*1996 NSW LEXIS 3398, **


NEW SOUTH WALES UNREPORTED JUDGMENTS

GARRY PAUL **STOCKS** and McDONALD HAMILTON CO PTY LTD v **BALDWIN**

No. 40434 of 1996

SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

1996 NSW LEXIS 3398; BC9604392

5 August 1996, heard;

20 September 1996 , delivered

**CATCHWORDS:** [*1] Negligence - Motor Vehicle Accident - Collision of Motor Vehicle with Pedestrian - Foreseeability of Pedestrian Failing to Take Reasonable Care for Own Safety - Magnitude of Risk Probability of Occurrence - Motor Vehicle Driven at Excessive Speed in Circumstances

ORDERS

1. Appeal dismissed.
2. The appellants to pay the respondent's costs of the appeal.

**JUDGES:** MAHONEY P , SHELLER JA and SIMOS AJA

Mahoney P:

The facts relevant to this appeal are detailed in the judgment of Simos AJA which I have had the advantage of reading.

The main questions argued upon this appeal have been: whether the trial judge was correct in finding that the defendant was driving at 25-35 miles per hour; whether it was negligent for him to do so; and whether that negligence caused the plaintiff's injuries.

(a) In my opinion, the judge correctly concluded that the defendant was driving at that speed. The defendant himself had said that, when he was moving into the kerbside lane and noticed the traffic lights red, he was travelling "about 40 kilometres an hour approximately": this is equivalent to some 25 miles per hour. He drove, or coasted up the lane and he did not suggest that he had significantly reduced [*2] his speed before the impact with the plaintiff. More significantly the independent witness, Mr Carter, estimated his speed to be of the order of 25-35 miles per hour. His Honour was in a position of advantage in assessing the reliability of the evidence of Mr Carter. No doubt he took proper account of such restrictions as were imposed upon what Mr Carter could see by reason of the fact that he saw the defendant's vehicle in his traffic mirror and when it passed his car. Mr Carter was pressed in cross-examination as to his observation and estimate and he adhered generally to the estimate that he had made; he did so in a way which may well have impressed the judge in his assessment of his credibility and his reliability.

(b) Mr Maconachie QC, for the defendant, submitted that the Court should find that to drive at 25-35 miles per hour

in such a situation was not negligent. He submitted that, were it negligent and were city traffic to proceed accordingly, it would come to a halt.

There is force in Mr Maconachie's submissions. The use of motor vehicles in the city creates real dangers: vehicles may strike pedestrians or they may collide with one another. But the fact that such [*3] dangers are created and that it is apparent that they exist does not mean that vehicles must be driven and pedestrians must be controlled in such a way that these dangers are entirely removed. The foreseeability of the dangers which motor vehicles create and the degree of proximity that exists between a motorist and a pedestrian together mean that drivers have a duty of care to pedestrians. But that duty of care does not require that drivers drive in such a way or that pedestrians be so controlled that all danger is removed and that no damage can occur. In the much cited and frequently applied case of Wyong Shire Council v Shirt (1980) 146 CLR 40 at 47-8, Mason J indicated that what a driver must do is determined by "what a reasonable man would do by way of response to the risk" attendant upon his driving. As his Honour indicated, there must be "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". These matters are to be "balanced out" in determining what, in relation to a foreseeable [*4] danger, a reasonable man will do". His Honour: at 48; said: "The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

The advantages to the community - and to the reasonable pedestrian in particular - are such that the reasonable person (whose opinions represent the law) would accept that vehicles may be driven at a speed which involves, and leaves to be borne, a foreseeable risk of injury. As cases which come before this Court evidence, it not infrequently occurs - and it is therefore foreseeable - that a person may step suddenly from behind a parked van or other obstruction into the path of an oncoming vehicle: cf Chin v Venning (1975) 49 ALJR 378. Yet the law does not require that all vehicles travel at a speed slow enough to be able [*5] to stop before hitting her: see generally Nolan v Marsh Motors Pty Ltd (1965) Qd R 490; Daly v Liverpool Corporation (1939) 2 All ER 142. It was at one time suggested that there was a duty to avoid foreseeable dangers and that accordingly, for example, a driver must drive at night at such a speed that he can stop within the limits of his vision. But that view is no longer accepted: Tidy v Battman (1934) 1 KB 319; Morris v Luton Corporation (1946) 1 KB 114; cf Cowan v Robertson (1941) SC 502. See generally Lee Transport Co v Watson (1940) 64 CLR 1. Therefore it is for the driver - and, if necessary, the Court - to decide how the reasonable person to whom Mason J has referred will act in each case.

In deference to Mr Maconachie's submissions, I have stressed that the reasonable person would accept that it is not the duty of a driver so to drive that there is no foreseeable risk of injury to others. To think otherwise would be to ignore the realities of city life. But it is not to be taken from what I have said that risks may be ignored. In the "balancing" process to which Mason J referred, at least four things are to be borne in mind: the extent of the damage that may be done by [*6] a driver to a pedestrian; the degree of likelihood that a pedestrian will suddenly come into the path of an ongoing vehicle; the consequent extent of the precautions which a driver must take against that eventuality; and the extent of what a driver is able to do when confronted with such a danger.

The damage which a driver may do to a pedestrian is great: the injuries suffered by the present plaintiff show this. This is an important matter when deciding what a driver must do. The inconvenience of driving slower is to be measured against, inter alia, what may be done to a pedestrian if the driver's estimate of the risk is wrong.

Pedestrians sometimes act carelessly. I do not mean by this that they do so more often than not. But, in my opinion, they do so with sufficient frequency that a prudent driver would take account of it. The likelihood of that occurring is not a "far-fetched or fanciful" risk which is to be put aside or discounted. It is something which occurs often enough for the prudent driver to foresee it and take it into account.

Mr Maconachie QC not merely submitted that a prudent driver may so drive that there are risks of injury; he submitted that the Court should [*7] accept that a prudent driver may determine what he should do upon the

assumption that pedestrians will obey the law and will take sufficient care for their own safety. In my opinion that puts the matter too high in favour of the defendant driver.

Mr Maconachie QC cited the passage from the judgment of Jordan CJ in Trompp v Liddle (1941) 41 SR (NSW) 108 at 109; in which the Chief Justice said: "A driver is entitled to assume that other drivers will observe the rules of the road. This does not mean that he may drive at any pace he chooses so far as roads coming in on his left are concerned, or with complete indifference as to the possibility of a car suddenly emerging from a side road as a result of accident, miscalculation, ignorance or recklessness. It means that it is not unreasonable for him to act on the assumption that other drivers are obeying the rules unless there is something which would make him realise that they are not."

But, as Jordan CJ said, he may not drive "with complete indifference" as to the possibility of recklessness and in particular may not assume compliance with the law when "there is something which would make him realise that" it will or may not be [*8] complied with. In Wheare v Clarke (1937) 56 CLR 715 at 723, Latham CJ said: "It is true that, as a general rule, a man is entitled to assume that others will act in a non-negligent manner: Toronto Railway v King (1908) AC 260. But, in any case where negligence is the issue, the real question is whether, in all the circumstances, the person charged with negligence exercised the degree of care which those circumstances required."

In McLean v Tedman (1984) 155 CLR 306 at 311, the majority of the Court said: "In such a situation it is not an acceptable answer to assert that an employer has no control over an employee's negligence or inadvertence. The standard of care expected of a reasonable man requires him to take account of the possibility of inadvertent negligent conduct on the part of others. This was acknowledged even in the days when contributory negligence was a common law defence: Wheare v Clarke (1937) 56 CLR 715 at 723; Henwood v Municipal Tramways Trust (SA) (1938) 60 CLR 438 at 444."

That was said in the context of a work accident but it is in my opinion applicable to the assessment of negligence in the present circumstances. Accordingly, in deciding what, as a reasonable [*9] person, a driver must do, he and the court must take into account the likelihood that the pedestrian may do what in this case, as the judge held, the plaintiff did.

In this context, what is the significance of the speed at which the defendant was driving? The speed is significant because of the effect it has or may have upon what the driver will be able to do if such an eventuality occurs. If a pedestrian was to do what the plaintiff did, the things which the present driver could do to avoid her were limited. Swerving was of little if any use: he was driving in a traffic lane presumably not much wider than a car width, with a line of stationary cars on his right and the kerb on his left. In a practical sense, he could avoid the pedestrian only by stopping and, of course, his capacity to do so would be affected by his speed.

There was no evidence in this case as to the distance the car would travel in the time between his seeing the plaintiff and coming to a stop. Calculations have been made or suggested as to reaction time, braking time, time for skidding and the like: see, eg, Leslie and Britts Motor Vehicle Law in New South Wales, para11.3755 et seq. If matters of this kind [*10] are proved and accepted sufficiently often, it may be that a court can take judicial notice of them. I do not think that this case should be decided on that basis. But the court may know that, after seeing the plaintiff, the vehicle would move a significant distance and that that distance would be the greater the greater the speed at which it was travelling. The faster it was travelling, the longer the distance to stop.

This was of significance in the present case. As Mr Maconachie QC stressed, the defendant stopped his vehicle only a short distance after he struck the plaintiff. The inference suggested was, I think, that he had done what he could to stop and had almost avoided the accident. This illustrates the significance of speed. If he had been travelling more slowly, it is likely that he would have stopped in time. But, however that be, I think that the possibility of a pedestrian doing what the plaintiff did was such that a reasonable person would have accepted that he should drive more slowly, at such a speed as to be able to cope with such an emergency if it arose.

(c) It follows from what I have said that speed contributed to the occurrence of the accident. Mr

Maconachie's [*11] submission was, I think, essentially that it is what the plaintiff did which caused the accident and that, whatever the defendant's speed, the accident would have occurred. The trial judge did not form that conclusion. What the plaintiff did was foolish. But I am not satisfied that, had the defendant been driving at a speed appropriate to the circumstances, he could not have avoided striking her. And, for the reasons to which I have referred, it was because of the speed at which he was travelling that he was not able to stop in time.

I have spelled out these considerations in deference to the submissions made by Mr Maconachie QC for the defendant. But, in the end, the determination of what a duty of care requires in such circumstances is not to be determined by a syllogistic process from facts to conclusion. It involves the kinds of value judgments to which Mason J referred in Shirt's case and involves taking into account not merely the matters to which I have referred but all of the circumstances of the case. I am satisfied that the speed at which the defendant was driving contributed to the accident which happened.

In respect of the other matters that have been argued I agree [*12] with the judgment of Simos AJA.

The appeal should be dismissed with costs.Sheller JA:

I agree with Simos AJA.Simos AJA:

In this matter the plaintiff, Irene Edna Baldwin, sustained serious injuries on 29 March 1990 when she was struck by a motor vehicle being driven along Condamine Street, Manly Vale, by the defendant, Garry Paul Stocks. Condamine Street runs generally in a north-south direction and has three lanes on each side of a median strip. At the time of the accident the plaintiff was in the course of crossing Condamine Street from the eastern side to the western side, at a point approximately forty metres south of traffic lights at the intersection of King Street and Condamine Street. The plaintiff had alighted from side of Condamine Street at a bus stop on the eastern about 4.30 pm on that day. At that time it was raining or had been raining and the surface of the road was wet and could have been greasy. The conditions were described by the defendant as murky and overcast with some component of reduced visibility.

At the time of the accident motor vehicles were banked up on the western side of Condamine Street from the traffic lights back to the point where [*13] the plaintiff was crossing the road and indeed, further back from that, both in the lane nearest the median strip and in the middle lane. There was, however, no bank up of cars in the kerbside lane on the western side of Condamine Street in which, however, there was probably some light traffic. The plaintiff left the eastern t side of Condamine Street stooped over or huddled over as she walked to the median strip where she paused briefly and then walked purposefully, without pausing, and apparently without looking, across the lane of stationary traffic adjacent to the median strip on the western side of Condamine Street, across the adjoining middle lane and into the adjoining kerbside lane where she was struck by the motor vehicle being driven by the defendant. According to one of the witnesses, Mr Carter, after leaving the median strip, the plaintiff continued to walk stooped over or huddled over "fighting the rain" and his impression was that she accelerated slightly. This witness gave evidence that he had the impression of two projectiles hitting each other. He described "this car coming from 50 metres down the road and this lady, briefly, hesitating in the median strip and then [*14] progressing across the road in a purposeful way. And because I have a panoramic mirror on my car I was able to keep both parties in view at the same time and they collided."

The defendant stopped his car about four metres from the point of impact and rendered assistance to the plaintiff who was lying on the road.

Abadee J in the Common Law Division held that the defendant was negligent in that he was driving his car at a speed which was excessive in all the circumstances and that that negligence was a cause of the accident. His Honour held that the plaintiff was guilty of contributory negligence and apportioned 40 per cent of the responsibility for the accident to her. After assessing the plaintiff's damages for past and future economic loss his Honour assessed the plaintiff's damages for non-economic loss at 60 per cent of a "most extreme" case. His Honour

also held that there should be a discount for contingencies of 20 per cent.

The learned trial judge was "satisfied" that the plaintiff stepped from the middle lane on the western side of the median strip in front of the defendant's vehicle without pausing in any way to check whether it was safe to proceed from the middle [*15] lane into the kerbside lane. As his Honour said "in other words" he was satisfied that the plaintiff proceeded from the median strip across two lines of (stationary) traffic and straight into the path of the defendant's vehicle without pausing, having proceeded along that route in a purposeful manner. His Honour was also satisfied that the plaintiff did not look, or adequately look, to see if there was traffic proceeding in a northerly direction before she stepped off the median strip. His Honour was also satisfied that the plaintiff never looked or adequately looked thereafter to see if there was traffic proceeding in a northerly direction on the western side of Condamine Street. He was satisfied that the plaintiff never looked or adequately looked before she stepped from between the vehicles in the middle of the three lanes on the western side of Condamine Street into the third or kerbside lane and into the path of the defendant's vehicle which was proceeding in a northerly direction. He was also satisfied that the traffic lights were red and that there was a pedestrian crossing which could have been and should have been availed of by the plaintiff on the afternoon in question. [*16] He was satisfied that the accident occurred about forty metres from the intersection where the traffic lights were. His Honour held that the defendant was negligent in that he was driving his vehicle at an excessive speed in the conditions then existing and in the relevant location. He said that it was unnecessary for him to explore the question of whether or not the first defendant was or was not keeping a proper look out for pedestrians, having regard to the circumstances existing at the time of the accident, namely, a wet day, a murky day and stationary lines of traffic on the western side of Condamine Street in the two lanes closest to the centre, the stationary vehicles being stopped at a shopping centre and having stopped by virtue of red lights. His Honour referred to the essential shopping location in the area and in the area of the accident as being on the western side of Condamine Street and to the fact that this was a busy shopping centre. His Honour also referred to the fact that there was a school in the vicinity, that the accident occurred in the area after 4.00 pm and in the location where one would, his Honour held, at the very least, expect to find pedestrian movement, [*17] particularly on the western side or shopping centre side of Condamine Street.

Although his Honour did not expressly state what he found to be the relevant speed of the defendant's vehicle, he did state that he accepted Mr Carter's "general estimate of speed", which was 25 to 35 miles per hour. On the hearing of the appeal counsel for the appellant submitted that his Honour was in error in accepting the evidence of Mr Carter to the effect that the relevant speed of the defendant was 25 to 35 miles per hour, and submitted that his Honour should have preferred the evidence of the appellant (defendant) in this connection, which was to the effect that he was travelling about 30 to 35 kph, as he told the investigating police officer to whom he gave a statement or alternatively, 40 kph approximately and coasting, according to the appellant's evidence in chief.

Counsel for the appellant pointed to two principal matters in relation to his submission to the effect that the learned trial judge should have preferred the evidence of the appellant as to the speed at which his vehicle was travelling, namely, firstly, the fact that whilst in the course of giving his evidence in chief Mr Carter [*18] stated that he was stationary in the middle lane on the western side of Condamine Street, in cross-examination he conceded that he was stationary in the lane adjacent to the median strip on the western side of Condamine Street; and secondly, that, according to Mr Carter's own evidence, although he had observed the defendant's vehicle in his rear vision mirror from approximately 50 metres behind him, he was not able to "gauge" speed from that observation and that his estimate of speed was based upon the "very short distance" the vehicle travelled after it had actually passed Mr Carter's vehicle.

In relation to the first of these matters, counsel for the appellant referred to his Honour's statement in the judgment that he generally accepted the evidence of Mr Carter "in relation to what he observed and from whence he observed it." Counsel submitted that his Honour was in error in generally accepting the evidence of Mr Carter in relation to "from whence he observed it". This assumes that the learned trial judge was referring only to Mr Carter's evidence in chief in this connection. There is, however, no warrant for such a view since Mr Carter readily conceded in cross-examination [*19] that he was stationary in the lane adjacent to the median strip and had been mistaken in his evidence in chief to the effect that he was stationary in the middle lane on the western side of Condamine Street. In that state of the evidence his Honour can only have been referring to Mr Carter's undisputed position in the lane adjacent to the median strip when his Honour referred to his acceptance of the evidence of Mr Carter in relation to

"from whence he observed it".

In relation to the second of these matters, counsel for the appellant referred to Mr Carter's own evidence that he had seen the defendant's vehicle in his rear vision mirror from approximately 50 metres behind him and in respect of which, when asked at what sort of speed was the defendant's vehicle travelling, Mr Carter answered "with no degree of accuracy, it is a flat screen that I was looking through, and I can't gather speed. I can't gauge speed."

However, in other evidence, Mr Carter maintained that he was able to estimate the speed of the defendant's vehicle during the time he observed it after it had passed him. In this connection Mr Carter was asked in chief:- "Q : Doing the best that you can, what sort [*20] of speed would you say that this car was doing in the time that it (was) in front of you ... as best you can Mr Carter? A: I would say, approximately, between 25 and 35 miles an hour."

Mr Carter also gave evidence in chief that before he saw the impact he did not see any brake lights, nor did he see any sign that the defendant's vehicle was slowing down.

Moreover, despite being challenged in cross-examination, Mr Carter continued to maintain that he was able to estimate the speed of the defendant's vehicle in the distance it travelled after it had passed him. Mr Carter's evidence in this connection was as follows:- "Q: Your view of this vehicle in the kerb-side lane was not sufficient to enable you to form any impression at all of the vehicle's speed? A: Only an impression of speed, but nothing more accurate as that, yes, until such time that vehicle actually passed me. Q: It only travelled for a very short distance once it passed you? A: That is true. Q: And the distance was so short that you were unable to during that distance or during that time to make any reasonable assessment of speed, that's so, isn't it? A: No, that is not so, but I have not been able to give an absolute. [*21] I have given my estimate which was 25 to 35 miles an hour, having driven some 30 odd years, it is the best approximate I can give."

Having regard to all this evidence and the other evidence in the case, it is plain that the learned trial judge was amply justified in accepting Mr Carter's evidence, and, in particular, his estimate of the defendant's speed, at 25 to 30 miles per hour, in preference to the evidence of the appellant, and there is no basis upon which this Court would be justified in disturbing that finding.

In particular, in my opinion, the evidence to the effect that the appellant's vehicle stopped about four metres from the point of impact does not constitute any such basis since, in my opinion, it is not necessarily inconsistent with his Honour's finding as to the speed at which the appellant's vehicle was travelling.

Counsel for the appellant also submitted, in effect, that even if the appellant's vehicle was travelling at 25 to 35 miles per hour as his Honour found, that speed was not excessive in the circumstances. He submitted that the driver of a vehicle on a busy street was entitled to act on the assumption that pedestrians will take normal precautions [*22] for their own safety, unless there is something to indicate to the contrary, and referred the Court to Trompp v Liddle (1941) 41 SR (NSW) 108 and Cotton v Commissioner for Road Transport (1943) SR (NSW) 66.

Counsel referred the Court to the following passage in the judgment of Jordan CJ in the first mentioned case (at 109):- "A driver is entitled to assume that other drivers will observe the rules of the road. This does not mean that he may drive at any pace he chooses so far as roads coming in on his left are concerned, or with complete indifference to the possibility of a car suddenly emerging from the side road as the result of accident, miscalculation, ignorance or recklessness. It means that it is not unreasonable for him to act on the assumption that other drivers are obeying the rules unless there is something which should make him realise that they are not. Thus, the mere fact that he sees the bonnet of a car appear from a side street on his left does not make it imperative for him to stop. Drivers in such a position normally advance far enough to see where the cars are approaching on their right; and a driver so approaching may reasonably assume that the driver on his [*23] left is advancing to serve his purpose unless he gets some indication to the contrary."

The passage following that passage in the judgment (at 110) is as follows:- "Again, it is not unreasonable for a driver to act on the assumption that other drivers are driving at reasonable speeds, in the absence of some indication

to the contrary. It is negligent to drive at a higher speed than is reasonably safe in the particular locality; and it is evidence of negligence to drive at a higher speed than is allowed by any regulation in force in the locality. A driver approaching a street which comes in on his right may not unreasonably assume that drivers approaching on his right are not driving at excessive speeds, unless he receives some indication that they are in fact so doing. If he is in this way misled into under-estimating the speed of an reasonably fast car, and a collision occurs through his moving forward in a way that would be safe if the other car were proceeding at a reasonable pace, it is not he but the driver of the other car who has been guilty of negligence."

In relation to the second case counsel for the appellant referred to the following passage (at 68) again in the [*24] judgment of Jordan CJ:- "Thus, for example, the driver of a vehicle in a busy street is entitled to act on the assumption that pedestrians whom he is approaching and who have the appearance of normal adults will take normal precautions for their own safety, unless there is something to indicate the contrary: Trompp v Liddle. Ordinary traffic would become impossible if this were not so. If an accident occurs only because such a person, although without any fault of his own, acts abnormally and without warning, the driver too is not at fault. Quite different considerations apply and special precautions would be called for from the driver, if, assuming him to be taking proper care, he would see that he was approaching the vicinity of a young child, or a person who appeared to be drunk, blind or crippled, or behaving recklessly. But, independently of the course of conduct from others which a driver is entitled to expect for the purpose of regulating his own, if those others in fact fail to take such reasonable care for their own safety as they are capable of taking, the common law penalises their failure by preventing them from recovering damages for injuries to which the failure has [*25] substantially contributed ... "

Relying upon the approach taken in these authorities counsel for the appellant submitted, in effect, that even if the appellant's vehicle had been travelling at between 25 and 35 miles per hour that 'speed was not excessive in the circumstances because the appellant was entitled to assume that any pedestrian who was about to cross the kerbside lane from between stationary vehicles in the middle lane on the western side of Condamine Street would, taking reasonable care for his or her own safety, pause and look to the left before moving into the kerbside lane. In those circumstances, so it was submitted, in effect, the plaintiff was not required to reduce his speed or otherwise take any action unless there was something to indicate the contrary, namely, unless there was something to indicate that such a pedestrian was going to step into the kerbside lane without first pausing and looking to the left. It was submitted that is in fact what happened in the present case and that in those circumstances, the appellant did everything that he could possibly have done, a view to avoiding the namely, brake and swerve with plaintiff, although unsuccessfully. [*26] Accordingly, so it was submitted, there was no negligence on the part of the appellant.

Counsel for the appellant also referred to the dissenting judgment of Mahoney JA (as he then was) in Mitchell v Government Insurance Office (NSW) (1991-1992) 15 MVR at 369 and, in particular, to the passage in his Honour's judgment (at 379) referring to the decision of v Shirt (1980) 146 the High Court in Wyong Shire Council CLR 40 where Mason J (as he then was) held (at 47) as follows:- "In deciding whether there has been a breach of the duty of care the tribunal of fact must first act itself whether a reasonable man in the defendant's position would have foreseen that his conduct would have involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer 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 [*27] 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 ... the existence of a foreseeable risk of injury does not of itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

Notwithstanding that it is, in my opinion, generally correct that the appellant was entitled to assume that a person in the position of the plaintiff would take reasonable care for his or her own safety by pausing and looking to the left before stepping into the kerbside on the western side of Condamine Street, it would still, in my opinion, have been reasonably foreseeable that a person in the position of the plaintiff, more especially in the prevailing conditions at the time, might not take reasonable care for his or her; own safety and act as did the plaintiff in the present case. In

such circumstances a reasonable person in the position of the appellant is in accordance with Shirt's case, required to assess both the magnitude of [*28] the risk and the degree of probability of its occurrence along with the difficulty and inconvenience of taking alleviating action. In my opinion, in the present case the magnitude of the risk of a pedestrian acting in the manner in which the plaintiff acted was great although the degree of probability of its occurrence was slight. Nevertheless there would, in my opinion, have been no difficulty or inconvenience for the appellant to take alleviating action in the circumstances of the present case by slowing down to a speed less than 25 to 35 miles per hour, which might well have enabled the accident to be avoided, and, in my opinion, it was open to the learned trial judge to take that view. Moreover, in my opinion, no reason has been shown why this Court should disturb that view.

In my opinion, if, in the circumstances of the present case, the appellant had been travelling at a speed of less than 25 miles per hour, he may well have been able to stop his vehicle after the time when, in the particular circumstances of the present case, he should first have seen the plaintiff and before colliding with the plaintiff. As the appellant was travelling at a speed in excess of the speed [*29] which would have enabled him to do that, it is plain in my opinion, that his Honour the learned trial judge was entitled to find that the appellant was driving at an excessive speed in the circumstances. In this connection it should be noted that the defendant gave evidence that when he first saw the plaintiff she was "about two paces" into the kerbside lane, but he said that he "(didn't) know the answer to that specific question" "why I didn't notice her" (earlier). The defendant also said that his vehicle was "about three, four metres ... maybe as long as five" metres away when he (first) saw the plaintiff.

Consistently with this analysis it cannot be doubted that the plaintiff's conduct in stepping into the kerbside lane from between stationary vehicles in the middle lane, without pausing to look to see whether there was any oncoming traffic, was a contributing cause of the accident. But it does not follow, that the appellant cannot have been guilty of negligence as stated above.

In my opinion, the same analysis holds good even if it were the fact that the plaintiff had stepped into the kerbside lane without looking from behind a vehicle sufficiently large to obscure her [*30] from the view of the appellant until she stepped from behind it into the kerbside lane, having regard, in particular, to the defendant's evidence that he first saw the plaintiff when she was about two paces into t the kerbside lane from a distance of three, four or five metres. In any event, although the appellant gave evidence that there was a van or minivan or "something" close to where the plaintiff stepped out, what exactly it was he said he didn't recall although he said it was bigger than a car and smaller than a truck. Because the defendant did not mention this in his statement to the police the learned trial judge had reservations as to whether there was such a vehicle present.

When it was put to the defendant that there was not a minivan or similar vehicle there at all the defendant replied:- "I don't know. I don't have a specific recollection, or I could not tell you exactly. I am unable to answer yes or no. I am sorry, I don't have that specific recollection."

He added that he didn't know what was there, what size or what colour.

CONTRIBUTORY NEGLIGENCE

Counsel for the appellant submitted that although the learned trial judge was clearly correct in finding [*31] that contributory negligence by the plaintiff was guilty of reason of his finding that she had failed to take reasonable care for her own safety, his Honour was in error on the question of apportionment of responsibility and the fell into for the accident as between the appellant plaintiff. It was submitted that his Honour error in that he failed to pay any regard to the causative component of the defendant's conduct and considered only an evaluation of the culpability of the respondent in relation to the occurrence of the accident. Counsel referred to the passage in his Honour's judgment in which he said:- "Doing the best I can in the circumstances and bearing in mind my evaluation of the culpability of the plaintiff in relation to the occurrence of this accident, I consider the appropriate measure of contributory negligence is in the order of 40 per cent." In this connection the plaintiff referred to the following passage in the judgment of the Court in Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492 at 494:- "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison [*32] both of culpability, ie 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."

It should be first be said that it is by no means clear that the learned trial judge failed to have regard to the relative importance of the acts of the parties in causing the damage, notwithstanding the manner of his expression in the passage from his judgment just quoted. At an earlier point in his judgment his Honour had said this:- "In terms of negligence, I consider that the defendant was driving at an excessive speed and that there was a causative link between the speed at which he was driving his vehicle in the circumstances and the plaintiff's accident." [*33] However, be that as it may, I am of the opinion that the apportionment of 40 per cent responsibility to the plaintiff was not outside the bounds of a reasonable exercise of discretion by his Honour. It is true, as counsel for the appellant submitted that all that the plaintiff had to do was to pause and look to before stepping from between the cars in the second lane into the kerbside lane to avoid the accident, but, on the other hand, all that the defendant had to do was reduce his speed which was, in all the circumstances, excessive. In those circumstances it cannot be said in my opinion that the conduct of the plaintiff was causatively more potent than any excessive speed on the defendant to any extent that would justify the submission for the appellant that the the left part of the learned trial of counsel Judge's apportionment was outside the limits of any reasonably exercised discretion.

As the High Court held in Podrebersek's case supra (at 493-4):- "A finding on a question of apportionment is a finding upon a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. [*34] It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds ... Such a finding, if made by a judge, is not lightly reviewed." NON-ECONOMIC LOSS

Counsel for the appellant submitted that, notwithstanding that the learned trial judge did take into account the plaintiff's age and notwithstanding that the plaintiff suffered serious injuries and had continuing permanent disabilities, his characterisation of the plaintiff's case as 60 per cent of a most extreme case was not properly proportionate to such an extreme case. Counsel for the appellant submitted, in particular, that the relatively short life expectancy of the plaintiff was such that a lower order of proportion was required. Whilst I can see the force of the submissions on behalf of the appellant in this connection I am unable to find that his Honour's decision exceeded the bounds of a reasonable exercise of his discretion in this respect.

DISCOUNT FOR CONTINGENCIES

The parties accepted that the conventional allowance for contingencies was 15 per cent but counsel for the appellant submitted that the increase of 5 per cent to 20 per cent assessed by the learned [*35] trial judge was "outside the range of a properly exercised discretion."

In this connection counsel for the appellant referred to the plaintiff's bilateral knee replacements which were approaching the limit of their expected durability, the plaintiff's arthritis in her neck and other places, the likelihood that within two or three years, even in the absence of the accident, the plaintiff would have required some form of hostel/nursing assistance, and her age.

Again, whilst I can see the force of the submissions on behalf of the appellant, I am unable to agree that his Honour's decision in this connection was outside the range of a properly exercised discretion.

For the above reasons, in my opinion, the appeal should be dismissed with costs.

**ORDER:**

1. Appeal dismissed. 2. The appellants to pay the respondent's costs of the appeal.

Representation:
Counsel for the Appellants: JE Maconachie, QC
Solicitors for the Appellants: Abbott Tout
Counsel for the Respondent: AJ Lidden
Solicitors for the Respondent: Stacks