

MOTOR VEHICLE COLLISIONS

INDEX

- 1. Elements of Negligence p2**
- 2. Negligence in a Motor Vehicle Accident p2**
- 3. Breach of the Duty of Care pp2-3**
- 4. Contributory Negligence p3**
- 5. Apportionment of Damages p3**
- 6. Damages p3**
- 7. Particulars of Negligence in the Court Process pp3-4**
- 8. Claims for Damages for Negligence pp4-18**
 - (a) Windscreen of the defendant's motor vehicle struck with a rock causing the windscreen to go opaque – defendant lost control of his motor vehicle and caused damage to another vehicle p4
 - (b) Driver required to apply brakes prior to collision – whether mechanical failure of truck pp4-5
 - (c) Motorist driving over hatched area on carriageway – forming lane prematurely pp5-6
 - (d) Motorist turning in front of oncoming vehicle – whether apportionment of liability appropriate pp6-7
 - (e) Concertina-type collision – driver of first car sued drivers of second and third cars – negligence proved by first driver – unable to prove claim against other drivers pp7-8
 - (f) Vehicle struck from behind – vehicle accelerated forward striking another vehicle – vehicle then struck another four vehicles – causation – whether driver's actions were a reasonable response in the circumstances – whether driver acted negligently after colliding with the vehicle in front – 'agony of the moment' decision – contributory negligence – whether magistrate in error in finding first driver liable – whether magistrate in error in adopting the 'all or nothing' approach pp8-9
 - (g) Property damaged – one vehicle fled scene – two occupants seen in fleeing vehicle pp9-10
 - (h) Roundabout – two vehicles entering at same time – right of way – whether vehicle making right hand turn – vehicle moving laterally when unsafe p10
 - (i) Collision between right turning and oncoming vehicles – right turning vehicle stopped in intersection for a few seconds – opportunity for oncoming vehicle to stop pp10-11
 - (j) Motor Vehicle accidentally reversed – collided with vehicle to rear pp11-12
 - (k) Collision between two motor boats both travelling on a river at speed – head-on situation – one driver pulled to right as per navigation regulations – other driver pulled to left – 'agony of the moment' decision pp12-13
 - (l) Stationary vehicle on freeway at night – hazard lights not operating – driver unaware of location of switch to activate hazard lights – collision with another vehicle pp13
 - (m) Mobile car wash – collision between part of car wash and car – car to stop when red lights on – lights not easily seen – view of scene by Magistrate – *Res ipsa loquitur* pp14-15
 - (n) Truck turning left – overtaken on left by other vehicle – overtaking in breach of regulation – truck driver gave way to two vehicles on the left – did not see third vehicle pp15-16
 - (o) Motor vehicle collision on narrow country road – driver's forward vision obscured by bend in road – driver travelling at 80-90 km/h – collision with vehicle reversing with driver's side wheels on edge of bitumen pp16-17
 - (p) Motor vehicle collision between two vehicles in intersection controlled by traffic lights pp17-18
- 9. Duty of Care pp18-22**
 - (a) Participation by plaintiff with defendant in illegal enterprise – agreement to drive while disqualified pp18-20
 - (b) Duty of care – collision involving a stolen motor vehicle p20
 - (c) Intersection controlled by traffic control signals – duty of driver crossing on green light pp20-22
- 10. Cases involving Contributory Negligence – Apportionment pp22-27**
 - (a) Collision involving a motor car and a heavy truck – assumption by truck driver that other driver would yield right of way pp22-23
 - (b) Contributory negligence – must be pleaded p23
 - (c) Intersection controlled by traffic control signals – duty of driver crossing on green light p24
 - (d) Colliding with rear of vehicle in front – front vehicle almost stationary beyond a dangerous blind crest – both drivers negligent – apportionment 80/20% pp24-25
 - (e) Large truck blocking roadway – truck not well lit – dark and raining – truck struck by vehicle travelling along roadway – question of negligence – whether apportionment appropriate pp25-26
 - (f) Finding by magistrate that one party liable for the collision – whether magistrate bound to conclude driver guilty of contributory negligence pp26-27
- 11. Claims for Cost of repairs etc pp27-37**
 - (a) Claim for cost of repairs and loss of no claim bonus – complainant indemnified by insurance company for cost of repairs pp27-28
 - (b) Claimant sought from other party the amount of the excess which was paid – a release was signed in full and final settlement pp28-29
 - (c) Motor vehicle under hire-purchase agreement – whether amount due from hirer under such agreement recoverable as damages from defendant p29

MOTOR VEHICLE COLLISIONS

- (d) Vehicle not repaired at hearing date – award made – whether interest should be allowed pp29-30
- (e) Repairer authorised to repair vehicle – solicitors authorised to recover damages pp30-31
- (f) Collision between motor vehicle and tram – economic loss sustained by tramway operator – operational performance penalties payable by tramway operator to third party pp31-33
- (g) Defendant admitted driving negligently – legislative prohibition on charging for or recovering repair costs from owner where vehicle repaired without written approval pp33-34
- (h) Whether magistrate erred in admitting evidence of insurance assessors – finding that plaintiff liable for damage caused in the accident pp34-35
- (i) Question of quantum – application of principles for measuring damages – finding by magistrate that plaintiff had not sustained the loss claimed pp35-37

12. Foreseeability pp37-38

Motor vehicle collided with a pole – driver's wife a passenger received both physical and mental injuries – wife pregnant gave birth to child – passenger's mother required to look after her daughter – lost income and travelling expenses incurred by mother as a result pp37-38

1. Elements of Negligence

The elements of a negligence claim are duty, breach and consequent damage. The legal or ultimate burden of proof lies on the plaintiff in relation to each element. That is, the plaintiff must satisfy the Court on the balance of probabilities that the damage to the plaintiff's motor car had been caused by negligence on the part of the defendant, by a failure on the part of the defendant to exercise reasonable care in the management and control of his/her motor car in all the circumstances.

In *Ridge v Baldwin* [1963] UKHL 2; (1963) 1 QB 539; [1964] AC 40; [1963] 2 All ER 66; [1963] 2 WLR 935 Lord Reid observed that '[t]he idea of negligence is ... insusceptible of exact definition'.

2. Negligence in a Motor Vehicle Accident

"1. In a motor vehicle accident, the act of negligence and the damage to the vehicle usually occur at the same time. At that moment, the owner becomes entitled to sue the negligent driver for the loss. The established rules governing what losses can be recovered by the owner of the damaged vehicle from the negligent driver were stated by the House of Lords in *Dimond v Lovell* [2002] 1 AC 384; [2002] 1 QB 216.

According to those rules, where the vehicle is commercially repairable (not a write-off), the owner is entitled to recover the reasonable cost of repairing it. In the words of Lord Hobhouse, 'the measure of loss is the expenditure required to put [the vehicle] back into the same state as it was before the accident': *ibid* AC 406; see also *Burdis v Livsey* [2002] UKPC 34; [2003] QB 36, [84]; [2002] All ER (D) 155; [2002] 3 WLR 762; [2003] RTR 22 per Aldous LJ, Tuckey and Jonathan Parker LJJ concurring.

2. Prior to the vehicle being repaired, the vehicle may be destroyed by some later unrelated act. The vehicle may be repaired without cost by the owner themselves, a friend or a relative. It may lie in waste and never be repaired at all. It may be given away, traded in as-is on another vehicle or sold off for its post-accident value. The law of damages does not interfere with the owner's freedom of choice in this regard. Whatever choice the owner makes, the loss represented by the reasonable cost of repairing the vehicle is recoverable against the negligent driver. That is the law's assessment of the damage caused by the negligence of that driver.

3. In some cases, the claim may not be for the cost of repairing the vehicle, but for consequential losses. One common example is a claim by an owner for hiring a substitute vehicle while repairs are being carried out. Such cases can raise complications."

Per Bell J in *Tehan v Saric* [2010] VSC 175; MC 18/2010, 23 April 2010.

3. Breach of the Duty of Care

The classic exposition of the principles relating to breach of the duty of care is that of Mason J in *Wyong Shire Council v Shirt* [1980] HCA 12; (1980) 146 CLR 40; (1980) 29 ALR 217; (1980) 54 ALJR 283; (1980) 60 LGRA 106; 47 Aust Torts Reports 80-278, as follows (at CLR 47-48):

"In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer

MOTOR VEHICLE COLLISIONS

be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

4. Contributory Negligence

"Actionable negligence is the breach of a duty of care owed to another which is a cause of the other to suffer injury or damage. On the other hand, contributory negligence is principally a failure to take care for the safety of one's own person or property, rather than being in breach of a duty owed to another. See *Nance v British Columbia Electric Railway Co* [1951] AC 601; [1951] 2 All ER 448; [1951] 2 TLR 137; *Trinidad and Cane Law of Torts in Australia*, 2nd Ed. 534.

A breach of a duty of care owed to another can, however, in circumstances amount to contributory negligence. See *Noall v Middleton* [1961] VicRp 43; [1961] VR 285. A finding of no contributory negligence negatives both matters". McDonald J in *Keep v Pozzebon* [1994] VicSC 507; MC 51/1994.

5. Apportionment of Damages

The High Court in *Podrebersek v Australian Iron & Steel Pty Limited* [1985] HCA 34; (1985) 59 ALR 529; (1985) 59 ALJR 492 at 494; [1985] Aust Torts Reports 80-321 said:

"The making of an apportionment as between a plaintiff and a defendant on their respective shares in the responsibility for the damage involves a comparison both of culpability, that is of the degree of departure from the standard of care of the reasonable man ... and of the relative importance of the acts of the parties in causing the damage ... It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case. For example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

6. Damages

"1. It is trite law that when goods are damaged by the negligence of a tortfeasor, the owner of the goods suffers an immediate and direct loss in consequence of the damage sustained and a cause of action accrues to the owner to recover that loss. The basic pecuniary loss recoverable by an owner in that circumstance is the diminution in the value of the damaged goods, on the principle that the owner is entitled to be put back, so far as money can do it, into the same position as if the damage had not occurred.

2. In the case of negligent damage to a car, the authorities establish that if the car is wrecked completely as the result of the collision, the loss that the owner is entitled to recover from the tortfeasor will normally be measured by the cost of replacing the car with another car of comparable type and condition, with an allowance in favour of the tortfeasor for the value of the car in its damaged condition.

3. If the car is repairable, the measure of loss will usually be the costs of repair but if the costs of repair exceed, or would exceed, the market value of the car, a question arises as to whether it is reasonable for the owner to incur the expenditure in repairing the car or whether the reasonable option is to replace the car. Ordinarily, the owner can recover the cost of repairs or the value of the car, whichever is the less. In each case, the onus is on the owner to satisfy the Court on the evidence as to which of the measures of damages is reasonable in the circumstances and as to the amount of damages to which the owner is entitled by the application of that method."

Per Davies J in *Zogiannis v Stevens* [2012] VSC 264; MC 23/2012.

7. Particulars of Negligence in the Court Process

"A Magistrate erred in finding that the particulars of negligence are required to be stated in order of importance. Close examination of the facts indicates the Magistrate did not find as a matter of law that this was a procedural or substantive requirement. He did make observations that the same was a matter of good sense – and with the latter comment I concur. But had he found there was a legal requirement to state particulars in any form of priority, then indeed he would have been wrong.

The *Magistrates' Courts Civil Procedure Rules* Order 9 – which largely reflect the *Supreme Court Rules* – operates as a code in pleading matters. The rules do not require, and cannot in any way be interpreted as to require, the particulars of negligence to be set out in any form or order. All that

MOTOR VEHICLE COLLISIONS

is required is that those particulars upon which the party intends to rely be recited with clarity. Undoubtedly, it would be preferable for practitioners to recite the particulars of negligence in a way which brings the issues clearly before the court in as expeditious a manner as possible. The vexation of the Magistrate is understandable but it is not, as a matter of law, correct.

However the Magistrate went on from those comments to pass further remarks about purported negligence on the defendant's solicitors' part. These remarks were wholly gratuitous and, in my view, incorrect as a matter of law. It follows that he could have raised in the defendant's mind a very clear implication that he was being ill-served by his solicitor and legal advisers, when in fact he was not.

Per Nathan J in *Baldwin v Goodman Fielder & Mills Pty Ltd* [1991] VicSC 2; MC 22/1991, 17 January 1991.

8. Claims for Damages for Negligence

(a) Windscreen of the defendant's motor vehicle struck with a rock causing the windscreen to go opaque – defendant lost control of his motor vehicle and caused damage to another vehicle

HELD:

1. It was reasonably open to the Magistrate to take the view that the defendant's action in mistakenly placing his foot on the accelerator was the cause of the collision, and was itself the result of the defendant's shock and loss of control of his car arising from the large rock striking his windscreen and injuring his passenger, and rendering his windscreen opaque, and that this mistake on the part of the defendant was not inconsistent in all the circumstances with the exercise of reasonable care in the management of his car.

2. The exercise by a motorist of reasonable care does not imperatively require that he shall drive his car on the assumption that his windscreen is liable to be struck at any moment by a large rock flung by some unruly bystander, nor does it imperatively require that if his windscreen is hit by a large rock he must nevertheless make no mistake in the operation and control of his brakes and accelerator, notwithstanding his own shock and the general agony of the moment. The law does not require a motorist to be perfect. The appropriate defendant should have been the hurler of the rock.

Per Newton J:

"... Evidence, which the Stipendiary Magistrate accepted, established that when the defendant's car was travelling in a westerly direction along Little LaTrobe Street at about 15 or 20 miles per hour and was about 55 to 60 feet to the east of the complainant's car (which was stationary) a person threw a large rock through the windscreen of the defendant's car and injured his passenger; this evidence further established that the defendant was dazed by this incident, and could not see properly since his windscreen had gone white, and that the defendant lost control of his car and in attempting to apply the foot brake mistakenly put his foot on the accelerator, with the result that his car increased speed and struck the complainant's car about one second later.

... it was reasonably open to the Stipendiary Magistrate to take the view that the defendant's action in mistakenly placing his foot on the accelerator was the cause of the collision, and was itself the result of the defendant's shock and loss of control of his car arising from the large rock striking his windscreen and injuring his passenger, and rendering his windscreen opaque, and that this mistake on the part of the defendant was not inconsistent in all the circumstances with the exercise of reasonable care in the management of his car.

The exercise by a motorist of reasonable care does not imperatively require that he shall drive his car in Little LaTrobe Street on the assumption that his windscreen is liable to be struck at any moment by a large rock flung by some unruly bystander, nor does it imperatively require that if his windscreen is hit by a large rock he must nevertheless make no mistake in the operation and control of his brakes and accelerator, notwithstanding his own shock and the general agony of the moment. The law does not require a motorist to be perfect.

As at present advised, I would venture to say that the appropriate defendant in this case would have been the hurler of the large rock. But perhaps his identity is unknown, or he is bereft of financial resources. The order nisi will be discharged with costs fixed at \$120."

Per Newton J in *Ford v Brent* [1971] VicSC 33; MC 04/1971, 25 February 1971.

MOTOR VEHICLE COLLISIONS

(b) Driver required to apply brakes prior to collision – whether mechanical failure of truck

A claim for damages for negligence when there was a collision between plaintiff's vehicle and defendant's truck when travelling in opposing directions at the end of one-lane bridge. The plaintiff, moving slowly had almost crossed the bridge. The defendant, travelling at 35-25 mph veered to one side on a muddy surface and skidded crosswise into the plaintiff. He explained that his wheels locked because of mechanical failure. Police evidence substantiated that his wheels were fixed and immovable after the accident. Trial judge found that the wheel lock was probably caused by hard braking.

HELD:

1. The trial judge was probably right when he said that where a defendant sought to escape from a situation where on the face of it he was negligent, by alleging some mechanical failure for which he was not responsible that in that case there was a burden on him to adduce some evidence to support his contention. However, given the justifiable findings of fact which concluded the case against the appellant, the trial judge's observation on the law as to onus played no part in his determination.

2. Furthermore, there was not any evidence of mechanical failure causally related to the accident to require consideration by the tribunal of fact. Accordingly, onus in those circumstances was irrelevant.

Per Reynolds J:

"It is submitted that where His Honour went on to say, as I have quoted, 'It has been put to me that there was some mechanical failure. The onus would be on the defendant to establish this.', that His Honour has misdirected himself in law and a new trial is called for. His Honour had already made a finding that the defendant had to apply his brakes so hard that the wheels locked, and it is not suggested – nor can it be suggested – that in making this finding he had misdirected himself in point of onus.

If the learned District Court Judge was intending to deny by what he said that the onus of establishing negligence on the part of the defendant was upon the plaintiff from the first to last, then what His Honour said in my opinion, was incorrect. If His Honour meant no more than that where a defendant seeks to escape from a situation where on the face of it he was negligent, by alleging some mechanical failure for which he was not responsible that in that case there is a burden on him to adduce some evidence to support his contention, His Honour was probably right.

In the present case what His Honour said was of no moment. His Honour had already made justifiable findings of fact which concluded the case against the appellant, and His Honour's observation on the law as to onus played no part in his determination.

Furthermore, there was not, in my opinion, any evidence of mechanical failure causally related to the accident to require consideration by the tribunal of fact. Onus in these circumstances was irrelevant."

Per Reynolds J (with Hutley and Bowen JJ A in the NSW Court of Appeal) in *Blackman v Commissioner For Main Roads (NSW)* MC 23/1974, 30 October 1973.

(c) Motorist driving over hatched area on carriageway – purpose of hatched area – forming lane prematurely

A motorist drove his vehicle over a diamond or triangular area of white diagonal stripes on the surface of the carriageway and came into collision with a vehicle on his left. In a claim for damages arising out of the collision, it was open to the Court to find the motorist 70% negligent in failing to keep a proper lookout and in forming a third lane prematurely in that the carriageway was clearly marked otherwise.

Per O'Bryan J:

"... The collision occurred in Centre Road, a short distance west of the intersection, which is controlled by traffic lights. Some distance west of the intersection, the carriageway is divided into four traffic lanes, two being for east-bound traffic and two being for west-bound traffic. As a motorist approaches Warrigal Road from the west, the two lanes become three lanes, the lane adjacent to the centre of the road being a 'right turn only' lane. There was a diamond, or triangular, shaped area of roadway marked with white diagonal stripes approximately eight metres wide by 63 metres long adjacent to the centre, indicating a lane change some distance west of the intersection. I shall refer to this area as "the hatched area".

MOTOR VEHICLE COLLISIONS

The accident occurred more or less on the hatched area when the vehicle being driven by Dale in an easterly direction was struck on the nearside front by a vehicle being driven by Russell in a general southerly direction.

... The relevant *Road Traffic Regulations* did not prohibit a motorist driving over the hatched area. Consequently, Dale was not guilty of a breach of the *Road Traffic Regulations*, so as to provide *prima facie* evidence of negligence. The learned Magistrate appears to have decided that, at the time of the collision, Dale was guilty of negligence because he was driving along the hatched area when the collision occurred. He determined that, as a prudent motorist, Dale should not have been on the hatched area and because Dale was in an area when the accident occurred in which a reasonably prudent driver would not have been, Dale was guilty of negligence.

... The carriageway, at the point of collision, was marked and used by prudent motorists as a two-lane carriageway. In travelling easterly at 20 kilometres an hour in an unauthorised third lane, Dale took a considerable risk. He failed to keep a proper lookout for traffic attempting to cross the carriageway from his left. I believe Dale inevitably had to be found guilty of negligence because he prematurely made a third line of traffic and failed to keep a proper lookout. A finding of negligence was open to the Magistrate. Mr Wilson submitted that, were I to conclude that no error of law occurred in the finding of negligence, the Magistrate was in error in apportioning 70% of the blame against him. Mr Wilson relies upon Russell's clear breach of Regulation 607, which requires a driver entering a highway from land abutting on the highway to give way to all vehicles travelling in either direction.

I am faced with a finding of negligence on the part of both parties which is supportable by the evidence and an apportionment of responsibility for the accident made by the learned Magistrate. It is no easy task to disturb an apportionment of negligence made by a Magistrate, who has heard the evidence and seen the witnesses. On the one hand, Mr Wilson relies upon Russell's failure to 'give way' to Dale's vehicle. Yet Russell had safely negotiated two lines of vehicles and was entitled to assume that his main danger would come from the east from vehicles entering Centre Road at Warrigal Road and not from a motorist making a third line of traffic prematurely. No doubt, Russell failed to keep a proper lookout. Again, Dale was pursuing an unorthodox manoeuvre, making a third line of traffic and driving over a hatched area serving to warn of a change in lanes ahead. He also failed to keep a proper lookout. Each party, therefore departed from the standard of care expected of a prudent motorist. I am not persuaded, on the evidence, that no reasonable Magistrate could apportion liability 70/30 against Dale.

... Perhaps the apportionment against Dale might have been less but the test is not what I might have done, rather, it is whether a Magistrate, acting reasonably, could not have reached the decision he did. In my opinion, none of the grounds argued have been made out and the order nisi should be discharged with costs."

Per O'Bryan J in *Dale v Russell* [1984] VicSC 491; MC 23/1986, 30 October 1984.

(d) Motorist turning in front of oncoming vehicle – whether apportionment of liability appropriate

Where a motorist (confused by the presence of a left-turning vehicle) turned across the path of oncoming traffic and collided with an oncoming vehicle, it was open to the Court to find 100% liability on the part of the motorist making the turn.

Per Nathan J:

"Matters as to impact damage indicating the events of the collisions are of peripheral value, and the contradictions referred to by Mr Walsh indicate a lively legal mind but in no way displace the heavy onus borne by him. The contradictions in the evidence to which he referred are contrived, the inconsistencies as to damage as put by Mr Mitchell are tortured, and the plain facts of the matter show through the affidavit material. The photographs, part of the exhibits, support Mr Mitchell's contentions. He was not seriously eroded in terms of credit according to the affidavit material, and his story is entirely plausible.

Once I accept that view I must then examine whether a Magistrate could reasonably come to the view of finding one hundred percent liability on Mrs Haddad's part, or whether on the face of the evidence an apportionment should have ensued. I am satisfied that the story given by Mr Mitchell of a vehicle turning across his path, resulting in him braking and skidding into the said vehicle does not necessarily incur any liability on his part. A reasonable Magistrate could properly conclude that the initiating factor of all the damages which followed was the commencement of the right hand turn across the path of Mr Mitchell's vehicle. It is of no satisfaction to Mrs Haddad that a court or another Magistrate might have come to a different view in respect of apportionment.

MOTOR VEHICLE COLLISIONS

If it was reasonable in those circumstances for the Magistrate so to conclude, then indeed the onus placed upon the applicant has not been discharged. I merely observe that on the view of the facts which I am of the view the Magistrate could have arrived at then indeed he was perfectly entitled not to apportion liability. Matters of motor car collisions are often a matter of passion and pride, and I suspect there have been elements of that in this case. Be that as it may, the law does not decide issues on that basis, but upon the evidence which is presented before it. I am perfectly comfortable, in fact more than satisfied, that the learned Magistrate did not make a manifest error on the material before him."

Per Nathan J in *Haddad v Mitchell* MC 27/1987, 14 May 1987.

(e) Concertina-type collision – driver of first car sued drivers of second and third cars – negligence proved by first driver – unable to prove claim against other drivers

1. Where, in a tortious action by a complainant against two defendants a complainant is able to prove negligence generally but unable to prove negligence specifically on the part of one or other or both defendants, the complainant is entitled to a determination notwithstanding the court's difficulty in deciding the question of liability and the degree of contribution (if any) between the defendants.

Hummerstone v Leary (1921) 2 KB 664, referred to.

2. Accordingly, a Magistrate was in error in dismissing a claim on the ground that the complainant, whilst proving negligence in general, had not proved negligence against one or the other or both defendants.

Per Nathan J:

"... It was undisputed that the damage to the complainant's vehicle arising out of the collision with Nichol arose because his car had been struck in the rear by Stanley. If Stanley was not forced into striking Fraser by Vitkus, then the damage must have been caused by Stanley alone.

... The overwhelming weight of the evidence was that either Stanley or Vitkus caused Fraser's damage. There simply can be no other conclusion. To leave a complainant without remedy because of indecision as to whether the fourth car in the concertina struck the third car before it in turn struck the second car which struck the first car is to illustrate the difficulties of decision-making, but not the impossibility of it.

... By isolating the cases against both defendants the Magistrate failed to deal with a legal issue before him. He found as a fact that it was either the negligence of Stanley or Vitkus which caused Fraser's damage; the fact of the tort being committed was therefore not in dispute. The only issue was the degree of contribution between them; and this was an issue to which, as a matter of law, the Magistrate had to address his mind. The difficulties of disposing of the claims as between defendants was used as a platform to deny a blameless complainant a civil remedy. Moreover, the difficulties do not appear to have been insurmountable. Every day of the week Magistrates must decide between competing stories, as was the case here between Stanley and Vitkus. Some extrinsic evidence was available.

The plaintiff has established the threshold issue of negligence. The issue was which one of two persons was responsible. Of facts similar to these and by reference to earlier English authority, viz *Hummerstone v Leary* (1921) 2 KB 664, Menzies J said, p151:

"The argument proceeds that in any case where the proper conclusion is that injury was caused by the negligence of one or other or both of two persons, each of them, having failed to disprove his own negligence, is to be regarded not only as having been guilty of negligence but, in the absence of any evidence upon which to apportion the blame between the two negligent persons, the conclusions must be drawn that they were equally responsible.

This argument fails because of the distinction that must be drawn between an action by a plaintiff against two defendants when there is evidence that one or other or both were negligent, and an action by a plaintiff against a defendant when all that can be said at the end of the case is that there was negligence on the part of one or other or both the parties. In the former case, the plaintiff is entitled to a determination because he has made out a *prima facie* case against defendants sued not merely jointly but in the alternative; in the latter case, the whole of the evidence leaves open the question whether the injury was caused by the plaintiff's own negligence without any negligence on the part of the defendant".

... As I have already observed, the case before me proceeded on the basis that negligence had been

MOTOR VEHICLE COLLISIONS

established. It is a rare and exceptional case in which the weight of the evidence will speak from the affidavit material so as to compel a conclusion that a magistrate's decision was wrong as being contrary to it. However, for the extensive reasons given above, I am satisfied that that part of the ground 1 is made out and the order absolute should be made on that basis. Further, I am satisfied that the magistrate was in error in directing himself that the despatch of the case required the complainant to prove the order of collisions (as between Stanley and Vitkus and Stanley and Fraser). I do so for the reasons already given and for this additional one, the collision between Vitkus and Stanley may have been immaterial, so far as Fraser's damage was concerned. It is unnecessary to pronounce upon ground 3."

Per Nathan J in *Fraser v Vitkus & Stanley* [1989] VicSC 554; (1989) 10 MVR 103; MC 64/1989, 13 November 1989.

(f) Vehicle struck from behind – vehicle accelerated forward striking another vehicle – vehicle then struck another four vehicles – causation – whether driver's actions were a reasonable response in the circumstances – whether driver acted negligently after colliding with the vehicle in front – 'agony of the moment' decision – contributory negligence – whether magistrate in error in finding first driver liable – whether magistrate in error in adopting the 'all or nothing' approach.

C., the driver of a motor vehicle collided with the rear of a taxi. Immediately following the impact, the taxi accelerated forward some distance colliding with another vehicle and then went further and collided with another four vehicles. At the hearing, counsel for C. indicated that the question of contributory negligence was not open and that it was an 'all or nothing' situation. The magistrate found that C. was wholly liable for the damage to the taxi. Upon appeal—

HELD: Appeal dismissed.

1. The magistrate was not in error in finding that the actions of the taxi driver in accelerating into the car in front were a reasonable response in all the circumstances, and in particular, in the context of the emergency, dilemma or stress created by the initial impact. Once the magistrate found that the taxi driver's actions were caused by C.'s negligence and they were a reasonable response to the situation created by that negligence, there was no room for the suggestion that there was a break in the chain of causation. The magistrate was conscious of the subsequent events which occurred and it could not be said that the approach adopted by the magistrate was not open.

2. In relation to the question of contributory negligence, although this was pleaded, it was expressly disavowed in favour of an 'all or nothing' approach to be based on the 'agony of the moment' authorities. In view of the fact that contributory negligence may be dealt with by apportionment and the court is now free to lay blame where properly it should fall, because of the express abandonment of contributory negligence, the magistrate was not in error in failing to deal with the issue of contributory negligence.

Per Nettle J:

"... 17. I also reject the appellant's third proposition, because I consider that there was evidence of primary facts from which it was open to infer that the act of acceleration was the result of reaction under stress to the initial impact.

18. That is not to say that I would have reached the same conclusion. But that is not the point. The question on this appeal is not whether I regard the actions of the taxi driver as a reasonable reaction to the situation created by the appellant's negligence. The question is whether it was open to the Magistrate as a matter of law to reach the view that they were^[4]. I consider that it was. It accords with everyday experience that people react instinctively to an episode of extreme stress in ways which would be regarded as irrational in other circumstances. That does not mean that their conduct is unreasonable. In the cool detachment of hindsight it may seem an irrational reaction to a rear end impact to apply the accelerator rather than the brake. But that does not mean that it is necessarily an unreasonable response to press the wrong pedal in the state of excitement and fear which is capable of being engendered by a car accident. To suggest that it must be otherwise, which after all is what the appellant's argument amounts to, is to depart from the realities of ordinary human behaviour.

19. The fourth proposition necessarily falls with the third. Once it was found that the taxi driver's action was caused by the appellant's negligence, and was a reasonable response to the situation created by that negligence, there was no room for the suggested break in causation^[5].

20. That is enough to dispose of this appeal. In case it matters, however, I should say that in the course

MOTOR VEHICLE COLLISIONS

of the hearing before the Magistrate and again before me this morning, considerable reference was made to the so-called agony of the moment doctrine^[6] and to the degree of latitude which it affords.

21. The Magistrate more than once articulated the concept in terms that a plaintiff in a case of this kind (*scil.* an agony of the moment case) is to be afforded a degree or even a considerable degree of latitude before his or her reaction to the agony will be adjudged unreasonable. It was suggested that the use of those expressions bespoke a misconception on the part of the Magistrate that a plaintiff was entitled to recover even if his or her reaction to first impact were something less than reasonable.

22. I do not consider that the Magistrate made any error of the kind suggested. It appears plain to me that his invocation of the concepts of "latitude" and "considerable latitude" did no more than recognise, as a common sense matter of fact, that in some circumstances a defendant's negligence may be regarded as being responsible for the production of what would otherwise be regarded as an aberrant response. In the view of the Magistrate it was responsible, and in my view it was open to his Worship so to conclude.

23. The final aspect of the matter which warrants attention is the question of contributory negligence. It will be remembered that although contributory negligence was pleaded, in the course of final submissions before the Magistrate it was expressly disavowed in favour of an all or nothing approach to be based on the agony of the moment authorities. It may be thought that if the Magistrate had been invited to consider the question of contributory negligence he could have found that there was some negligence on the part of the taxi driver. The agony of the moment doctrine, somewhat like the last opportunity rule, originated as a mechanism to ameliorate the excesses of rules relating to contributory negligence before the enactment of apportionment legislation. So long as contributory negligence was a complete defence to a claim, it was understandable that courts would attempt to excuse contributory negligence as the results of the agony of the moment or of a failure of another to exploit the last opportunity to avoid calamity. Now that contributory negligence may be dealt with by apportionment, there is not the same need to go to those lengths; for the court is now free to lay blame where properly it should fall^[7]. ..."

^[4] See *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38 at 41; [1956] ALR 301, *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19 and *S v Crimes Compensation Tribunal* [1998] 1 VR 83, especially in the judgment of Phillips JA at pages 88-93.

^[5] See and compare *March v Stramare* [1991] HCA 12; (1990-91) 171 CLR 506, 517; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095, 515; *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408, 428; (1992) 107 ALR 617; (1992) 66 ALJR 550; [1992] Aust Torts Reports 81-163; *Medlin v State Government Insurance Office* [1995] HCA 5; (1995) 182 CLR 1 at 6; (1995) 127 ALR 180; [1995] Aust Torts Reports 81-322; (1995) 69 ALJR 118.

^[6] See Hart and Honore, *Causation in the Law*, 5th edition at pages 142, 143 and 184; Fleming, *The Law of Torts*, *ibid*; *Jones v Boyce* [1816] EWHC KB J75; (1816) 1 Stark. 493, 171 ER 540; *Ansell v Arnold* (1963) SASR 355; *United Uranium No Liability v Fisher* (1955) ALR 99 at 133; *The Bywell Castle* (1879) 4 PD 219; 41 LT 747; and *British School of Motoring Ltd v Simms* [1970] 1 All ER 317.

^[7] See Fleming, *The Law of Torts* 9th edition at pages 318-320; *March v Stramare*, *supra* at 511-513. Per Nettle J in *Cook v Velkray Pty Ltd* [2002] VSC 361; MC 25/2002, 23 August 2002.

(g) Property damaged – one vehicle fled scene – two occupants seen in fleeing vehicle

Where the owner of a motor car was shown to have been in it together with some other person when it was being driven, in the absence of evidence to the contrary it was open to draw the inference that the motor car was being driven by the owner.

Per Brooking J:

"In February 1989, Stephen Allen went fishing at Sorrento from the vicinity of the aquarium, leaving his car parked near the boat ramp. On his return he found that someone had damaged his car by running into the front of it. Allen obtained the number of the other vehicle on his return to the shore, finding the number written on a piece of paper under the windscreen of his car.

That note had been put under the windscreen, I am afraid, not by the delinquent driver but by an observant and public-spirited bystander, who had seen the incident and taken the number of the offending vehicle, a car registered number DOB-932, which had been towing a trailer with a boat on it and had backed into the parked car, damaging it with the rear of the trailer.

... If a person who owns a car is shown to have been in it together with some other person or persons at a time when it was being driven, then, in the absence of anything in the evidence tending against the view that the owner was driving, the likelihood is, as a matter of common sense and common experience, that the owner was driving the car, exercising his right to drive his own car rather than surrendering that right to a companion.

... The question is whether it was open to the learned Magistrate to infer that the defendant was

MOTOR VEHICLE COLLISIONS

the driver of his car. This question can be sub-divided into two questions by asking whether it was open to the Magistrate to infer that the defendant was one of the two men in the car and whether it was open to him to infer that of those two men it was the defendant who was the driver. I have no doubt that it was, to say the least, open to the learned Magistrate to infer that the appellant was one of the two men in his car at the time of the accident and that of those two men it was he who was the driver, having regard to his ownership of the car and to the absence of any evidence to suggest that he had permitted his companion to drive, with the result that it was the companion who was driving at the time of the accident.

If a person who owns a car is shown to have been in it together with some other person or persons at a time when it was being driven, then, in the absence of anything in the evidence tending against the view that the owner was driving, the likelihood is, as a matter of common sense and common experience, that the owner was driving the car, exercising his right to drive his own car rather than surrendering that right to a companion. ...

Per Brooking J in *Milonis v Tifran Pty Ltd* (1991) 14 MVR 573; [1991] VicSC 479; MC 31/1991, 13 September 1991.

(h) Roundabout – two vehicles entering at same time – right of way – whether vehicle making right hand turn – vehicle moving laterally when unsafe

1. Where two vehicles enter a roundabout from the same point of entry, neither is to be regarded as approaching the other from the right nor doing a right hand turn.
2. Where, in a roundabout, two vehicles entered at the same point, one moved laterally and collided with the rearward right hand side of the other, it was open to a magistrate to find that the driver of the vehicle moving laterally was liable for the damage caused.

Per Hayne J:

"... I interpolate that both parties conceded that the bare fact that there was demonstrated to have been a breach of the regulations did not of itself demonstrate negligence. (See *Tucker v McCann* [1948] VicLawRp 40; (1948) VLR 222). However that may be, I am of the view that the analysis contended for by the appellant is flawed in both respects. Both vehicles having entered the round-about from the same entry, once in the round-about, I do not consider that either is to be regarded as having approached the other from the right. Nor do I consider that it is correct to say that within the round-about one vehicle is to be regarded as doing a right-hand turn simply because that vehicle sought to exit from the round-about at exit four. Within the round-about, which was where this accident occurred, I consider that the conduct of the parties could be regarded by the magistrate as being governed by regulation 507. That is to say, as being governed by the obligation not to move laterally out of their lane, or line of traffic, unless it was safe to do so.

I do not say that the magistrate must have reached such a conclusion. I say only that it was open to the magistrate to reach such a conclusion on the evidence before him. As I said when describing the magistrate's findings, as recounted by the appellant, the magistrate found that the appellant left her lane at some stage. In my view, that finding was open to the magistrate on the evidence below.

I should add that that finding was open if only because the uncontroverted evidence below was that the respondent's vehicle was struck on the right-hand side towards the rear. It may then have been open to a magistrate to conclude that the appellant had tried to turn into the path of the respondent when the respondent was ahead of her. In any event, in all the circumstances, I do not consider that it can be said that the appellant has shown that no reasonable magistrate could have found that the accident was caused wholly by the appellant. Accordingly, I consider that the appeal should be dismissed."

Per Hayne J in *Baffsky v Mangos & Anor* MC 47/1992, 24 August 1992.

(i) Collision between right turning and oncoming vehicles – right turning vehicle stopped in intersection for a few seconds – opportunity for oncoming vehicle to stop

Where the driver of a vehicle began to make a right-hand turn then stopped for an appreciable period of time and an oncoming vehicle came from a service road, proceeded into the intersection and collided with the other vehicle, it was open to a Magistrate to conclude that the driver of the oncoming vehicle was wholly negligent in failing to keep a proper look-out and drive at a reasonable speed in the circumstances.

Per Hayne J:

"... I therefore proceed on the basis that the Magistrate found that the second respondent began to make his right hand turn at a time when it was safe to do so, and that he was then forced to stop because a car came from the service road and proceeded into the intersection. There was some suggestion in the evidence that the Magistrate's findings were made in two parts, the second part being made in response to questions asked of the Magistrate by counsel. Whether this is so or not, it is, I think, clear that the Magistrate sought to explain the finding that he had made by finding in effect that the appellant was, at the time that the second respondent commenced his right hand turn, sufficient distance away from the intersection for it to be safe for the second respondent to commence the turn, and that the appellant was at that time in a position where he had time enough to stop to prevent the accident.

... In my view it is implicit in the finding that when the defendant started to move it was apparently safe to turn, that the appellant was then far enough away to stop to avoid a collision. There was, in my view, evidence on which the Magistrate could make that finding.

... As to the first of the two points made, namely that the Magistrate should have found that the second respondent failed to keep a proper lookout, I think it very important to recall what it was that the Magistrate did find. His finding was, in effect, that the accident was caused wholly by the negligence of the appellant because the appellant had not kept a proper lookout. His finding was, in effect, that the respondent had been stopped sufficiently long in the position where he was for the appellant to have seen the vehicle and to have stopped before hitting the vehicle. Indeed his finding was that the appellant "had enough time to stop to prevent the impact had he been keeping a proper lookout and driving at a reasonable speed, and therefore the plaintiff was negligent and caused the accident."

The question of what caused this accident is a question of fact. We are told by the High Court in *March v E & MH Stramare Pty Ltd* [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095 that where negligence is in issue, causation is essentially a question of fact to be answered by reference to common sense and experience. Thus the question of what caused this accident was essentially a question of fact for the Magistrate to determine on the basis of the evidence before him.

There was, in my view, evidence upon which he could conclude that the plaintiff did have enough time to stop to prevent the impact, had he been keeping a proper lookout and driving at a reasonable speed, and there was therefore evidence upon which he could conclude that it was the plaintiff's negligence that caused the accident. If that is so, the question of whether the defendant ought to have seen the plaintiff's vehicle sooner than he did is, I think, nothing to the point..."

Per Hayne J in *Pangalos v ATC & Bourke* MC 52/1992, 7 October 1992.

(j) Motor Vehicle accidentally reversed – collided with vehicle to rear

Where the driver of a motor vehicle accidentally slipped the vehicle's transmission into reverse, the car reversed and collided with the front of the vehicle behind thereby causing damage, it was not reasonably open for a magistrate to conclude that the driver reversing was not negligent.

Per Ashley J:

"... According to the plaintiff, the defendant's vehicle unexpectedly reversed into the front of her stationary vehicle. According to the defendant, his vehicle stalled. He then restarted the vehicle, which had automatic transmission, whilst the transmission lever was in the "neutral" or "park" position. Whilst the lever remained in that position the plaintiff's vehicle ran into the rear of his stationary vehicle.

The Magistrate accepted the plaintiff's account, thereby finding that the defendant's vehicle had reversed into the front of the plaintiff's motor car. He nonetheless found that there was no negligence on the part of the defendant. This appeal by the unsuccessful plaintiff is against that finding. It is said that a finding of "no negligence" in the circumstances that I have described was not reasonably open. That is the test that must be applied in these circumstances.

It appears that the Magistrate found that the reason whereby the defendant's vehicle reversed was that the defendant, having started his vehicle which had been stalled, had then slipped the transmission into "reverse" accidentally. It seems also that the Magistrate found that there was no intent on the part of the defendant to put his car into reverse, and that the Magistrate also said that he did not know why the defendant had slipped the car into reverse.

It is not altogether clear from the affidavit material why the Magistrate said that he did not know why the defendant had done what he did. It may be that he intended to say no more than that what had

MOTOR VEHICLE COLLISIONS

happened was not intentional, and was accidental. Certainly, his finding that the car had gone into reverse because the transmission had been accidentally put into reverse provides a quite adequate explanation of what had occurred, and why it occurred.

It appears to me that the Magistrate reached a conclusion that, on the circumstances before him, was not reasonably open. It may be that he was misled by his references to the conduct of the defendant being not intentional and accidental. But be that as it may, I find it impossible to conclude that a finding of negligence as against the defendant should not have been made upon the facts found. ..."

Per Ashley J in *Carisbrooke v Ranford* [1992] VicSC 629; MC 05/1993, 7 December 1992.

(k) Collision between two motor boats – both travelling on a river at speed – head-on situation – one driver pulled to right as per navigation regulations – other driver pulled to left – 'agony of the moment' decision

Whilst driving a speed boat on the Murray River 30 metres from the bank and at 40-60 km/h, G. was faced with an oncoming speed boat driven by M. Believing that M. would observe the Navigation Regulations and move to the right, G. continued at the same speed until 5 metres from M's boat when he pulled to the right. M. pulled his boat to the left and the two boats collided causing damage. In subsequent proceedings, a magistrate apportioned G.'s liability as 25% in that he could have taken evasive action given the available reaction time of 2-3 seconds. Upon appeal against the apportionment—

HELD: Appeal upheld. Apportionment set aside. Finding of negligence against G. set aside.

In the circumstances, G. was confronted with an agony of the moment situation where he had only seconds to determine upon a course of action. His actions in complying with the Regulations and turning to the right were understandable. Accordingly, the magistrate was in error in finding that the collision was in any way caused by any negligence on G.'s part.

Per Coldrey J:

"... Insofar as they are relevant to these appeals, the Magistrate's findings of fact are as follows. At all material times the appellant Groves was travelling on his starboard (i.e. correct) side of the river in accordance with the provisions of Rule 9(a) of the regulations, whilst the respondent Mason was travelling on his port (i.e. wrong) side of the river. Each was travelling 30 metres from the New South Wales bank of the river and at the same speed of between 40-60 kilometres per hour. Groves first saw the boat driven by Mason adjacent to a bend in the river and some 50 metres from his boat. He continued at the same speed in the belief that Mason would move to the right (i.e. starboard) as required by Rule 14 of the regulations in order to avoid a collision. When Groves' vessel was about five metres from that driven by Mason, the former driver, observing that the latter had not altered the course of his vessel, took his foot off the accelerator, almost immediately re-applied it, accelerated and, at the same time, turned to the right. At the same approximate time Mason pulled his boat to the left. The two vessels thereupon collided with the front of the bow of Groves vessel striking the right lower side of the bow of that driven by Mason. On the basis of these factual findings the learned Magistrate held that Mason was negligent in that he:

- (i) failed to keep a proper look-out.
- (ii) failed to observe the other vessel until almost the last moment.
- (iii) was in breach of Rules 5, 9(a) and 14 of the regulations.

The approach of the Courts to such a situation is exemplified by the case of *Vayne v State Government Insurance Commission (SA)* [1991] SASC 2730; (1991) 13 MVR 446 at 448. That was a case in which the Full Court of South Australia considered a head on collision between two motor vehicles. In the course of delivering a judgment with which the other members of the Court concurred, King CJ stated:

"... it is to be remembered that the defendant was confronted with what could be fairly described as a desperate situation. He had a vehicle coming towards him on the incorrect side of the road, placing him in imminent peril. He reduced his speed and endeavoured to manoeuvre his vehicle in a way which seemed to him, in the agony of the moment, to be the best way of avoiding the accident. The inclination to move to the right was perfectly understandable when he was faced with a vehicle coming directly at him on the incorrect side of the road. Likewise, however, his indecision that the manoeuvre was too dangerous and that he should veer to the left was also understandable and, in my view, correct. I cannot blame the defendant for not stopping. To stop would have placed him in a sitting-duck position, directly in the path of the oncoming vehicle, and I think it would be unreasonable to expect a driver to place himself in that position."

I agree with the submission of Mr O'Callaghan that the reasoning employed in this case is apposite to the present situation where Groves, who was driving on the correct side of the Murray River at a

MOTOR VEHICLE COLLISIONS

permitted speed and keeping a proper look-out, was confronted with a fast travelling boat on the wrong side of the river, with only seconds to determine upon a course of action. In these circumstances the finding of the Magistrate that the conduct of the appellant Groves up until the time he swerved to starboard constituted negligence is, in my view, untenable, as is the finding that he was in breach of Rule 8 of the regulations.

The ultimate course of action taken by Groves in turning his boat to starboard in accordance with the requirements of rule 14 of the regulations, whilst equally falling under the umbrella of action taken in the agony of the moment, constitutes, in itself, an unimpeachable manoeuvre. To impugn it as unreasonable because Groves should not have assumed that Mason would comply with the regulations is to impose upon the reasonable man a prescience which has no basis in logic or law.

In summary, therefore, given the urgency of the situation, negligence could not be attributed to Groves for failing to stop, for failing initially to alter course, for decelerating or, thereafter, for taking appropriate and legally specified evasive action. It follows from the foregoing that I am of the view that the Magistrate was in error in finding that this collision was in any way caused by the negligence of the appellant, Groves."

Per Coldrey J in *Groves v Mason* [1992] VicSC 332; MC 54/1992, 5 August 1992.

(1) Stationary vehicle on freeway at night – hazard lights not operating – driver unaware of location of switch to activate hazard lights – collision with another vehicle

Where, on a wet night, a motorist left a stationary vehicle on a freeway so as to cause an obstruction and failed to operate the vehicle's hazard lights being unaware of the location of the operating switch, and a collision occurred causing damage, it was open to a magistrate to find that the driver of the stationary vehicle was negligent in not knowing where to activate the hazard lights and that the failure to activate the hazard lights caused the accident.

Per Hayne J:

"... In my view, it was open to the Magistrate to conclude, as a matter of commonsense and experience, that the failure of Stevenson to activate his hazard lights caused the accident. The finding of the Magistrate that there was no negligence on the part of Kinali also, of course, required consideration of all of the evidence. There was evidence called from not only the drivers, but also two other witnesses. One, who had been a passenger in Kinali's cab, gave some evidence of what he saw immediately before the collision, in particular, evidence of how far the cab then was from Stevenson's car, but it seems that he was unable to say whether there were other vehicles to the left of the cab.

The question confronting the Magistrate, when considering whether Kinali was negligent, was whether Kinali had acted in breach of duty, or whether he had, as the Magistrate was to put it, "Taken every step to avoid a stationary obstruction on the roadway in front of him". That, of course, required consideration of whether the Magistrate accepted the evidence of Kinali, that the car in front had diverged suddenly, leaving the obstruction ahead of him, with him having nowhere to go because of the traffic on his left. It required consideration of the speed at which Kinali was travelling, and required consideration of the conditions that then obtained. It required consideration of the distance that Kinali was travelling behind the car in front of him. In the end it required consideration of what steps could have been taken to avoid what was a sudden and unexpected hazard.

The appellant submitted that the only conclusion open to the Magistrate was that Kinali must have been travelling too fast or too close to the car ahead. Now, it may be, as the respondent submitted, that this argument of the appellant proceeds from the premise that there was no negligence on the part of Stevenson in failing to have his hazard lights on, and thus that there was no basis for the conclusion that the car ahead might have diverted earlier.

It is significant, as the respondent points out, that there is no suggestion recorded in the material relating to the cross-examination of Kinali, that a case was put to Kinali that he was travelling either too fast or too close to the car ahead of him. It may then be that the case now put on appeal is one that was never put below.

However that may be, the question confronting the Magistrate was essentially a question of fact, dependent for its outcome upon consideration of all of the evidence that was before the Magistrate, evidence which I have not heard, and of which I have necessarily only an imperfect record. In my view, it is not demonstrated that no reasonable Magistrate could have reached the conclusion he did. It was a conclusion that was open on the evidence below. It follows that the appeal should be dismissed."

Per Hayne J in *Stevenson v Kinali* [1992] VicSC 658; MC 10/1993, 14 December 1992.

MOTOR VEHICLE COLLISIONS

(m) Mobile car wash – collision between part of car wash and car – car to stop when red lights on – lights not easily seen – view of scene by Magistrate – *Res ipsa loquitur*

Upon payment of a fee, F. drove her car into a mobile car wash owned by T. P/L. When a red light is displayed, a metal bar prevents a vehicle from moving past a certain point. F. gave evidence that she saw no red light before her car collided with the bar causing damage to the bar and the hydraulic system of the car wash. During the hearing, the magistrate declined to have a view of the car wash. At the end of the evidence, he dismissed the claim on the basis that T. P/L had not proved that F. had failed to keep a proper look-out for the red light. Upon appeal—

HELD: Appeal dismissed with costs.

1. *Res ipsa loquitur* is a rule of law which facilitates proof of negligence where there is a paucity of evidence about an event which ordinarily does not happen without negligence. As the facts were known in the present case, the rule had no application. The question was whether T. P/L proved negligence against F. on the known facts. On the evidence, the magistrate's conclusion was reasonably open.

2. A view of the scene may be held by a magistrate for the purpose of understanding the evidence but not for the purpose of deciding the case. A magistrate is not compelled to have a view. In the present case, a view of the car wash to look at the position of the red light may have produced a conclusion based on the view rather than the evidence given by the witnesses. Accordingly, the magistrate was correct in declining to have a view.

Per O'Bryan J:

"... Before turning to the facts it is convenient to dispose of a point raised by counsel for the appellant which is outside the questions of law relied upon by the appellant. During the hearing, on two occasions, counsel for the appellant invited the Magistrate to view the mobile car wash "given that the major issue in contention appeared to be whether the lights could or could not be seen". The Magistrate declined to do so. Counsel faintly argued in this Court that the Magistrate should have had a view of the *locus in quo* presumably to help resolve conflicts in the evidence.

In my opinion the learned Magistrate very correctly declined to do so. A view of the *locus in quo* may be held for the purpose of understanding the evidence but not for the purpose of deciding the case. It would be unwise in most instances for the fact finder to treat a view as evidence. The High Court in *Scott v The Shire of Numurkah* [1954] HCA 14; 91 CLR 300; [1954] ALR 373 cautioned against the result of a view replacing the evidence. The learned Magistrate was entitled to have a view but was not compellable to do so. In my opinion, a view would have been most unwise for there was a real risk that the Magistrate might have reached conclusions based upon what he saw or did not see and not upon what the witnesses said they were able to see or not see.

The learned Magistrate agreed with counsel for the plaintiff in the Court below that the failure of the respondent to see the red light "was the critical point of the case". The learned Magistrate said that the failure to see the red light was either due to negligence or "the red light is hard to see and/or could not be seen". He said that he was satisfied on the evidence that the red light is not easily seen and the appellant's case failed. This finding was challenged in the first question of law as unreasonable. I am unable to accept the submission that it was not reasonably open to the Magistrate to find as he did that the red light is not easily seen. The appellant's evidence did not identify where the red light was positioned. Two witnesses said that it was hard to see or could not be seen. In my opinion, the learned Magistrate was entitled to regard the visibility of the red light "as the critical point of the case" and to conclude that the appellant had failed to establish that the respondent failed to keep a proper look out for the light. Had the respondent seen the red light in time or, if a reasonable person ought to have done so, and proceeded to drive forward, inevitably a finding of negligence would have been made by the Magistrate. The first question of law is not made out.

Counsel for the appellant argued that negligence ought to have been found upon another two bases. Firstly, in not seeking instructions when the respondent was unsure as to how the car wash operated. Secondly, in driving at an excessive speed. The short answer to this argument is that these particulars of negligence were not pleaded and not raised in the Court below. They were, therefore, not the subject of any finding by the Magistrate.

Counsel for the appellant did not press strongly the second question of law. *Res ipsa loquitur* is a rule of law which facilitates proof of negligence where there is a paucity of evidence about an event which ordinarily does not happen without negligence. The rule simply establishes a *prima facie* case of negligence and avoids an injustice because a plaintiff is unable to explain the event.

MOTOR VEHICLE COLLISIONS

Where the facts are known, as they were in the present case, the inquiry is whether negligence has been established on the known facts. The plaintiff carried the burden of proof at the end of the case, the burden did not shift to the defendant. The *res ipsa* rule had no application.

The second question of law is misconceived, in my opinion, and is not made out. The order of the Court is: appeal dismissed with costs."

Per O'Bryan J in *Tasandy Pty Ltd v Franjic* [1994] VicSC 360; MC 50/1994, 24 June 1994.

(n) Truck turning left – overtaken on left by other vehicle – overtaking in breach of regulation – truck driver gave way to two vehicles on the left – did not see third vehicle

P.'s driver T., pulled up at traffic lights behind two other vehicles. To T.'s right was a prime mover with a large trailer attached driven by K. When T. reached the front of K.'s trailer, T noticed the left-hand indicators on K.'s truck were on. When the traffic lights turned to green, T. moved forward but stopped at the stop line because K.'s truck was turning left and a collision was imminent. T. sounded the horn for some time but the truck continued to turn left and the rear of the trailer struck the driver's door and front corner of T's vehicle causing damage. At the hearing the magistrate found K. 100% to blame. On appeal—

HELD: Appeal dismissed.

1. By T. moving her car forward and passing to the left of K.'s truck, T. was in breach of Reg. 502(5)(b) which provides that a driver of a vehicle must not overtake or pass to the left of a vehicle displaying the sign: DO NOT OVERTAKE TURNING VEHICLE.

2. However, a breach of a regulation is no more than a piece of evidence to be considered with all other evidence when a court determines the ultimate questions. It is to be weighed in the evidence and given such weight as is proper in all the circumstances of the case.

Tucker v McCann [1948] VicLawRp 40; (1948) VLR 222, applied.

3. Given that two vehicles in front of T. had moved forward and cleared the intersection, T. reasonably expected that K. would also allow T. to move forward and clear the intersection. The failure by K. to see T.'s car and avoid colliding with it was a breach of the duty of care.

4. Contributory negligence is principally a failure to take care for the safety of one's own person or property, rather than being in breach of a duty owed to another.

Nance v British Columbia Electric Ry. Co [1951] AC 601; 1951 2 All ER 448; [1951] 2 TLR 137, applied.

5. Whilst T. was in breach of the regulation in moving forward, it was not reasonably apparent that this would create a situation of danger. On all of the evidence it was open to the magistrate to conclude that there was no contributory negligence on the part of T.

Per McDonald J:

"... If it is established by other evidence that a regulation relied on was breached, that is a fact which must be taken into account when determining whether in all the circumstances the party who breached the same was negligent or guilty of contributory negligence. A breach of a regulation is no more than a piece of evidence to be considered with all other evidence when a court determines the ultimate questions before it. It is to be weighed in the balance with all other evidence before the court and given such weight as is proper in all the circumstances of the case. *Tucker v McCann* [1948] VicLawRp 40; (1948) VLR 222 at 225.

... The magistrate accepted the evidence of Ms Trentin, as he was clearly entitled to do. He found she had stopped three cars back from the corner, level with the front of the trailer. At this time the lights to her and the appellant were red and the vehicles were stationary. She moved forward, following the cars in front of her, when the lights turned to green. On the evidence of the appellant, he had observed a vehicle to his left at the intersection. This was one of the vehicles in front of Ms Trentin. His evidence was that when the lights changed, he allowed this vehicle in the left-hand lane to "clear the intersection before executing (his) left-hand turn". He said further that before executing the turn, he "again looked in (his) mirror and saw nothing and he then executed (his) turn". It was open to the magistrate to conclude on the evidence that the appellant's vehicle remained stationary while the first car on its left cleared the intersection and until the appellant looked again in his mirror observing nothing, including that which he had previously observed, a white car at the rear of his trailer.

... The failure to observe the respondent's motor car, either when the appellant's vehicle was stationary at the lights and before he commenced to execute his turn, or during it, and the failure to take steps

MOTOR VEHICLE COLLISIONS

to avoid the collision which would have been open to him had he observed the car, constituted a breach of the duty of care that the appellant owed to Ms Trentin, having regard to the position in which her car was on the road. At the relevant time, as found by the magistrate, Ms Trentin sounded her horn "loud and long". This warning was heard by another driver on the road who was called as a witness. It was open on the evidence to conclude that this warning was either not heard when it ought to have been heard or not paid attention to by the appellant. It was open on the evidence for the magistrate to conclude that this negligence, when applying the test of common sense, experience and making a valued judgment, was a cause of the collision. See *March v Stramare Pty Ltd* [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095.

... The fact that this movement must have commenced at a time when the appellant's vehicle was stationary and when there were other cars in the left-hand lane, and in such circumstances it would have been open to find that the driver of the respondent's vehicle had grounds to reasonably expect that the presence of her car would have been observed and that the driver of the heavy vehicle, although signalling to turn left, was remaining stationary while the other cars moved forward. This was a relevant matter in assessing this issue. The magistrate found that Ms Trentin stopped her car when she realised there was a danger. It was open to the magistrate to infer that she realised that there was a danger and stopped when the appellant moved his vehicle forward and commenced to execute a left turn. As referred to, on the evidence she was then stationary for some time giving warning of her position and presence. It was open to the magistrate to conclude that when she was moved forward, it ought not to have been reasonably apparent to her that her action would create a situation of danger.

In the circumstances of this case, I am satisfied that notwithstanding that the action of Ms Trentin in moving the respondent's vehicle forward when the appellant's vehicle was stationary constituted a breach of the regulation, that fact, when viewed with all the other relevant evidence, it was open to the magistrate to conclude that there was no negligence on her part in the relevant sense. Even assuming that the actions of Ms Trentin which constituted a breach of the regulation was a failure to take reasonable care for her own safety and the property of the respondent, the facts in this case provide a good example of why the "but for" test should not be a definitive test of contributory negligence in the circumstances of this case. *March v Stramare Pty Ltd (supra)*. I am satisfied that even had the magistrate on the facts found that there was contributory negligence on the part of Ms Trentin, it would have been open to him, when applying the test of common sense, experience and making a valued judgment, to conclude that such actions were not a cause of or contributed to the happening of the collision in the circumstances in which and when it occurred as appeared from the evidence. For those reasons, the appeal should be dismissed."

Per McDonald J in *Keep v Pozzebon* [1994] VicSC 507; MC 51/1994, 1 September 1994.

(o) Motor vehicle collision on narrow country road – driver's forward vision obscured by bend in road – driver travelling at 80-90 km/h – collision with vehicle reversing with driver's side wheels on edge of bitumen

M., who was driving his motor vehicle at 80-90km/h on a narrow country road and approaching a corner with limited visibility, collided with S's. vehicle which was reversing possibly with its driver's side wheels on the edge of the bitumen. At the hearing, the Magistrate found M. to be 100% negligent. Upon appeal—

HELD: Appeal dismissed.

It was open to the magistrate to conclude that it was negligent for M. to approach this corner of the road at a speed which did not enable him to stop before colliding with S's vehicle. It was also open to the magistrate to find that S. was not negligent in the circumstances.

Per Harper J:

"... It was, in my opinion, also open to His Worship to conclude that, as a matter of law, it was negligent to approach this corner of Back Glenlyon Road at a speed which did not enable the oncoming vehicle, on its driver first becoming aware of the respondent's car, to stop the oncoming vehicle before colliding with that car. A driver who is confronted by a bend in a narrow country road which obscures his or her forward vision, and who is therefore also confronted by the possibility of an unseen obstacle ahead, may only be able to avoid colliding either with that obstacle or with oncoming traffic by stopping before the obstacle is reached.

It was open to the magistrate to find that this was the position faced by the appellant shortly before his collision with the respondent's car. It is a short and (given appropriate findings of fact as to such things as speed and distance) legitimate step to hold that the appellant was negligent in not stopping before that collision. His Worship may not, in the words which I have quoted, have expressed the applicable law with the utmost felicity; but I am satisfied that any lack of felicity does not evidence an

MOTOR VEHICLE COLLISIONS

appellable mistake. Until the appellant had been found in breach of a duty of care to the respondent, the question of the respondent's duty is in my opinion irrelevant.

Of course, the respondent's behaviour – and in particular his execution of the reversing manoeuvre in which he was engaged at the time of the collision – is of immediate and direct relevance in determining whether or not the appellant acted negligently. Once that decision has been properly made, the issue of the respondent's contributory negligence, or the issue of any breach by the respondent of his duty to the appellant, may fall for determination. I can find no fault with His Worship's approach to the law in this regard.

Motor vehicle collisions give rise to issues of fact which the courts often find very difficult to resolve. Not least among the problems is the very human tendency to filter the facts through one's subconscious to the extent that when they relodge themselves in the conscious memory they become very different to the reality. It is not necessarily the case that this phenomenon occurred with the recollection of either the respondent or the appellant here. My point is only that, because the memory is a very fallible instrument with which to reconstruct the truth, the task which confronts the courts in discovering the truth is often immensely difficult. The result, regrettably but understandably, is that litigants sometimes feel very disappointed about the results of the litigation.

Doubtless this applies to the appellant in this case. That is not to say that I think that the magistrate was wrong in his findings of fact. This is an appeal on a question of law only; it is therefore not in my power to inquire for myself into the other aspect of the case. I merely acknowledge the importance which litigants commonly attach to the outcome of motor vehicle cases, as indeed to litigation in general. For the reasons which I have endeavoured to state, it is my opinion that this appeal must fail."

Per Harper J in *Murer v Scott* [1996] VicSC 131; MC 20/1996, 2 April 1996.

(p) Motor vehicle collision between two vehicles in intersection controlled by traffic lights

Two vehicles collided in an intersection controlled by traffic control signals. One vehicle turned in front of an oncoming southbound vehicle. The driver of the turning vehicle claimed that she had a green arrow in her favour. The other driver said she had a green light in her favour. On the hearing of the claim, the magistrate found that the driver of the turning vehicle had a green arrow at the time of entering the intersection. He said that there being no clear evidence as to the state of the lights, the driver of the turning vehicle was negligent and was liable for the damage. Upon appeal—

HELD: Appeal dismissed.

It was open to the magistrate to find that there could not have been a green arrow if there was a green light facing the southbound traffic. The magistrate's finding as to the state of the lights could not have been made if the southbound vehicle had entered on a red light. Further, the reference by the magistrate to the obligation on the driver of a turning vehicle would not have applied if that vehicle had turned on a green arrow. In the circumstances, the decision of the magistrate was open on the evidence.

Per Eames J:

"... 16. The fact contributory negligence was not expressly pleaded does not seem to me in all the circumstances of this case to be of importance. The Magistrates' Court is not a court of pleadings and it would have been open to argue contributory negligence had it been appropriate to do so.

... 19. Although His Worship appears to have decided the case without having regard to the state of the lights it must follow from his findings that he did not conclude that the respondent's vehicle entered against a red light, because, as he found, there could not have been both a green arrow and a green light facing the two vehicles at the same time.

20. There was an obvious explanation for the accident which the evidence would have supported, namely, that with respect to the northbound vehicles, and vehicles also intending to turn right into Alexandra Parade, the sequence was that first both a green light and a green arrow would be displayed, but that after some vehicles had turned right the green arrow would cease to be displayed and at the moment a green light would face both north and also southbound vehicles in Nicholson Street. Northbound vehicles intending to turn right would then have to give way to on-coming southbound vehicles.

21. That sequence of lights and that possible explanation was put to the appellant in cross-examination by counsel for the respondent. In her evidence she said, "I looked up when I was just passing the white line and it was a green arrow." Later she was asked, "So what I am putting to you is that you did see the car in front, you looked up before you entered the intersection and you saw that there

MOTOR VEHICLE COLLISIONS

was a green arrow, that while you were in the intersection you saw a green light, but at that stage it wasn't a green arrow?" She replied, "On the point of my vehicle entering the intersection I had a green arrow, that I can say." She was asked, "And what I am putting to you is that you proceeded into the intersection on the assumption there was a green arrow and you failed to give way to the other vehicle, which is what you were meant to do?" She said, "I was turning right and I had the green arrow."

22. Those responses, in my view, are entirely consistent with the witness only being confident that there was a green arrow as she first moved into the intersection, not later.

23. His Worship's findings, which I noted earlier, seem to me to have recognised that that was the limit of the positive assertion made in cross-examination, and to have constituted a finding that that was the extent of the actual state of the observations made by the witness at the relevant time.

24. In expressing himself in terms that, "There being no clear evidence as to the state of the lights," and "an obligation of a turning vehicle evaporates if there is an arrow turn applicable to that car, but that just cannot be determined from the evidence", those statements must be read with His Worship's finding that there could not be a green arrow if there was a green light facing the southbound traffic. Thus, despite the words he unfortunately chose, his finding could not have been made if the respondent's vehicle had entered on a red light.

25. The verdict, therefore, can be supported by the evidence and also by those findings of fact which I have identified as being explicitly and impliedly made by His Worship. Furthermore, as counsel for the respondent noted, there was a good deal of other evidence to support the contention that the appellant had failed to keep a proper look-out at the time. To have spoken of the "higher obligation" of the turning vehicle was potentially (and, probably, actually) confusing, but it followed an acknowledgment that such an obligation would not have applied if that vehicle had turned on a green arrow."

Per Eames J in *Goh v Berry Street Incorporated* [2001] VSC 341; MC 40/2001, 29 August 2001.

9. Duty of Care

(a) Participation by plaintiff with defendant in illegal enterprise – agreement to drive while disqualified

The parties, two youths, took a car on a jaunt from Adelaide to Port Augusta and shared the driving. Each knew that the other was disqualified from holding a driver's licence, and would be committing the offence of driving while disqualified. During the trip, negligent driving by the appellant caused an accident in which the respondent was injured. He sued the appellant in the Supreme Court of South Australia, where at first instance the trial judge dismissed the action on the ground that the appellant owed no duty of care to the respondent because they were engaged in a joint illegal enterprise. However, this decision was reversed by the Full Court, and a verdict entered for the respondent for \$30,500. On appeal to the High Court—

HELD:

(i) Per Mason, Jacobs, Murphy and Aickin JJ (Barwick CJ dissenting): The appeal should be dismissed, since there was no defence to the respondent's action that his injury occurred while he was aiding and abetting the appellant in the commission of the offence of driving while disqualified.

(ii) Per Mason, Jacobs and Aickin JJ: There was no absolute rule that participants in a joint illegal enterprise owed no duty of care to each other. However, a plaintiff's case would fail when the joint illegal enterprise in which he and the defendant were engaged was such that the court could not determine the particular standard of care to be observed. Before the court would say that the appropriate standard of care was not permitted to be established there must be such a relationship between the act of negligence and the nature of the illegal activity that a standard of care owed in the particular circumstances could only be determined by bringing into consideration the nature of the activity in which the parties were engaged.

Progress and Properties Ltd v Craft [1976] HCA 59; (1976) 135 CLR 651; (1976) 12 ALR 59; 51 ALJR 184, followed;

Smith v Jenkins [1970] HCA 2; (1970) 119 CLR 397; (1970) ALR 519; 44 ALJR 78, distinguished.

Bondarenko v Sommers (1968) 69 SR (NSW) 269; [1968] 1 NSWLR 488; 79 WN (NSW) 615; *Henwood v Municipal Tramways Trust (SA)* [1938] HCA 35; (1938) 60 CLR 438; [1938] ALR 312;

Godbolt v Fittock (1963) 63 SR (NSW) 617; [1964] NSWLR 22; 80 WN (NSW) 1110;

Andrews v Nominal Defendant (1965) 66 SR (NSW) 85; [1965] NSWLR 1614, considered.

MOTOR VEHICLE COLLISIONS

In the present case the court was able to determine the appropriate standard of care, since the facts concerning the joint illegal enterprise had no bearing on the standard of care reasonably to be expected of the driver.

(iii) Per Murphy J: The defence of illegality should be confined strictly, so that, where the plaintiff's offence was statutory, recovery would be denied only where denial of recovery was statutory policy, and not because the court, for reasons of policy, declined to adopt a standard or recognize a duty of care. Otherwise, recovery should be denied only where there was a voluntary assumption of the risk.

(iv) Per Barwick CJ (dissenting): Where there was a joint venture to do an act punishable by fine or imprisonment, no narrow or pedantic view should be taken of the nature and scope of the arrangement between the parties when applying the principle of *Smith v Jenkins*, and the consequence to one of the participants of any act done in furtherance of the arrangement or in obtaining the benefit of having carried it out should not give rise to a cause of action. The relationship of those participants should not be regarded as giving rise to relevant rights or duties.

Per Jacobs J (Mason and Aickin JJ agreeing):

"2. The recent decision of this court in *Progress Properties Ltd v Craft* [1976] HCA 59; (1976) 135 CLR 651; (1976) 12 ALR 59; 51 ALJR 184 was not before the Supreme Court of South Australia when it gave its decision. The basis of the principle whereby in some cases a defence of illegality may be raised in an action for negligence was there examined. In my reasons for judgement, with which Stephen, Mason and Murphy JJ agreed, I said:

'A plea of illegality in answer to a claim of negligence is a denial that duty of care arises out of the relationship of particular persons one to another. An illegal activity adds a factor to the relationship which may either extinguish or modify the duty of care otherwise owed. A joint illegal activity may absolve the one party from the duty towards the other to perform the activity with care for the safety of that other. That, it seems to me, is the effect of *Smith v Jenkins* [1970] HCA 2; (1970) 119 CLR 397; (1970) ALR 519; 44 ALJR 78. Where there is a joint illegal activity the actual act of which the plaintiff in a civil action may be complaining as done without care may itself be a criminal act of a kind in respect of which a court is not prepared to hear evidence for the purpose of establishing the standard of care which was reasonable in the circumstances. A court will not hear evidence nor will it determine a standard of care owing by a safe blower to his accomplice in respect of the explosive device. This is an example which gives no difficulty, but other cases can give difficulty in classification' (ALR at 73; ALJR at 190).

I adhere to that statement. I think that it is correct to base the defence upon a denial of a duty of care in the particular circumstances rather than upon a denial of remedy for a breach of the duty of care. A legal duty of care pre-supposes that a tribunal of fact can properly establish a standard of care in order to determine whether there has been a breach of the duty of care. If the courts decline to permit the establishment of an appropriate standard of care then it cannot be said that there is a duty of care.

3. Before the courts will say that the appropriate standard of care is not permitted to be established there must be such a relationship between the act of negligence and the nature of the illegal activity that a standard of care owed in the particular circumstances could only be determined by bringing into consideration the nature of the activity in which the parties were engaged. The two safe blowers provide the simplest illustration. What exigencies of the occasion would the tribunal take into account in determining the standard of care owed? That the burglar alarm had already sounded? That the police were known to be on their way? That by reason of the furtive occasion itself a speed of action was required which made it inappropriate to apply to the defendant a standard of care which in lawful circumstances would be appropriate? The courts will not engage in this invidious inquiry. The reason is no doubt based on public policy. If, then, no standard of care can legally be determined, it cannot be said that there is any duty of care. ...

... 9. On the other hand in *Andrews v Nominal Defendant* (1965) 66 SR (NSW) 85; [1965] NSW 1614 the fact that the plaintiff had permitted the driver of the vehicle to drive that vehicle when it was unregistered and uninsured was held not to be a bar. I would base this conclusion upon the ground that the fact of the vehicle being unregistered and uninsured did not bear upon the question whether or not the degree of care exercised by the driver was in the circumstances reasonable.

10. In the present case the driver of the car was disqualified from driving and therefore his driving of the car was an offence; the passenger knew that the driver was disqualified and aided and abetted him in driving whilst so disqualified. The question is what bearing have those facts on the standard

MOTOR VEHICLE COLLISIONS

of care reasonably to be expected of the driver? The answer is — none whatsoever. I would dismiss the appeal."

Per Jacobs J (Mason and Aickin JJ agreeing) in *Jackson v Harrison* [1978] HCA 17; (1978) 138 CLR 438; 52 ALJR 474; 19 ALR 129 (Noted 52 ALJ 703); MC 27/1978, 16 May 1978.

(b) Duty of care – collision involving a stolen motor vehicle

The defendant escaped from a juvenile detention centre and stole a car and its keys from a garage. The garage reported the theft of the car but not of the keys. When the defendant attempted to use a stolen credit card at a service station, the attendant reported it to the police, who gave chase. A high speed chase ensued, resulting in the defendant colliding with a car driven by the plaintiff. At the time of the collision the police car had slowed down. The plaintiff claimed that the defendant, the police, the juvenile authorities and the garage were all negligent.

HELD: The defendant was clearly negligent. The police were not liable as they had discontinued their active pursuit and had driven with due care having regard to the circumstances. The juvenile authorities were not liable because the accident on the day following the defendant's escape was too far removed from the alleged negligence of custodial care. The garage was not liable as the accident was too remote and could not have been reasonably foreseen.

Home Office v Dorset Yacht Co Ltd [1970] UKHL 2; [1970] AC 1004; [1970] 2 All ER 294; [1970] 2 WLR 1140; [1970] 1 Lloyd's Rep 453; 114 Sol Jo 375, HL, considered.

[*Halsbury's Laws* (3rd edn.), Vol. 28, para. 4 Canada.]

O'Reilly v C and The Canadian Indemnity Co. (1978) 3 WWR 145; MC 60/1978.

(c) Intersection controlled by traffic control signals – duty of driver crossing on green light

1. A motorist has no absolute right to enter an intersection merely in compliance with a green light. However, in determining the respective duties of the drivers, the position of the motorist entering on a green light is somewhat stronger than that of the driver entering against a red light.

2. Whether there has been a breach of the duty of care by the driver with the right of passage depends on whether that driver:

- (a) should have seen the other driver;
- (b) ought reasonably to have anticipated the possibility of a collision; and
- (c) could have done anything useful to avoid the collision.

3. In this case there was no liability for the driver with the green light.

Per Wood J:

"... While it may be accepted that a defendant who enters an intersection with a green light in his favour will not always be blameless if he collides with another vehicle in the intersection, the traffic control signal is a powerful factor in his favour. This is a matter, to my mind, which is well demonstrated by prior decisions. Each of course is a decision based on its own facts, and it would be unwise and unjustified to seek to extract a statement of general principle from them.

Nevertheless the course of judicial reasoning discloses the common sense view which is to be applied in such cases. Reliance was placed by counsel for the plaintiff on the well-known passage in *Sibley v Kais* [1967] HCA 43; (1967) 118 CLR 424; [1968] ALR 158; 41 ALJR 220, where, in a joint judgment, the court said at CLR 427 in relation to the traffic rules imposed by statutory Regulation in Western Australia:

"These Regulations in nominating the vehicle which has another vehicle on its right as the give-way vehicle are undoubtedly salutary and their breach is deservedly marked with criminal penalties. But they are not definitive of the respective duties of the drivers of such vehicles to each other or in respect of themselves: nor is the breach of such Regulations conclusive as to the performance of the duty owed to one another or in respect of themselves. The common law duty to act reasonably in all the circumstances is paramount.

The failure to take reasonable care in given circumstances is not necessarily answered by reliance upon the expected performance by the driver of the give way vehicle of his obligations under the Regulations; for there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties, whether derived from statutory sources or from the common law. Whether or not in particular circumstances it is reasonable to act upon the assumption that

MOTOR VEHICLE COLLISIONS

another will act in some particular way, as for example by performing his duty under a Regulation, must remain a question of fact to be judged in all the particular circumstances of the case. Therefore, it is, in our opinion rightly said that the "right hand rule" is not the be all and end all in relation to questions of civil responsibility'. The obligation of each driver of two vehicles approaching an intersection is to take reasonable care. What amounts to 'reasonable care' is, of course, a question of fact but to our mind, generally speaking, reasonable care requires each driver as he approaches the intersection to have his vehicle so far in hand that he can bring his vehicle to a halt or otherwise avoid an impact, should he find another vehicle approaching from his right or from his left in such a fashion that, if both vehicles continue, a collision may reasonably be expected."

This passage has been approved and applied by the High Court subsequently in *Cocks v Sheppard* (1979) 25 ALR 325; (1979) 53 ALJR 591 and *Baggermaatschappij Boz and Kalis BV v Australian Shipping Commission* (1980) 54 ALJR 382. As McClemens J observed however in *Versic v Connors* (1968) 88 WN (NSW) (Pt 1) 332 at 335; [1968] 3 NSW 770; "*Sibley v Kais* lays down no new principles, but merely restates in a clear manner what they are". [*His Honour then referred to Regulations made under the Motor Traffic Act 1909 (NSW) and continued*]. ...When considering the conduct of the parties in the present case, I think it appropriate to bear in mind the purpose which traffic control lights are designed to serve. Although not elevating this purpose to a rule of law, I believe it should be assumed to be part of the information known to and accepted by motorists. Conveniently, the purpose was described by Scott LJ in *Joseph Eva Ltd v Reeves* [1938] 2 KB 393, in a passage with which I respectfully agree at 410:

"As I said at the outset, the essence of the lighting system is to prevent the presence on what the judge called 'the restricted "area" of the cross-roads of any traffic from the red direction when traffic is ordered forward in the green light direction. Its object is not only to prevent collisions but also to prevent unnecessary delay at cross-roads: and if a car with the green just opened in its favour, summoning it forward, had to keep a lookout for traffic from the red direction, it would prevent that automatic resumption of forward movement by the vehicles temporarily held up, which is vital to the free circulation of traffic. To hold that such a car owes a duty to a lawbreaker crossing from the red direction would undermine the whole system of lights Regulation and defeat an important part of its purpose'."

In this regard I consider the position of the motorist approaching an intersection with a traffic control light in his favour is somewhat stronger than that of the driver of a stand-on vehicle approaching an intersection governed by a stop sign. In the latter case, it seems to me, there is more cause, arising out of common experience, for caution as to the possible approach of a disobedient or unobservant motorist.

An examination of the cases where negligence or contributory negligence has been found against motorists entering intersections with the signal in their favour invariably shows that there was knowledge of the other vehicle, or an opportunity with the exercise of reasonable care for it to have been seen within time for evasive action to be taken: e.g. *Godsmark v Knight Brothers (Brighton) Ltd* 1960 *The Times* 12 May; *Shepherd v Zilm* (1976) 14 SASR 257; *Grace v Sheppard Wine Tankers Pty Ltd* (1978) 18 SASR 541; but cf *Reeves case*; *Radburn v Kemp* [1971] 3 All ER 249; and *Rust v Needham* (1974) 9 SASR 510. The assumption upon which these cases was decided was described by Zelling J in *Shepherd v Zilm* at 260 as:

"... an assumption which any driver may properly make that the drivers of other vehicles will use the road reasonably and in conformity with the law, until he has actual notice that they will not do so, or has disabled himself from obtaining that notice due to his own defective look out."

As Edmund Davies LJ observed in *Radburn v Kemp* at 251, there is "no absolute right to enter a road junction when and merely because the lights turn in your favour". Whether there is a breach of the duty of care by the party with the right of passage will depend on all the other circumstances and prevailing conditions. This will include whether or not the other vehicle should have been seen by the driver with the green light, whether he ought reasonably to have anticipated that it would carry on, and whether once it was seen he could have done anything useful to avoid the accident.

It is for the plaintiff to establish that the first defendant was negligent in not seeing the plaintiff, and in not taking action to avoid the accident. That to my mind required proof that the defendant should have anticipated the possibility of an accident of the kind which occurred, that he could have seen sufficiently far up King St from the centre lane in George St to pick up the plaintiff's vehicle, and that he had time to bring the coach to a stop.

In this regard, the present case is to be considered in the context of my finding that the defendant entered a built up intersection in the centre of the city, on an entirely reasonable course, at a

MOTOR VEHICLE COLLISIONS

reasonable speed and at a time when the green phase was well under way. He was not accelerating rapidly away on the change of light to green, nor was he trying to beat a change to red. In either of these events he might reasonably have anticipated the possibility of another vehicle within the intersection, for example, because it was under the charge of a slow moving driver, or of an impatient driver.

I see no reason why a prudent driver in the position of the first defendant should have anticipated the possibility of a vehicle on his right disobeying the traffic signal in the conditions which thus prevailed. Next, I am satisfied that the first defendant's vision to his right was substantially limited by the angle of the intersection and the building on the south-western corner. Finally, I am satisfied that the first defendant could not reasonably have been expected to have brought his coach to a stop so as to avoid the accident within the time available, whether that is taken as the time from which he might first have seen the vehicle had he been looking to his right, or the time he first saw it. In this regard there was nothing in his position or speed of approach which was either unusual or unreasonable so as to affect his vision or control of the coach.

In the result, although I entertain considerable sympathy for the plaintiff in her predicament, I am not satisfied that she has proved that the first defendant was negligent. There will be a verdict for the defendants, and I order the plaintiff to pay their costs."

Per Wood J in *Henderson v Hassel & Anor* (1986) 3 MVR 359; MC 16/1987, 24 June 1986.

10. Cases involving Contributory Negligence — Apportionment

(a) Collision involving a motor car and a heavy truck – assumption by truck driver that other driver would yield right of way

Defendant driving a 13-ton lorry on Princes Highway, Corrimal NSW, claimed that he made the assumption that the plaintiff would stop at the intersection and yield the right of way that was rightfully hers (the plaintiff); and that on this assumption continued at a speed which, having regard to his load and nature of vehicle, made his decision irreversible. Defendant had sounded his horn and it was found that this caused the plaintiff to hesitate or prop before moving into defendant's path. Argued that this prop or hesitation either broke the chain of causation or made possible a finding of contributory negligence. The Court found in favour of the plaintiff. Upon appeal—

HELD: Appeal dismissed. No contributory negligence on the part of the plaintiff.

1. The question was whether the Court should have made a finding of contributory negligence against the plaintiff on the basis that, although warned by the defendant's horns, she went forward across his path making a collision inevitable. This finding was not made. By the time the defendant found it necessary to sound his horns the emergency had arisen. He sounded them from some distance back continuously, and they were apparently very loud. The plaintiff was then in a situation of danger and it would have been difficult for her to assess, even though she was on the western side of the road, what was the best thing to do.

2. In all the circumstances the Court was not satisfied that she was guilty of any want of reasonable care on her own behalf which contributed to the accident.

Per Reynolds JA:

"The argument for the appellant sought to treat this second stop as if it were of such a nature and such a duration that judgment could be exercised and a conscious decision taken, involving, as I have indicated, either the termination of the initial situation of danger or a failure to take due care thereafter for her own safety. His Honour, however, treated it as but an incident in a continuing situation brought about entirely by the negligence of the defendant, and as I think, rightly.

I am mindful of the principles recently enunciated by the High Court in *Edwards v Noble* [1971] HCA 54; (1971) 125 CLR 296; [1972] ALR 385; (1971) 45 ALJR 682, and *a fortiori*, I do not think it appears that His Honour was wrong. There is no misdirection in law: there is no misapprehension of fact; no important facts have been over-looked. His Honour has indeed favoured the litigants and this Court with careful and detailed reasons, and there is no suggestion of undisclosed or unexpressed error. His important finding is at p91 on the question of contributory negligence and should not be disturbed. It is in these terms:-

"The question is whether I should make a finding of contributory negligence against the plaintiff on the basis that, although warned by the defendant's horns, she went forward across his path making a collision inevitable. I do not think I should make this finding. By the time the defendant found it necessary to sound his horns the emergency had arisen. He sounded them from some

MOTOR VEHICLE COLLISIONS

distance back continuously, and they are apparently very loud. The plaintiff was then in a situation of danger and it would have been difficult for her to assess, even though she was on the western side of the road, what was the best thing to do.

In all the circumstances I am not satisfied that she was guilty of any want of reasonable care on her own behalf which contributed to the accident.'

My view on this aspect of the case is not influenced by any consideration of judicial restraint. I would propose that so much of the appeal as relates to the issue of liability fails."

Per Reynolds JA (with Hardy and Bowen JJA NSW Court of Appeal) in *McGirr v Tulleman* MC 20/1974, 15 November 1973.

(b) Contributory negligence – must be pleaded

On a dark night a motor vehicle driven by the plaintiff ran into the rear of an unlit articulated vehicle parked by the roadside. As a result the plaintiff sustained personal injuries. He brought an action for damages against the driver of the articulated vehicle, claiming that he had been negligent. The defendant filed no defence even though ordered to do so by the Court, and was accordingly debarred from defending the action. He was given notice of the date and time of the hearing of the action but did not attend. The Judge found that the plaintiff was one-third to blame for the accident and reduced the damages accordingly. The plaintiff appealed contending that the judge was not entitled to do so because contributory negligence had not been pleaded.

HELD: The defence of contributory negligence was only available if it was pleaded. It followed that in the absence of a pleading by the defendant of contributory negligence, the judge had no jurisdiction to make a finding of such negligence on the part of the plaintiff. Accordingly the appeal would be allowed and the plaintiff awarded the full amount of the damages.

Per Sir David Cairns (Orr and Stamp L JJ agreeing)

"... That evidence was supported by a doctor's report. It was contended by counsel, who appeared in that court for the plaintiff and has appeared for him in this court, that in those circumstances the judge was not entitled to reduce the damages on the grounds of contributory negligence because no such matter was in issue, the defendant having delivered no defence and having been debarred from defending. The judge did not accept that contention. There is no indication in his judgment as to the view he took about it. It is implied that he rejected it because he simply said:

"I reach the conclusion that the plaintiff must have been contributorily negligent and that the blame for the accident should be apportioned as to one third to the plaintiff and two thirds to the defendant."

There appears to be no direct English authority on the question of whether in the absence of a pleading of contributory negligence the court has jurisdiction to make a finding that there was negligence on the part of the plaintiff. Contributory negligence is dealt with, so far as the statute is concerned, in the *Law Reform (Contributory Negligence) Act 1945*, s1(1), which provides:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ..."

That leaves open the question of whether the court can only make a finding of contributory negligence if there is a plea to that effect. It appears to me that, with all respect to Judge McDonnell, it was not right in this case to treat the matter as if there were a plea of contributory negligence before the court. That seems to me to be the rule in relation to procedure. The opposite view would mean that a plaintiff in any case where contributory negligence might possibly arise, even though it was not pleaded, would have to come to court armed with evidence that might be available to him to rebut any allegation of contributory negligence raised at the trial.

It is true that in the ordinary case it would not be likely to involve anything beyond the evidence he would be given to establish negligence on the part of the defendant, but circumstances are reasonably conceivable in which it might be. In my view, this appeal should succeed and the Judgment should be amended by increasing the amount of damages to £598 with the appropriate costs."

Per Sir David Cairns (Orr and Stamp L JJ agreeing) in *Fookes v Slaytor* [1979] 1 All ER 137; [1978] 1 WLR 1293; [1979] RTR 40; MC 34/1979, 9 June 1978.

MOTOR VEHICLE COLLISIONS

(c) Intersection controlled by traffic control signals – one driver entering intersection when signals in middle of red phase – whether contributory negligence

1. Where a driver entered an intersection when the traffic control signals were in the middle of the red phase, it was held that the other driver was not obliged to foresee that kind of homicidal behaviour and was not guilty of contributory negligence.
2. Whilst it is important that people drive defensively, the driver with a green light is not required to cross an intersection with unreasonable apprehension at the expense of risking a rear end collision with a following motorist.

Per Cox J:

"... Fortunately there was an eye witness, Mr Lewis, who was disinterested and, I am satisfied, completely reliable. His evidence was entirely favourable to the plaintiff. I find that the defendant was negligent in entering the intersection against the red light.

Mr Janus, for the defendant, submitted that the plaintiff must at least be guilty of contributory negligence. She should have kept a better look out. The plantation between the up-track and the down-track of the Port Road is 108 feet wide. There were scattered trees and shrubs on the plantation but the evidence suggests that the two drivers could have seen one another had they looked. There are two problems as it seems to me, about Mr Janus's argument. First, despite what I have just said, the evidence about the view across the corner is not entirely clear. I am not sure what obstruction, if any, was created by the trees and shrubs.

I note that the defendant did not see the plaintiff as she came through the plantation, although one would expect that any motorist deliberately entering the intersection against the red light (as I consider the defendant did) would at least satisfy himself first that it was safe to do so. More important, it is a question of what may reasonably be required of a motorist in the plaintiff's circumstances. Road users have all learned to be ready for the motorist who enters a controlled intersection after the lights have changed from green to amber, even from amber to red, but that was not this case. The lights facing the plaintiff changed to green before she got to the up-track of the Port Road and they were still green, according to Lewis's evidence, an appreciable time after the collision. It follows that the defendant entered the intersection when the lights were more or less in the middle of their Port Road red phase.

I do not think the plaintiff was obliged to foresee that kind of homicidal behaviour. No doubt some motorists would have looked about them more and have seen the defendant's car approaching, but that is not the test. And what if the plaintiff had seen the defendant's car approaching? It is important, I think, not to set an unrealistically high standard for the "stand on" driver in right-of-way cases and the like. We all know that there are people who drive around the city on their brakes, stopping when they have to but not a moment before they have to.

The behaviour of such people at a controlled intersection is unpredictable, unless the prediction is to be based upon the almost invariable obedience of motorists (including, at the last instant, that sort of motorist) to such a definite and uncompromising warning as a red traffic light that is in the middle of its phase. It is important that people drive defensively, but it is no use driving across intersections such as this in a state of constant and unreasonable apprehension, quick to avoid a collision with someone on the left who might drive straight through the red light but at the expense of risking a rear end collision with a following motorist instead. I do not think that the plaintiff was guilty of contributory negligence."

Per Cox J in *McCutcheon v Grimmond (No. 2)* [1986] 40 SASR 487; MC 15/1987, 28 May 1986.

(d) Colliding with rear of vehicle in front – front vehicle almost stationary beyond a dangerous blind crest – both drivers negligent – apportionment 80/20%

Where a person drove his motor vehicle at a speed which was excessive in the circumstances and failed to keep a proper look-out and ran into the rear of another vehicle which was almost stationary a short distance beyond a dangerous blind crest, both drivers were negligent, with liability apportioned 80% against the driver of the near-stationary front vehicle.

Per Shanahan DCJ:

"... The picture emerges of the appellant driving his car up and over the crest and being confronted with the respondent's car, which was either stopped or going forward very slowly at the time of impact, which occurred a short distance past the crest.

MOTOR VEHICLE COLLISIONS

The stipendiary magistrate found that the appellant knew the road very well, that the visibility of the crest was not particularly good and that he was not aware of a car being ahead of him. He found that the appellant must bear the major responsibility for the collision. He found that he drove at a speed which was excessive for the circumstances and that he failed to keep a proper look-out. He also found that the respondent contributed to the collision in testing his brakes and bringing his vehicle to a stop, or a near stop, where it was not prudent to do so. He apportioned liability – 80% against the appellant, 20% against the respondent.

... I am of the further opinion that the appellant did not approach it with due care. His speed ought to have been less. His look-out more vigilant. Danger on the other side was not "a mere possibility which would not occur to the mind of a reasonable man." I see no grounds for interfering with the finding of the stipendiary magistrate that the appellant was driving at a speed which was excessive in the circumstances or that his look-out was defective. However I find that he has erred when he apportioned liability. Apportionments are not lightly interfered with. See *Pennington v Norris* [1956] HCA 26; (1956) 96 CLR 10 at 16 where the High Court said:

"It is to be expected therefore that cases will be rare in which the apportionment made can be successfully challenged ... but giving full weight to these considerations in the present case, we are unable to avoid the conclusion that, in apportioning the responsibility equally, His Honour must have overlooked certain features of the case and that the amount by which he reduced the assessed damages cannot really be supported."

The same case decides that the apportionment is to be measured by the degree of departure from the standard of care of the reasonable driver. I find that the stipendiary magistrate to use the words of the case, "must have overlooked certain features of the case". The appellant's fault lay in his failure to direct his mind on what may have been on the other side of the crest. The respondent's fault lay in having his car stopped or near stopped "a short distance" – say 20 metres or so over the crest. The configuration of the crest ought to have drawn his attention to the danger of having his car where it was – hidden from cars coming over the rear. It almost constituted a trap.

I find on the facts as accepted by the stipendiary magistrate that the apportionments decided upon by him cannot really be supported. I find that the degree of departure from the standard of care of the reasonable man in the case of the appellant is venial compared with the degree of departure from that standard by the respondent. I find the apportionment of liability to be – as against the appellant 20% – as against the respondent 80%. I allow the appeal with costs to be taxed. I order that the \$400 security for costs be paid out to the solicitors for the appellant."

Per Shanahan DCJ (Brisbane Qld District Court) in *Sellin v Lowcock* MC 18/1989, 18 January 1989.

(e) Large truck blocking roadway – truck not well lit – dark and raining – truck struck by vehicle travelling along roadway – question of negligence – whether apportionment appropriate

S. was driving his motor car at the speed limit in the middle lane of the Maroondah Highway. I. was the driver of a large truck which entered the highway and stopped in a gap in the median strip with its rear wheels about halfway across the lane occupied by S.'s vehicle. It was dark and raining at the time and the truck was not well lit.

HELD: It was open to the magistrate to find that the:

(a) truck driver was negligent and 90% to blame for not waiting until the road was clear and in taking up a position in the middle of the road thereby creating a considerable hazard;

(b) motor car driver was negligent and 10% to blame for not looking sufficiently far ahead given the prevailing conditions and the speed at which he was travelling.

Per Hayne J:

"... However, in my view, the evidence below was such that it was open to the Magistrate to conclude that Ireland moved from the position near the service road median strip at a time when he could not safely have completed the right-hand turn that he intended to make even if the city bound car mentioned by Ireland in his evidence had not moved, as it did, from the centre lane to the lane closest to the central plantation.

Thus it was, in my view, open to the Magistrate to conclude that Ireland moved into the position that he did at a time when there was a significant risk that in doing so, he would thereby create the very considerable hazard presented by a stationary truck of the dimensions that I have mentioned.

MOTOR VEHICLE COLLISIONS

Thus, it was open to the Magistrate to find that there was negligence on the part of Ireland "in not waiting until it was all clear". In those circumstances, it is not necessary for me to say whether it was open to the Magistrate to find, as he did, that given the difficulties likely to be encountered in coming out of Cook Road and turning right onto the Maroondah Highway the driver should have taken, or the company could have prescribed, a route different from that which was in fact adopted. The evidence below of the extent to which the route was prescribed by the company is, in my view, not altogether clear. If it were necessary for me to form some conclusion on this aspect of the matter, it would not seem to me to be demonstrated that the Magistrate could not have concluded that there was negligence in taking the route that Ireland in fact took.

As I have noted earlier, the Magistrate spoke in his findings in terms of Ireland not giving way "to on-coming traffic 2 minutes down the road". At first sight, that comment suggests an unusually high standard of care being required of Ireland. However, the significance of the comment is to be understood in the light of the immediately succeeding words recorded concerning the Magistrate's findings – that Ireland "knew or ought to have known it would cause and could be blocked in those conditions". (By this I understand the Magistrate to be referring to the significant risk that Ireland would have to stop his truck in the position that in fact he did.) It follows that I am of the view that the Magistrate could find on the evidence below that Ireland was negligent. As I have already noted, the Magistrate found that Sanchez did not keep a proper lookout; that finding was inevitable given the evidence of Sanchez that he did not see the truck until the last moment.

The appellants submitted that the Magistrate should have found (but did not find) that Sanchez was travelling at an excessive speed. The Magistrate found that before the accident Sanchez was travelling at the speed limit, 75 kph. Of course, the finding that the driver was travelling at the maximum speed allowed by law is by no means conclusive of the question whether that speed was in all the circumstances excessive. But the question of the speed at which Sanchez was travelling on this occasion does not, in my view, in the circumstances of this case raise any separate question for consideration from Sanchez' failure to keep a proper lookout – failure adverted to by the Magistrate. Even if it were appropriate to have regard to notions of last clear chance or opportunity to avoid the accident, something which I gravely doubt, Sanchez' negligence in this matter lay in the fact that he was not looking sufficiently far ahead given the conditions and the speed at which he was travelling. I do not consider that the appellant demonstrates any error on the part of the Magistrate in this respect."

Per Hayne J in *Ireland & Anor v Sanchez* [1992] VicSC 642; MC 08/1993, 10 December 1992.

(f) Finding by magistrate that one party liable for the collision – whether magistrate bound to conclude driver guilty of contributory negligence

S. was driving a truck which collided with a motor car owned by APP/L and driven by R. R. was exiting from a driveway and turned left thereby colliding with the truck which was oncoming at speed and at least in the middle of the road if not further to the right. Further, the collision occurred on a narrow roadway overhung by trees on which trucks were prohibited. The Magistrate found that the truck driver was 100% negligent for the collision and subsequent damage. Upon appeal—

HELD: Appeal dismissed.

1. Given that the Magistrate accepted that the accident occurred on a roadway on which trucks were prohibited, which was narrow and overhung by trees, and that the probability was that the truck was travelling 'at least in the middle of the road, if not further to the right' it was open to the Magistrate to find that the truck driver's negligence was a cause of the respondent's damage.

2. Likewise, the Magistrate's finding as to speed could not logically materially affect the case as to contributory negligence. In view of the Magistrate's finding that the truck driver 'was oncoming at a speed', this finding did not demonstrate error with respect to the issue of contributory negligence. It could not compel a conclusion the driver of the motor car was guilty of contributory negligence.

3. In the circumstances, the truck driver failed to demonstrate that the Magistrate was bound to conclude, either that there was no negligence on the motor car driver's part, or that the evidence as a whole necessarily required a finding of contributory negligence.

Per Osborn J:

"... 7. First, it is submitted that contributory negligence was not pleaded. The decision of the Court of Appeal in *Spotless Services v Herboth* [2009] VSCA 285; (2009) 26 VR 373 is in point. In that case, Mandie JA stated (at VR 379):

In my view the authorities establish that a defendant generally cannot rely upon a defence of

MOTOR VEHICLE COLLISIONS

contributory negligence without having specifically pleaded the same, nor should a court apportion liability in the absence of such plea. The only relevant exception is no doubt where, in the absence of a specific plea, the parties have in the way that the case has been conducted put the matter in issue at trial.

8. Mr Wilmoth submits that although contributory negligence was not pleaded, the matter was put in issue at trial. He points to the fact that the Magistrate encapsulated the issues before her as being the sole or single issue of 'how did the collision occur and effectively whose fault was it'.

9. I doubt that this is sufficient. I note that there was no evidence adduced or admission made of agency as between the respondent and Mr Ratnam. It seems to me that the better view is that the issue of contributory negligence, as a defence, was simply not specifically adverted to by counsel or the Magistrate. Nevertheless, I do not rest my decision on this technical ground.

... 20. I am not persuaded that the statement contained in her Honour's *ex tempore* judgment concerning speed is to be understood as a finding that the appellant's speed was negligently excessive. That statement is as follows: 'I accept the plaintiff looked both ways, but that he could not avoid the truck which was oncoming at a speed. I cannot be satisfied how fast it was going.'

21. The bases of the Magistrate's findings of negligence were summarised in the immediately preceding passages of the judgment, namely that she accepted that the accident occurred as described by Mr Ratnam, that it occurred on a roadway on which trucks were prohibited, which was narrow and overhung by trees, and that the probability was that the truck was travelling 'at least in the middle of the road, if not further to the right'.

22. These matters provided more than sufficient basis to find that the appellant's negligence was a cause of the respondent's damage.

23. Likewise, the Magistrate's finding as to speed could not logically materially affect the case as to contributory negligence, which, as I understand it, is at the core of this appeal. I hold specifically that the Magistrate's finding as to speed, expressed as it was, does not demonstrate error with respect to the issue of contributory negligence. It could not compel a conclusion the appellant was guilty of contributory negligence.

24. The appellant has failed to demonstrate that the Magistrate was bound to conclude, either that there was no negligence on the respondent's part, or that the evidence as a whole necessarily required a finding of contributory negligence. Accordingly, the appeal will be dismissed."

Per Osborn J in *Singh v Alston Post Pty Ltd* [2011] VSC 534; MC 37/2011, 19 October 2011.

11. Claims for Cost of repairs etc

(a) Claim for cost of repairs and loss of no claim bonus – complainant indemnified by insurance company for cost of repairs

In an action for negligence resulting from a motor car collision, the claim for damages was under two heads: the cost of repairs and a claim for the amount of a no claim bonus lost by the complainant as a result of having recourse to his insurers. The Magistrate accepted the evidence of defendant's negligence and of the loss of the no claim bonus but took the view that since the cost of repairs had been paid to the complainant under his insurance policy he could not recover them as damages from the defendant. He seems to have taken the view that having been indemnified the complainant had not suffered any loss. However, the Magistrate allowed the complainant the amount claimed by way of loss of no claim bonus and made an order for that amount only. Upon order nisi to review—

HELD: Order absolute in relation to the claim for damages for cost of repairs. Order discharged in relation to the order for the no claim bonus.

1. The fact that the plaintiff's own insurance company had paid the particular loss was not a thing which the defendant the wrongdoer, could set up in diminution of damages.

Morley v Moore (1936) 2 KB 359; (1936) 2 All ER 79, followed.

2. The fact that the complainant recovered from the insurance company and subsequently recovered also from the defendant so that at that stage he stood to be more than indemnified, the surplus moneys were held on trust for the insurance company and must be accounted for to it.

3. Accordingly, the magistrate was in error in declining to make an order for the damages for repairs.

4. The amount of a no claim bonus lost as the result of an accident caused by the defendant's

MOTOR VEHICLE COLLISIONS

negligence can be recovered by the plaintiff who sustains the loss. In a sense this loss flows from a combination of the defendant's negligence with the terms of a contract made between the complainant and the third party, and it is as a consequence of those terms that the complainant suffers the alleged loss.

5. Accordingly, the magistrate was not in error in deciding that the no claim bonus lost as a result of the defendant's negligence would be recovered.

Per Lush J:

"On this Order to Review the complainant challenges the correctness of the Magistrate's decision that the cost of repairs was recoverable because the insurance moneys had been received. The fact that a plaintiff or complainant in these circumstances receives complete or partial indemnity from an insurer does not affect the liability of the defendant in any way. If, after indemnity, an action is brought against the defendant the Court usually does not know whether the action is brought at the instance of the insurance company for its own benefit or brought by the injured party independently of the insurance company. The Court may often guess that the action is in fact brought at the instance of the insurance company, and in the present case some indication was given to the magistrate that that was so. Whichever origin the action has the defendant's position is the same. Perhaps the simplest way of putting it in business terms is that the insurer is insuring the complainant against damage to his or her vehicle and is not insuring the defendant against liability for damage inflicted.

The law on the subject was clearly stated in the case of *Morley v Moore* (1936) 2 KB 359; (1936) 2 All ER 79 to which Mr Berkeley has referred, at p362 of the report (2 KB) where Sir Boyd Merriman says 'that a long line of authorities establishes that the mere fact that the plaintiff's own insurance company has paid the particular loss is not a thing which the defendant the wrongdoer, can set up in diminution of damages', and with that statement I respectfully agree.

If, as in this case, the fact is that the complainant has recovered from the insurance company and subsequently recovers also from the defendant so that at that stage he stands more than indemnified, the surplus moneys are held on trust for the insurance company and must be accounted for to it. In view of the evidence relating to damage which was before the Magistrate in this case I think that it is unnecessary to send the matter back for assessment of the damage, and I propose to make an order which will have the effect of granting the complainant the amount claimed.

Turning to the second head of damages, which perhaps is strictly not the subject matter of this appeal, there is indirect authority in the case cited by Mr Berkeley of *Ironfield v The Eastern Gas Board* (1964) 1 All ER 544; [1964] 1 WLR 1125 for the proposition that the amount of a no claim bonus lost as the result of an accident caused by the defendant's negligence can be recovered by the plaintiff who sustains the loss. In a sense this loss flows from a combination of the defendant's negligence with the terms of a contract made between the complainant and the third party, and it is as a consequence of those terms that the complainant suffers the alleged loss.

There is, of course, no novelty in the idea that a plaintiff can recover from a defendant in circumstances like this sums which he has lost as the result of the effect of the accident on the terms of the contract between the plaintiff and the third party. Perhaps the commonest instance of this is a claim for loss of a plaintiff's wages, but a different claim of the same type is also encountered in these Courts when a plaintiff is deprived by the defendant's negligence of the capacity for performing a specific contract on which he is engaged, or from entering into other contracts.

It seems to me, therefore, that I should not interfere with the Magistrate's decision that the no claim bonus lost as a result of the defendant's negligence should be recovered in these proceedings. I do not regard it as too remote."

Per Lush J in *Fyander v Sutherland* [1966] VicSC 3; MC 01/1976, 4 February 1966.

(b) Claimant sought from other party the amount of the excess which was paid – a release was signed in full and final settlement

This matter was a claim for damages to the complainant's vehicle caused by the defendant's negligence in his own vehicle. Counsel for the defendant admitted that his client was guilty of negligence and liable for the collision and admitted quantum of the resulting damage. Counsel for the complainant in his turn admitted that the complainant had signed a release to the defendant in consideration of payment of \$100 and in substance admitted that this sum would have to be applied in reduction of damages. The defendant's counsel then stated the defendant's defence was a defence based on the release. The magistrate upheld the defence of release. Upon order nisi to review—

HELD: Order nisi discharged.

MOTOR VEHICLE COLLISIONS

1. There was only one claim: the plaintiff's claim for the total damage which under Condition 3b his insurer was entitled to prosecute for its own benefit. It was not open to the plaintiff by contract with his insurer or otherwise to divide the single claim into two or more claims to be separately prosecuted.

2. The Magistrate was not obliged to find that the complainant intended to settle his \$100 excess.

Per Lush J:

"... In my opinion there was only one claim, the plaintiff's claim for the total damage which under Condition 3b his insurer was entitled to prosecute for its own benefit. It was not open to the plaintiff by contract with his insurer or otherwise to divide the single claim into two or more claims to be separately prosecuted. ..."

Per Lush J in *Wright v Gunston* [1975] VicSC 462; MC 04/1976, 12 September 1975.

(c) Motor vehicle under hire-purchase agreement – whether amount due from hirer under such agreement recoverable as damages from defendant

A car in the respondent's possession under hire-purchase was damaged beyond repair as a result of the appellant's negligence. The Supreme Court of the ACT made an order for —

- (a) the market value of the car – \$4800
- (b) loss of use of the vehicle – \$200
- (c) amount to pay out hire-purchase agreement – \$1704.

An appeal to the Federal Court in respect of the amounts of \$200 and \$1704 was the subject of this decision. All three judges agreed the appellant was liable for the \$200 since damages might be recovered for loss of use of a non-profit earning chattel. On the question of the amount to pay out the termination of the hire-purchase agreement, the court was divided. Blackburn and Franki JJ agreed the appellant would be liable for economic loss arising from termination of the hire-purchase agreement only if a special relationship existed between the appellant and the respondent. This was based on the High Court decision of *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* [1976] HCA 65; (1976) 136 CLR 529; 11 ALR 227; 51 ALJR 270, however, each came to a different view on the facts as to whether, in this case such a special relationship existed. The only evidence as to such a special relationship was that the drivers of both cars worked together and the respondent had mentioned in general conversation to the appellant: "It cost me \$7000 and I am paying it off to Lombards." It is to be noted that the accident occurred away from work.

Per Blackburn J:

"I cannot believe that the law requires that the reasonable man driving a motor vehicle on the highway has a duty to keep a sharp lookout for those vehicles, and those persons, which are the subject of hire-purchase agreements about which he has previously had some information. It is for this reason with great respect to Franki J that I do not agree the principle of the *Willemstad* is brought into play by the facts of this appeal."

Per Blackburn J in *Millar v Candy* [1981] FCA 208; (1981) 38 ALR 299; (1981) 58 FLR 145; MC 72/1982, 15 December 1981.

(d) Vehicle not repaired at hearing date – award made – whether interest should be allowed

Where the cost of repairing a damaged motor vehicle has not been incurred at the date on which an award is made, the court must not allow interest in respect of the amount awarded.

Per O'Bryan J:

"The second substantial ground of appeal concerns the award of interest on the damages. The learned Magistrate awarded interest of \$66.34. Mr Gunst argued that because the damage had not been suffered before the Order was made, no interest should have been awarded. Section 60 of the *Supreme Court Act* 1986, which applies in the Magistrates' Court, provides in sub-section (3):

"If the damages awarded by the Court include any amount for—

- (b) compensation for loss or damages to be incurred or suffered after the date of the award;

the Court must not allow interest in respect of any amount so included or in respect of so much of the award as in its opinion represents any such damages."

Unfortunately, when the Magistrate announced his decision and made the award, including the award of interest, the point concerning interest was not raised. Mr Gunst argued that because repairs to the respondent's vehicle had not been carried out at the date of the hearing, and the cost not incurred,

MOTOR VEHICLE COLLISIONS

no interest should have been awarded in respect of the cost of repairs. It is not disputed that interest should not have been awarded in respect of the cost of hiring a replacement car. It is by no means clear, however, what interest, if any, was awarded in respect of the cost of hiring a replacement vehicle. The Magistrate was not asked to give reasons for his award of interest.

Mr Burchill for the respondent, argued that the test for damage in respect of the car is diminution in value and such damage was suffered when the accident occurred, therefore interest was claimable in respect of the vehicle under s60(1). I am not persuaded that this argument is correct. The nature of the claim was the cost of repairs and the cost of those repairs had not been incurred when judgment was given. The Summons states in respect of the question - "What is the nature of your claim?", "Cost of repairs to the plaintiff's vehicle, including assessment fee and the cost of a replacement vehicle".

In my view, the learned Magistrate erred in awarding interest as he did. Accordingly, Grounds C and D of the appeal will be upheld. Grounds A and B of the appeal fail. Accordingly, the appeal will be allowed in part and there will be deleted from the judgment the sum of \$66.34. In the circumstances, I do not consider that the appellant is the successful party, the principal grounds of this appeal were Grounds A and B. In respect of these grounds, the appellant has failed. Consequently the order for costs will be that the respondent is entitled to have his costs of the appeal paid by the appellant."

Per O'Bryan J in *Antrim v Hinkley* MC 09/1994, 29 March 1994.

(e) Repairer authorised to repair vehicle – solicitors authorised to recover damages

C.'s motor vehicle was damaged when it was involved in a collision with a vehicle driven by S. C. signed a document headed "Recovery Authority" which authorised the repair of the car and a firm of solicitors to act for C. in the recovery of damages and costs. When the matter came on for hearing, the magistrate dismissed C.'s claim on the ground that he had not suffered any monetary loss. On appeal—

HELD: Appeal allowed. Dismissal set aside. Order on the claim for damages.

By signing the Recovery Authority, C. assigned to the repairer his interest in the chose of action being his claim for damages against S. As the assignment operated only in equity, it was necessary for the action against S. to be brought in C.'s name.

Per Hayne J:

"... However this may be, even if the agreement on its true construction is that the repairer agreed to repair the vehicle in return for Croce giving to him the irrevocable authority that I have mentioned, it does not mean that Croce had no action against Steel. As I have said, it may well be that the authority amounted to an assignment of the cause of action by Croce to the repairer. Even if this is so, and even if the assignment was in full satisfaction of any claim that the repairer may have had against Croce for the cost of the work that was to be performed, it does not follow, as the learned Magistrate seemed to conclude, that Croce therefore has no claim against Steel. The assignment was one of which no notice was given to Steel, and it could therefore operate only in equity, even if a claim for damages for tort can be assigned under the statutory provisions of the *Property Law Act* s134. See *May v Lane* (1894) 64 LJQB 236, 238; cf. *King v Victoria Insurance Company* [1896] AC 250; 74 LT 206; 44 WR 592; 65 LJPC 38; 12 TLR 285.

The assignment being one which could operate only in equity, it follows that any action against the tort-feasor must be brought in the name of the assignor. The assignee would have no right to enforce the claim in his own name. See, for example, *Marchant v Morton Down & Co* [1901] 2 KB 829, 832; *King v Victoria Insurance Company*, (*supra*) 254-256; Vol. 6, *Halsbury* 4th Ed., (Replacement) para.22.

Thus, even if the third question of law posed in this matter is answered "Yes", and even if Croce had assigned his cause of action in full satisfaction of the price of the repair work, it would not follow that Croce's action should have failed. He would still have been the proper plaintiff against Steel, although he would have been bound in equity to hold the proceeds of any judgment or settlement for the benefit of the repairer.

... However, I do not consider that these matters mean that Croce had not suffered loss and damage as a result of the accident, and in the end I did not understand the respondent to seek to support the judgment below on these bases. The fact remains that Croce's property had suffered damage. Whether he had the vehicle repaired or not, *prima facie*, he was entitled to recover the cost of putting it into its pre-accident condition from the party who, by his negligence, had caused that damage. In my view, it is again nothing to the point that Croce was able to make some arrangement, even perhaps some unusual arrangement, with the repairer about the terms on which the repairs would be carried out. It matters not whether, through ignorance, inadvertence or deliberate choice, the repairer chose to give up the security that ordinarily he might be entitled to assert in protection of his claim to payment for the work done. The bare facts that the repairer chose not to make any demand for payment from

MOTOR VEHICLE COLLISIONS

Croce, and that the repairer chose not to exercise any lien that he may have had over the vehicle as security for payment for the cost of repairs, do not conclude the question whether Croce was liable to pay for the repairs. In my view, the fourth and fifth questions of law that I have mentioned above should each be answered "No". I consider that the appeal should be allowed."

Per Hayne J in *Croce v Steel* [1993] VicSC 137; MC 41/1993, 29 March 1993.

(f) Collision between motor vehicle and tram – economic loss sustained by tramway operator – operational performance penalties payable by tramway operator to third party

Pursuant to a Franchise Agreement with a third party, M. operated tramway passenger services. The Agreement provided for the payment by M. to the third party of certain penalties when its services were delayed. One of M.'s trams collided with a motor vehicle negligently driven by I. When M. subsequently commenced proceedings against I., the particulars of damage included an amount by way of operational penalties said to have been imposed on M. by the third party. In dismissing the claim, the Magistrate identified the kind or genus of loss as a reduction of a financial benefit payable by a third party or the imposition of a financial penalty upon M. by a third party. The Magistrate also found that the loss as identified was not reasonably foreseeable. Smith J dismissed the appeal [MC 12/2008]. Upon appeal to the Court of Appeal—

HELD: Per Redlich J and Williams AJA, Neave JA dissenting, appeal allowed. [2008] VSC 10; (2008) 49 MVR 331; MC 12/2008 overruled.

1. Per the Court: The characterisation of the kind or genus of loss or damage suffered by M. was a question of law and not of fact.

2. The test for remoteness of damage is that established in *The Wagon Mound* [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1 All ER 404 and applied in *National Australia Bank Ltd v Nemur Variety Pty Ltd* [2002] VSCA 18; (2002) 4 VR 252; [2002] Aust Torts Reports 81-645 namely, whether the damage claimed by the appellant is 'of such a kind or genus that a reasonable person should have foreseen'. This involves a two stage process. First, it is necessary to identify the particular kind or genus, to which the loss belongs ('the categorisation question'). Second, once the particular kind or genus has been identified, it is necessary to determine whether a reasonable person in the position of the defendant ought to have foreseen loss of that particular kind or genus.

3. The categorisation applied by the Court should not be so narrow as to require foreseeability of the precise manner in which the particular injury came about or of its extent. The precise damage need not have been foreseen, and it is sufficient if damage of the same kind as occurred could have been foreseen in a general way.

Hughes v Lord Advocate [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31; and

March v Stramare Pty Ltd [1991] HCA 12; (1990-91) 171 CLR 506; (1991) 99 ALR 423; (1991) 65 ALJR 334; (1991) 12 MVR 353; [1991] Aust Torts Reports 81-095, applied.

Per Redlich JA and Williams AJA, Neave JA dissenting:

4. In the present case, the narrow category chosen by the Magistrate was not appropriate as the loss alleged to have been suffered by Metrolink was not that which was of an unusual kind. There was nothing unusual about the expectation that Metrolink would receive remuneration for the operation of its part of the tram network or that it would lose revenue in the event that it could not operate a part of its service. There is no reason of policy that compels a different approach to the recovery of losses calculated by reference to targeted performance obligations which have not been met because of the inability to conduct the service, and losses arising from the same cause which are to be calculated under a different remuneration structure. That this remuneration might be reduced or increased depending upon the operator's ability to provide the service is unremarkable. That the mechanism by which remuneration for this service is determined might be complex, and be calculated according to a number of key performance indicators, is similarly neither unusual, nor is its complexity a reason to treat it differently from a more simple form of remuneration. For this very reason, I. was compelled to concede that it was reasonably foreseeable that fares would be lost as a consequence of interruption to the operation.

5. Accordingly, the Magistrate erred in defining too narrowly the kind or genus of the loss suffered by Metrolink. The appropriate categorisation was simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'.

6. It was in no way 'far-fetched' that the collision of a car with a tram, causing an inability to operate trams on the network, might result in a loss of revenue. It was in fact highly likely, or at least a real risk, that the disruption of the provision of any service might result in a loss of revenue to the person who was responsible for the provision of that service. Accordingly, I. was liable for the loss incurred by M. arising by operation of the Franchise Agreement.

Per Redlich JA (Williams AJA agreeing):

"... 30. By complaint filed on 21 March 2006, Metrolink Victoria Pty Ltd ('Metrolink') commenced proceedings in the Magistrates' Court to recover damages from the respondent Ryan Inglis ('Inglis') arising from a collision between a tram owned by Metrolink and a motor vehicle driven by Inglis. By his defence Inglis admitted the accident and negligence, and has since paid for the cost of repairs to the tram.

31. As a result of this collision the passage of the damaged tram was blocked until the motor vehicle was removed. In consequence of this the operation of a number of trams also operated by Metrolink was delayed. The only issue before the Magistrate related to damages claimed to arise from the loss which Metrolink alleges they have suffered pursuant to a franchise agreement with the State of Victoria.

... The categorisation of the loss

48. It was common ground between the parties that the test for remoteness of damage is that established in *The Wagon Mound Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1 All ER 404 and applied by this Court in *National Australia Bank Ltd v Nemur Varity Pty Ltd* [2002] VSCA 18; (2002) 4 VR 252; [2002] Aust Torts Reports 81-645 namely, whether the damage claimed by the appellant is 'of such a kind or genus that a reasonable person should have foreseen'.

49. As identified by his Honour on the appeal, this involves a two stage process. First, it is necessary to identify the particular kind or genus, to which the loss belongs ('the categorisation question'). Second, once the particular kind or genus has been identified, it is necessary to determine whether a reasonable person in the position of the defendant ought to have foreseen loss of that particular kind or genus.

... 97. In the present case, the narrow category chosen by the learned Magistrate is not appropriate as the loss alleged to have been suffered by Metrolink is not that which is of an unusual kind. I observe that much has been made by the respondent before this Court, and before the judge below, of the complexity of the Franchise Agreement. In the modern world, however, complexity of contracts, and the provision of items such as key performance indicators and other performance targets, could hardly be said to be unusual.

... 99. For these reasons I conclude that the learned Magistrate erred in defining too narrowly the kind or genus of the loss suffered by Metrolink. The appropriate categorisation was simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'.

Was the loss reasonably foreseeable?

100. Once the appropriate category of loss has been determined, it is necessary undertake the second step of the test laid down in *The Wagon Mound*. In the present case that requires one to ask whether the loss of revenue as a result of inability to operate the tram service should have been foreseeable to a reasonable person in the position of Inglis.

101. The authorities provide some guidance as to the principles which apply to the question of reasonable foreseeability. The question is whether there was 'a real risk, one which would occur to the mind of a reasonable man in the defendant's position and which he would not brush aside as far-fetched'. A risk of injury is foreseeable if it is real and not far-fetched or fanciful, even if extremely unlikely to occur: *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383, 402; [1971] ALR 253 (Windeyer J).

102. It was conceded by the respondent in the Supreme Court that if a claim was made by Metrolink in respect of fares lost, then that sort of loss was reasonably foreseeable as a loss suffered in the operation of business. A loss of fares is, I observe, of precisely the same kind or genus as loss arising by operation of the Franchise Agreement. They are both 'revenue lost as a result of the inability to operate the tram service'. It should not be otherwise, as there is no sound policy reason to treat direct remuneration from fares differently from that part of remuneration calculated under the Franchise Agreement. They are both part of the overall payment for the operation of the tram service.

103. I consider in the present case, that it is in no way 'far-fetched' that the collision of a car with a tram, causing an inability to operate trams on the network, might result in a loss of revenue. It is

MOTOR VEHICLE COLLISIONS

in fact highly likely, or at least a real risk, that the disruption of the provision of any service might result in a loss of revenue to the person who is responsible for the provision of that service.

104. I would allow the appeal."

Per Redlich JA (Williams AJA agreeing) in *Metrolink Victoria Pty Ltd v Inglis* [2009] VSCA 227; (2009) 25 VR 633; (2009) 54 MVR 145; [2009] Aust Torts Reports 82-032; MC 26/2009, 2 October 2009.

(g) Defendant admitted driving negligently – legislative prohibition on charging for or recovering repair costs from owner where vehicle repaired without written approval

T.'s motor vehicle was badly damaged in an accident caused by the other driver's negligent driving. The repairer who repaired his vehicle failed to obtain T.'s written authorisation. As a result of s153(2) of the *Accident Towing Services Act 2007* ('Act'), the repairer was not able to sue for or recover any sum for carrying out the repairs. T. sued the other driver for damages totalling \$29,091.67 which included the sum of \$4598 for a hire car. In making an award only for the cost of the hire car, the Magistrate dismissed T.'s claim for the damage on the ground that T. had suffered no loss. Upon appeal, Bell J granted the appeal and made an order in T.'s favour for the full amount of the claim plus costs. Upon appeal—

HELD: Appeal dismissed. *Tehan v Saric* [2010] VSC 175; MC 18/2010, approved.

1. Adopting the approach outlined by Dixon CJ and Windeyer J in *The National Insurance Company of New Zealand v Espagne* [1961] HCA 15; (1961) 105 CLR 569; [1961] ALR 627; 35 ALJR 4, it is appropriate to consider the character of the Act, and in particular the legislative provision from which the benefit to T. in this case was derived. It was common ground that the Act was a piece of consumer legislation and that s153 of the Act was intended to deter repairers and to protect the owners of motor vehicles involved in accidents as defined. It is obvious that the benefit conferred on the owner, where the repairer had no approval in writing to perform the repairs, was conferred on an owner 'independently of the existence in him of a right of redress against others.' Clearly enough, the legislation manifested no intent that this benefit was intended to be provided in relief of liability in any others to compensate the owner. Indeed, the provision is not restricted to collisions involving other vehicles.

2. Subsequent High Court decisions do not appear to have moved from the approach taken in *Espagne*. The question posed by Mason and Dawson JJ in *Redding v Lee* [1983] HCA 16; (1983) 151 CLR 117; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530, while in that case directed to social services payments, was applicable to the present case involving a benefit constituted by immunity from action rather than a monetary payment. The question is: 'was the benefit conferred on him independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?' – and, allowing for the different statutory context, the answer must be in the affirmative.

3. To the extent that, as some of the cases have suggested, the question really depends upon reason, justice and policy, in the present case the cardinal principle of compensation was trumped by the intent of the legislation as indicated by the character of the Act and of the particular provision, and the nature of the benefit involved.

4. Per Robson AJA: The relevant provisions of the *Accident Towing Services Act 2007* were not intended to confer any benefit on Mr Saric as a tortfeasor. On the contrary, the provisions were intended as a penalty to be levied against the repairer for failing to obtain written authority for its repair work.

Per Mandie JA (Harper JA and Robson AJA agreeing):

"1. ... The repair costs were disallowed by the Magistrate on the basis that the respondent had suffered no loss in relation to them because the repairer was not entitled to recover them from the respondent as a result of the application of provisions contained in the *Accident Towing Services Act 2007* (Vic) ('the Act'). The repairer had carried out the repairs without the approval in writing of the respondent and was thus not entitled to sue for or recover any sum or charge for those repairs by virtue of s153 of the Act.

... 59. Adopting the approach outlined by Dixon CJ and Windeyer J in *Espagne*, it is appropriate to consider the character of the Act, and in particular the legislative provision from which the benefit to the respondent in this case was derived. It was common ground that the Act was a piece of consumer legislation and that s153 of the Act was intended to deter repairers and to protect the owners of motor vehicles involved in accidents as defined. It is obvious that the benefit conferred on

the owner, where the repairer has no approval in writing to perform the repairs, was conferred on an owner 'independently of the existence in him of a right of redress against others.' Clearly enough, the legislation manifests no intent that this benefit was intended to be provided in relief of liability in any others to compensate the owner. Indeed, as the respondent pointed out, the provision is not restricted to collisions involving other vehicles. The problem at hand was assuredly not present to the mind of the drafters but one can impute from the nature of the provision that Parliament would not have intended a tortfeasor to gain from the benefit provided to an owner. It is fair to state, I think, while recognising the conclusory nature of the expression, that the benefit derived by the owner is 'entirely collateral'.

60. Subsequent High Court decisions do not appear to me to have moved from the approach taken in *Espagne*. I consider that the question posed by Mason and Dawson JJ in *Redding v Lee*, while in that case directed to social services payments, is applicable to the present case involving a benefit constituted by immunity from action rather than a monetary payment. The question is: 'was the benefit conferred on him independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?' – and, allowing for the different statutory context, the answer must, I think, be in the affirmative.

61. A number of authorities including *Manser v Spry* [1994] HCA 50; (1994) 181 CLR 428; (1994) 124 ALR 539; (1994) 68 ALJR 869; [1994] Aust Torts Reports 81-299 have emphasised the nature of the benefit as being an important factor in determining the legislative intention. In the present case, I think that this is a key factor as explained above.

... 62. To the extent that, as some of the cases have suggested, the question really depends upon reason, justice and policy, I consider that in the present case the cardinal principle of compensation is trumped by the intent of the legislation as indicated by the character of the Act and of the particular provision, and the nature of the benefit involved.

63. For those reasons, I would, as I have said, dismiss this appeal."

Per Mandie JA (Harper JA and Robson AJA agreeing) in *Saric v Tehan* [2011] VSCA 421; MC 50/2011, 15 December 2011.

(h) Whether magistrate erred in admitting evidence of insurance assessors – finding that plaintiff liable for damage caused in the accident

V. was involved in a motor vehicle collision with a motor vehicle driven by Y. V. issued proceedings seeking damages for repairs to his vehicle and the balance for the cost of a hire car and loss of earnings. After hearing the parties and witnesses, the Magistrate found that the collision was caused by the negligence of V. and dismissed the claim. The Magistrate stated that V.'s evidence in relation to the damage to his motor vehicle was not accepted, there was no evidence that repairs had been carried out and no evidence to prove the claim for loss of earnings and the cost of hiring a motor vehicle. Upon appeal—

HELD: Appeal dismissed.

1. The Magistrate was entitled to allow, and accept, the evidence of the both insurance assessors. Although V. alleged a conspiracy between the assessors, the Magistrate did not accept his submission on that point. No other evidence was put forward in the Magistrates' Court to support a submission that the insurance assessors' evidence should not have been accepted. Further, the Magistrate's acceptance of their evidence was not done in isolation. The Magistrate had the benefit of seeing each of the assessors give oral evidence, and be cross-examined by V.

2. In any event, the evidence of the assessors was only one factor that weighed in favour of the decision reached by the Magistrate. The Magistrate was entitled on the evidence, to prefer the version of the collision given in evidence by Y. to that of V., where their evidence conflicted. In turn, Y.'s evidence was supported not only by the evidence of the two assessors, but also by the evidence of V.'s witnesses.

3. On the basis of all the evidence, the Magistrate correctly concluded that V. was claiming the same damage in respect of both collisions and that V.'s vehicle had not been repaired.

4. Accordingly, V. failed to demonstrate any error of law on the part of the Magistrate in accepting the evidence of the two insurance assessors and in dismissing V.'s claim.

Per McMillan J:

"... 4. Mr Velissaris alleged that he was travelling north along High Street and that as he slowed down to turn left, Mr Yang's vehicle collided with the rear right hand side of his vehicle. Mr Velissaris

MOTOR VEHICLE COLLISIONS

alleged that as a result of the collision, his vehicle was damaged along the right hand side, including the tail light, rear quarter panel, door and a broken right rear vision mirror.

5. In contrast, Mr Yang alleged that Mr Velissaris veered into the lane in which he was travelling, without giving way. Mr Yang gave evidence that the left rear vision mirror of his vehicle clipped the right rear vision mirror of Mr Velissaris' vehicle and that the damage was limited to the damage to the mirror.

6. Some months later, Mr Velissaris had another collision with another vehicle, involving damage to the same area of his vehicle.

... 9. In the hearing before the Magistrate, Mr Yang called two insurance assessors to give evidence. The first assessor was Mr Williams, who assessed both Mr Velissaris' vehicle and Mr Yang's vehicle on behalf of Mr Yang's insurer, Just Car Insurance, in November 2009. His evidence was that there was no evidence of damage to Mr Yang's vehicle which was consistent with the damage claimed by Mr Velissaris to his vehicle and that there was no evidence that Mr Yang's vehicle had ever been repaired. On the other hand, his evidence with respect to Mr Velissaris' vehicle was that he thought that the damage on the side of Mr Velissaris' vehicle had been caused by someone scraping an object backwards and forward on the panels. Mr Williams took photographs of Mr Velissaris' vehicle at this time.

... 12. Both Mr Williams and Mr James were of the opinion that the damage to Mr Velissaris' vehicle observed in October 2010 was the same damage observed in November 2009. According to both assessors, the damage on Mr Velissaris' vehicle had not been repaired. The Magistrate found that this fact was confirmed by a witness for Mr Velissaris, Mr El Sheik. The evidence of Mr El Sheik was that the only repairs he carried out were to the right rear vision mirror, the right back tail light and the bumper bar and that all of the parts used by him were second-hand and supplied to him by Mr Velissaris, which was contrary to Mr Velissaris' evidence that Mr El Sheik fixed his vehicle in August 2009.

13. In all other respects, Mr El Sheik confirmed that when he was driven to court by Mr Velissaris for the hearing before the Magistrate, the damage to Mr Velissaris' vehicle which he had observed in July 2009 was still there.

... 29. In my view, the Magistrate was entitled to allow, and accept, the evidence of the both insurance assessors. Although Mr Velissaris alleged a conspiracy between the assessors, the Magistrate did not accept his submission on that point. No other evidence was put forward in the Magistrates' Court to support a submission that the insurance assessors' evidence should not have been accepted. Further, the Magistrate's acceptance of their evidence was not done in isolation. The Magistrate had the benefit of seeing each of the assessors give oral evidence, and be cross-examined by Mr Velissaris.

30. In any event, the evidence of the assessors is only one factor that weighed in favour of the decision reached by the Magistrate. In my view, the Magistrate was entitled, on the evidence before her, to prefer the version of the collision given in evidence by Mr Yang to that of Mr Velissaris, where their evidence conflicted. In turn, Mr Yang's evidence was supported not only by the evidence of the two assessors, but also by the evidence of Mr Velissaris' witnesses, Mr El Sheikh at the hearing and Mr Veluto in the form of his report.

31. On the basis of all the evidence before her, the Magistrate correctly concluded that Mr Velissaris was claiming the same damage in respect of both collisions and that Mr Velissaris' vehicle had not been repaired."

Per McMillan J in *Velissaris v Yang* [2012] VSC 257; MC 22/2012, 19 June 2012.

(i) Question of quantum – application of principles for measuring damages – finding by magistrate that plaintiff had not sustained the loss claimed

Z.'s motor vehicle was damaged when it collided with a vehicle being driven by S. Z. issued proceedings claiming the loss plus the loss assessor's fee. At the hearing of the claim, S. admitted liability for the collision but denied the loss and damage claimed and alleged that the claimed net loss was excessive. In his claim, Z. stated that he sold his car as a wreck; however, evidence emerged that Z. still owned the vehicle and that the damage to it had been repaired. The Magistrate found that Z. was still the owner of the motor vehicle at the date of the hearing of the claim but concluded that Z. had not proved the loss he had asserted in the pleadings. Accordingly, he made an order on the claim for the amount of the loss assessor's fee (\$330) and refused both parties their costs of the proceedings. Upon appeal—

HELD: Appeal allowed. Magistrate's orders set aside. Remitted to the Magistrate for determination in accordance with the law.

MOTOR VEHICLE COLLISIONS

1. It is trite law that when goods are damaged by the negligence of a tortfeasor, the owner of the goods suffers an immediate and direct loss in consequence of the damage sustained and a cause of action accrues to the owner to recover that loss. The basic pecuniary loss recoverable by an owner in that circumstance is the diminution in the value of the damaged goods, on the principle that the owner is entitled to be put back, so far as money can do it, into the same position as if the damage had not occurred.

2. In the case of negligent damage to a car, the authorities establish that if the car is wrecked completely as the result of the collision, the loss that the owner is entitled to recover from the tortfeasor will normally be measured by the cost of replacing the car with another car of comparable type and condition, with an allowance in favour of the tortfeasor for the value of the car in its damaged condition. If the car is repairable, the measure of loss will usually be the costs of repair but if the costs of repair exceed, or would exceed, the market value of the car, a question arises as to whether it is reasonable for the owner to incur the expenditure in repairing the car or whether the reasonable option is to replace the car. Ordinarily, the owner can recover the cost of repairs or the value of the car, whichever is the less. In each case, the onus is on the owner to satisfy the Court on the evidence as to which of the measures of damages is reasonable in the circumstances and as to the amount of damages to which the owner is entitled by the application of that method.

3. The Magistrate applied the wrong legal principles in concluding that the onus of proof on quantum was not discharged by reason of the finding that the plaintiff still remained the owner of the car. That fact, whilst relevant, was insufficient of itself to engage the legal principles governing the assessment of the damages that the plaintiff was entitled to recover. What the plaintiff had to prove was the extent of the damage to his car caused by the defendant's negligence (as this was in issue) and satisfy the Magistrate that the appropriate measure of damages was the market value of his car immediately before the accident, less its post-accident value, on the basis that this measure of damages was less than the cost of repairs. The question for the Magistrate was whether he should be satisfied on the evidence on the balance of probabilities that the loss should be quantified on that basis and not by reference to the cost of repairs. The Magistrate did not address that question at all and the failure to address that question vitiated the decision.

Per Davies J:

"... 6. It is trite law that when goods are damaged by the negligence of a tortfeasor, the owner of the goods suffers an immediate and direct loss in consequence of the damage sustained and a cause of action accrues to the owner to recover that loss. The basic pecuniary loss recoverable by an owner in that circumstance is the diminution in the value of the damaged goods, on the principle that the owner is entitled to be put back, so far as money can do it, into the same position as if the damage had not occurred: *Dimond v Lovell* [2002] 1 AC 384, 406; [2002] 1 QB 216 (Lord Hobhouse of Woodborough).

7. In the case of negligent damage to a car, the authorities establish that if the car is wrecked completely as the result of the collision, the loss that the owner is entitled to recover from the tortfeasor will normally be measured by the cost of replacing the car with another car of comparable type and condition, with an allowance in favour of the tortfeasor for the value of the car in its damaged condition: *Dimond v Lovell* [2002] 1 AC 384; [2002] 1 QB 216; *Powercor Australia Ltd v Thomas* [2012] VSCA 87; *Neville Kingsbury-Carr v Glenn William Kiliman* [2007] ACTSC 36; (2007) 47 MVR 522. If the car is repairable, the measure of loss will usually be the costs of repair: *Jansen v Dewhurst* [1969] VicRp 53; [1969] VR 421; *Murphy v Brown* (1985) 1 NSWLR 131; (1985) 2 MVR 29; [1985] Aust Torts Reports 80-701 but if the costs of repair exceed, or would exceed, the market value of the car, a question arises as to whether it is reasonable for the owner to incur the expenditure in repairing the car or whether the reasonable option is to replace the car: *Jansen v Dewhurst* [1969] VicRp 53; [1969] VR 421. Ordinarily, the owner can recover the cost of repairs or the value of the car, whichever is the less. In each case, the onus is on the owner to satisfy the Court on the evidence as to which of the measures of damages is reasonable in the circumstances and as to the amount of damages to which the owner is entitled by the application of that method.

The claim for loss and damage

8. As liability for the collision was not in issue, Mr Zogiannis is entitled to recover the direct loss that he sustained as the result of the negligent damage to his car. Mr Zogiannis put his claim on the basis that he is entitled to recover damages measured by the pre-accident value of his car less its salvage value (the net loss) in the amount assessed by a loss assessor. The loss assessor's assessment was attached to the Complaint as required by r40.14(1)(b) of the *Magistrates' Court (General Civil Procedure) Rules 2010* (Vic) and by force of that Rule, that assessment was evidence of the loss claimed by Mr Zogiannis.

MOTOR VEHICLE COLLISIONS

9. In his Defence, Mr Stevens disputed that Mr Zogiannis had suffered the loss claimed, and further pleaded that the amount claimed for the net loss of the vehicle was excessive.

The reasons for decision

11. The Magistrate rejected Mr Zogiannis' evidence that he had sold the car as a wreck and found, as a fact, that Mr Zogiannis was still the owner of the car. On the basis of that finding, the Magistrate concluded that Mr Zogiannis had not proved "the loss he has asserted in his pleadings". The Magistrate then went on to hear counsel on the question of the loss assessor's fee. Counsel for Mr Stevens disputed the fee on the ground that it was a disbursement. His Honour concluded that it was a particular of loss and allowed the claim.

12. The Magistrate did not explain in express terms why it followed from the finding of the fact that Mr Zogiannis was still the owner of the car that he had not proved his claim. It is sufficiently clear though, on a fair reading of the reasons for judgment, that His Honour was of the view that Mr Zogiannis had to show that he had lost the total use of his car, as the damages he was seeking was a claim for the net loss value of his car and that His Honour was of the view that he had not proved total loss because he still had the car and it had been repaired.

Decision

13. The Magistrate applied the wrong legal principles in concluding that the onus of proof on quantum was not discharged by reason of the finding that Mr Zogiannis still remained the owner of the car. That fact, whilst relevant, was insufficient itself to engage the legal principles governing the assessment of the damages that Mr Zogiannis is entitled to recover. Mr Zogiannis did not have to prove that he no longer had the car nor did he have to prove that the car was completely wrecked in order to recover damages quantified by reference to the market value of the car. What Mr Zogiannis had to prove was the extent of the damage to his car caused by Mr Stevens' negligence (as this was in issue) and satisfy the Magistrate that the appropriate measure of damages was the market value of his car immediately before the accident, less its post-accident value, on the basis that this measure of damages was less than the cost of repairs. The question for the Magistrate was whether he should be satisfied on the evidence on the balance of probabilities that the loss should be quantified on that basis and not by reference to the cost of repairs. The Magistrate did not address that question at all and the failure to address that question vitiates the decision.

14. Counsel for Mr Zogiannis went further and submitted that the only conclusion reasonably open to the Magistrate on the evidence before the Court was that Mr Zogiannis had suffered loss and that the measure of his loss was the uncontroverted pre-accident value of the car less its post-accident value. However, by deciding the case on the basis that he did, the Magistrate did not make the relevant findings of fact that would oblige him to find in favour of Mr Zogiannis and it is not open to this Court to "second guess" the factual findings in the light of the evidence before the Magistrate: *Price Street Professional Care Pty Ltd v Commissioner of Taxation* [2007] FCAFC 154; (2007) 243 ALR 728 at [29]; (2007) 97 ALD 593; (2007) 67 ATR 544 (Kenny, Edmonds and Greenwood JJ). The case must be remitted to the Magistrate for determination in accordance with the law."

Per Davies J in *Zogiannis v Stevens* [2012] VSC 264; MC 23/2012, 19 June 2012.

12. Foreseeability

Motor vehicle collided with a pole – driver's wife a passenger received both physical and mental injuries – wife pregnant gave birth to child – passenger's mother required to look after her daughter – lost income and travelling expenses incurred by mother as a result

HELD:

1. While reasonable foreseeability is essential to any liability for negligence, such foreseeability by itself does not in all situations impose a duty of care. In the case of the driver of a vehicle on the highway, his duty does not, save in exceptional circumstances, extend beyond road users in the neighbourhood or persons who are themselves on or who have property adjacent to the roadway. Policy and reasons of humanity have extended by way of exceptional cases the primary duty to take care to those injured in the course of rescue attempts or the like.

2. Likewise, these considerations have dictated that relatives of an accident victim suffering harm by reason of nervous shock should have a cause of action if their shock not only is foreseeable by the tortfeasor, but also the relative is in sufficient proximity to the tortfeasor's carelessness.

3. But beyond this the law has not yet gone nor is it for the Court to attempt to take it. It still remains true that a negligent motorist who caused great facial disfigurement to a pedestrian could not be made liable to every person who throughout the pedestrian's life experienced shock or

MOTOR VEHICLE COLLISIONS

nausea on seeing his disfigurement, although such shock or nausea might have been reasonably foreseeable.

4. Accordingly, the mother had no cause of action in respect of the primary claim nor in respect of the claim made for the economic loss in the form of travelling expenses and lost income caused by the attention voluntarily given the daughter.

Per Adam and Crockett JJ:

"... There is also a third plaintiff joined in the action. She is the first plaintiff's mother (hereafter called the mother). She, too, claims damages in negligence against her son-in-law. Her claim is pleaded in this way: as the mother and only relative of the first plaintiff to whom the first plaintiff could turn, she had a moral and maternal duty to care for her daughter in her severely incapacitated state. The provision of such care and the rendering of services for her, especially after the birth of the infant, were essential when the daughter was not in hospital. That care and those services were provided gratuitously by her without any agreement being made for any future payment or recompense. Prior to the need to assist her daughter arising, the mother conducted a hairdressing business of which she was the proprietress.

... In our view, it is still the law that, while reasonable foreseeability is essential to any liability for negligence, such foreseeability by itself does not in all situations impose a duty of care. In the case of the driver of a vehicle on the highway, his duty does not, save in exceptional circumstances, extend beyond road users in the neighbourhood or persons who are themselves on or who have property adjacent to the roadway. Policy and reasons of humanity have extended by way of exceptional cases the primary duty to take care to those injured in the course of rescue attempts or the like: *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112; [1962] ALR 379; *Chadwick v British Railways Board* [1967] 2 All ER 945; [1967] 1 WLR 912; *The Law of Torts* 4th ed. (1971) Fleming p157. Likewise, these considerations have dictated that relatives of an accident victim suffering harm by reason of nervous shock should have a cause of action if their shock not only is foreseeable by the tortfeasor, but also the relative is in sufficient proximity to the tortfeasor's carelessness. (Cf. per Lush J *Benson v Lee, supra*, at p880.) But beyond this the law has not yet gone nor do we think it is for us to attempt to take it.

In our opinion, it still remains true as Rich J said in *Chester v Waverley Corporation* [1939] HCA 25; (1939) 62 CLR 1; [1939] ALR 294, at CLR p11 and at ALR p297 that "a negligent motorist who caused great facial disfigurement to a pedestrian could not be made liable to every person who throughout the pedestrian's life experienced shock or nausea on seeing his disfigurement", although such shock or nausea might have been reasonably foreseeable. See also, *The Negligent Infliction of Nervous Shock in Road and Industrial Accidents* (1974) 48 ALJ 196.

... This claim of the mother, being limited to economic loss sought to be recovered by a "third person" from the tortfeasor is, we think, *a fortiori*, unsustainable. There appears to be no authority establishing that pecuniary loss which is voluntarily incurred and is unassociated with personal injury to a person other than the immediate victim of a road user's tortious act, is recoverable by that other person from the road user. Indeed, it appears clear that such pecuniary loss suffered by a third person is, apart from the exceptional cases to which we have already referred, irrecoverable unless the loss has arisen as an expense which the third party was under a legal duty to discharge. See *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)* [1952] HCA 2; (1951) 85 CLR 237 at p291; [1952] ALR 125 at p157; *Commissioner for Railways (NSW) v Scott* [1959] HCA 29; (1958) 102 CLR 392 at pp408 and 462; [1959] ALR 896 at pp904 and 940.

In so far as this is based on policy considerations see *Weller and Co v Foot and Mouth Disease Institute* [1966] 1 QB 569 at pp584-585; [1965] 3 All ER 560; [1965] 2 Lloyd's Rep 414; [1965] 3 WLR 1082; 109 Sol Jo 702; *SCM (UK) Ltd v Whittall* [1971] 1 QB 337; [1970] 3 All ER 245 at p250; [1970] 3 WLR 694. There is in *Gow v Motor Vehicle Insurance Trust* [1967] WAR 55 a suggestion that where a third party incurs a debt pursuant to some moral obligation to the injured victim the tortfeasor is liable to compensate that third person provided that it was reasonably foreseeable that such debt would be incurred. However, we are not persuaded that this is the law. ..."

Per Adam and Crockett JJ in *Pratt & Goldsmith v Pratt* [1975] VicRp 37; [1975] VR 378; MC 39/1974, 17 September 1974.

Patrick Street LL B, Dip Crim
1 April 2014