlights of the first defendant's car illuminating the area in front of him before he began his turn to the right.[10] The trial judge found that the plaintiff's step to the right "was either inadvertent, or a momentary misjudgement of where in relation to the fog line he was standing when he turned to face the first defendant's vehicle."[11]

[15] The insurer argued that the acceptance of the plaintiff's evidence that he began his turn to the right only after the area in front of him was illuminated was inconsistent with the trial judge's finding that "the plaintiff's evidence of what occurred just prior to the collision is based on conscious or subconscious reconstruction rather than actual memory."[12] There was no such inconsistency. In the following sentence the trial judge recorded that she accepted some aspects of the plaintiff's evidence. The trial judge cannot be said to have fallen into error by accepting the plaintiff's evidence that the headlights "coming from behind" lit up the trees in front of him and a railing beside him, that "I thought well if … I can see that then he's got to be able to see me", and that "I put my hand out to hitchhike and started to … stop to turn around and face the traffic…". The evidence was not objectively unlikely or inconsistent with any inherently reliable evidence. It cannot be said that the trial judge was mistaken in accepting the evidence merely because her Honour rejected other evidence given by the plaintiff. The insurer naturally emphasised factors which militated against acceptance of the plaintiff's evidence (in particular, that the plaintiff had a very poor memory of how the accident occurred, he gave evasive and inconsistent answers when questioned about his prior drug, alcohol, medical, employment and criminal histories, and he admitted that he had partly reconstructed the events of the day of the accident), but the trial judge did not overlook that evidence.

[16] The plaintiff's evidence formed one aspect of the material that justified the conclusion that the headlights illuminated the plaintiff for a sufficient period to enable the first defendant to see the plaintiff and take evasive action. There was also uncontroversial evidence that the first defendant's car had been given a roadworthy certificate about six months earlier. There was no reason to think that the car did not comply with the regulatory requirement that its low-beam headlight illuminate the road ahead for at least 25 metres. As the plaintiff was walking only

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7 Reasons at [14]-[28].
8 Reasons at [21].
9 Reasons at [25].
10 Reasons at [43]-[44].
11 Reasons at [63].
12 Reasons at [20].

slightly to the left of the fog line on the left side of the road (finding (4)), it was a reasonable inference that the first defendant's headlights would have illuminated the plaintiff much earlier than when they were about 15 metres apart, which was when the first defendant in fact first saw the plaintiff (finding (7)).

[17] The insurer argued that a curve in the road prevented the first defendant from seeing the plaintiff any earlier. In the direction in which the plaintiff and the first defendant were travelling, the road curved to the right and the collision occurred near the left hand edge of the road some distance beyond the apex of the curve. As a matter of logic the curve might have prevented the headlights from illuminating the plaintiff until the first defendant had negotiated some part of the curve, but whether that was in fact what happened is a different question. My own impression of the photographs is that it would be very surprising if the curve depicted in them had any such effect, at least from any point closer than about 40 metres to the point of collision. The plaintiff was standing so close to the left lane that headlights designed to illuminate the road ahead for at least 25 metres should have started to illuminate him well before the 15 metres claimed by the first defendant. Indeed, from about 40 metres or so before the point of collision the effect of the curve depicted on the photographs might have been to direct the headlights slightly towards the plaintiff's position on the left hand side of the road, thereby more effectively illuminating him. I accept that any precise finding on that topic would require evidence about the throw and reach of the headlights and the exact configuration of the road and that there was no such evidence. However, the photographs do not support the insurer's argument that the configuration of the road would have prevented the headlights from illuminating the plaintiff until they were as close as 15 metres apart.

[18] In addition, that argument failed to confront important aspects of the first defendant's own evidence. When the first defendant was cross examined he said in relation to some of the photographs that his headlights were not "on him yet" and "didn't show him up yet", and that (in relation to photograph 11, taken about 50 metres from the point of collision) "he wasn't in my line of sight yet." Those answers were consistent with the insurer's argument, but when the first defendant was asked why he did not see the plaintiff from where photograph 12 was taken (about 40 metres from the point of collision) he did not answer the question. Instead he responded: "I didn't". He advanced the explanation that "it was dark and [the plaintiff] was wearing dark clothes." The trial judge did not accept the first defendant's evidence that it was too dark for the first defendant to see the plaintiff earlier than he did and in finding (8) (which the insurer did not challenge) her Honour rejected the first defendant's pleaded case that the plaintiff's clothing was black. The evidence on that topic included the testimony of Miss Plum that the plaintiff was wearing "bright lairy board shorts."

[19] Other evidence provided further support for the plaintiff's case that the first defendant should have had time to take evasive action. In examination in chief the first defendant gave evidence which suggested that he did have time to react in that way and that the suggested inadequacy of time concerned only the period after the plaintiff had stepped onto the road. The first defendant elaborated that he "registered somebody being there as I come [sic] around the corner and he came into my lights", and that "… I didn't have time to do anything once he moved." The first defendant elaborated that he "… just sort of come around the corner and [the plaintiff's] sort of – he's come into the vision of my lights … and I've

registered him being there … And yeah, by the time he took the step out in front of my car … I didn't have any – any time to do anything", and that "… it happened pretty quick, but I seen him standing there and it registered with me that he was there, and I thought it was okay. Like, just in that brief second I thought … he was just sort of waiting for me, but yeah, as I sort of got on top of him, more or less, like a second later, he – yeah, took a step out in front of my vehicle." The first defendant said in cross examination that he had seen the plaintiff standing there for "[o]ne or two seconds, I'd imagine" and that "I just remember registering him being there and thinking, 'Okay.' You know, 'He's going to wait' or whatever." Although the first defendant gave other evidence to the effect that he had no time to brake or otherwise react after the plaintiff first became visible, this evidence pointed to the contrary conclusion. It suggested that the first defendant saw the plaintiff before the plaintiff stepped onto the road and in sufficient time to form the view that the plaintiff was waiting for the first defendant to pass.

[20] Furthermore, when the first defendant was asked in examination in chief whether he had time to swerve, he said that he did not swerve "because once I've come around the corner and I've seen him, there was headlights, like, in my peripheral vision coming the other way, so …". The first defendant responded to a subsequent question that "… swerve would be the first thing you'd do, but I knew he was there, so I didn't want to – you know, didn't do it … Head-on accident … would have caused." Later in cross-examination the first defendant gave a similar explanation for not swerving, that "I saw some lights approaching me from a car in another lane as I entered the corner sort of thing. I knew there was a vehicle there somewhere, so…". The trial judge concluded, accurately, that the first defendant's evidence "seemed to be that he would have swerved when he saw the plaintiff but for an approaching car."[13]

[21] Those aspects of the first defendant's evidence justified an inference that he saw the plaintiff standing very close to the edge of the left lane in time to take evasive action but failed to take any such action for fear of colliding with an oncoming car. However the trial judge rejected and gave persuasive reasons for rejecting the first defendant's explanation for failing to take evasive action.[14] That being so, and having regard also to the evidence which suggested that the headlights illuminated the plaintiff much earlier than when the first defendant first saw the plaintiff, that after the headlights illuminated the plaintiff some time elapsed before the plaintiff stepped across the fog line, and that the first defendant could have swerved more than a metre to the right within his lane, the inference was available that the first defendant should have seen the plaintiff in sufficient time to take evasive action.

[22] The insurer relied upon an analysis which demonstrated that the first defendant had very little time available to react to the appearance of the plaintiff within the headlights, but that analysis was unreliable because it was necessarily based upon the first defendant's evidence that he could not have seen the plaintiff earlier than he did. The other evidence I have discussed justified the trial judge in taking a different view.

[23] The insurer's analysis was also based upon the first defendant's evidence that he was travelling at about 50 kilometres per hour. The trial judge did not make any specific finding about speed, but it is implicit that her Honour accepted that the first

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13 Reasons at [26].

14 Reasons at [27], [43].

defendant complied with his duty to take reasonable care to control the speed of his car such that he was in a position to know what was happening in the vicinity of the car in time to take reasonable steps to react.[15] That was consistent with the conclusion that the first defendant did not keep a proper lookout. The presence of a pedestrian at 9.30 pm where the collision occurred was readily foreseeable because, although there was no footpath on the side of the road upon which the plaintiff was walking, there were houses in the area and the collision occurred very close to the entrance to a private residence.

[24] The trial judge's remark that there was no "independent evidence" concerning the reach of the headlights followed immediately after the rejection of the first defendant's explanation for failing to deviate away from the plaintiff.[16] For the reasons I have given, the trial judge was correct in concluding that the absence of such evidence did not preclude the finding that the first defendant should have seen the plaintiff earlier. The trial judge's reference to her "own experience of life" concerned no more than the use of common sense in drawing inferences from the evidence to which her Honour referred. That was entirely appropriate.

[25] On the trial judge's findings of fact, which I would affirm, if the plaintiff had remained stationary near the edge of the road, the first defendant's car would have passed dangerously close to him. The car would have passed as close as half a metre, perhaps even closer when regard is had to the car's wing mirrors. The first defendant's evidence that he would have deviated away from the plaintiff (had there not been an oncoming car) supported the conclusion that the first defendant's duty to take reasonable care required him to take that action to avoid the risk of a collision.

[26] In the result, there is no sufficient ground upon which this Court might overturn the finding that the first defendant was negligent in failing to keep a proper lookout and in failing to slow down and steer clear of the plaintiff. There is also no ground for setting aside the finding of fact (finding (15)) that if the first defendant had deviated toward the right or slowed down the collision would not have happened. That finding was justified by the first defendant's evidence that the collision occurred virtually immediately upon the plaintiff taking his short step across the fog line when he turned to face the car, and the photographic evidence showing that the car was damaged on its left side. The plaintiff's conduct in stepping across the fog line was undoubtedly a cause of the collision, but there was no error in the trial judge's conclusion that the first defendant's negligence was also a cause.

Contributory negligence

[27] Because the plaintiff was "intoxicated" (as that term is defined in the *Civil Liability Act* 2003 (Qld)) and failed to establish that his intoxication was not self-induced or did not contribute to the accident, the starting point for the reduction of his damages on account of contributory negligence was a minimum of 25 per cent.[17]

[28] The trial judge referred also to other grounds for holding that the plaintiff was guilty of contributory negligence: he failed to take reasonable care for his own safety in that he did not walk on the footpath provided, he did not walk on the right hand side

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15 I have adapted the description of the relevant duty given in *Hawthorne v Hillcoat* [2008] NSWCA 340 at [47] by Hodgson JA (Ipp JA agreeing) with reference to *Manley v Alexander* (2005) 223 ALR 228 at 231[12].

16 Reasons at [44].

17 *Civil Liability Act* 2003 (Qld), s 47.

of the road facing oncoming traffic, and he took a step into the path of the first defendant's car when he knew it was approaching.[18] After referring to observations in High Court decisions that the driver of a motor vehicle has greater capacity to cause damage than a pedestrian on the road, the trial judge observed, citing *Edwards v Nominal Defendant*,[19] *Teubner v Humble*,[20] and *Pennington v Norris*[21] that "[t]he driver should therefore bear greater responsibility where the driver causes injury to a pedestrian".[22] Her Honour gave the following additional reasons for concluding that the plaintiff's damages should be reduced by 40 per cent on account of his contributory negligence:

> "In the present case, the plaintiff made a conscious and logically sound choice to walk on the left side of the road in the same direction as the traffic and on the side without a footpath when one was available on the other side. The plaintiff chose to do so, not because he was intoxicated but because he wished to hitchhike home. He made a decision not to ride his bicycle because he had been drinking. He did not want to spend money on a taxi. He had a 6 kilometre distance to walk late at night. He was not so intoxicated that he could not walk. He had already walked approximately two kilometres in good time. He kept to the side of the road except for the one step. This does not involve the grave degree of culpability seen in the cases referred to by Mr Feely.
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> The step to the right by the plaintiff was either inadvertent, or a momentary misjudgement of where in relation to the fog line he was standing when he turned to face the first defendant's vehicle. This reduces somewhat the significance of his contributory negligence."[23]

[29] The insurer argued that the trial judge's conclusion that there was no rational justification for the plaintiff to step onto the road, other than that he was intoxicated and that his judgement was therefore impaired, falsified her Honour's conclusion that the significance of the plaintiff's contributory negligence was reduced by the fact that his step on to the road was either inadvertent or a momentary misjudgement. It was of particular significance that the plaintiff stepped on to the road directly into the path of the first defendant's car; that was the primary cause of the accident. The insurer argued that the trial judge failed to attribute sufficient weight to the limited opportunity for the first defendant to observe the plaintiff and take effective action to avoid the collision, and that the plaintiff's culpability was greater and his conduct was of more significance than that of the first defendant in causing the collision.

[30] The plaintiff argued that the trial judge's reasons justified the apportionment. The Court was reminded of the hurdle faced by an appellant who seeks to challenge a finding of this kind:

> "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law,

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18 Reasons at [55].
19 [2006] QCA 475 at [18].
20 (1963) 108 CLR 491.
21 (1956) 96 CLR 10.
22 Reasons at [59].
23 Reasons at [62]-[63].

> but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds': *British Fame (Owners) v Macgregor (Owners)* [1943] A.C. 197 at 201. Such a finding, if made by a judge, is not lightly reviewed. …
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> ...
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> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man (*Pennington v. Norris* (1956) 96 C.L.R. 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v. Gypsum Mines Ltd* [1953] A.C. 663 at 682; *Smith v. McIntyre* [1958] Tas.S.R. 36 at 42-49 and *Broadhurst v. Millman* [1976] V.R. 208 at 219 and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."[24]

[31] Even so, this is one of the relatively rare cases in which there is a sufficient ground for setting aside a trial judge's apportionment. All other things being equal, a driver of a car should ordinarily bear the lion's share of the responsibility where the driver's negligence results in injury to a pedestrian whose negligence contributes to the collision, because the driver has a far greater capacity to cause damage than the pedestrian. In this case, however, all other things were far from being equal. It was the plaintiff's conduct in standing very close to the edge of the left lane in a relatively dark area at night which initially created the danger. The first defendant's only fault was in failing to avoid that danger by keeping a proper lookout and slowing down or deviating. In addition to creating the initial danger, the plaintiff also precipitated the collision by stepping onto the roadway in circumstances in which he knew that a car was approaching. That was inadvertent conduct but it was presumably contributed to by his "intoxication".

[32] The plaintiff's conduct was so markedly more culpable than that of the first defendant, that the trial judge's apportionment must involve error, even taking into account the far greater capacity for the first defendant to cause damage by negligent driving. Essentially for the reasons advanced by the insurer, the apportionment should have been made in its favour. The trial judge's apportionment should be set aside.

[33] The insurer referred to cases in which particular apportionments were made,[25] but the circumstances were so different as to render those cases of no real assistance.

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[24] *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 493-494. See also *Joslyn v Berryman* (2003) 214 CLR 552; [2003] HCA 34 at [157] per Hayne J; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; [2001] HCA 24 at [2] per Gleeson CJ.

[25] *Hawthorne v Hillcoat* [2008] NSWCA 340; *Vale v Eggins* [2006] NSWCA 348; *Evans v Lindsay* [2006] NSWCA 354.

On the facts of this case I consider that the plaintiff should bear 60 per cent of the responsibility.

Orders

[34] I would order that the appeal be allowed.

[35] It is necessary then to vary the judgment to give effect to my conclusion that the plaintiff's damages should be reduced by 60% rather than by 40%. That variation may also have a bearing upon costs orders made in the District Court as well as upon the appropriate costs order in this Court. I would direct that the parties lodge written submissions within 14 days of today's date as to the consequential orders that should be made to give effect to the Court's reasons for allowing the appeal.

[36] **ANN LYONS J:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.

[37] **MARTIN J:** I agree, for the reasons given by Fraser JA, with the orders he proposes.