SUPREME COURT OF QUEENSLAND

CITATION:	*AAI Limited v Atkinson* [2019] QCA 228
PARTIES:	**AAI LIMITED** ABN 48 005 297 807 (appellant) **v** **TEEK RENEE ATKINSON** (respondent)
FILE NO/S:	Appeal No 388 of 2019 DC No 52 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville – Unreported, 14 December 2018 (Lynham DCJ)
DELIVERED ON:	25 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 June 2019
JUDGES:	Gotterson and McMurdo JJA and Henry J
ORDERS:	**1. Application for extension of time refused.** **2. Appeal dismissed.** **3. The appellant is to pay the respondent's costs of the appeal, excluding the application for extension of time, on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – GENERALLY – where the appellant was the licensed insurer of a driver who was involved in a collision with the respondent's vehicle – where the respondent commenced proceedings against the driver seeking damages – where the respective versions of the collision given by the driver and the respondent were diametrically opposed – where the question for the learned trial judge was whether the respondent was stationary waiting to perform a U-turn when the collision occurred or whether she drove into the path of the driver – where the learned trial judge found that the respondent was stationary awaiting to perform a U-turn when the driver's vehicle collided with the respondent's vehicle and that the collision was caused by the negligence of the driver – where the appellant on appeal challenges the factual findings made by

the learned trial judge as being not supported by the evidence – whether the findings of the learned trial judge were against the evidence

Lee v Lee (2019) 93 ALJR 993; [2019] HCA 28, cited
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679; [2016] HCA 22, cited

COUNSEL: T Matthews QC, with E J Williams, for the appellant
C C Heyworth-Smith QC, with P Nolan, for the respondent

SOLICITORS: Jensen McConaghy Lawyers for the appellant
McDonald Leong Lawyers for the respondent

[1] **GOTTERSON JA:** On 13 March 2017, Teek Renee Atkinson, who is the respondent to this appeal, commenced a proceeding in the District Court at Townsville against Paul Anthony Temple, as first defendant, and the appellant, AAI Limited, as second defendant. The latter was the licensed insurer under the *Motor Accident Insurance Act* 1994 (Qld) in respect of a grey Hyundai Elantra sedan.

[2] The proceeding arose out of a motor vehicle accident that happened at about 11.30 am on 1 September 2012 on Fulham Road in the Townsville suburb of Heatley. At the time, Ms Atkinson was driving a blue Holden Barina hatchback and Mr Temple was driving the Hyundai sedan. The two vehicles collided. Ms Atkinson suffered personal injuries in the collision. She sued for damages for resultant loss and damage.

[3] The claim was heard over two days in Townsville in late March 2018. On 14 December 2018, judgment was given for Ms Atkinson in the sum of $296,671.85.[1] Reasons for Judgment were also delivered that day.[2]

[4] On 10 January 2019, the appellant filed a notice of appeal to this Court against the liability findings in the Reasons for Judgment.[3]

The roads in the vicinity of the collision

[5] The collision occurred when Ms Atkinson was driving in a westerly direction along Fulham Road. Two other roads joined Fulham Road from the south, that is to say to Ms Atkinson's left, in the vicinity of the location of the collision. The first of them in her direction of travel was Narangi Street. The junction with Boyes Court was a short distance on. To the north of Fulham Road in that vicinity was the site of the Heatley State High School, part of which at the time housed a construction site.

[6] There was one lane of travel for motor vehicles in each direction on Fulham Road. The lanes were separated by double white lines with a break at the intersection with Boyes Court. In Ms Atkinson's direction of travel there was to her left on either side of the intersection a parallel lane for cyclists which was bordered by a continuous white line on one side and the kerb on the other. There was a similar parallel lane for cyclists in the other direction of travel.

The contested case on liability

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1 By order made on 11 January 2019, that amount was varied to $292,783.90: AB 65.
2 AB 7-64.
3 AB 1-6.

[7] It was admitted on the pleadings that Mr Temple was driving the Hyundai in a westerly direction on Fulham Road at the time.[4]

[8] The learned trial judge set out the pleadings of the respective parties concerning the circumstances in which the collision occurred. He did so as follows:

> "[33] The pleadings delineate the issues in dispute between the parties in respect to liability. The plaintiff's case is pleaded in paragraph 5 of the statement of claim on the following basis:
>
> "(c) The Plaintiff's vehicle had slowed to a stationary position at a break in the lines with the indicator on just prior to the intersection of Boyes Court and Fulham Road close to the centre of the road waiting for an opportunity to turn on Fulham Road;
>
> (d) The First Defendant failed to brake and avoid a collision with the Plaintiff's vehicle and hit the Plaintiff's vehicle at speed deploying the airbags."
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> [34] Conversely, on the question of liability the defendants deny liability on the basis pleaded in paragraph 2 of the amended defence:
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> "(b) The Plaintiff's vehicle had not slowed to a stationary position at a break in the lines with the indicator on just prior to the intersection of Boyes Court and Fulham Road close to the centre of the road waiting for an opportunity to turn on Fulham Road as the Plaintiff's vehicle was attempting to cross Fulham Road from the First Defendant's left hand side otherwise described as the southern side of Fulham Road;
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> (c) The Plaintiff's vehicle pulled across Fulham Road in front of the First Defendant's vehicle and despite the First Defendant's attempts to avoid the Plaintiff's vehicle a collision occurred between the First Defendant's vehicle and the Plaintiff's vehicle."[5]

The respective versions of what happened

[9] Ms Atkinson gave evidence at trial as did her partner, Jonathon Sheppard, whom she was to collect from the construction site. A police officer who attended the scene of the accident, Senior Constable PS Good, was also called in the plaintiff's case. Witnesses in the defence case were Mr Temple, his daughter, Esther, who was a passenger in the vehicle, and two residents of Boyes Court at the time, Mr MP Bulmer and Ms LK Suhle.

[10] The respective versions of how the collision occurred were summarised by the learned trial judge. His Honour said:

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4 AB 69: Statement of Claim paragraph 5(b) admitted at AB 76: Amended Defence paragraph 1.

5 AB 20.

> "The plaintiff maintained that her vehicle was stationary close to the centre line at an angle intending to execute a U-turn when the first defendant collided with the side of her vehicle. Mr Shepard, supporting the plaintiff's version, was also adamant that he had observed the plaintiff's vehicle come to a stop at the dual white lines on Fulham Road at a slight angle effecting a U-turn when he was waiting to be collected by her from work. On the other hand the first defendant was equally adamant that he had an unobstructed view of the road ahead and did not observe the plaintiff's vehicle stationary beside the centre line immediately before the collision and that the plaintiff's vehicle had in fact emerged from his left into the path of his vehicle. Esther Temple also was adamant that she had observed the plaintiff's vehicle emerging from Boyes Court and into the path of her father's vehicle leading to the collision."[6]

[11] From these versions, His Honour identified as the critical issue for his determination:

> "Whether (Ms Atkinson) was stationary close to the centre line waiting to perform a U-turn when the collision occurred or whether (Ms Atkinson) drove into the path of (Mr Temple's) vehicle from the left".[7]

[12] The learned trial judge was unassisted by any photographic evidence of the two vehicles in the locations at which they came to rest after the collision, they having been removed before the police arrived at the scene. Nor was there any photographic evidence of the damage to Ms Atkinson's vehicle.[8] There were, however, photographic exhibits of the damage to Mr Temple's vehicle.[9]

The reasons at first instance

[13] The learned trial judge characterised the respective versions of Ms Atkinson and Mr Temple as "diametrically opposed". He regarded the location of damage sustained by each vehicle as "arguably most significant" as an indicator of the position of Ms Atkinson's vehicle immediately before the collision.[10] His Honour observed that the consensus of the witness evidence was that the damage to Ms Atkinson's vehicle was around the driver's side door.[11] The most damage to Mr Temple's vehicle was at the front corner on the passenger's side.[12]

[14] His Honour drew a conclusion as to which parts of the respective vehicles had come into contact with each other in the collision. He expressed that conclusion as follows:

> "[46] The location of the damage sustained by each vehicle is in my view critical to making a finding as to where each vehicle was positioned at the point of impact. Having regard to the damage sustained by the first defendant's vehicle it is clear in

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6 At [43].
7 At [35].
8 At [36].
9 Exhibit 16: AB 92-97.
10 At [44].
11 Ibid.
12 At [45].

my view that the passenger side front corner of the vehicle collided first with the driver's side of the plaintiff's vehicle and with some degree of force given the extent of the damage described. The area of damage to the front bumper bar and bonnet of the first defendant's vehicle, which appears to be much less significant than that caused to the front passenger side corner, is consistent with that area of the vehicle coming into contact with the plaintiff's vehicle after the initial impact."

[15] The learned trial judge elaborated on this conclusion, repeating that the point of impact, as determined by him, was important as "the best evidence (of) the general position of each vehicle at the point of impact" and then explaining that that was so for two reasons. His Honour continued:

"[47] … First, it demonstrates in my view that the collision did not occur when the vehicles were positioned perpendicular, or in a "T" shape, to each other. Had the collision occurred that way then it would reasonably be expected that the whole of the front of the first defendant's vehicle would have sustained significant damage rather than, as here, the more significant damage being to the front passenger side corner of the vehicle. Secondly, and leading on from this, given that the first defendant's vehicle sustained the most significant damage to the front passenger side corner, the only logical explanation for this is that the plaintiff's vehicle must have been at an angle relative to the first defendant's vehicle when impact occurred, with the rear section of the plaintiff's vehicle being in a position closer to the front of the first defendant's vehicle at the point of impact, as perhaps best demonstrated in the following diagram:

[48] The diagram is not of course intended to represent the exact or even approximate angle of the two vehicles but simply to demonstrate the finding which I make that the first defendant's vehicle must have been on at least some angle relative to that of the plaintiff's in order for it to have sustained damage to the

> passenger side front corner. Accepting that to be so, this would also provide an explanation for the extent of damage to the driver's side of the plaintiff's vehicle as described by the witnesses. Whilst as I have noted already there is a discrepancy on the evidence as to the area where the plaintiff's vehicle had sustained damage, where there is consensus is that the damage was not confined to a specific point on the driver's side but extended over an area of approximately half a car length which on all descriptions included at least some part of the driver's side door. Leaving aside the dispute as to the initial point of impact, the most likely explanations for the damage extending at least half a car length from the point of impact along the driver's side of the plaintiff's vehicle are either that following impact the momentum of the collision caused the corner of the first defendant's vehicle to continue to slide along the driver's side of the plaintiff's vehicle to at least some extent before the vehicles became stationary or that following initial impact with the passenger side front corner, that the front of the first defendant's vehicle then rotated around and also came into contact with side of the plaintiff's vehicle. The preponderance of evidence also supports a finding that the front of the first defendant's vehicle pushed up against the driver's side of the plaintiff's vehicle when the two vehicles came to rest. This is also consistent in my view with there being little or no separation of the two vehicles from the point of initial impact which would also explain the damage to the plaintiff's vehicle extending at least half a car length.
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> [49] Having regard to the damage sustained by each vehicle in the collision, I am satisfied on the balance of probabilities that it was the passenger side front corner of the first defendant's vehicle which initially collided with the driver's side of the plaintiff's vehicle. I am also satisfied that the plaintiff's vehicle was positioned at an angle to the first defendant's vehicle at the point of impact. That finding becomes relevant then to assessing the evidence as to the position of the plaintiff's vehicle immediately before impact."

[16] His Honour regarded his finding as to the respective positions of the vehicles as one that "contradicts the evidence of both (Mr Temple) and his daughter".[13] He noted that there was no evidence which supported the finding that Ms Atkinson's vehicle had been stationary on the left side of Fulham Road just prior to turning into the path of Mr Temple's vehicle.[14]

[17] The learned trial judge had reservations concerning the reliability of the evidence given by Mr Temple and his daughter. For that, his Honour gave the following detailed reasons:

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13 At [50].

14 At [51]. In fact, the Amended Defence had not pleaded that Ms Atkinson's vehicle veered to the left towards the kerb and then moved off to the right into the path of Mr Temple's vehicle in order to make a "U" turn. Nor was such a scenario put to Ms Atkinson in cross examination.

"[57] Conversely, I am less persuaded as to the reliability of the evidence of the first defendant or his daughter Esther Temple. Whilst I accept that both witnesses were earnest in endeavouring to give an honest account of what they recalled of the accident, there are features relating to their evidence which causes me to harbour doubt as to the reliability of their versions. In respect to the first defendant, there are two matters in particular that cause me concern as to the reliability of his evidence. In his evidence at trial he purported to recall the plaintiff's vehicle coming from his left into the path of his vehicle although he qualified that by saying he did not "really see the vehicle before impact." The assertion, even a qualified one, by the first defendant that he had observed the plaintiff's vehicle emerge from his left is to be compared with what he told Senior Constable Good at the road side immediately after the accident. Senior Constable Good recalls the first defendant stating to him that the plaintiff "just appeared", that he had not noticed the plaintiff's vehicle driving along Fulham Road and that "she appeared out of the blue". There was no claim by the first defendant when speaking to Constable Good that the plaintiff's vehicle emerged from his left. I interpret what the first defendant was saying to Senior Constable Good was that he had no recollection of observing the plaintiff's vehicle until immediately before impact.

[58] The other matter which is concerning with respect to the first defendant's evidence is that it leaves me with a distinct impression that it is the product of reconstruction as to how he now believes the accident must have happened. There is evidence from both the first defendant and his daughter Esther Temple that they spoke about the accident in the days following. According to Esther she spoke to the first defendant two days after about the accident although the extent of that conversation is unclear. The first defendant in explaining the reason why he had not informed Senior Constable Good that he had observed the plaintiff's vehicle come from his left said that this was because he had not "spoken to my daughter after it." Thus there is at least some evidence to support a finding that the first defendant's evidence at trial was not based upon his independent recollection of the accident but was rather the product of what he might have been told by his daughter as well as him reconstructing the events in his own mind to explain why he did not observe the plaintiff's vehicle immediately before impact.

[59] Esther Temple did not resile in her evidence that she observed the plaintiff's vehicle emerging from Boyes Court and into the path of her father's vehicle. She was not spoken to at the time of the accident and like many of the other witnesses her evidence at trial was based upon what she could recall of an event which occurred more than five years previously and when she was a child. There are a number of features of [Esther's] evidence

> which raise for me doubts as to the reliability of her recollection. Her observations were made from the front passenger seat of her father's vehicle. She recalled her view was unobstructed in front. Curiously, Esther did not recall observing any light coloured utility further along Fulham Road at or near the roundabout. The plaintiff recalled a utility overtaking her vehicle when she was stationary awaiting to perform a U-turn. The first defendant also recalled seeing a similar vehicle approaching the roundabout. The fact that Esther could not recall seeing any such vehicle raises at least some doubts as to the reliability of her observations immediately before the accident. Secondly, and whilst not the subject of cross-examination, it would appear from the photographic evidence adduced at trial that Fulham Road from the point indicated by Esther where she looked down to read the text message she had received from her mother commences a slight sweeping right hand bend up to a point approximating the Boyes Court intersection. Therefore it does not appear that the first defendant's vehicle was travelling in a direct straight line leading up to the point of collision but was travelling slightly off centre as it negotiated the slight bend in the road. The view from inside of the vehicle therefore would not have been directly in front looking down the carriageway.
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> [60] The third feature in Esther Temple's evidence relevant to an assessment of her reliability relates to the text message she said that she received shortly before the collision. Her evidence was that she was holding her phone and that when she received the message she looked down and read the text message before looking up again and observing the plaintiff's vehicle on the left. Whilst Esther Temple maintained in evidence that she did observe the plaintiff's vehicle before the collision, the evidence of her looking down to read the text message raises a concern that only moments before the collision she was distracted by her phone thereby directly impacting upon her ability to concentrate on the road in front of her."

[18] His Honour then restated his finding as to the position of Ms Atkinson's vehicle at impact in these terms:

> "[63] In the end the most compelling evidence as to the position of the plaintiff's vehicle is, for the reasons explained earlier, the damage sustained by each vehicle. Coupled with the concerns I have in respect to the reliability of the evidence of the first defendant and his daughter Esther Temple, I am ultimately persuaded that it is more probable than not that the plaintiff was stationary at the end of the white centre line as she described in evidence awaiting to perform a U-turn when her vehicle was overtaken by the utility also observed by the first defendant. Moments after that I am also satisfied on the balance of probabilities that the passenger side front corner of

> the first defendant's vehicle collided with the driver's side of the plaintiff's vehicle causing the plaintiff's vehicle to rotate relative to the point of impact. I am not satisfied on the balance of probabilities that the plaintiff's vehicle emerged from the left hand side of the defendant's vehicle and drove into the path of the first defendant."

[19] Next, in paragraph 64 of the Reasons, the learned trial judge made the following further and ultimate findings on the balance of probabilities:

> "(a) On 1 September 2012 at approximately 11.30am the plaintiff was driving her vehicle in a westerly direction along Fulham Road. The plaintiff stopped her vehicle at an angle at a break in the unbroken centre lines near the intersection of Boyes Court intending to effect a U-turn to collect her then partner from a work site located on the grounds of Heatley High School. The plaintiff had her right indicator activated;
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> (b) Whilst the plaintiff was stationary awaiting to perform a U-turn the front passenger side corner of the first defendant's vehicle collided with the driver's side of the plaintiff's vehicle;
>
> (c) The collision between the plaintiff's vehicle and the first defendant's vehicle was caused by the negligence of the first defendant in failing to keep a proper lookout, driving without due care and attention and failing to take action to avoid the collision."

[20] These findings made it unnecessary for the learned trial judge to determine the plea of contributory negligence that had been made. At trial, it was conceded by the Defence that if his Honour accepted Ms Atkinson's evidence as to how the collision occurred, then there would be no basis for attribution of contributory negligence to her.[15]

The grounds of appeal

[21] The grounds of appeal as set out in the Notice of Appeal are:

> "(a) The trial Judge erred in making each of the findings set out at paragraph [64] of the Reasons for Judgment, when those findings were against the evidence and not reasonably open on the evidence.
>
> (b) The trial Judge erred in finding that the Respondent had discharged the onus of proof in circumstances where he ought to have found rationally that the collision could only have occurred when the vehicles were positioned perpendicular or in a T-shape to each other and in so doing:
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> (i) erred in accepting the Respondent's evidence;
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> (ii) erred in finding that the Respondent's vehicle was stationary at an angle to the centreline of the carriageway of Fulham Road;

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15 At [66].

(iii) wrongly rejected or his reasoning for so doing was not rational the evidence of the independent witnesses as to the positions of the vehicles immediately after the collision;

(iv) absent evidence, and in the face of the evidence of the physical damage to the vehicles, erroneously inferred or reasoned that there were two impacts in the collision;

(v) wrongly rejected the evidence of the First Defendant and his daughter when their evidence was not only consistent with but made inherently probable by the evidence of position of the vehicles immediately after the collision and the physical damage to them respectively;

(vi) ignored the First Defendant's most contemporaneous statement made immediately after the collision to the Respondent;

(vii) ignored the evidence of the inexperience of the Respondent as a driver of a motor vehicle."[16]

[22] These grounds challenge findings of fact made by the learned trial judge. The appeal to this Court is by way of rehearing.[17] That requires the Court to conduct a "real review" of the evidence given at trial and of the reasons of the learned trial judge in order to determine whether there have been errors of fact as alleged made.[18]

[23] In *Fox v Percy*,[19] the High Court affirmed that the mere fact that a trial judge reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. With references to a number of authorities, Gleeson CJ, Gummow and Kirby JJ described the types of instances where findings of fact at first instance would be vulnerable to appellate court interference.[20]

[24] Later, the High Court in *Robinson*, citing the description given in *Fox*, said to the same effect:

> "But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences".[21]

[25] Most recently, in *Lee v Lee*,[22] the High Court stated that appellate restraint in this regard is applicable to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give evidence. I note that the findings at subparagraphs (a) and (b) in paragraph 64 of the Reasons are findings of that character.

The approach taken in arguing the appellant's case

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16 AB 1, 2.
17 *Uniform Civil Procedure Rules* r 765(1).
18 *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; (2016) 90 ALJR 679 at [43].
19 [2003] HCA 22; (2003) 214 CLR 118.
20 At [28], [29].
21 Per French CJ, Bell, Keane, Nettle and Gordon JJ at [43].
22 [2019] HCA 28 per Bell, Gageler, Nettle and Edelman JJ at [55] (Kiefel CJ agreeing).

[26] In written submissions on appeal, the appellant submitted that the findings at paragraph 64 of the Reasons of the learned trial judge "cannot be logically or rationally supported by reference to a number of matters of evidence which his Honour attempted to eschew". His Honour erred, it was contended, "by drawing inferences which were not open so as to support the Respondent's version, or by ignoring what seems to have been uncontroverted or unchallenged independent evidence, particularly as to the position of the vehicles immediately following (the collision)."[23]

[27] Rather than making separate submissions in support of each ground of appeal and, in the case of the second of them, each of its seven particulars, the appellant identified six matters in evidence which, it was submitted, demonstrated deficiencies of those kinds in the reasoning of the learned trial judge towards the challenged findings. In light of the approach taken by the appellant, it is, in my view, both appropriate, and sufficient, to analyse those six matters.

[28] **Matter 1:** This matter[24] is that on the undisputed evidence, there was no damage at all to the rear of Ms Atkinson's vehicle, she having given evidence that the damage to it was on the driver's side along the back panel and into the door[25] and Mr Temple having depicted it as extending from the driver's side wheel arch back across the door and into the back panel.[26]

[29] **Discussion:** The appellant's submissions do not develop an argument why this feature of the evidence renders the findings, particularly the finding as to where the vehicles were positioned when they collided, wrong, glaringly improbable or contrary to compelling inferences. Ms Atkinson had not given evidence that Mr Temple's vehicle collided with the rear of her vehicle and his Honour did not find that it did. Had such a finding been made, it would have been difficult to reconcile it with the absence of evidence of damage to the rear of the Barina.

[30] **Matter 2:** The contention underlying this matter[27] is that two independent witnesses, Mr Bulmer and Ms Suhle, in sketches that were tendered in evidence[28] and in supporting testimony[29] depicted "the immediate post-impact position" of Mr Temple's Hyundai as being "wholly within the marked westbound carriageway of Fulham Road essentially parallel to the centreline". That evidence, it was submitted, could not rationally support a finding that it was the front passenger side of the Hyundai that impacted first with the driver's side of the Barina.

[31] Further criticism is levelled[30] at his Honour's observations that the witnesses were not asked to give evidence until some five and a half years after the accident and that that was a relevant factor in assessing the reliability of their recollections.[31] It was not put to either witness that the first time they had been asked to recall their observations at the scene was when they were giving evidence. As well, Mr Bulmer

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23 Appellant's Outline of Submissions ("AOS") paragraph 14.
24 AOS paragraph 16.
25 Exhibits 7, 8: AB 85, 86; AB 217 Tr 1-14 ll41-44. A Barina is a two door vehicle.
26 Exhibit 32: AB 131.
27 AOS paragraph 17.
28 Exhibit 34: AB 133 and Exhibit 35: AB 134 respectively.
29 AB 348 Tr 2-57 l20 – AB 349 Tr 2-58 l21 and AB 355 Tr 2-64 l45 – AB 356 Tr 2-65 l4 respectively.
30 AOS paragraph 18.
31 At [36].

had given evidence that about two weeks after the accident, someone had asked him to write a statement of his version of events.[32]

[32] **Discussion:** This contention proposes that evidence that the Hyundai came to rest "essentially parallel to the centreline" on the westbound side of the road precluded the finding that his Honour made. A difficulty with this proposition is that whilst both Mr Bulmer and Ms Suhle said in their oral testimony that the Hyundai was in the westbound lane, neither described it as being essentially parallel to the centreline. Ms Suhle depicted it as at an angle to the centreline, as indeed did Mr Temple.[33]

[33] A second difficulty with the proposition is that it implies that the fact that the Hyundai came to rest in that position would preclude a finding that the front passenger's side of the Hyundai impacted first with the driver's side of the Barina. Yet that was the point of impact strongly suggested by the damage to the vehicles, particularly the Hyundai.

[34] I would add that, in this case, the reliability that the learned trial judge could attribute to the evidence of the independent witnesses was constrained by inconsistencies. According to Mr Bulmer, the vehicles were touching and at almost 90 degrees to each other when they came to rest.[34] Ms Suhle said that they were at "maybe 45 degrees" to each other[35] and not touching.[36]

[35] A third difficulty with this contention is that it also proposes that the locations where vehicles that have collided come to rest provides a sound basis for inferring where they were positioned when they collided. In *Fox*, Callinan J listed the many mechanical and environmental variables that are at play when a motor vehicle collision occurs. His Honour doubted the value of evidence that seeks to draw an inference of that kind from the locations of vehicles at rest *post* collision.[37]

[36] Finally, with regard to Mr Bulmer's evidence, I note that he did not identify who it was who asked him to write the statement. He was not asked in evidence in chief or in cross examination whether he wrote such a statement or provided it to anyone.

[37] **Matter 3:** This matter[38] is based on an aspect of the account that Ms Atkinson gave to Senior Constable Good which he included in a witness statement document.[39] She said that after the collision, she climbed out of the Barina via the door on the front passenger's side. The following then occurred:

> "7. I was standing next to my car, I remember the male driver of the car that hit me was sticking his head out of the window yelling "You drove out in front of me and cut me off".
>
> 8. I said "My kids are in the car. You hit me I was in front of you all the time.""[40]

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32 AB 350 Tr 2-59 ll10-18.
33 Exhibit 29: AB 128; Exhibit 30: AB 129.
34 AB 349 Tr 2-58 ll33-44.
35 AB 356 Tr 2-65 l2.
36 AB 357 Tr 2-66 ll5-6.
37 At [149].
38 AOS paragraph 19.
39 Exhibit 1: AB 89-91.
40 AB 90.

[38] This evidence, the appellant submitted, was overlooked by the learned trial judge. It was important both as a contemporaneous record of Mr Temple's account of what happened and as evidence that his version of events was not the product of reconstruction by him after he had spoken to his daughter about the collision. It was consistent, it was suggested, with his daughter's evidence and also with a scenario in which Ms Atkinson was stationary in Boyes Court watching a vehicle to her left travelling east along Fulham Road and upon seeing Mr Shepherd at the constructions site, moved off across Fulham Road without looking to her right and directly into the path of Mr Temple's vehicle.

[39] **Discussion:** In my view, the significance to be attributed to the statement by Mr Temple that Ms Atkinson drove out in front of him and cut him off is necessarily tempered by evidence of what he told Senior Constable Good at the scene. In his police notebook, Senior Constable Good recorded the following exchange with Mr Temple:

> "(Q) When did you first notice the other vehicle
>
> (A) She just appeared. I did not notice her vehicle driving along Fulham Road …
>
> (Q) What do you think caused the accident
>
> (A) I don't know. I was driving & she appeared out of the blue."[41]

[40] In his evidence in chief, Mr Temple said that he first saw Ms Atkinson's vehicle immediately after the impact. He had lowered his gaze to check his speedometer and as he was raising his eyes, the impact occurred.[42] He did not see the Barina beforehand.[43]

[41] Given what Mr Temple told Senior Constable Good and said in evidence, it would have been inappropriate for the learned trial judge to have relied on what he yelled at Ms Atkinson as reliable evidence of a path of travel of her vehicle that Mr Temple had actually observed before the collision occurred. It evidently was not.

[42] Further, Mr Temple did not tell Senior Constable Good at that stage that he saw Ms Atkinson driving out from his left and across his path of travel. In cross examination, it was put to him that he first mentioned it after he had received a traffic infringement notice. His explanation for the omission was:

> "That's because I was unaware of it. I hadn't spoken to my daughter after it."[44]

[43] It was therefore plainly open to his Honour to infer, as he did, that a version of events in which Mr Temple placed Ms Atkinson's vehicle on his left before the collision was the product of reconstruction on his part after discussion with his daughter.

[44] **Matter 4:** This matter[45] attributes to the learned trial judge, a finding at paragraph 48 of the Reasons that there were two impacts between the Hyundai and

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41 Exhibit 19: AB 112, 113; Exhibit 20: AB 117.
42 AB 310 Tr 2-19 ll10-13.
43 AB 320 Tr 2-29 ll36-37.
44 AB 330 Tr 2-39 ll11-13.
45 AOS paragraph 20.

the Barina in order "to explain away the significance of the absence of any damage to the rear of the Barina and the extensive damage to the front of the Hyundai". The criticism made is that "there was no evidence from any witness to support a finding of two impacts".

[45] **Discussion:** A review of the reasoning in paragraph 48 reveals that the learned trial judge found that the Hyundai must have been on at least some angle relative to the Barina in order for the former to have sustained damage to the front corner on the passenger's side. Significantly, his Honour did not find that there were two points of impact.

[46] The learned trial judge then ventured two possible explanations for the fact that the damage to the Barina extended over the driver's side door and into the panel to the rear of it. The first mentioned explanation was of a continuous sliding or scraping from the point of impact. The second was that it was the front corner of the Hyundai that initially impacted with the Barina and that the Hyundai then rotated to the right with its front corner area again coming into contact with the driver's side door area on the Barina.

[47] Since the finding attributed by the appellant to the learned trial judge was not in fact one that his Honour made, this criticism is without justification. Further, it implies that had there been two impacts as the second explanation envisages, then, notwithstanding the speeds of the vehicles and the very short time involved, they would have been capable of being seen or felt as separate impacts by the occupants of the vehicles. There was no evidence that that would have been so.

[48] **Matter 5:** During the evidence in chief of Senior Constable Good, a QPRIME report created by him was tendered.[46] The report contained the following statement:

> "Police observed a small mark on the road which appeared to be from (the Barina) being pushed sideways".[47]

[49] This matter[48] criticises the learned trial judge for either having ignored or having failed to explain or reason away this evidence. The evidence of the mark was consistent only with Mr Temple's version, it was submitted.

[50] **Discussion:** When he gave his evidence, Senior Constable Good was not asked where the mark was located on the surface of the roadway or what its dimensions were. There was no evidence otherwise as to that. Nor was Senior Constable Good asked what he meant by the words "pushed sideways". Those words are capable of having a range of meanings, one at least of which would support Ms Atkinson's version, namely, that the Barina was at an angle to the Hyundai and on impact was forced in a crab-like manoeuvre to its side.

[51] Given the absence of evidentiary detail of the kind to which I have referred, it is unsurprising that the learned trial judge did not rely on this statement for any purpose. This criticism, too, is without foundation.

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46 Exhibit 21: AB 119-123.
47 At AB 119.
48 AOS paragraph 21

[52] **Matter 6:** This matter[49] arises from the fact that at the time Ms Atkinson held a learner driver's permit but was driving unaccompanied, a traffic offence for which a traffic infringement notice was issued to her. Her inexperience as a driver, it was submitted, behoved the learned trial judge to have more carefully analysed her version of what occurred.

[53] **Discussion:** I would say at once that it is evident from his detailed and exhaustive Reasons that the learned trial judge gave careful attention to the evidence of each of the witnesses. The fact that the notice was issued for that particular offence did not of itself give a reason for proceeding on a footing that Ms Atkinson's evidence was less reliable than that of other witnesses.

[54] I would add that Mr Shepherd's evidence also supported Ms Atkinson's version that she pulled up near the centre of Fulham Road in order to execute a U-turn. It was not put to him that she had entered Fulham Road from Boyes Court or that she had moved from the left hand side of Fulham Road across Mr Temple's path of travel.

Disposition

[55] For the reasons given in discussion of the above matters, I am not persuaded that any of them has merit. Certainly, they do not warrant a conclusion that the learned trial judge erred in any of the ways alleged in the grounds of appeal.

[56] The appeal ought therefore be dismissed. The appellant should pay the respondent's costs of the appeal.

[57] On 14 February 2019, the respondent filed an application for an extension of time within which to file a notice of contention. Since it is unnecessary for this Court to consider the contentions in this notice, that application ought to be refused. No order for costs should be made in respect of it.

Orders

[58] I would propose the following orders:

1. Application for extension of time refused.
2. Appeal dismissed.
3. The appellant is to pay the respondent's costs of the appeal, excluding the application for extension of time, on the standard basis.

[59] **McMURDO JA:** I agree with Gotterson JA.

[60] **HENRY J:** I have read the reasons of Gotterson JA. I agree with those reasons and the orders proposed.

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[49] AOS paragraph 22.