SUPREME COURT OF QUEENSLAND

CITATION:	*Sykora v Hammer & Anor* [2010] QSC 356
PARTIES:	**PAUL SYKORA** **by his litigation guardian JANET SYKORA** (plaintiff) v **HEATHER ROSANN HAMMER** (first defendant) and **SUNCORP METWAY INSURANCE LIMITED** **ABN 83 075 695 966** (second defendant)
FILE NO/S:	BS 1400 of 2008
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15-16 February 2010
JUDGE:	Daubney J
ORDER:	**1. Subject to sanction of the quantum of the claim, there will be judgment for the plaintiff.** **2. I will hear the parties further.**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO LOOK-OUT – PEDESTRIAN ACCIDENTS – where the plaintiff claims damages for personal injuries sustained in a motor vehicle accident – where the plaintiff was aged 2 years 8 months at the time of the accident – where children were playing handball on the side of the road – where a tennis ball bounced onto the road and was chased by the plaintiff – where the plaintiff was struck by the car – where the driver did not see the children near the road or the tennis ball – where the driver did not brake on seeing the child – where the driver put the car into a "defensive slide" when she saw the child on the road – whether the driver was negligent in failing to keep a proper lookout – whether the driver was negligent in failing to take appropriate evasive action *Antypas v McKeon* [2001] NSWCA 417, distinguished

Derrick v Cheung [2001] HCA 48, distinguished
Hobbelen v Nunn [1965] Qd R 105, cited
Latham v Fergusson [2006] NSWCA 288, distinguished
Lolomanaia v Rush (1996) 24 MVR 128, cited
Manley v Alexander (2005) 223 ALR 228; [2005] HCA 79, cited
Mitchell v Government Insurance Office (NSW) [1992] 15 MVR 369, cited
Mobbs v Kain [2009] NSWCA 301, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422, applied

COUNSEL: SC Williams, QC with EJ Williams for the plaintiff
RJ Douglas, SC with R Green for the defendants

SOLICITORS: DLA Phillips Fox for the plaintiff
Jensen McConaghy Solicitors for the defendants

[1] The plaintiff, Paul Sykora ("Paul") sues by his litigation guardian, Janet Sykora ("Janet") for damages for personal injuries suffered by him at about 7.30 pm on 7 November 1989. Paul was struck by a vehicle driven by the first defendant, Heather Rosann Hammer ("Ms Hammer") when he ran out onto the road. At the time of the accident, Paul was aged 2 years and 8 months.

[2] On the day of the accident, Paul's family was attending a Melbourne Cup Day party at the Stastny family home at unit 2, 140 Kumbari Avenue, Southport. Kumbari Avenue is a wide, two-lane suburban street with ample width to allow cars to park on each side of the street without obstructing traffic. Two house lots south of the Stastny's home, Kumbari Avenue is intersected by Bellevue Parade. There was, and is, a shop on the corner of Bellevue Parade and Kumbari Avenue (on the opposite side of the road to the Stastny's). Each of the lots in the relevant part of the Avenue is about 17 metres in width. To the north, Kumbari Avenue is intersected by Horder Avenue, before ending at an intersection with Government Road. Since the time of the accident, a traffic island has been constructed near the corner with Bellevue Parade, outside the corner shop.

[3] In November 1989, daylight saving time was operative in Queensland. It was common ground before me that, although this incident occurred at 7.30pm, it was still light.

[4] At the time of the incident, the adults were in the backyard of the Stastny's property, and a number of children were playing a game of handball in the driveway at the front of the property.

[5] The concrete driveway was marked by a division (probably an expansion join) approximately mid-way between the garage door and the roadside. The driveway was approximately 10 metres long. A fence along the side of the property stopped at this mid-way division. On the evening of the incident, a number of cars were parked along Kumbari Avenue, including a blue van which was adjacent to the driveway and which may have had a trailer attached.

[6] Handball is a game commonly played by children in which a tennis ball is bounced between players over a designated mid-way line, in this case, the mid-way division in the concrete driveway. Conflicting evidence was given as to the specific children

who were involved in the game of handball. Michael Statsny ("Michael"), the 11 year old son of the residents of the property, gave evidence that he and another boy by the name of Ainsley Richards ("Ainsley") (his next door neighbour, aged about 11) were playing at the time, but Paul's sister Janet recalled that she was playing against Michael.

[7] In any event, it is clear that some children were involved in a game of handball on the front driveway of this property. Nothing turns on the exact identification of the players in the game.

[8] At approximately 7.30pm, the tennis ball was hit by Michael and was missed by his opponent. The tennis ball bounced or rolled onto Kumbari Avenue. Paul, who was initially crouched near to the garage door, stood up and chased the ball onto the road.

[9] Ms Hammer was driving north along Kumbari Avenue. Her car struck the plaintiff as he ran across the road.

Evidence of the incident

[10] Michael was involved in the game of handball on the driveway. He was 11 years old at the time. He was standing with his back towards the garage doors and his opponent (who he recalled was Ainsley) was standing further down the driveway with his back to the road. They had played for some time and remembered the ball being missed and bouncing onto the road a number of times during the game. Michael recalled that there were cars parked at the kerb, including a van to the right-hand side of the driveway (i.e. just to the south of the driveway).

[11] Michael recalled that Paul was squatting at the top of the driveway, near the garage doors. Michael said he hit the ball towards Ainsley who missed the ball. Michael saw Paul get up and chase the ball. Michael tried to grab him, but was unable to hold onto him. He described Paul as travelling "at full speed for his age". Michael did not see the car until it was "almost basically at the driveway". His view was obstructed by the fence next to the house. He saw the car hit Paul when he was nearing the centre line on the road (on the near side of the road). He was not sure which part of the car hit Paul, but saw that Paul ended up lying on the opposite side of the road, near the gutter. He recalled that, at the time of the collision, the ball had nearly reached the gutter on the opposite side of the road.

[12] Janet is Paul's older sister and was 10 years old at the time of the incident. She gave evidence that she was playing handball with Michael and was standing on the driveway near to the road and facing the garage door. Janet also recalled a van parked next to the driveway. She described missing the ball and it bouncing past her across the road. She turned to see where the ball went and saw Paul running after the ball. When she first saw him, he was already on the road. She said that although her first thought was to get Paul off the road, he "was too far away from me to run out and get him".

[13] She recalled looking for traffic:

> "Did you look for traffic?- -Yes.
> Where did you look? - - I looked to my left first.
> And then? - -And then to my right, and then again to my left and then again to my right.

> Did you see a car coming from your right – I won't worry about the one on your left? - - Yes. I saw a white car in the distance.
> When you say "in the distance", how far away? - - I am really not sure. I am no good with distances.
> Do you know the scene now? You have been back to it since? - - Yes.
> There is a traffic island? - - Yes.
> Does that assist you? - - It was a fair way from the traffic island when I first saw the white car.
> On the far side or the near side of the traffic island? - - Far side.
> When you saw it the second time, when you looked the second time, where was it? - - It was closer to the traffic island, up near where the traffic island is.
> Where the traffic island is now? - - Mmm, at the start of it, the start of Bellevue Parade.
> Did you see the driver of the car at any time before the accident? Did you actually look at the driver? - - Yes.
> What did you see of the driver? - - I saw – well, as it came, as the car came closer I was looking and then I could see that there was a person driving with blonde hair and they weren't watching the road.
> …
> What could you see the driver doing? - - I am not sure what they were doing, but they weren't watching the road.
> Why do you say the driver wasn't watching the road? - - Because I couldn't see her face. I could just see the back of someone's blonde hair."

[14] Janet was cross-examined at length about her observations and whether she, in fact, made any such observations. She did not waiver from her original statements.

[15] She said that the driver looked forward with a shocked expression and "then the car screeched". She said the car ended up with its nose pointing towards the opposite side of the road and that Paul was hit when he was "in the middle of the road or closer to the other side of the road". She did not see the impact or see where the ball was at the time of impact. She said that the street lighting was off and that there were no lights on the car.

[16] She recalled that her father was the first person to go to Paul and that an ambulance was called immediately. She travelled with her mother in the ambulance to the hospital and her father followed them in another car. She did not remember police attending while she was at the scene.

[17] Janet was asked by solicitors in 1994 to provide her recollections of the incident. She prepared an essay entitled "Paul's Accident":

> "My family and I were going to our friend's house on Melbourne Cup Day. We were playing with their kids. Paul, Mike and I got bored after awhile and didn't know what to do, so we got a soccer ball and started kicking it around in the backyard. We all got bored of that and agreed to play handball. So we began to play handball in the backyard on the grass. The grass was not in good condition and had many parts where grass wasn't growing. Then Mike's mother came out and yelled at us, not to play on the grass, because it wouldn't grow, she told us to go and play on the drive-way. I didn't like the idea of that because there was a big, noisy, and smelly road out there. This would mean we would have to waste time getting the ball all the time when it went across the road. While we were playing our parents were in the backyard talking and socializing. As Mike and I were playing handball and Paul was watching the ball sped across the road, so I

> went and got it. Then we kept playing and the ball went across the road several times, so Mike and I took turns of getting the ball. Paul was watching the game carefully and as the ball went across the road again he decided to do us a favour and go get the ball. I turned around just about to go get the ball when I saw Paul, he was half way across the road. In a panic I quickly looked to my left and saw a taxi cab heading for Paul (from far away) then I looked to my right and saw a white car coming at Paul. I wanted to run and get him but my feet wouldn't move. I wanted to scream but not a sound came out of my mouth. There was a woman in the car, she was not watching the road, she was fixing something in the back of her car, boxes or her baby. My brother was still running, the woman was going very fast, then she turned around seeing Paul and slammed on her brakes. Her brakes were useless, the car was still moving, screeching, sliding and turning the car slid for about 30m until BANG! She hit my brother, throwing him into the air. Then I finally dropped to my knees and my scream came out. It wasn't Paul's fault because there was a van parked to my right on the road. Paul would have checked if a car was coming but he couldn't see past the van. When he got hit I broke into tears and screamed at Mike to go get my parents, I told him to hurry up. My dad ran over to Paul and carried him to the grass. Paul was bleeding badly on his head and all over my dad. At that moment when I saw my dad holding Paul in his arms and checking for a pulse I thought he was dead. By this time my mum was in shock and didn't know what to do and I was hysterically crying and screaming. Mike's mother told me to calm down as she put her arm around me. I snapped at her rudely and told her off, how could I calm down, I thought my only brother was dying and this stupid woman told me to calm down and not to worry. I was so angry. I just couldn't believe what had happened, I kept blaming myself, I wanted it to be me instead of Paul. I kept saying to myself why didn't I stop him or run after him, it should have been me! The ambulance arrived soon and took Paul to hospital, mum and I went with Paul in the ambulance, while dad drove after us…"

[18] She went on to describe the treatment that Paul received in and out of hospital. Janet conceded before me that some of the statements in this essay were not entirely from her own recollection, but what she had been told by her mother. Specifically, she said that the sentence "Paul would have checked if a car was coming but he couldn't see past the van" was something her mother had told her. She maintained that the parts describing the accident were all her own words as she was the only person in her family who saw the accident.

[19] Paul Sykora (the plaintiff's father) gave evidence that he was in the backyard and heard the accident. He rushed out to the front yard and saw his son lying in the opposite gutter and went to his aid. He recalled four or five other children being in the front yard. He said the ambulance arrived about 20 minutes after the accident but did not see the police arrive.

[20] Ms Hammer had held her driver's license continuously since 1972 and was aged 38 years at the time. Ms Hammer was familiar with Kumbari Avenue, having travelled along that road many times.

[21] Ms Hammer had agreed to drive one of her neighbours to bingo. She was returning from the bingo hall in Southport and was travelling north along Kumbari Avenue, intending to turn left into Government Road. She could not recall if she had her headlights on, but said that it was still daylight. She was alone in the car. She said there was nothing in the rear of the car which required her attention and that she was

looking straight ahead and concentrating on where she was going as she travelled along Kumbari Avenue.

[22] She recalled the intersection with Bellevue Parade, the corner shop and the houses alongside the road. She said that she observed people coming out of houses on her left-hand side. She said she saw a row of parked cars on her left and a van but that she did not see any children at any location to her front. She thought she was travelling under the speed limit of 60km/h as she intended to make a turn further along the road, but was unable to estimate her exact speed.

[23] She described the accident as follows:

> "…As I was driving down the road, I had taken off from the traffic lights. My first indication was, as I said, I noticed that the houses were on the left, the cars were parked on the side of the road. I noticed adults – and I can't tell you how many were coming out of the front door – and that was prior to anything else happening. The next thing I saw a flash of blue and gold, had no idea what it was, took evasive action, and the result we know. I put – I tried to put the car into a defensive slide because my instinct – it was a reaction, spur of the moment reaction was to try not to hit whatever it was that I saw.
>
> This blue and gold that you saw, object that you saw, are you able to say where it was or where it appeared to come from when you first saw it? - - Not when I first saw it. It was in front of the car. It was just like a flash. That was it. And there was no definition. I couldn't tell you whether it was a child, what it was. It was blue and gold.
>
> Where was this object at your eye level and in relation to your vehicle? - - In front – on my bonnet at the front.
>
> Are you able to say whether you braked your vehicle? - - I don't recall braking, no.
>
> You said you put your vehicle into a defensive slide. Do you recall saying that? - - Yes, I do."

[24] Ms Hammer said a defensive slide as something she was taught to do as part of a defensive driving course because "if you don't hit the brakes that you go into a slide and the car will try and get away from you". She described her car sliding into a position where the bonnet of the car was facing into a fence on the right hand side of the road; the car was on the wrong side of the road. She said that this was a "spur of the moment decision" and that she did not realise what she had hit until she heard someone say that it was a child. Ms Hammer said she did not apply the brakes.

[25] Police officers, Constable Wunsch and Constable McKenzie, arrived on the scene at about 7.40pm. Given the lapse of time, it was not surprising that neither officer had any independent recollection of the events when they gave evidence in this trial and their notebooks recording their attendance at the incident were produced to the Court. It appears from their notebooks that they spoke to the witnesses Michael, Ainsley and Ms Hammer.

[26] It is apparent that the police attended after the ambulance had already taken Paul and his family had left for the hospital. This seems clear as the police did not record seeing the injured boy or seeing Janet or the father. This is consistent with the

evidence of both Janet and Mr Sykora that they did not see the police, but left in, or with, the ambulance.

[27] Constable Wunsch had drawn a diagram which depicted the relative locations of persons and units involved in the incident. It showed a parked van with a trailer just to the south of the driveway. It showed the direction of travel of both Paul and the car. The car is shown travelling north along the road in the correct lane, then after the collision veering diagonally across the road. It depicted Paul as moving straight out from the driveway, in a direction perpendicular to the edge of the road, then after the collision (which appeared to be as he was nearing the centre line of the road) moving in a direction diagonally across the road, ending up in the gutter on the opposite side of the road.

[28] Constable Wunsch recorded the following interview with Ms Hammer:

> "Q. Heather, were you the driver of the vehicle involved in the accident earlier tonight?
>
> A. Yes.
>
> Q. What can you tell me about the accident?
>
> A. I was heading north and I was going to make a left turn into Government Rd. As I was driving past the shop, I saw a boy in a blue and white shirt and blonde hair run out from the left hand side of the road. I realised that I was going to hit him and I hit the breaks (sic) and reared right, as I remember the white car coming the other way, and I said to myself and I thought that it was either the boy or the car. I then heard the thump on the car. I don't know where I hit him.
>
> Q. What speed were you travelling at just prior to the accident happening?
>
> A. I don't exactly know what speed I was travelling at but it wouldn't have been fast as I had just stopped at the lights at the top of the hill and I was going to make a left hand turn.
>
> Q. When did you first see the boy?
>
> A. I'd say just past the shop.
>
> Q. When you first saw the boy how far away from the vehicle was he?
>
> A. I don't know I really can't say how far away.
>
> Q. Was there any daylight at the time of the accident?
>
> A. Yes. It was about dusk.
>
> Q. Did you have your headlights on at the time of the accident?
>
> A. Yes.
>
> Q. What time did the accident happen?

A. About half past seven.

Q. Was your car in good mechanical condition at the time of the accident?

Q. Yeh"

[29] Counsel for the defendants submitted that the record of the police interview above was "the most detailed contemporaneous version" of events. However, Ms Hammer described herself as being hysterical at the time. When specifically asked, counsel for the defendants said that "in our submission you would look to both bodies of evidence in order to make your relevant findings and, if there were some inconsistency, then you would be looking to see what was said by the witness at the time when matters were fresh in her mind".

[30] Ms Hammer maintained in her oral evidence that she did not know that the object was a boy until after the collision, repeating that she saw only a "blue and gold flash". In her original statement to police, however, she said she "saw a boy in a blue and white shirt and blonde hair". There was no mention of this "flash" at the time of the incident. Her original statement was clearly against her interest. There seems to be no reason to doubt its accuracy, given that it was contemporaneous and against her interest.

[31] She also gave evidence before me that she did not see this blue and gold flash until it was directly in front of the car, i.e. "right on the bonnet". In cross-examination, she then stated that "no, it was before the shop" when she saw the blur; there is a distance of some 35-40 metres from the far boundary of the shop to the driveway. In her original statement to Constable Wunsch, she said she was "just past the shop"; on this basis, a distance of some 25 metres from the driveway. There is a tension between these versions.

[32] Having regard to the significant period of time which has elapsed since the incident, I am inclined to prefer the most contemporaneous version available, when the accident was fresh in Ms Hammer's mind, i.e. that she saw a boy in a blue and white shirt with blonde hair run across the road as she was driving past the shop.

[33] Counsel for the defendants submitted that Janet's evidence was "surprising and inexplicable in a number of respects" and ought not be accepted generally for the following reasons:

(a) she was 10 years old and confronted by a major incident in which her only brother was seriously injured;
(b) she plainly felt guilty that she did not exercise greater care in looking after her brother and wanted to blame someone;
(c) the conflict with Michael as to whether she, not Ainsley as he says, was engaged in the handball game at the time;
(d) her first observation of the plaintiff being on the road and running, when she first saw him immediately before the accident, and yet she claims to make detailed and repeated observations of traffic to left and right;
(e) her 1994 "essay" containing a mixed account of her own recollections, what she had been told by others and suppositions on her part;

(f) her resistance to basic propositions such as the immediacy of the accident circumstances; and

(g) the absence of police record of her being a witness, but rather the witnesses being Michael and Ainsley.

[34] True it is that Janet was only 10 years old at the time of the accident, but this does not of itself make her evidence unreliable – Michael was the same age but counsel for the defendants would have me place no similar doubt on his evidence. It was submitted that Michael was independent and attempted to give an accurate recollection. Janet would understandably have been upset at her little brother's injury. But so was Ms Hammer - she described herself as "hysterical" after the incident. Janet's age and distress are not on their own, sufficient to completely discredit her evidence.

[35] There is an inconsistency between the evidence of Janet and Michael about the identity of the children who were playing at the time. I see no reason why Michael's version of the handball game should be categorically accepted over Janet's. No evidence was given by the other boy, Ainsley, and there is no other evidence to corroborate either story. In any event, I do not think that anything turns on the identity of the second player in that game.

[36] Janet said that Paul was already on the road when she first observed him and that he seemed too far away from her to reach out and bring him to safety. If Janet was, as she says, involved in the game of handball, she would have necessarily been at least a couple of metres from the curb. While much emphasis was placed by counsel for the defendants on the fact that Paul was running "apace", it must be remembered that he was only a toddler and even if he did "run" across the road and was already just on the road when Janet saw him, it would take a number of seconds for him to travel the distance from the curb to the middle of the road. If the initial evidence of Ms Hammer regarding when she first saw the boy on the road (i.e. just past the shop) is accepted, then the car must have been approximately 25 metres away and there would almost certainly have been time for Janet to make observations to her left and right before the impact. Janet was most certain of these observations and was not shaken in her evidence despite extensive cross-examination. In light of this, I do not find that Janet was resistant to "basic propositions such as the immediacy of the accident" as was submitted for the defendants.

[37] Janet's essay did contain a mixture of her own account, her suppositions and second hand knowledge she had acquired. Janet was, however, most forthcoming when giving evidence regarding this. I do not propose to give particular weight to the statements in this essay, given the emotive writing and the fact that it is not entirely her recollections. The fact that a teenage girl wrote an emotive essay regarding an accident involving her younger brother when she was asked to write down what she remembered of the incident is not, however, a factor which bears on an assessment of her ability to give truthful evidence before the court.

[38] I do not find that the absence of a record of her as a witness in the police records is a matter which bears negatively on her credibility. Rather, it is entirely consistent with the fact that the ambulance and Paul's immediate family left the scene prior to the arrival of the police.

[39] For these reasons, I am not prepared to regard Janet's evidence as unreliable. I note, however, that it is not appropriate to place much weight on her observations made about the speed of the vehicle. She was a child at the time and admitted a defect in relation to her perception of time (Janet said that the incident seemed to occur in "slow motion").

[40] Counsel for the defendant put much weight on the evidence given by Michael, who suggested that the accident happened so quickly that he had no opportunity to react. It was submitted that "the court ought find that the plaintiff was running and the events that occurred subsequently occurred very quickly". Counsel for the defendants sought to persuade me that Paul was a boy at "full tilt", moving at "such a speed" that Michael "couldn't get his hands on him", and that things happened in the "blink of an eye". The reality, however, is that Paul was a toddler aged 2 years and 8 months. "Full tilt" is a relative term, particularly when used to describe the movements of a "toddler".

[41] The difficulty with the defendant's theory that the incident happened so quickly and that the toddler emerged virtually under the wheels of the car is that, even on Ms Hammer's version of events, she had ample time to put the car into the defensive slide manoeuvre. Nor does this theory sit well with her contemporaneous statement to police that she saw the boy on the road as she was going past the corner shop.

[42] The yellow tennis ball was hit by Michael past his opponent and travelled across the road to the opposite gutter. Michael said that the ball was not hit particularly hard and that it was nearly at the gutter on the opposite side of the road when Paul was hit as he neared the centre line on the road. In the course of cross-examination, Michael gave the following evidence:

> "And you were playing handball and Ainsley missed the ball. So it wasn't a peg or a hard throw-----? -- No.
>
> -----that put the ball onto the road. It was -----? -- Not – a normal hit, yeah.
>
> So there's a bit of driveway behind where Ainsley was standing. By the time the ball got to the end of the driveway it was pretty well just rolling, wasn't it?-- Yes.
>
> And Paul was running faster than the ball was rolling? -- Yes.
>
> And you're quite definite, though, that the ball hadn't reached the other side by the time Paul was hit? -- Yes, that's correct.
>
> And you think that he might have been one or two steps behind the ball when he was hit? -- Yeah. Basically, it just happened so quick. I just don't take no notice of where the ball was. I just concentrated on trying to stop Paul from actually trying to get to the ball himself before he gets hurt. Being, like, a young toddler obviously you have no road sense. It could have been a possibility that the ball didn't hit the kerb before."

[43] Counsel for the defendants submitted that, on the basis of this (particularly the last question and answer quoted above) findings should be made that Paul was only one or two steps behind the ball when he was hit and that the ball had not reached the other side. It is clear that that is not what the witness intended to convey. When

Michael's evidence is taken as a whole, and giving appropriate weight to his considered and descriptive answers given in evidence in chief, I am satisfied that he put the ball nearing the curb at the time of impact and that Paul was hit as he neared the centre of the road.

[44] On the evidence as I have assessed it, the ball must necessarily have preceded Paul by a number of metres for the following reasons:

(a) Paul was originally squatting near the garage doors when the ball was hit towards the road by Michael. When the ball was missed by the other player, Paul must have reacted, stood up and started to move after the ball. When Paul realised the ball had been missed, the ball must have been on, or almost on, the road (as the opponent was standing adjacent to the road);

(b) Paul must then have run the length of the driveway (estimated at approximately 10 metres) to the edge of the road and then another 1.6 metres (the width of the parked van) to emerge in the roadway;

(c) Counsel for the plaintiff submitted that the fastest man in the world can run at the speed of ten metres per second and a world class marathon runner could cover about six metres per second; a "toddler" aged two years and eight months will be considerably slower than this. Even if the (rather generous) speed of 3 metres per second was used (which equates to running 100 metres in 33 seconds) and allowing one second for his reaction time, it would have taken Paul 5 seconds to travel the length of the driveway and emerge from in front of the van, giving the ball 5 seconds to travel across the road;

(d) The ball would necessarily have slowed as it travelled across the road and approached the rise in the centre of the road, so it is likely that Paul would have been able to gain some ground on the ball;

(e) But, Paul was only a toddler; even if he managed to make up half the ground between him and the ball, the ball would still have preceded him by at least 5 metres, and probably more.

(f) Considering the length of the driveway, the ball must have preceded Paul onto the road by at least 5 metres.

[45] Counsel for the plaintiff submitted that had the ball preceded the child onto the road by 5 metres (approximately 2 seconds) this represents 22 metres of car travel at 40km/h, which, given that she was 25 metres from the point of impact when she saw the boy, places her over 45 metres from the point of impact when she could, and should, have seen the yellow tennis ball on the road.

[46] Ms Hammer gave evidence that if she had seen the children playing in the driveway she would have taken special precautions. She accepted that the observation of a tennis ball bouncing or rolling onto and across the road in front of her vehicle would have led to her being concerned that a child may chase it to retrieve it and would have called for her to take special precautions, namely braking and being more vigilant.

[47] Kumbari Avenue was a suburban street which Ms Hammer knew to be in an area populated by young families. Given the nature of the handball game being played across the division in the driveway, at least one child (whether this was Ainsley or Janet or whether it was both of them) must have been on the "road-side half" of the

driveway and would have been visible to traffic on the road. Ms Hammer said she did not see a child.

Breach of duty of care

[48] A driver of a vehicle on a public road is under a duty to other persons on and in the vicinity of the road on which he or she drives to exercise reasonable skill and care with a view to avoiding the causing of injury to those persons.[1]

[49] In *Hobbelen v Nunn*,[2] Gibbs J said:

> "In *Rudek v McArthur*… it was said: "We think that it must be conceded that it is incumbent on everyone, who drives a motor vehicle upon a public highway, to drive at a speed which is reasonable in the circumstances, to look where he is going, and to do what he can to avoid running into any person or object that may be or come in his way. It follows that, where a motor vehicle has overtaken and run down a pedestrian, this fact unless answered or explained is sufficient to establish a reasonable ground for holding that the driver of the vehicle was negligent. … But the fact is not conclusive. … Although, as was pointed out by Dixon J., as he then was, in *Lee Transport Co. Limited v. Watson* …, "general reasoning of an *a-priori* character about states of fact", is "seldom possible and always dangerous", and although it must be remembered that the onus of proving negligence lies on the plaintiff, it seems to me to be a proposition of ordinary good sense that the driver of a motor vehicle who has run down a pedestrian can hardly escape a finding of negligence unless the facts provide a satisfactory explanation for his failure to see the pedestrian or to avoid him."

[50] In *Mitchell v Government Insurance Office (NSW)*,[3] Kirby P discussed the duty of care owed to children:

> "***Duty of care to children and young persons***
>
> One special circumstance which the courts have determined to be relevant to the standard to be expected relates to the cases in which it has been held that the driver should anticipate the presence of young children near the highway on which he or she is proceeding and take particular care in such circumstances. In a series of cases, this court (and its predecessor) have stressed the special care which drivers must take when they know, or should know, that children are near the highway. The obligation has been explained in terms of the imputed knowledge of the tendency of children to act in ways which adults might regard as irresponsible.
>
> In *Mye v Peters*, this court was concerned with the decision of a trial judge relating to the standard of care to be expected of a driver. The injured plaintiff was a child aged 5 years 8 months at the time of the accident. He was injured when he dashed across the road after alighting from a school bus. He was hit by the defendant's vehicle. The skid-marks on the bitumen extended for some 66 ft (about 30 m). The driver was aware that the bus from which the child had alighted was a school bus. He was also aware that it had stopped to allow children to alight. This court upheld the verdict for the plaintiff. In the course of giving his reasons, Sugerman JA observed:
>
> "[Counsel for the defendant] stressed the changes in standards which he said had taken place in recent years both in the density of traffic and in

---

1 *Mobbs v Kain* [2009] NSWCA 301 at [91].

2 [1965] Qd R 105 at 111 (citations omitted).

3 [1992] 15 MVR 369 at 372 (citations omitted).

the education of young children in these matters and with the teaching and indoctrination which the evidence suggests this child had received from its parents and the bus driver, and I think one may reasonably assume from its kindergarten teachers. But very young children remain very young children, notwithstanding indoctrination. Adults are apt to be appalled by the disregard which they often manifest for their safety and the needless risks which they take. While on the one hand it might be suggested that they do not meet with more harm because they lead a charmed life, the other and preferable view of the matter is that they are greatly dependent upon the solicitude which is shown for their safety and welfare by adults doing in their vicinity things which might endanger them. Moreover, it must be remembered that as the High Court said in *McHale v Watson…*, the test to be applied is an objective one and not one which is dependent upon the degree of intelligence of a particular child or the standard of indoctrination which it may have received."

A similar approach was taken by this court in *Settree v Roberts….* In that case, Hope JA said:

"Seeing a group of young children so close to the side of the trafficable portion of the road, even though their backs were turned to that portion of the road, the defendant had a duty to take appropriate precautions to guard against the event that one or more of the children might do what children have a well-known propensity of doing, that is, move suddenly out on to the road … . That one of the children might so act was a possibility which the defendant ought reasonably to have foreseen and guarded against. There was ample time and ample room for her to adopt some course of action to avoid the risk of an accident; she took none. By slowing down or by moving away from the side of the road towards the centre, or across it (there is no evidence that any vehicles were coming in the opposite direction at the time and it was not suggested to witnesses who saw the accident that there were) she would have given both the plaintiff and herself a greater opportunity of avoiding the accident. The use of the horn would have warned the plaintiff of the danger created by her approach."

In *Settree*, Hutley JA gave reasons for concluding that the driver was guilty of negligence. On p 6 of the report his Honour said: "On the basis that a group of children beside the road should stimulate a motorist to take precautions which neither delay the traffic nor cause any risk, there is some evidence of a breach of duty of care…"

Mahoney JA, at pp 1-2 of his reasons said: "A reasonable person in the position of the defendant driver would have realised that there was a real possibility that a child of the age of the plaintiff might suddenly turn and run, or otherwise move, on to the bitumen. Mrs Roberts was driving on the bitumen about 2 to 3 ft from its edge. Therefore, if the plaintiff did act in this way there was a real danger that he would strike, or be struck by, the motor vehicle. If this happened the damage to him might well, as the events showed, be very grave. In those circumstances, a duty to take care existed."

…

In the three cases mentioned, I must acknowledge that the appeals were those of the defendant seeking to challenge a judgment at first instance in favour of the infant plaintiff. Here the judgment went against the plaintiff. But the principle can surely not be different. That principle is founded not on the mere sympathy of judges for injured children. It is based on knowledge of the well-known propensities of children which the law attributes to drivers. It is also based, as Mahoney JA stressed in *Settree* (set out above) that it is the driver who is generally in a better situation to anticipate and control events. He or she tends to be much older and more experienced in the ways of the traffic-way. Furthermore, he or she is in

> charge of a fast moving object with a large potential to cause grave injury and even loss of life, including to children who are pedestrians or otherwise near the highway. It is this disproportion of responsibility, control and experience, as well as knowledge of the occasional irresponsible behaviour attributed to children and known by the motoring public, that has led to the development of the approach to which an unbroken series of decisions in this court has given effect."

[51] In *Lolomanaia v Rush*,[4] the New South Wales Court of Appeal allowed an appeal by an injured child plaintiff against a defendant driver. The child, aged 4 years, was injured by the defendant when the child ran out in front of a parked van and onto the road. In that case, the defendant had seen the child's siblings playing handball on the side of the road, but did not see the plaintiff until immediately before she struck him. Counsel for the defendant submitted that she was close to the children when she saw them and was, in reality, given no real opportunity to take any precautions. Clarke JA, with whom Sheller JA agreed, rejected that submission stating that "she ought to have seen the children and the van as she entered the road". The court held that the presence of young children on or near the road calls for the exercise of greater care and caution than usual by the reasonably prudent driver and that the defendant was negligent in failing to moderate or adjust her driving in order to ensure that she could deal with a possible risk of tragedy if there was a child hidden by the van who suddenly came onto the road. Clarke JA said that "she simply failed to respond to what was a reasonably obvious warning that there may be danger", namely the presence of children on the roadside.

[52] The facts of the present case bear some similarity to those of *Derrick v Cheung.*[5] In that case, a girl, aged about 21 months, ran out of a yard onto the footpath and then suddenly ran out between parked cars onto a busy road where she was hit by a car. The driver braked and attempted to avoid hitting the little girl by veering to her right, but collided with the child. The trial judge found that it was "clear on the evidence that as the [driver] approached the point at which her vehicle struck the [child], the combination of parked cars on her left, and a tree and some shrubs by the side of the footpath prevented her from seeing the [child], or having any opportunity to do so, until the [child] appeared on the roadway. His Honour also held that the [child] had moved very quickly onto the roadway."[6]

[53] On those facts, the trial judge found that negligence was proved, accepting a submission that in all the circumstances the driver's speed, despite being within the prescribed speed limit, was excessive, because at that speed it was "beyond the power of a motorist to stop in time if a child suddenly appeared from in front of one of the parked cars". This decision was upheld by the Court of Appeal of New South Wales.

[54] On appeal to the High Court, the primary decision was overturned. The appellant's main submission was that the Court of Appeal should have intervened because there was "no basis upon which his Honour could properly hold that there had been any want of care on the part of the appellant". Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ said:[7]

---

4 (1996) 24 MVR 128.
5 [2001] HCA 48.
6 [2001] HCA 48 at [4].
7 At [13].

> "The appeal to this court must be upheld. There was no basis upon which any finding of negligence on the part of the appellant could be made. That the facts of the case are tragic, and the collision a parent's worst nightmare, as the trial judge accurately described them, did not relieve his Honour of his obligation to determine the issues according to law: in this case, by not finding an absence of care in circumstances in which reasonable care was, … in fact being exercised. Even if the inference which the trial judge drew, that if the appellant's speed had been slower by a few kilometres per hour she would have been able to avoid the collision, was more than mere speculation, it is still not an inference upon which a finding of negligence could be based. Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence. That test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care."

[55] That case is distinguishable from the present on a number of important factual bases. In that case, findings were made that the driver was prevented from seeing the child on the pavement or before she ran onto the road. In the present case, there were a number of clear indicia of children being present which were able to be seen by the driver, but which were not seen, namely the tennis ball bouncing across the road and the children playing handball on the driveway.

[56] In *Manley v Alexander*,[8] a man had been struck and injured by a tow truck. At the time of the collision, 4 o'clock in the morning, the man was intoxicated, dressed in dark clothing and lying on the road. The driver of the tow truck saw another man on the side of the road who appeared to have been drinking and kept his eye on this man. The driver did not slow down but started to veer to the centre of the road. When he looked back at the road, he saw something lying on the road. The High Court of Australia held that the driver failed to exercise reasonable care. Even though the man was wearing dark clothing and lying on the road, the driver should have seen him as some form of obstruction on the road to be avoided, but the driver did not see him, his attention focused on the other man standing on the side of the road. Gummow, Kirby and Hayne JJ said that "driving requires reasonable attention to all that is happening on or near the roadway that may present a source of danger" and that "the reasonable care that a driver must exercise when driving a vehicle on the road requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events".[9]

[57] In *Antypas v McKeon*,[10] Ipp AJA (with whom Hodgson JA and Rolfe AJA agreed) held that a defendant driver had acted reasonably when the plaintiff's conduct of running across the road brought about a sudden emergency, and it would be unreasonable in those circumstances to criticize the defendant for swerving and not braking. It is important to note, however, that the plaintiff in that case failed to prove a relevant part of their claim; that the accident occurred because the driver failed to observe the presence of the plaintiff until almost the moment of impact when there was no reasonable excuse for failing to observe the plaintiff much

---

8 (2005) 223 ALR 228; [2005] HCA 79.

9 (2005) 223 ALR 228; [2005] HCA 79 at [11]-[12]

10 [2001] NSWCA 417.

earlier. In circumstances where the driver was not able to see the plaintiff until the point of impact, the court was unwilling to criticise the driver for her choice of emergency action. The facts of the present case are quite different.

[58] In *Mobbs v Kain*,[11] McColl JA (with whom Giles and MacFarlan JJA agreed) said:

> "[91] The second appellant, as the driver of a vehicle on a public road, was under a duty to other persons on and in the vicinity of the road on which he was driving to exercise reasonable skill and care with a view to avoiding the causing of injury to those persons. The question of whether he failed to exercise the requisite reasonable skill and care, and if so whether this caused injury to the respondent were questions of fact: ... It might be accepted that the line of authorities to which I (and the primary judge) have referred recognise that, as a matter of principle, "a person driving a motor vehicle on a public road should, as a reasonable person, appreciate that there is a significant risk of causing serious and perhaps catastrophic injury to other persons; and for that reason should, as a reasonable person, exercise quite a high degree of vigilance, especially in the presence of other traffic and in the vicinity of intersections"."

[59] In *Vairy v Wyong Shire Council*,[12] Hayne J said:

> "When a plaintiff sues for damages alleging personal injury has been caused by the defendant's negligence, the inquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. That inquiry must attempt, after the event, to judge what the reasonable person would have done to avoid what is now known to have occurred. Although that judgment must be made after the event it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury."

[60] My conclusion in the present case is that a reasonable and prudent driver, keeping a proper lookout, would have observed at least one (and maybe more) children playing on the driveway as they drove along Kumbari Avenue. No reasonable explanation was given for Ms Hammer's failure to see the children. It is possible that she had, as counsel for the plaintiff suggests (and consistent with the evidence of Janet, that she saw the driver looking at something behind her), focussed her attention on the people she saw walking out of the house several lots down the street and not on the road ahead. For whatever reason, Ms Hammer failed to see the children. The sight of children adjacent to the road necessitates special care be taken by a driver, given children's well known propensity to act suddenly and without care for their own safety. A prudent driver would have reduced their speed and perhaps moved towards the centre line in the road as they approached the children playing.

[61] The bright yellow tennis ball bounced or rolled across the bitumen at least 5 metres ahead of Paul entering the road. A bright yellow tennis ball against a black bitumen road would have been clearly visible to a driver paying proper attention to the road ahead. Ms Hammer did not see the ball. The sight of a ball bouncing across a road requires immediate precautionary action by a driver, considering the high probability that balls are often followed by children, who may run onto the road unexpectedly.

---

11 [2009] NSWCA 301.

12 (2005) 223 CLR 422 at 461.

[62] These are two indicia of a particular perceivable risk which the driver should have observed and taken into account, i.e. the risk of a child running onto the road. A driver must control the speed and direction of the vehicle in such a way that the driver knows what is happening in the vicinity of the vehicle in time to take reasonable steps to avoid exactly these sorts of well-known risks.

[63] I have already indicated my acceptance of Ms Hammer's statement to police that she saw the child when she was travelling past the shop, some 25 metres before the point of impact. Even if she did not see the children or the tennis ball, the sight of a small child running onto the road necessitates immediate braking. However, Ms Hammer did not apply the brakes, instead, attempted to put the car into a defensive slide manoeuvre.

[64] This is not a case like *Latham v Fergusson*[13] in which it could be said that, even if a proper lookout had been kept to her front and she had made the available observations (in this case of the children, the ball and the boy), there was insufficient time for her to react and brake so as to avoid impact. Ms Hammer clearly did have time to react. Nor was this a case like *Antypas v McKeon*, where the child ran out so quickly that the driver could not be faulted for swerving rather than braking the vehicle in an attempt to avoid collision.

[65] This is a case where there was a clear and perceivable risk of children which was observable to, but not observed by, the driver. Accordingly, the plaintiff has proved that the first defendant failed to keep a proper lookout. It then falls to the plaintiff to prove that, if the driver had kept a proper lookout, she would have seen the indicia of danger and/or the boy in sufficient time to take precautionary and evasive action to avoid the collision.

[66] If a proper lookout had been kept and precautionary measures taken, this accident could have been avoided. Even though the driver did not brake but rather, in a late response to the situation, put the car into the defensive slide manoeuvre, the collision very nearly did not happen; the child was hit by the nearside of the car as the car slid, tracking Paul's direction of travel.

[67] Even though Ms Hammer did not see the children or the ball, she still took evasive action in the form of a defensive slide. While it was clearly a reaction made in an emergency situation, it was not, I think, the action to be reasonably expected of a driver confronted with that situation. The emergence of a child some 25 metres in front of the vehicle requires emergency braking. A "defensive slide" would have prolonged the movement of the vehicle towards the child and effectively caused the vehicle to follow the child's movement as he ran across the road, increasing the likelihood that a collision would occur. The "defensive slide" was clearly not a reasonable response to the situation.

[68] A reasonably prudent driver, on seeing children playing on the driveway and noting the obstruction to vision presented by the parked van, would have slowed and become more vigilant. The driver would have been in a state of heightened awareness so as to be able to react quickly to the emergence of a child onto the road. On seeing the tennis ball bounce across the road at a distance of about 45 metres in front of the vehicle,[14] the appropriate and reasonable response would have been to

---

13 [2006] NSWCA 288.

14 See [45] above.

immediately and severely apply the brakes, given the likelihood that a child would follow the ball onto the road. Had the brakes been applied at this time, the collision would surely have been avoided.

[69] I therefore find that the plaintiff has proved his claim against the first defendant in negligence. The parties informed me that agreement had been reached on the quantum of damages, subject to necessary sanction by the Court.

[70] There will be the following orders:

1. Subject to sanction of the quantum of the claim, there will be judgment for the plaintiff.
2. I will hear the parties further.