HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, CALLINAN AND HEYDON JJ

ANTHONY PETER SUVAAL APPELLANT

AND

CESSNOCK CITY COUNCIL RESPONDENT

Suvaal v Cessnock City Council
[2003] HCA 41
6 August 2003
S384/2002

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

G O'L Reynolds SC with D R Conti for the appellant (instructed by McClellands)

D F Jackson QC with D T Miller for the respondent (instructed by Moray & Agnew)

CATCHWORDS

Suvaal v Cessnock City Council

Negligence – Causation – Appellant suffered injury in bicycle accident – Factual finding that appellant was injured as result of bicycle coming into contact with potholes following loss of concentration – Version of events not advanced by either party – Whether sufficient evidence for trier of fact to make that finding – Whether trier of fact can decline to accept the versions of events advanced by the parties – Whether trier of fact can adopt a version of events not advanced or tested by either party – Whether rejecting a plaintiff's version of events amounts to a finding of credibility – Whether trier of fact entitled to consider alternative case, in drawing inferences and reaching conclusions, where alternative case open on the pleadings and evidence – Whether consideration of alternative case amounts in the circumstances to procedural unfairness.

Appeal – Powers of appellate court – Restrictions on disturbance of findings and conclusions of trier of fact dependent on impressions of the credibility of witnesses and consideration of the entirety of the evidence – Whether entitled to intervene in conclusion reached by trier of fact contrary to evidence of plaintiff – Whether trier of fact precluded from reaching her own conclusion as to probable facts different from that asserted by plaintiff based on other evidence – Relevant appellate principles.

Supreme Court Act 1970 (NSW), s 75A.

1 GLEESON CJ AND HEYDON J. The appeal in this unusual case must be dismissed with costs for the reasons given by Callinan J, together with the following reasons.

2 Despite an ambiguous passage in the primary judge's reasons, it became common ground, at least in argument before the Court of Appeal, that there were no potholes in the intended path of the plaintiff as he travelled along the road, and if he hit potholes, this can only have been because his bicycle moved to the left, perhaps only to a small degree, and encountered potholes at the left hand edge of the road surface. The plaintiff's case, rejected by the primary judge, was that a motor vehicle forced him to the left. The primary judge, to the contrary, found that he moved left because of a loss of concentration on his part. The Council contended that his leftward movement could have been caused by a failure in the integrity of the handlebars in normal use on the road before he ran into the potholes at the left side of the road.

3 The case presented numerous difficulties for the plaintiff and for the primary judge. There was only one eye-witness, the plaintiff, and he was obviously an interested witness. He was giving evidence at a trial conducted six years after the events in issue. He gave numerous out-of-court versions of events, some of which were inconsistent with others, and some of which were less complete than was desirable from his point of view, given the nature of the case presented at the trial. The pain and shock of the accident may well have deleteriously affected his powers of memory and narration in its immediate aftermath. The continuing pain of the plaintiff's injuries and the medication he was given may well have similarly affected his powers of memory thereafter. The evidence of numerous other witnesses also was in conflict. Since the plaintiff was travelling at 25 miles per hour, ie about 40 kilometres per hour, which is more than 11 metres per second, the intervals of time within which the relevant events were happening were extremely small. If the handlebars failed in normal use on the road without the bicycle striking a pothole first, it might have hit a pothole a metre or two later – one or two tenths of a second later. This posed a difficulty for the primary judge when determining the precise order of events as it might not have been prudent to rely on the plaintiff's account of the order of events. The difficulties any witness in the plaintiff's position might have in perceiving whether the handlebars failed just before the potholes were struck or simultaneously with them being struck are obvious.

4 During the examination in chief the plaintiff said that a station wagon brushed his right leg, hit his right hand and forced him "into the pot holes and the rough edge of the road". The evidence continued:

"Q. What happened to you?

A. I bounced into a couple of pot holes and then I went into the rough edge of the road and bounced a couple more times and my handle bars went around like that. I had them like that and on the handle bars and after I hit a couple of pot holes and then I bounced into the rough edge of the road and then they went around like that.

Q. You are doing an anti-clockwise motion?

A. Yes, they were like that and I bounced a couple of times and then went on the rough edge of the road and it just went around like that. (Demonstrated swerving anti-clockwise to 90 degrees.)

Q. When that happened were you able to steer the bike?

A. No. I had balanced but I could not steer it.

Q. And what happened?

A. It went on to the dirt and to the left and it went straight across to the right hand side of the road."

5 In cross-examination the plaintiff said:

"Q. When you say the car forced you off the road can you just tell us a little more about that. Are you saying that you felt some contact with some type of car on your right side?

A. Brushed up on my thigh.

Q. Are you then saying that you moved your bike to the left or was it forced to the left?

A. No, the car forced me to the left.

Q. So you didn't alter your steering direction, the car forced the steering direction to be altered?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. When that happened what is the first thing that you became aware of from the point of view of feeling roughness?

A. I hit some pot holes.

Q. Were the pot holes that you hit not filled in with tar or –

A. Yes.

Q. So they were actually holes not filled in holes?

A. It happened that quick, how could I estimate.

Q. I am asking, if you can't you can't?

A. They might have had tar but sunken in, but I know I hit pot holes.

Q. How many?

A. I remember bouncing two or three times and my handle bars coming around."

6 Later the plaintiff said, while drawing a sketch on a piece of paper:

"Q. … I want to see what your direction was?

A. If I went into the rough here I bounced a couple of times.

Q. When you say rough, you mean the edge of the bitumen and the pot hole?

A. Yes, and the patches.

Q. And the patches after patches?

A. Yes, my handle bars went around like that.

Q. Did you hear a snap?

A. No, it just went around.

Q. The handle bars suddenly went around and you are indicating an anti clockwise direction to a 90 degrees, approximately?

A. Whether it was right at that time, I don't know. That's after bouncing in the holes I went on to the dirt a bit, out on to the dirt a bit. I went out on to the dirt and back across. I don't know if I went that way, that way or that way."

7 The primary judge found:

> "it was not the presence of a motor vehicle which caused the plaintiff to veer and change the direction of his steering of the bicycle. Nor did the motor vehicle hit or brush against his right thigh or right hand."

8 This finding must have had a significant effect on the plaintiff's credibility, at least as a reliable narrator of events. That was not the only flaw the primary judge identified. The primary judge also found that the plaintiff had given contradictory evidence about whether he could remember anything in the period 3-16 February 1993, immediately after the accident. In addition, the primary judge referred to variations in the plaintiff's evidence about the potholes and patches in the road and the difficulties he would have had in observing them at the moment he lost control of the bicycle. The primary judge then stated:

> "These factors do not mean that I find the plaintiff an untruthful witness. However, it has meant that I have examined his evidence with caution."

9 In setting out these general conclusions, the primary judge did not mention that she also later recorded her rejection of the plaintiff's denial that he had adjusted the handlebar on his bicycle to a point higher than the recommended maximum, and her rejection of a further denial by him that he had filed the lower part of the handlebar.

10 However, even if the primary judge formed the opinion that the plaintiff was, these instances apart, sincere, honest and reliable, the fact remains that she did not accept a fundamental element of his version of the events just before he was injured, even though it was an element to which he had stubbornly adhered.

11 Many, but not all, of the arguments advanced by the plaintiff in criticism of the Court of Appeal's conclusions rely on the proposition that the key findings of the primary judge were credit-based. The question as to whether these findings were credit-based or not is important for two reasons. First, if those findings were not credit-based, these arguments do not arise. Secondly, and more crucially, the question whether the relevant findings were credit-based or not casts light on the nature of the trial and the question whether any of the plaintiff's arguments can be entertained.

12 In submitting that the primary judge's finding that the plaintiff hit potholes on the left hand side of the road was credit-based, counsel for the plaintiff relied on two passages in the primary judge's reasons. One was:

> "the plaintiff hit potholes which caused a change in the direction of the steering of the plaintiff's bicycle. … [A]fter the plaintiff hit the potholes he went onto the rough edge of the road. In the accounts given by the plaintiff of how the accident occurred he consistently mentioned the loss

> of control of his bicycle, the handlebars collapsing and the steering giving way. I accept the plaintiff's account that he caused his bicycle to go into potholes or hit patches and the rough edge of the road. His bicycle bounced two or three times. The tar in the potholes may have sunken in but he knows that he hit potholes. The handlebars of his bicycle turned anti-clockwise and at that point he lost control of the steering."

If this passage is to be construed as containing credit-based findings, the key element in it is: "I accept the plaintiff's account that he caused his bicycle to go into potholes". The difficulty, however, is that it is erroneous to say that the plaintiff gave an "account" that "he caused his bicycle to go into potholes". His only account was that the unidentified motor vehicle caused his bicycle to do that. A finding that he hit the potholes before the steering collapsed might or might not be defensible by resort to other evidence and other reasoning, but it is not a finding based on the plaintiff's "account", which was to an entirely different effect.

13 The other passage which the plaintiff relied on as containing credit-based findings was:

> "The plaintiff, for reasons other than the presence of a motor vehicle, lost concentration when he allowed the steering of the bicycle to put him into the potholes and rough edge of the road."

This does not sit well with the first passage. It is difficult to reconcile the statement that the plaintiff "caused his bicycle to go into potholes" with the statement that the plaintiff "allowed the steering of the bicycle to put him into the potholes". But whether or not the second passage is reconcilable with the first, it too cannot be a credit-based finding sourced in an acceptance of the plaintiff's testimony. He never testified to any loss of concentration. Nor did he testify that "he allowed the steering of the bicycle to put him into the potholes", as though he was capable of exercising some choice in the matter: again, his testimony was to the opposite effect, namely that the motor vehicle forced him into the potholes against his will.

14 If the only eye-witness to an accident, like the plaintiff in this case, says: "A car brushed my leg and hit my hand, forcing me onto the side of the road where I hit potholes, the steering collapsed and I was injured", and a judge rejects either the existence or the causative role of the car, while it may in some circumstances be open to the judge to seek to account for the witness's injuries by recourse to inferences from other evidence in the case, and while it may be possible to conclude that the witness did hit potholes at the side of the road, it cannot be said that that is a credit-based conclusion. The plaintiff's account of the accident was a single account, which if accepted would have rendered the Nominal Defendant liable. To reject the assigned role of the car is to reject the

propositions which the plaintiff was communicating, and is not to base the element relating to the potholes on acceptance of the witness's credit. It is highly artificial and impermissible to engage in a process of parsing and analysing the plaintiff's testimony before severing particular words from it, purportedly leaving the balance as a free-standing proposition. It distorts the substance of what he was saying.

15 The fact that the primary judge's conclusion was not credit-based renders irrelevant some of the plaintiff's arguments to this Court, but leaves some available.

16 However, there is a more fundamental weakness in the plaintiff's position. Because of the way the proceedings were conducted and because of the primary judge's rejection of the plaintiff's evidence that a car forced him off the road, it was not open to the primary judge in this particular case to conclude that the plaintiff hit the potholes at the side of the road by reason of a loss of concentration[1].

17 It is necessary at the outset to deal specifically with the following submission of the plaintiff: "It is not the plaintiff's fault that the full ramifications of a finding of loss of concentration were not fully explored by the Council at the trial." In view of the plaintiff's conduct in the witness box, that is a wholly baseless submission. That is because the possibility that the plaintiff suffered a loss of concentration was a proposition which the plaintiff refused to let the Council explore. Counsel for the Nominal Defendant, and then counsel for the Council, with considerable fairness, endeavoured, in the course of testing the plaintiff's account, to open up the possibility of some cause of the accident other than a car forcing the plaintiff off the road. As the quotations from the plaintiff's cross-examination by those two counsel, which are set out in

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1 There was debate about whether the Council ought to have filed a Notice of Contention in relation to its argument that it had no opportunity to deal with the loss of concentration case. It is not necessary to resolve that debate. Even if the plaintiff was not on notice of the point until the Council's written submissions were served, or even until the oral argument on this appeal – and the high degree of preparedness of the plaintiff's counsel by the time of the oral hearing suggests he was certainly on notice by then – an opportunity was given to file written submissions on whether loss of concentration was in issue at the trial. That opportunity was taken up by both parties. Even if there ought to have been a Notice of Contention, which it is not necessary to decide, any prejudice occasioned by the failure to file it has been cured and there can be no objection to considering the arguments advanced.

Callinan J's reasons for judgment[2], show, the plaintiff refused to contemplate the existence of that possibility, and repeatedly refused to answer questions on any assumption other than that a car forced him off the road. Those refusals meant that the plaintiff precluded examination by counsel for the Nominal Defendant and the Council of the factual rationalisation at which the primary judge eventually arrived in finding the Council liable. For the primary judge to reach conclusions about the cause of the accident which the plaintiff had rejected and which the plaintiff had prevented the Council from testing was in itself impermissible.

18 The truth is that the key finding of the primary judge that the plaintiff veered left into the potholes because of a loss of concentration was never mentioned by him to any of the numerous witnesses who reported to the court what the plaintiff said in the period beginning immediately after he was found injured beside the road and in the following months; was not specifically raised in the pleas of contributory negligence in the defences of the Nominal Defendant and the Council; was never asserted in the plaintiff's testimony; was a proposition which, by reason of the plaintiff's stance in cross-examination, could not be tested; was never advanced by his counsel in argument before the primary judge; was not advanced by any other party; and was a proposition rejected in the plaintiff's Notice of Cross-Appeal to the Court of Appeal[3].

19 Before this Court, counsel for the plaintiff submitted that a case alternative to the theory of being forced off the road had been pleaded and that the loss of concentration case was in issue at the trial.

20 Any contention that the loss of concentration theory was pleaded must be rejected.

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2 At [134] below.

3 That document complained about the primary judge's finding of 20 percent contributory negligence on the part of the plaintiff. Ground 1(a) stated that the primary judge erred in finding that the plaintiff "lost concentration when he allowed the steering of the bicycle to put him into the potholes and rough edge of the road". Ground 2 said: "There was no evidence given by the [plaintiff] to support a finding that he lost concentration when he allowed the steering of the bicycle to put him in the potholes and rough edge of the road." Indeed there was not. Counsel for the plaintiff abandoned the cross-appeal at the start of oral argument in the Court of Appeal, but the Notice of Cross-Appeal does further illustrate how radically inconsistent the primary judge's findings were with the assumptions of the parties, and in particular the plaintiff, as revealed by examining the course of the trial.

21 The plaintiff pointed to paragraph 9 of the Statement of Claim[4]. However, it says nothing about going off the road because of a momentary loss of concentration. The plaintiff submitted that to plead that his injuries were "caused by the negligence" of the Council is a sufficient pleading of the case found by the primary judge, and that to plead a "loss of concentration" was not a necessary averment. That submission is unsound. The plaintiff was entitled to make a claim against the Council in the alternative to that which he made against the Nominal Defendant[5]. But he was obliged to plead specifically any matter which, if not pleaded specifically, might have taken the Council by surprise[6]. The plaintiff pleaded the manner in which he came to be on the edges of the road in paragraph 6 of the Statement of Claim, namely being forced onto the edges by the unidentified motor vehicle. In that early part of the Statement of Claim the plaintiff also pleaded that the Council had designed, constructed and maintained the road (paragraph 3), and was responsible for maintaining its edges (paragraph 4), which were rough and uneven (paragraph 5). The Council would reasonably have read the case against it as picking up not only the allegations about the road and its edges in paragraphs 3-5, but also the allegation in paragraph 6 about how the plaintiff came to be on those edges. It would have been possible for the plaintiff, in the case against the Council, to make some allegation about how he came to be on the edges which was alternative to the allegation on that subject made against the Nominal Defendant – possible, though perhaps very damaging to the overall credibility of the plaintiff's case. The failure of the plaintiff to plead specifically any other cause explaining his presence on the road edges meant that the Council may have been taken by surprise by the primary judge's reliance on loss of concentration.

22 The defences of the Nominal Defendant and the Council do not plead loss of concentration either. They each said only that the plaintiff had failed to keep a proper lookout (which does not specifically allege a loss of concentration) and that he failed to ride on the bitumen surface (which asserts a neutral fact calling for an explanation rather than offering an explanation).

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4 Quoted below by Callinan J at [126]. The Statement of Claim was amended on 29 November 1999, long after the trial had started and the plaintiff had left the witness box. However, the parts relevant to the present debate were not amended.

5 Supreme Court Rules 1970 (NSW), Pt 15 r 17(2).

6 Supreme Court Rules 1970 (NSW), Pt 15 r 13(1).

23 Hence the alternative explanation for the plaintiff's presence on the road edges was outside the pleadings. It was thus not open to the primary judge to adopt it unless the course of the trial made that permissible.

24 The plaintiff did contend in this Court that an alternative case based on a loss of concentration was in issue at the trial. That contention, which was put in several ways, must also fail.

25 The plaintiff submitted in this Court that the case found by the primary judge was "covered by the plaintiff's submissions at trial". That is wholly incorrect.

26 The plaintiff also submitted in this Court that "it was a matter for the defendants to agitate the issue of 'loss of concentration'." That, too, is incorrect.

27 However, whether or not it was for the defendants to agitate the issue of loss of concentration, the plaintiff submitted in this Court that the Council and the Nominal Defendant had in fact done so. That is unsound. The Council submitted to the primary judge: "You cannot speculate upon loss of attention, tiredness, misjudgment etc for the [reason] that he has given you his only reason – a motor vehicle. If this is a lie and is rejected, then to embrace any other reason is speculation." The fact that one party rules a matter out as not in issue does not make it an issue unless an opposing party contends that it is an issue. The Council also submitted that if the plaintiff was not forced off the road by a motor vehicle, the most probable explanation for the accident was that the handlebars failed in normal road use without hitting a pothole. The plaintiff did not file any written submission in response to the quoted passage controverting it and contending that loss of concentration was an issue, nor did he file any written submission contending that the plaintiff's injuries could be explained otherwise than by the unidentified motor vehicle or by failure of the handlebars in normal road use. The plaintiff did not establish that any relevant oral submission had been made on his behalf. The Council's exclusion of loss of concentration as an issue was thus accepted.

28 The Nominal Defendant filed two sets of written submissions. The first related to the plaintiff's claim against the Nominal Defendant and the Council and the second related to the Nominal Defendant's cross-claim against the Council.

29 In the first set of submissions the Nominal Defendant recorded an understanding that the plaintiff's case was that a motor vehicle forced him off the road – an understanding shared by the primary judge and by the Council. The Nominal Defendant submitted that that contention was wrong, and that the accident was caused by a failure of the handlebars in normal use. The Nominal Defendant did raise the possibility that the plaintiff's attention may have been

distracted by the presence of another car on the road which, without negligence, caused him to take his eyes off the road or move left to permit overtaking. But the Nominal Defendant submitted that the primary judge did not have to speculate about this. Obviously this possibility was inconsistent with the plaintiff's case and the plaintiff did not adopt it.

30 A little later, the Nominal Defendant contended that one respect in which the plaintiff had been guilty of contributory negligence was in "[n]ot looking or concentrating [on] where he was going, thereby resulting in running into potholes in the road." The theory that the plaintiff was not looking or concentrating on where he was going was probably only a re-statement of the possibility that another car distracted the plaintiff; was unsupported by evidence pointed to by the Nominal Defendant or otherwise; was contradicted by the plaintiff's testimony; and was not part of the plaintiff's case until oral submissions before the Court of Appeal began.

31 The final occasion on which it was submitted that the Nominal Defendant referred to the subject of loss of concentration was in the Nominal Defendant's submissions on the cross-claim against the Council. The Nominal Defendant submitted that the plaintiff's case was that the final fracture of the head stem occurred when the bicycle struck potholes "whether this was caused by being forced into that place by a motor vehicle or otherwise". In fact the plaintiff's case excluded any possibility falling within the words "or otherwise". And, as counsel for the plaintiff who appeared in the Court of Appeal conceded to that Court, neither the Nominal Defendant, nor the Council, nor the plaintiff's own counsel, had put any specific questions to the plaintiff about losing concentration. Further, the Nominal Defendant's submission did not go on to contend that the plaintiff had lost concentration.

32 These passing allusions scarcely made the possibility of a loss of concentration a fact in issue. The plaintiff did not raise it as an issue, the Council denied that it was an issue, and the only specificity to which the Nominal Defendant condescended was the possibility that the plaintiff's attention was distracted by a car, which the primary judge did not accept. Even if the primary judge's finding could be said to have been foreshadowed in final address by these fleeting references after the evidence had closed, it was too late for the Council to deal with the matter in evidence.

33 After the primary judge made her unrequested and unexpected finding about a loss of concentration, the plaintiff's first response was to challenge it in the Notice of Cross-Appeal filed on 15 December 2000. But on 24 April 2001 the plaintiff filed written submissions for use in the Court of Appeal which adopted a different tack, foreshadowing the plaintiff's eventual abandonment of the Notice of Cross-Appeal at the hearing on 22 October 2001. The plaintiff submitted that the primary judge was entitled to infer some momentary loss of

concentration; that she did not make a finding excluding the existence of a motor car; and that the plaintiff was riding along the road "believing that a motor vehicle was travelling behind him". The fact is, however, the primary judge never made a distinct finding either that there was a motor vehicle or that the plaintiff believed there was a motor vehicle. But, untenable though that part of the written submissions was, its narrow form highlights the fact that it had not been put at trial.

34 A further retreat took place in oral argument before the Court of Appeal. Counsel for the plaintiff did not argue there that the presence of a motor vehicle distracted the plaintiff or that he believed there was a motor vehicle. Counsel for the plaintiff, while accepting that a loss of concentration had been denied by the plaintiff, submitted that the primary judge was entitled to infer its existence.

35 Hence the primary judge's theory of a loss of concentration was never in issue before the close of the evidence at the trial; was rejected at all material times by the plaintiff; was, if raised in address at all, at most raised faintly and briefly in voluminous written submissions by the Nominal Defendant at a time too late to affect the evidence; and was never adopted by the plaintiff until oral argument began in the Court of Appeal. The plaintiff's contention that it was in issue at the trial is not correct. In these circumstances it cannot be relied on now.

36 A trier of fact, confronted with divergent cases being advanced by the parties, may decline to accept either case and may proceed to make findings not exactly representing what either party said[7]. But that does not justify the creation of an entirely new case with which the losing party had no testimonial or other evidentiary opportunity to deal.

37 In *Anchor Products Ltd v Hedges*[8] Windeyer J said: "[I]f a plaintiff builds his case entirely upon allegations in the pleadings of particular acts or omissions on the part of the defendant, he may be confined to the issue he has thus chosen, unless at the trial he be allowed to amend". The present case is one in which the plaintiff not only pleaded a particular case, but emphatically denied the possibility of any other case throughout his testimony. Not surprisingly, the plaintiff never sought leave to amend. Windeyer J continued: "On the other hand, if [a plaintiff] has made a general allegation of negligence, his alleging particular faults does not necessarily prevent his relying upon an inference to be drawn from the fact that the accident happened." Windeyer J was referring to the doctrines surrounding the maxim res ipsa loquitur. But the present case was very

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7 *Williams v Smith* (1960) 103 CLR 539 at 545.

8 (1966) 115 CLR 493 at 499.

far from being a case where, to use his words, "the accident spoke for itself." Windeyer J also said that it was permissible for the trial judge in that case to allow, and indeed to suggest, an amendment along res ipsa loquitur lines, because it met "matters that emerged in the course of the trial"[9]. Here nothing emerged in the course of the trial to match any amendment which might have been proposed by way of foreshadowing the primary judge's finding. The primary judge rationalised the circumstances so as to generate a possible explanation for the accident which was not directly supported by any matter that emerged in the course of the trial. It was not an explanation which the Council had any opportunity to deal with while the plaintiff was in the witness box or at any time before the evidence closed.

38 Counsel for the plaintiff joined issue with the Council's argument that it had had no opportunity to deal with the loss of concentration theory at the trial by submitting that if there had been anything in the point, it would have been propounded by the senior counsel who represented the Council in the Court of Appeal: that senior counsel also appeared at the trial, but not in this Court. Counsel for the plaintiff said that that particular senior counsel would certainly have taken the point, if it had been available, that there had been a prejudicial breach of the rules of natural justice, but he did not.

39 In fact the senior counsel in question did take the point. Of the proposition that the plaintiff "suddenly lost concentration", he said "no-one had a chance to ask him that or test him on that because he wouldn't agree to assume anything except this is what happened". That stand had been foreshadowed in the Further Amended Notice of Appeal, paragraph 1(d), which contended that the primary judge erred in finding that the plaintiff had, for reasons other than the presence of a motor vehicle, lost concentration, and one of the circumstances said to give rise to that error was that the plaintiff had "refused in cross-examination to countenance questions which proceeded on the assumption that there was no motor vehicle which forced him off the road". Further, even if senior counsel did not take the point in the Court of Appeal, that did not debar his successor from doing so in this Court.

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9 (1966) 115 CLR 493 at 499.

40 McHUGH AND KIRBY JJ. This appeal[10] is one of several[11] in which this Court has been asked to intervene, to correct appellate interference with a conclusion at trial said to have depended, in whole or part, upon an assessment of the credibility of key witnesses. The approach of appellate courts to this question is crucial for the performance of their statutory functions. So much has been recognised since the earliest years of this Court[12]. The question has repeatedly engaged the attention of this and other final courts, including recently[13].

41 Upon one view, there is nothing new to be said concerning the proper approach of appellate courts to their functions[14], especially because the issues have been visited by this Court recently on a number of occasions[15]. Nevertheless, special leave to appeal having been granted, it is necessary once again to embark upon the application of the established rules. Their application is invoked by a party rendered quadriplegic in the incident out of which this litigation arose. Self-evidently, the reversal by the New South Wales Court of Appeal of the judgment at trial in his favour enlarged the tragedy of a profoundly injured person. But it would be impermissible to allow a tragic case, or the natural sympathy engendered by the circumstances, to distort the application of the relevant legal doctrine[16].

The facts

42 Mr Anthony Suvaal ("the appellant") was injured on 2 February 1993 whilst riding a bicycle on a road near Cessnock in New South Wales, called in

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10 From a judgment of the New South Wales Court of Appeal: *Cessnock City Council v Suvaal* [2001] NSWCA 428.

11 See eg *Fox v Percy* (2003) 77 ALJR 989; 197 ALR 201; *Shorey v PT Ltd* (2003) 77 ALJR 1104; 197 ALR 410; *Joslyn v Berryman* (2003) 198 ALR 137.

12 See eg *McLaughlin v Daily Telegraph Newspaper Co Ltd [No 2]* (1904) 1 CLR 243 at 277 and *Dearman v Dearman* (1908) 7 CLR 549.

13 eg *Housen v Nikolaisen* (2002) 211 DLR (4th) 577.

14 cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 326 [85]; 160 ALR 588 at 614 ("*SRA*").

15 Most comprehensively in *SRA* (1999) 73 ALJR 306; 160 ALR 588 and *Fox v Percy* (2003) 77 ALJR 989; 197 ALR 201.

16 cf *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 386 noted by Master Harrison in *Suvaal v Nominal Defendant* [2000] NSWSC 1043 at [269].

that section of its length Quorrobolong Road. The appellant was a cycling enthusiast. He lived in the district. At one stage he had competed professionally as a cyclist. Although by 1993 he was 35 years of age, he was hoping to make a comeback. When injured, he was in training for a circuit that was to commence about two or three months later. He was well familiar with the road and with the bicycle he was riding, which belonged to him.

43 The appellant's particular purpose was to time his speed over a segment of about 15 kilometres of the journey. This comprised a flat portion of the road called the "speed section" reached on the return journey from the town of Heaton to the appellant's home. On the "speed section" the appellant travelled at about 25 miles per hour (about 40 kilometres per hour). The critical events happened when he was about 1.5 kilometres from the end of the "speed section". He was travelling in a northerly direction. In the distance, the road veered to the left. At a point near a house occupied by the Barber family something happened that resulted in the appellant's losing control of the bicycle, veering off the road on the incorrect side and being propelled over the handlebars to land heavily in a nearby gully. As a result of his fall (or the impact of his body on a hard object (tree or boulder)) the appellant's helmet was smashed. His spinal cord was severed by a fracture at the C6-C7 level producing quadriplegia.

44 The appellant was eventually discovered by Mrs Barber when she heard his cries of help. She summoned assistance. Soon two officers of police arrived, namely Senior Constable Campbell and Senior Constable Barber, the latter being Mrs Barber's husband. An ambulance arrived. A helicopter was summoned to take the appellant to hospital. Mrs Barber, the police officers, the ambulance attendants and paramedics travelling with the helicopter gave evidence concerning conversations they had with the appellant about what had happened to him. Senior Constable Campbell prepared a report in a police notebook. This was lost, but its substance was transcribed in a police occurrence pad which survived. Similarly, the ambulance officers and the paramedics immediately recorded reports, as did Dr Stephen Ruff under whose care the appellant came the day after his injury.

45 In September 1994 the appellant commenced proceedings in the Supreme Court of New South Wales in respect of his damage and loss. He sued the Nominal Defendant, established by the *Motor Accidents Act* 1988 (NSW), and the Cessnock City Council ("the Council") on the basis of negligence for which each of those parties was alleged to be liable. The Nominal Defendant was sued on the footing that the appellant had been "brushed" by an unidentified motor vehicle that overtook him on his right-hand side, forcing him off the sealed bitumen surface of Quorrobolong Road onto the rough edges of the road whereby the handlebar assembly of the appellant's bicycle broke causing him to lose control and to crash in a way that occasioned his injuries. Alternatively, or additionally, the appellant sued the Council. The claim against the Council

rested on the allegation that it had failed to design and construct the bitumen surface of the road properly, and to repair the edges carefully, against the possibility that a person such as the appellant would suffer the loss of control of a bicycle as, it was claimed, had happened in this case.

46 The trial of the appellant's action was heard by Master Harrison. The trial lasted some 24 days, spread over the space of a year. It was hotly contested by both defendants, each of whom denied negligence, asserted contributory negligence on the part of the appellant and cross-claimed against the other.

47 In the course of the trial four hypotheses emerged to explain the critical incidents that led to the appellant's injuries. These were:

(1) That he had been forced off the road by an unidentified vehicle, resulting in impact with potholes that caused the handlebars of his bicycle to turn suddenly anti-clockwise, resulting in the snapping of the metal stem supporting the handlebars, loss of control, and veering off the road on the opposite side with consequent injuries. (The unidentified vehicle hypothesis);

(2) That he had no impact with potholes but, proceeding in the normal way along the road surface, the repeated trauma of normal road use caused a "final overload" to the metal stem of the bicycle weakened by defects revealed in post-accident examinations of the metal and by the adjustment of the handlebars to an unsafe position or by filing repairs allegedly performed upon the bicycle frame by the appellant weakening it and rendering it susceptible to fracture. (The normal riding hypothesis);

(3) That he had simply driven off the wrong side of the road because of his own negligence in controlling the bicycle, resulting in trauma to the bicycle frame at the point at which both the cycle and the appellant came to rest. (The wrong side hypothesis); and

(4) That, whatever caused the appellant to leave the road surface whilst travelling on the correct side (inferentially a temporary lapse of concentration), he there hit potholes that occasioned the sudden anti-clockwise movement of the handlebars resulting in the snapping of the metal stem, loss of control of the cycle's direction, the veering movement to the opposite side of the road and the consequent crash. (The pothole hypothesis).

48 The Council contested that the pothole hypothesis was ever in issue at the trial, except as an incident of the unidentified vehicle hypothesis. It will be necessary to return to that question.

The decision of the Master

49 The pleading of the case, its presentation at trial and the appellant's own testimony, make clear that the appellant's essential claim involved an assertion that he was forced off the road by an unidentified overtaking vehicle that brushed or actually touched him: propelling him into potholes to his left. Not only was that the way the appellant himself said the critical events were initiated. He also called a number of witnesses, mostly from his family, to give evidence that that was what he had told them a week or so after the incident.

50 The difficulty for the appellant with the unidentified vehicle hypothesis was that it was inconsistent with the recollection, and recorded reports, of those who had had immediate contact with the appellant after he was injured, most especially Senior Constables Barber and Campbell. After an analysis of the evidence, the Master rejected this first hypothesis[17]:

> "The preponderance of credible evidence establishes on the balance of probabilities that it was not the presence of a motor vehicle which caused the plaintiff to veer and change the direction of his steering of the bicycle. Nor did the motor vehicle hit or brush against his right thigh or right hand … [I]t is implausible that he did not mention it to any of the people who attended the scene, even when directly asked about the presence of a motor vehicle …
>
> It was one week after the accident that the plaintiff is reported to have said that he was hit by a brownish coloured station wagon and that something went past but he could not recall much after that."

51 The Master was not convinced that the appellant was an untruthful witness[18]. However, she did not accept his evidence that a motor vehicle had caused him to leave the road surface. As was later to be observed in the Court of Appeal[19], the Master's reasons do not contain an opinion that there was *no* motor vehicle. But they "acquitted any motor vehicle, assuming one was there, of any 'involvement' in the accident"[20]. This conclusion inevitably led to the dismissal of the Nominal Defendant from the proceedings. There was no cross-appeal by the appellant against the Master's judgment in favour of the Nominal Defendant. The unidentified vehicle hypothesis is therefore excluded.

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17 [2000] NSWSC 1043 at [112]-[113].

18 [2000] NSWSC 1043 at [17].

19 [2001] NSWCA 428 at [26].

20 [2001] NSWCA 428 at [27].

52 The Master did not trouble long over the wrong side hypothesis. Given such an experienced cyclist, familiar with the road and with his bicycle, her conclusion in this respect was unsurprising. That left the normal riding hypothesis or some other explanation derived from all of the facts in the Master's capacity as the tribunal of fact[21].

53 In the end, the Master accepted part of the appellant's evidence that concerned the causative element of the potholes on the left-hand side of the road. In the absence of an unidentified motor vehicle to explain how he would have strayed from the bitumen surface onto the uneven rough section on the side containing the potholes, the Master inferred a momentary lapse of concentration on the appellant's part. She concluded that "for reasons other than the presence of a motor vehicle, [he] lost concentration when he allowed the steering of the bicycle to put him into the potholes and rough edge of the road"[22]. The critical findings were expressed in these words[23]:

> "It is my view, and contrary to the [Council's] submissions, that the preponderance of credible evidence establishes on the balance of probabilities that the plaintiff hit potholes which caused a change in the direction of the steering of the plaintiff's bicycle. I also accept that after the plaintiff hit the potholes he went onto the rough edge of the road. In the accounts given by the plaintiff of how the accident occurred he consistently mentioned the loss of control of his bicycle, the handlebars collapsing and the steering giving way. I accept the plaintiff's account that he caused his bicycle to go into potholes or hit patches and the rough edge of the road. His bicycle bounced two or three times. The tar in the potholes may have sunken in but he knows that he hit potholes. The handlebars of his bicycle turned anti-clockwise and at that point he lost control of the steering. The bike went straight across the bitumen onto the right hand side of the road. He was heading towards two trees, he leant his left leg on the frame of the bicycle to steer between two trees. He then fell in the manner he described".

54 These findings were sufficient to establish that the presence of the potholes on the side of the road, for which the Council was responsible, were a relevant immediate cause of the appellant's injuries. It remained for the appellant to show that the Council was negligent in causing or permitting the potholes to

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21 cf *Williams v Smith* (1960) 103 CLR 539 at 545.

22 [2000] NSWSC 1043 at [309].

23 [2000] NSWSC 1043 at [167].

be there, although the road in question was a relatively minor country road[24]. On this point, the Master concluded that the Council had been negligent in discharging its duty of care to the appellant for the misfeasance which she found in the manner in which the Council had carried out its repairs and upkeep of the road[25]. In reaching the foregoing conclusions, the Master rejected the normal riding hypothesis.

55 The Master specifically rejected the Council's contention that the real cause of the snapping of the central metal frame upon which the bicycle handlebars rested (or whatever else caused the handlebar assembly to come free with resulting loss of steering) was the last event in a fatigue fracture of the metal stem or the imprudent adjustment by the appellant of the position of the head stem above the maximum marking recommended by the manufacturer[26]. These were amongst the hypotheses that the Council had pressed on the Master to permit an explanation of the cause of the critical events leading to the crash that involved no connection between the bicycle and potholes and simply blamed the sudden loss of control over the bicycle's trajectory upon defects in the bicycle itself, for which the Council was blameless.

56 At the trial, the parties called metallurgical engineers to support their respective cases. The Master accepted that the appellant was unaware of any fatigue cracks in the central head stem, such as had been found by microscopic examination of its metal components after the crash. Despite the appellant's denial, the Master accepted that he had adjusted the handlebars to a higher level than the recommended maximum fixed by the bicycle manufacturer[27]. She did not accept that this adjustment, or any filing of the metal stem, was a significant cause leading to the severance that resulted in the sudden loss of rider control over the direction of the bicycle. She explained (and the bicycle was in evidence) that the filing of the head stem involved only "shallow superficial abrasion marks" that "did not look rotational"[28]. In essence, the undetectable fatigue fractures would continue to be aggravated by the bumps occasioned to the head stem in ordinary passage of the bicycle over the road surface. Only "very

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24 The action was tried before the decision of this Court in *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

25 [2000] NSWSC 1043 at [305].

26 [2000] NSWSC 1043 at [288]-[289], [309].

27 [2000] NSWSC 1043 at [291].

28 [2000] NSWSC 1043 at [292].

minimal force [was] required to cause a final fracture"[29]. Specifically, the Master accepted the evidence of the appellant's metallurgist, Dr Thompson, that "the bicycle coming into contact with rough road edges would have been a sufficient shock load to produce the final fracture [making it] possible that the final fracture occurred when the plaintiff hit the potholes and the rough edge of the road"[30].

57 In support of the last-mentioned conclusion, the Master quoted the following evidence of Dr Thompson[31]:

> "A: … I would have expected if the bicycle had been used in that condition with the 50 per cent fatigue crack and then the two sub-critical overload impositions – if the bicycle had been used for a few hours or for a period of time and received a sufficient number of cycles of stress or load, then I would expect to have seen evidence of fatigue cracking similar to what accounted for 50 per cent of the cross-sectional area reduction.
>
> Q: Did you see that?
>
> A: No, I didn't.
>
> Q: Are you able to make upon the balance of probabilities a deduction from your failure to see that?
>
> A: My failure to see that, having known that the bicycle had been in use that morning, sways my balance of probability to the fact that the two sub-critical overload impositions were not there prior to the final overload. They would have occurred at a similar time as the final overload fracture."

58 There was alternative metallurgical evidence before the Master to posit, as a cause of the "final overload fracture", innocent traumas on the mid-road surface accumulating upon the pre-existing metal fatigue in the head stem tube of the bicycle. However, the Master preferred the opinion of Dr Thompson. She reduced the appellant's damages by 20% for contributory negligence. This included the appellant's adjustment of the head stem that had exposed "the weaker part of the head stem causing the crack to accelerate" and the appellant's riding of the bicycle at so high a speed in conditions where it was possible for a

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29 [2000] NSWSC 1043 at [298].

30 [2000] NSWSC 1043 at [298].

31 [2000] NSWSC 1043 at [300].

loss of concentration to occur with consequent divergence to the rough surface with its potholes[32].

59 It was in this way that the Master came to her conclusion that the Council was responsible for the cause that had occasioned the crash of the bicycle. Having found the remaining issues of negligence in favour of the appellant, the Master concluded that the appellant was entitled to recover a substantial judgment against the Council and it alone[33].

The decision of the Court of Appeal

60 The Council appealed to the New South Wales Court of Appeal against the judgment. The appellant cross-appealed. The Council's appeal challenged numerous aspects of the Master's reasoning including on the cause of the accident; the liability of the Council in negligence; the findings of fact upon which such liability had been determined; the conclusion as to the extent of the appellant's contributory negligence; and the costs orders. The appellant's cross-appeal contested the Master's conclusions on contributory negligence and on the refusal to award interest on the agreed damages. In this Court, the Council drew attention to the fact that, amongst the complaints concerning the Master's finding of contributory negligence, was one whereby the appellant said that "[t]here was no evidence given by [the appellant] to support a finding that he lost concentration when he allowed the steering of the bicycle to put him in the potholes and rough edge of the road". The cross-appeal was not pursued in oral argument before the Court of Appeal.

61 When the appeal was heard by the Court of Appeal, the issue of causation was severed and dealt with first. At the conclusion of argument, the Court unanimously upheld the appeal. It set aside the judgment in favour of the appellant. The other issues were not considered. The principal reasons of the Court of Appeal were given by Giles JA.

62 Addressing the Master's acceptance of the pothole hypothesis, Giles JA rejected the finding that the divergence into potholes was "due to lapse in concentration"[34]. He stated that this finding was "quite contrary to the

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32 [2000] NSWSC 1043 at [309].

33 Judgment was entered in favour of the appellant in the sum of $2,240,000. This represented the damages agreed in the event of the appellant's recovery of judgment against the Council. The appellant was ordered to pay part of the Nominal Defendant's costs.

34 [2001] NSWCA 428 at [9]-[10].

[appellant's] evidence". It had "no foundation in the evidence" being no more than a "rationalisation of what occurred, without due consideration of whether the loss of steering control was from final overload before the [appellant] went into the potholes"[35]. Giles JA pointed out that the Master had accepted the evidence of both metallurgists, Dr Thompson and Mr Robinson. The former, he said, whilst supporting a pothole hypothesis, had done so only on the basis of consistency with hypothesised facts including the presence of an overtaking motor vehicle. Mr Robinson had expressed the opinion that the "final overload fracture could have been caused by a light impact such as running over a small rock or a branch on the surface of the roadway"[36].

63 Because it was common ground that the main surface of the roadway did not contain potholes, to succeed it was necessary for the appellant to establish that it was more probable than not that he had come into contact with potholes on the left-hand side of the road before the final overload fracture and the loss of steering control. The Council submitted that once the hypothesis of an unidentified vehicle was excluded by the Master's finding, an impact with potholes prior to the final overload fracture could not be shown as more probable than not. It conflicted with the appellant's version of events, which provided no support for a divergence into the potholes other than by reason of being forced there by an overtaking vehicle. It therefore had no foundation in the evidence. The conflicting inferences were of "equal degrees of probability so that the choice between them is a mere matter of conjecture"[37]. Relying on what was said in *Holloway v McFeeters*[38], Giles JA accepted these submissions. He rejected the Master's conclusion. He expressed the view that the more probable explanation of the accident was that the final overload fracture of the head stem occurred in accordance with the normal riding hypothesis[39].

64 The other judges constituting the Court of Appeal agreed with Giles JA's analysis. Powell JA did so without separate reasons[40]. Rolfe AJA added some reasons of his own (with which Giles JA in a postscript expressed agreement[41]).

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35 [2001] NSWCA 428 at [10].

36 [2001] NSWCA 428 at [12].

37 [2001] NSWCA 428 at [16].

38 (1956) 94 CLR 470 at 480.

39 [2001] NSWCA 428 at [16].

40 [2001] NSWCA 428 at [1].

41 [2001] NSWCA 428 at [17].

In those reasons, Rolfe AJA emphasised that the appellant had not, at trial, sought to make out a case that he had moved to his left merely to allow the unidentified vehicle to pass or because of a disturbance in the air occasioned by the supposed car's motion[42]. The likelihood that a highly experienced cyclist, aware of the road and of the dangers, would otherwise move onto the rough side portion of the road, so as to come into contact with potholes, was, in Rolfe AJA's opinion, "totally improbable"[43].

65 It was on this basis that the Court of Appeal reversed the judgment for the appellant. By special leave, the appellant has appealed to this Court. The Council brought no cross-appeal. It filed no notice of contention.

The issues

66 Three issues were argued in the appeal to this Court:

(1) The appellant's submission that the Court of Appeal erred in disturbing the judgment of the Master having regard to the fact that that judgment rested, in material respects, upon advantages enjoyed by the Master and not by the Court of Appeal. Such advantages were said to include the assessment of the credibility and acceptability of the testimony of witnesses who gave oral evidence that had not been seen and heard by the appellate court. (The appellate principles issue);

(2) The Council's submission that the Master's conclusion in favour of the appellant, based on the pothole hypothesis, was unavailable in the circumstances, being a conclusion different from that pleaded by the appellant, asserted in his evidence and presented at trial. The appellant contested the entitlement of the Council to raise this point in the absence of a notice of contention. Alternatively, he argued that the point was unavailable in the way the case and the appeal had been conducted. (The procedural fairness issue); and

(3) The appellant's submission that the costs of the appeal to date should be borne by the Council having regard to the course that the appeal to the Court of Appeal had taken. (The appellate costs issue).

67 We shall address these issues in turn.

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42 [2001] NSWCA 428 at [28].

43 [2001] NSWCA 428 at [30].

Appellate review and credibility assessments

68 The starting point of analysis of the first issue is an appreciation of the nature, and incidents, of an appeal. It is not a common law procedure[44]. It is an invention of statute[45]. Within different statutes, appeal takes different forms[46]. Plainly, an appellate court must conform to its statutory function. As a repository of statutory power, it must discharge those powers fairly, reasonably and in accordance with law.

69 In the present case, the powers of the Court of Appeal were those stated in s 75A of the *Supreme Court Act* 1970 (NSW). That section provides for an appeal "by way of rehearing"[47] in which the Court of Appeal has the powers and duties of the court at first instance, including in "the drawing of inferences and the making of findings of fact"[48]. The character of the appeal is indicated by the fact that the Court "may receive further evidence"[49], although usually only "on special grounds"[50]. It is specifically empowered to "make any finding" and "give any judgment" that "ought to have been given … which the nature of the case requires"[51]. Unarguably, this is a large mandate. Being expressed in legislation, it may not be diminished by judicial exegesis that denies the statutory text. Being powers conferred, in this case, upon a superior court of record, ordinary principles would require that they be afforded a large ambit to be applicable to the many cases that come before the Court of Appeal.

70 Nevertheless, from the start, appellate judges have been alert to the realities of the ways in which they perform their duties. These have necessitated that they make allowance for the differences between trial and appellate

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44 *Fox v Percy* (2003) 77 ALJR 989 at 993 [20]; 197 ALR 201 at 206 and cases there cited.

45 *SRA* (1999) 73 ALJR 306 at 322 [72]; 160 ALR 588 at 609.

46 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-622; cf *Eastman v The Queen* (2000) 203 CLR 1 at 40-41 [130].

47 s 75A(5).

48 s 75A(6)(b).

49 s 75A(7).

50 s 75A(8).

51 s 75A(10). See *Warren v Coombes* (1979) 142 CLR 531 at 545.

functions. The most important differences are two. Appellate judges do not normally see or hear witnesses give their testimony. Typically, they read the record of the trial appearing in print. Communication is a complex process. It can be achieved by words but also by looks, gestures and body language, by pause, hesitation and interruption that may not be reflected adequately, or at all, in print[52].

71 The standard of court records, including transcript, has improved and may now sometimes be supplemented by visual recordings[53]. Contemporary judges[54] are aware of the limitations inherent in credibility assessment based on appearances[55]. But these considerations have not eliminated the necessity for appellate courts to give weight to the primary decision-maker's advantages in seeing and hearing significant witnesses.

72 A trilogy of cases in this Court[56] and many decisions before[57] and since[58] have insisted that where the primary decision depends, to any significant extent, upon the assessment of the credibility of important evidence, the appellate court's entitlement to draw contradictory inferences, make conflicting findings of fact and reach different assessments is constrained. This is not, as such, to curtail the discharge of the appellate court's statutory powers. It is simply to explain the

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52 *Coghlan v Cumberland* [1898] 1 Ch 704 at 705; *Dearman v Dearman* (1908) 7 CLR 549 at 561; *SRA* (1999) 73 ALJR 306 at 324 [78]; 160 ALR 588 at 612.

53 *SRA* (1999) 73 ALJR 306 at 327-328 [88]; 160 ALR 588 at 616-617.

54 And not only contemporary cases: see *Societe D'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co* (*The "Palitana"*) (1924) 20 Lloyds L Rep 140 at 152.

55 Scientific evidence throws doubt on this capacity: see eg *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 per Samuels JA.

56 *Jones v Hyde* (1989) 63 ALJR 349 at 351-352; 85 ALR 23 at 27-28; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v Australian National Railways Commission* (1993) 137 CLR 472 at 479, 482-483.

57 eg *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 56-57.

58 eg *Fox v Percy* (2003) 77 ALJR 989 at 994-995 [26]-[31]; 197 ALR 201 at 208-210; *Shorey v PT Ltd* (2003) 77 ALJR 1104 at 1107 [16]; 197 ALR 410 at 413; *Joslyn v Berryman* (2003) 198 ALR 137 at 167-168 [119]-[120].

ways in which such powers will be exercised, given a relevant differentiation in the significant data available to the appellate court when compared with that available to the primary decision-maker.

73 It is probably true to say that at different times in legal history, the weight given to credibility assessment and the impediment it presents to the exercise of an appellate rehearing have changed, influenced by the quality of the record available for scrutiny; the growing knowledge of psychology and the consciousness of the imperfections of credibility assessment; and a heightened appreciation of the benefits of appellate correction of error, including factual error[59]. But these considerations have not eliminated the appellate obligation to respect the advantages which the primary decision-maker has that are denied to the appellate court. As a matter of logic, experience and legal authority, it cannot be otherwise.

74 An appellate "rehearing", as applicable in the Court of Appeal in this case, is not, and cannot be, a hearing *de novo*. It is a rehearing on a record that omits data potentially influential upon the primary decision-maker. Nevertheless, there will be appeals in which the inhibitions upon disturbance of assessments influenced by credibility evaluation may be expressly or impliedly made inapplicable by judicial reasoning in the particular case[60]. Where the result reached is contrary to "extreme and overwhelming pressure"[61] or "glaringly improbable"[62] or "contrary to the compelling inferences of the case"[63], an appellate court will be authorised to substitute its conclusion for that reached by the decision-maker at trial.

75 The second consideration that reinforces appellate restraint is one that derives from another difference in the character of trials and appeals. It confirms the maintenance of a distinction between them. It strengthens the respect that appellate courts must pay to the decisions at trial. At trial the decision-maker has the advantage of hearing and seeing the evidence in its entirety, presented generally in an orderly and comprehensive fashion. By way of contrast, appellate

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59 *SRA* (1999) 73 ALJR 306; 160 ALR 588.

60 *SRA* (1999) 73 ALJR 306 at 331-332 [93]; 160 ALR 588 at 620-622.

61 *The Glannibanta* (1876) 1 PD 283 at 287; see also *Paterson v Paterson* (1953) 89 CLR 212 at 219.

62 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

63 *SRA* (1999) 73 ALJR 306 at 332 [93]; 160 ALR 588 at 621.

courts are typically taken to selected passages in the trial record, chosen by the parties to support their respective arguments[64]. As the joint reasons in this Court in *Fox v Percy*[65] put it, the way appeals are usually conducted sometimes impedes an appreciation:

> "of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share[66]. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole[67]."

76 If the foregoing limitations, established by authority, are recognised and given due weight and if, those considerations notwithstanding, the decision at trial is still considered "compellingly" or "palpably" erroneous, the appellate court may, in such an extreme case, be entitled to substitute its own conclusions on the facts. So much was acknowledged in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)*[68]. The task of appellate courts, including the Court of Appeal in the present case, is to give effect to these important, and sometimes competing, considerations, and all of them.

The Court of Appeal erred in this case

77 When regard is had to the foregoing principles it is impossible to avoid the conclusion that the Court of Appeal erred in disturbing the Master's conclusion about the issue fought at trial concerning the cause of the severance of the metal stem of the appellant's bicycle that, she found, was the reason why such an

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64 *SRA* (1999) 73 ALJR 306 at 330 [90]-[91]; 160 ALR 588 at 619-620.

65 (2003) 77 ALJR 989 at 993-994 [23]; 197 ALR 201 at 207.

66 *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637 per Lord Scarman; [1985] 1 All ER 635 at 637. See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25.

67 *SRA* (1999) 73 ALJR 306 at 330 [89]-[91]; 160 ALR 588 at 619-620 citing *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210; *Jones v The Queen* (1997) 191 CLR 439 at 466-467.

68 (1999) 73 ALJR 306 at 321 [63] per Gaudron, Gummow and Hayne JJ, 331-332 [93] per Kirby J; and compare at 338 [139] per Callinan J; 160 ALR 588 at 607, 620-622, 630.

experienced cyclist had left the road, veered to the incorrect side, and suffered injuries.

78 First, it was important to acknowledge (as the Master certainly did) that the task in hand was one of drawing inferences concerning what happened, effectively within a matter of seconds, immediately before the crash occurred.

79 The appellant was present. He did not suffer brain injury. He was conscious for at least part of the time following the crash, calling for help which ultimately attracted the attention of Mrs Barber[69]. But for one and a half hours before she arrived and thereafter, he was in great pain, lapsing in and out of consciousness. Once taken to hospital, he was sedated. His recollection of a vehicle that bumped, brushed or passed him, was not recorded in an objective form for more than a week after the crash. The rejection of that version of events did not mean that the appellant was untruthful. The Master avoided that logical fallacy[70]. However, because the primary version of the appellant was unproved, as inconsistent with contemporary oral and written records of what the appellant had said about the cause of his crash, it remained necessary for the Master to consider such alternative inferences as were available to her in the evidence.

80 True, the Master was required to avoid speculation and to keep in mind the fact that it was for the appellant to prove his case affirmatively. An equality of available hypotheses would not achieve a balance of persuasion. But one thing was clear from established authority in this Court. In deriving any likely conclusion from the facts, the Court of Appeal was obliged to give weight to the advantage which the Master enjoyed in having heard and seen all of the evidence of the witnesses over the lengthy hearing. That was a significant advantage when compared to a hearing before the Court of Appeal that was already abbreviated and lasted less than a day. The reasons given by the Master could only ever express in words the conclusions derived from the mass of evidence, partly by logical deduction and partly by intuition[71]. It was essential that the Court of Appeal pay close regard to the Master's conclusion. It was not to be brushed aside without full allowance for the advantages that she had enjoyed.

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69 [2000] NSWSC 1043 at [90].

70 [2000] NSWSC 1043 at [17].

71 *Biogen Inc v Medeva Plc* [1997] RPC 1 at 45 per Lord Hoffmann; cf *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 77 ALJR 398 at 416 [90], 417 [97]; 194 ALR 485 at 509, 510.

81 Secondly, upon the rejection, as unproved, of the unidentified vehicle hypothesis, it remained the duty of the Master to consider any alternative hypothesis that was open on the evidence in the way that it had been contested at trial. We shall turn shortly to consider the Council's complaint that the pothole hypothesis, involving the postulated lapse of concentration, was not in contest at the trial. But if it was in contest, it does not follow from a rejection of the appellant's recollection of the intervention of a motor vehicle that some other consideration did not result in the chain of events leading to the crash. Clearly, the bicycle crash occurred. It was therefore proper for the Master to evaluate competing hypotheses, so long as she remained within the evidence, addressed the issues litigated and acted with procedural fairness to all the parties[72].

82 Common experience teaches that elements in the recall of past events can be accurate even if elaboration (prompted perhaps by subconscious desires or interests) adds detail that is unreliable, incorrect or unprovable. There may remain at the heart of the matters recalled a core of truth that is accurate and sufficiently established. Clearly, this is what the Master considered had happened in this case. She rejected the intervening motor vehicle as unproved. But she accepted the other elements of the appellant's testimony. These included his moving to the left side of the road surface and hitting the potholes; the anti-clockwise motion of the handlebars of his bicycle; the fracture of the central metal stem; the immediate loss of control; and the veering motion to the opposite side of the road with the consequent crash. Once the unidentified motor vehicle was eliminated as unproved, it remained for the Master to decide whether the remainder of the appellant's evidence proved this element of his case, that is, whether the rest of the evidence should be accepted as true or rejected.

83 Thirdly, it was here that the assessment of two key witnesses in the trial became critical. The first was the appellant himself. He gave evidence of how the crash had happened. After the appellant had referred to the motor vehicle the following exchange occurred:

> "Q: What happened to you?
>
> A: I bounced into a couple of pot holes and then I went into the rough edge of the road and bounced a couple more times and my handle bars went around like that. I had them like that and on the handle bars and after I hit a couple of pot holes and then I bounced into the rough edge of the road and then they went around like that.
>
> Q: You are doing an anti-clockwise motion?

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72 *Williams v Smith* (1960) 103 CLR 539 at 545-546.

A: Yes, they were like that … (Demonstrated swerving anti-clockwise to 90 degrees.)

Q: When that happened were you able to steer the bike?

A: No. I had balanced but I could not steer it … it went straight across to the right hand side of the road."

84 The quoted passage illustrates the importance of gestures and courtroom behaviour, unavailable in a printed record. It was open to the Master to reject the causative agency of the motor vehicle but to accept as truthful the description of the critical events expressed in such a manner and illustrated with gestures and hand movements.

85 Fourthly, whilst it is true that the contemporary witnesses (and records) contained no reference to the presence of another motor vehicle (which Senior Constable Campbell at least, recording the occurrence in a police report, would almost certainly have noted) it is also true that Senior Constable Barber had no doubt that the appellant had told him at the scene of the crash that he had hit the potholes and that it was following this that he lost control. Senior Constable Barber is the second critical witness whom the Master saw and heard. His evidence was vital to her conclusion.

86 The Master's opinion that the pothole hypothesis was established by the evidence necessarily rested on her acceptance of Senior Constable Barber's recall of the appellant's contemporary complaint. That witness adhered to this recall. True, he did not record it in writing at the time. But it would have had no police significance. It did not inculpate another road user in responsibility for the crash. The absence of a written record was therefore inconclusive.

87 Because the Court of Appeal did not see or hear either the appellant or this police officer give evidence, it was bound to approach a conclusion based on the acceptance of that evidence with the caution required by authority. There is no doubt that the Master ultimately embraced the pothole hypothesis. She said specifically that she accepted the appellant's account that "he caused his bicycle to go into potholes or hit patches and the rough edge of the road"[73]. She accepted that it was this action that caused the handlebars of the bicycle to turn anti-clockwise and that "at that point he lost control of the steering"[74]. The Master remarked on her close observance of the appellant during his testimony[75]. She

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73 [2000] NSWSC 1043 at [167].

74 [2000] NSWSC 1043 at [167].

75 [2000] NSWSC 1043 at [16].

said expressly that, having rejected the unidentified motor vehicle hypothesis, she "examined his evidence with caution"[76]. Similarly, the Master expressed herself as satisfied that the appellant had "told Constable Barber that he hit a couple of potholes, the handlebars of the bike came away and he hit a tree"[77]. In these circumstances, there was evidence before the Master, which she accepted, that sustained the pothole hypothesis. The Court of Appeal, with respect, did not confront the obstacle which the Master's findings in this regard presented to its substituting a different, and contrary, conclusion on the facts.

88 Fifthly, that obstacle obliged the Court of Appeal, in accordance with authority, to consider whether, notwithstanding the recorded findings at the trial, the conclusion stated was undermined by objective, contemporaneous or other evidence, testimony not referred to[78] or some other feature of the case that made the stated conclusion "palpably" wrong or "glaringly improbable". Whilst it was not obligatory for the Court of Appeal to use a particular verbal formula, the absence of reference in the reasons of Giles JA to such considerations suggests that the correct approach to appellate review may not have been taken in this instance.

89 It is true that, in his reasons, Rolfe AJA concluded that "intentional or unintentional divergence into the potholes … was totally improbable"[79]. Giles JA, after writing his reasons, adopted what Rolfe AJA had said[80]. But if this *post scriptum* overcame the appellant's technical complaint concerning the language of the reasoning of Giles JA, it left in an unsatisfactory state the Court of Appeal's explanation of why, notwithstanding the acceptance of the appellant and Senior Constable Barber by the Master, it was authorised to come to the opposite conclusion on key findings that accepted both that potholes had initiated the events leading to the crash and that the appellant had mentioned them immediately after the crash to Senior Constable Barber. All that is proffered to render this evidence "palpably" or "totally" unacceptable is that it was not recorded in the contemporary notes, nor was specific evidence given by the appellant of a lapse of concentration.

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76 [2000] NSWSC 1043 at [17].

77 [2000] NSWSC 1043 at [160].

78 As in *SRA* (1999) 73 ALJR 306 at 331-332 [93]; 160 ALR 588 at 620-622.

79 [2001] NSWCA 428 at [30].

80 [2001] NSWCA 428 at [17].

90 Sixthly, in our view, the considerations just mentioned fall far short of overcoming the Master's conclusion based on the evidence that she identified and accepted. The other contemporary reports do not contradict that finding. Senior Constable Campbell said that the appellant had claimed the "bike just collapsed underneath me"[81] and the P4 Accident Report filled out by him recorded that the "[h]andlebar of push bike may have snapped … Driver ejected and unable to account for crash. Nil witnesses."[82] There was a similar report by the ambulance officers[83]. The paramedics with the helicopter recorded the history that the appellant "was a rider of a push bike whose steering failed and crashed"[84]. Dr Ruff took a history the day after the accident that "the handlebars failed"[85]. None of these brief histories is inconsistent with the pothole hypothesis. None of the historians had an interest or duty to elicit from the appellant the anterior facts that caused the "collapse" and "failure" of the handlebars in the event of a motor vehicle being excluded.

91 In judging the acceptability of the pothole hypothesis the Master had the advantage of assessing what the appellant and Senior Constable Barber told her in their evidence. She approached her functions in an apparently correct and suitably cautious, even sceptical, way. The evidence of Senior Constable Barber was more convincing because whilst he affirmed the impact with potholes he did not affirm any reference to a motor vehicle. The Master also had the advantage of expert evidence concerning the susceptibility of the metal stem to fracture given pre-existing metal fatigue and adjustment and photographs and descriptions of the road surface and of the edges at the point near where the crash happened. In our opinion, the Court of Appeal erred in concluding that it was entitled to reverse the Master's acceptance that an impact with potholes on the side of the road had triggered the chain of events that led to the crash.

92 Nor was it erroneous for the Master to infer a temporary lapse of concentration as the occasion for the appellant's coming into contact with the potholes. Once the motor vehicle hypothesis was excluded, momentary inattention (or put another way, a temporary lapse of concentration) was an available inference to explain contact between the appellant's bicycle and the potholes off the main surface to the left-hand side of the road. Considerations

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81 [2000] NSWSC 1043 at [36].

82 [2000] NSWSC 1043 at [37].

83 [2000] NSWSC 1043 at [42].

84 [2000] NSWSC 1043 at [44].

85 [2000] NSWSC 1043 at [59]. See also at [67], [78].

that supported that inference included the established existence of potholes in a relevant place on the edge of the sealed roadway; the appellant's evidence that he was riding "as close as possible but out a bit to avoid the potholes at the edge"; the fact that the appellant was travelling very fast, timing himself for a race; that he was nearing the end of the "speed section" when at least some degree of extra fatigue must be normal; that the road edges were very rough with extensive edge breaks and frequent edge drops; that the appellant had been riding his bicycle for about one and a half hours when the crash happened; and that the road in that section contained a bend to the left.

93 To reject a finding that inculpated the potholes and that rested, in part, upon acceptance of the credibility of two key witnesses, more was required than appears in the Court of Appeal's analysis of the evidence. The credibility-based conclusion of the Master was not undermined. The appellate court's reasons did not demonstrate a sufficient foundation for its intervention to give effect to a contrary factual conclusion. In short, those reasons did not conform to established authority that required the Court of Appeal to defer to such findings, out of recognition of the two important advantages that the Master enjoyed in this case. They did not demonstrate the very strong grounds necessary to permit the substitution of different findings.

94 Seventhly, at the conclusion of her reasons, having reviewed the evidence, the Master expressed her opinion that "to cause the final fracture there needed to be two single overloads and a final overload fracture"[86]. She stated that "[i]t was more probable than not that these overloads occurred when the [appellant's] bicycle hit the potholes and the rough edge of the western side of the road. The [appellant's] bicycle hitting uneven potholes and the rough edge of the road caused the final fatigue fracture in the head stem and the consequence was that the [appellant] lost control of the steering mechanism of the bicycle, and fell suffering … injuries"[87].

95 In the Court of Appeal, as Giles JA noted[88], the appellant submitted that the evidence of Dr Thompson, the expert metallurgist, was consistent with a breakage of the bicycle stem as a result of the bicycle's hitting potholes. However, Giles JA remarked that "Dr Thompson's evidence … did not rise above consistency, and could not do so". In a sense, that was true. Any opinion stated by Dr Thompson (who was obviously not present when the critical events

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86 [2000] NSWSC 1043 at [304].

87 [2000] NSWSC 1043 at [304].

88 [2001] NSWCA 428 at [12].

occurred) was bound to depend upon his acceptance of the factual premises upon which his opinion was based. However, during cross-examination, Dr Thompson was pressed by the questioner. In response to a question asked for the Council, the following exchange took place:

> "Q: I am putting to you – and I hope I am putting it as fairly as I can – that really on the material that you have and the tests you have done and the assumptions you have made as to what happened, you cannot say one way or the other that it is more probable than not that the sub-critical fracture was caused at the time of the assumed going into the pothole?
>
> A: I can say it is more probable than not".

In light of this critical passage, not mentioned in the reasons of the Court of Appeal, the statement that Dr Thompson's evidence "did not rise above consistency" was erroneous and misleading.

96 Once the pothole hypothesis was even tentatively accepted (as the Master did), the expert provided the linkage between the metal fracture and the instantaneous erratic movement of the appellant's bicycle. The fact that Dr Thompson placed it as a more probable explanation of the cause of the fracture became another evidentiary foundation for the overall conclusion reached by the Master. On the basis of Dr Thompson's answer it was open to the Master to consider that the expert evidence favoured the pothole hypothesis as more likely than the normal riding hypothesis – the hypothesis urged by the Council. Each was, to some extent, a viable explanation. But, according to Dr Thompson's answer, the pothole hypothesis was "more probable than not". That answer reinforced the conclusion reached by the Master based on her acceptance of the appellant's evidence of what had happened, to the extent that such evidence was confirmed by Senior Constable Barber.

97 Subject to what follows, these conclusions require that the appeal be allowed.

The argument of procedural unfairness fails

98 During argument before this Court the suggestion was raised that the pothole hypothesis amounted to a case quite different from that pleaded and presented by the appellant at trial. That suggestion poses the issue as to whether, by embracing that hypothesis, the Master had departed from the requirements of procedural fairness, in effect, by adopting a view of the evidence contrary to the case of the appellant and without affording the Council a proper opportunity to meet and respond to such a case.

99 It is true, as the Council pointed out, that the appellant's own evidence was that he had been forced off the road by a motor vehicle and that this is what had caused the contact of his bicycle with the potholes, posited as the event that occasioned the fracture to the bicycle stem, loss of control over the bike and subsequent crash. The appellant steadfastly resisted suggestions put to him during his evidence that might have been consistent with the pothole hypothesis, absent the offending vehicle. He repeatedly rejected assertions that there was "no such car". He accepted that he was a skilful rider familiar with the flat road section who had never previously driven off the road into potholes on the side. His case also accepted that there were no relevant potholes in the road surface proper and that the relevant section of the road was itself "perfectly safe" so long as a cyclist kept off the edges. The appellant himself never said that he had "lost concentration". According to the Council, such an hypothesis was therefore incompatible with the appellant's professed level of experience, care and attention.

100 The motor vehicle hypothesis having been rejected by the Master, the Council submitted to this Court that the appellant's case had failed. But, in the way the trial was pleaded and conducted, was the Master forbidden to accept the pothole hypothesis, with the explanation of loss of concentration, as she ultimately concluded?

101 In favour of this argument, which the Council embraced during the hearing in this Court, is the proposition that the introduction of contact between the appellant's bicycle and potholes on the left-hand side of the road was strictly incidental to the motor vehicle hypothesis and not a separate hypothesis, because the appellant repeatedly rejected it. At least in the absence of an amendment to the statement of claim, which specifically recounted the presence of an unidentified motor vehicle to explain the appellant's contact with the potholes, it was suggested that the Master should not have "invented" the pothole hypothesis for herself. Still less should she have based her judgment in favour of the appellant upon it.

102 If a party participates in a trial to meet a particular case which that party has pleaded and presented in only one way, it would be unfair to the other party to decide the case on a different basis of which the losing party had no fair notice and which it had no proper opportunity to defend[89]. Although rigid adherence to

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89 cf *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 at 517; *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 110; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 659; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Banque Commerciale SA (In Liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287.

pleadings is no longer uniformly practised and not a few cases stray from the pleadings without consequential amendment[90], such practices cannot excuse procedural injustice. It is elementary that a party is entitled to know the issues of fact that are to be decided in a trial where these are determinative of its success or failure[91].

103 The appellant submitted that, in so far as the Council sought to rely on such a complaint, it should not be heard in this Court. He pointed out that no such objection had been made in the Council's grounds of appeal to the Court of Appeal which were otherwise most detailed. Nor was the point raised by way of a notice of contention in this Court. The Council relied upon the terms of O 70 r 6(5) of the High Court Rules providing for the filing of a "notice of contention". That sub-rule excuses a party from giving a notice of cross-appeal if it "contends that some matter of fact or law has been erroneously decided and does not seek a discharge or variation of a part of the judgment". The Council affirmed that it was not contending that the Court of Appeal had erroneously decided a point of fact or law.

104 The form of a notice of contention in this Court[92] is not confined to cases of such erroneous decisions. It extends to circumstances where "the decision of the Court below should be affirmed but on grounds other than those relied upon by the Court below". This accords with the common experience of appellate courts today, including this Court. In practice, notices of contention usually refer to arguments supplementary to, and not necessarily inconsistent with, the reasoning of the intermediate court.

105 This Court has made it clear that, as a general rule, a respondent to an appeal is entitled to support a judgment of an intermediate court by reliance on an argument not presented below, so long as the argument does not depend on an issue of fact not litigated in the courts below and "so long as it is open to the respondent on the pleadings and having regard to the way in which the case has been conducted"[93]. If, therefore, the stated preconditions are met, it would be open to this Court to permit the Council to raise the point about a suggested

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90 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154, 164-167; see also *Jackamarra v Krakouer* (1998) 195 CLR 516 at 521 [7], 541-542 [66].

91 cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; cf at 16-17.

92 High Court Rules, First Schedule, Form 67.

93 *Owners "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 68 ALJR 311 at 313; 120 ALR 12 at 14.

procedural unfairness in the course that the Master had taken. But are those preconditions met?

106 Each side criticised the other for failing to conform to proper pleading rules. The Council attacked the appellant's departure from his amended statement of claim which to the very end contained as the primary allegation (as the appellant himself said in his testimony) that an unidentified motor vehicle had initiated the contact with the potholes on the side of the road. The appellant attacked a belated attempt of the Council to rely on a point of procedural fairness. The appellant asserted that, if the procedures were as unfair as the Council now suggested, such unfairness should have stood out as an issue long before the appeal reached this Court.

107 When we turn to the written submissions that were filed by the parties before the Master, it is clear enough as to how the issues were addressed at trial. The written submissions took on an added significance in this case because of the intermittent hearing of the evidence over such a long interval. The Nominal Defendant's submissions to the Master included extensive argument on that party's cross-claim against the Council. In those arguments the Nominal Defendant addressed the causation of the accident "be it whether this was caused by being forced into [the edge of the bitumen surface] by a motor vehicle or otherwise". Indeed, it is in that submission that the Nominal Defendant placed emphasis on the appellant's extended conversation with Senior Constable Barber (a person whom he knew on a first name basis). The submission continued:

> "After telling him that there was no vehicle involved and that he was certain about that he then said to Senior Constable Barber that when he was travelling along the road he 'hit a couple of potholes and the handlebars of the pushbike came away and he hit a tree'".

108 On this basis the Master was urged to accept the initial statement by the appellant to this police officer, unelaborated by statements made a week and more later concerning a motor vehicle. The same point was repeated in further submissions for the Nominal Defendant.

109 The Council's written submissions at trial also addressed what the Council there called the "fallback" findings urged by the Nominal Defendant. The Council, for detailed reasons, submitted that such a "fallback" conclusion was not open to the Master. In short, the Council urged that the choice was a black and white one – either the appellant was telling the truth about the motor car or he was fabricating his evidence, including so far as his evidence involved hitting "a couple of potholes" as stated by Senior Constable Barber. However, such "fabrication" would have involved not only the appellant but also Senior Constable Barber. That witness had denied the proposition that the appellant had mentioned the involvement of a motor vehicle. The Master inferentially rejected

the suggestion that the police officer was fabricating the potholes recollection. Certainly, Senior Constable Barber adhered to it. The contest on this score sharpened the significance of the Master's conclusion. It plainly rested on the acceptance of Senior Constable Barber's contested oral testimony.

110 On the basis of these written submissions, received by this Court without objection, there can be no doubt that the Master and the parties were fully aware at the trial of the pothole hypothesis. Whilst there were difficulties for the appellant's representatives to embrace it, given the testimony of their client, it was certainly "in play". There was no procedural unfairness in the Master's accepting it, as she did. It was compatible with Senior Constable Barber's evidence whereas the appellant's recollection of a passing motor vehicle was not. These facts explain why there was no ground of complaint on this issue before the matter reached its hearing in this Court. There was no error of law or of fair procedure in the Master's accepting part of the appellant's evidence as confirmed by Senior Constable Barber's testimony and rejecting other parts not so confirmed. The complaint of the procedural fairness issue is without merit. It is rejected.

The proper order for costs

111 Finally, the appellant submitted that, in the event of his success in this appeal, the Council should be ordered to pay his costs of the first hearing before the Court of Appeal, including the costs thrown away as a result of that Court's not dealing with all of the grounds of appeal. It was common ground that both sides appeared in the Court of Appeal prepared to argue all issues in the appeal. It was that Court that isolated the issue of causation for separate treatment and, having reached a conclusion upon it adverse to the appellant, decided the appeal solely on that footing, concluding its hearing in half a day.

112 In view of the conclusion reached by the majority in this Court, the costs issue does not arise for decision. It suffices to say that in our view the costs in the Court of Appeal were costs incidental to the disposal of the proceedings. We would have made an order providing that such costs abide the ultimate outcome of the proceedings.

The points of difference in the appeal

113 Ultimately, there are two substantial points of divergence between the majority's approach to this appeal and our own. The first is explained by the

view of Callinan J[94] (in which the other members of the majority agree[95]) that the success or failure of the appellant at trial turned inexorably upon the acceptance or rejection of the way the appellant himself explained how he came into contact with potholes, namely by being "brushed by", or steering to avoid, an unidentified motor vehicle.

114 With respect, this misunderstands and misstates the case, particularly as it developed at trial. The pleadings[96] make it clear that the appellant's claim against the Council was expressed "in the alternative" to the claim against the Nominal Defendant. As pleaded, it was only in the claim against the Nominal Defendant that the alleged presence of an unidentified motor vehicle was legally essential. By way of contrast, the claim pleaded, and the particulars of negligence given, against the Council were directed to the condition of the road surface, that is, to the pothole problem. That alternative claim remained to be decided by the Master, whatever conclusion she reached about the unidentified motor vehicle. The claim against the Council had its own separate legal and factual foundation. After rejecting the causative agency of a motor vehicle, the Master was bound to resolve it. She was entitled on the pleadings to uphold it. The evidence that she saw and heard sustained the conclusion that she reached.

115 Any doubt that this is so is resolved by an examination of the evidence called and the written arguments of the parties concerning the issue of the Council's liability. Of course, the appellant's representatives were obliged to endeavour to uphold their client's belief and evidence about the motor vehicle. But the appellant was not imprisoned in that claim, as the majority seem to think. When it failed, it was not because the Master concluded that the appellant was a deliberate liar. In effect, she concluded that, upon this point, the appellant had not established the presence of a motor vehicle or was mistaken. She then did what was appropriate and certainly open to her. She turned back to the remaining evidence and the inferences arising from it. This included the suggested causative agency of the potholes, the expert evidence inculpating the potholes in the crash and the oral testimony of the police officer who was on the scene immediately after the accident and gave evidence of the appellant's complaint about hitting the potholes.

116 Parties at trial are entitled to present alternative cases. They often do. Sometimes, the alternatives contradict each other. This can occasionally present

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94 Reasons of Callinan J at [123], [144].

95 Reasons of Gleeson CJ and Heydon J at [1].

96 Set out in the reasons of Callinan J at [126].

forensic problems. But it does not give rise to legal or logical problems. As this Court said in *Williams v Smith*[97]:

> "[T]he jury … might work out for themselves a view of the case which did not exactly represent what either party said. That is a possibility in such cases as this which every court of appeal must contemplate, and although there is no reason to suppose that is what they did in this case, it should not be excluded from the general view of the court."

The same principle applies in a case where the decision-maker on the facts is a judicial officer. The only difference is that he or she must, by reasons, explain the way in which important conclusions are arrived at. Those reasons reduce the need for speculation. But the drawing of inferences and deductions is not limited by what "either party said". Subject to the state of the evidence and requirements of procedural fairness, the Master was in the same position as a jury in deciding the facts of this case.

117 The evidence at trial supported the Master's conclusion and there was no procedural unfairness or irregularity[98]. The attempt to lock the appellant into a single case is not sustained by law nor by the record. That record, the cases of the parties and the entirety of the evidence are more likely to have been appreciated by a judicial officer who sat through the entire hearing than by a busy appellate court attracted to a suggestion of procedural unfairness not pleaded, nor even pressed, at trial, although occasion arose to do so if there was a genuine complaint of surprise.

118 Secondly, it is not the case that the Master artificially set out to "parse" and "analyse" the appellant's testimony, overlooking the way in which the appellant had blamed a motor vehicle[99]. The Master's reasons show that she was very conscious of the significance of her rejection of his recollection of events. But when she put his recollection to one side, she still declined to uphold the Council's submission, which was that the appellant was a liar[100]. She then considered whether, notwithstanding her conclusion that an unidentified motor vehicle had not been proved, the causative agency of the potholes left the appellant's claim against the Council standing.

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97 (1960) 103 CLR 539 at 545 per Dixon CJ, McTiernan, Fullagar, Kitto and Menzies JJ.

98 These reasons at [110].

99 Reasons of Gleeson CJ and Heydon J at [14].

100 An indication of the Council's submission appears in the reasons of Gleeson CJ and Heydon J at [27].

119 With all respect, the Master was not precluded from considering this alternative case[101]. It had been made completely clear at trial, especially in the Nominal Defendant's written submissions. But it was also plainly raised by the appellant's claim as pleaded against the Council. That pleading, and the particulars supporting it, did not have to descend to evidentiary detail about the available inferences concerning the exact way the appellant came into contact with the potholes. Only a most rigid approach to pleading and to the elucidation of the facts at trial would forbid the Master from addressing this alternative case and giving effect to the inferences that she drew from the whole of the evidence.

120 The complaint about surprise and the now suggested inadequacy of the appellant's pleading and particularisation of his case against the Council would be more convincing if they had been raised by the Council itself in a notice of contention in this Court instead of by appellate judges.

121 Appellate courts have undoubted functions of fact-finding and of drawing their own inferences, as we have acknowledged. But in a case of the present kind, appellate judges should approach their functions with proper modesty. The Master, with the advantages that she enjoyed, was entitled as a fact-finder to draw her own inferences and to reach her own conclusions, as she did. No error has been shown to warrant the Court of Appeal, in a hearing of half a day, substituting its factual conclusions for those of the Master reached after a hearing over 24 days. The result, in our view, is a serious appellate error with very serious consequences for the appellant. It should be reversed.

Orders

122 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside. It should be ordered that the proceedings be remitted to the Court of Appeal for determination of the remaining issues raised by the respondent's further amended notice of appeal to that Court. The costs in the Court of Appeal should be determined by that Court.

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101 Reasons of Gleeson CJ and Heydon J at [16], [23].

123 CALLINAN J. The principal question which this appeal raises is whether a primary judge is entitled to find a case in negligence in favour of a plaintiff on the basis of a version of events which the plaintiff not only failed to advance, but which he also expressly rejected.

The facts

124 The appellant, who was 35 years of age at the time of the accident giving rise to this appeal, had earlier been a professional cyclist competing in long distance, endurance and other competitions. At 5.30pm on 2 February 1993 he was training with a view to returning to professional racing, by riding his bicycle along Quorrobolong Road in the municipality of the respondent, as he had done in the past "at least a couple of hundred" times, in the previous two years or, as he also put it, several times a week during the preceding 15 to 18 years. Immediately before he was dislodged from his seat and fell heavily to the ground, he had been travelling at about 25 miles an hour some two feet or so inside the edge of the bitumen surface of the roadway. His claim was that he had been "brushed" by an unidentified motor vehicle on to the potholed left shoulder, and then, his wheels having come into contact with the potholes there, had crossed to the equally potholed right shoulder, with his bicycle out of control throughout. The appellant had chosen that stretch of road because it was the best of the worst roads in Cessnock. He suffered very severe injuries in the fall.

125 The appellant's bicycle was eight to ten years old. Its handlebars had been acquired separately from its frame. The appellant personally maintained the bicycle. He had made adjustments to its steering system and had dismantled the steering assembly some three to six months before the accident.

The case at first instance

126 The appellant sued the Nominal Defendant (as the legal alter ego of the driver of an unidentified motor vehicle) and the respondent in negligence and nuisance in the Supreme Court of New South Wales. This was the appellant's case on his pleading:

> "4. At all material times, the [respondent] was responsible for carrying out maintenance and repairs on the said road and, *in particular, the edges of the road alongside the sealed bitumen surface*.
>
> 5. At all material times the said edges of the road contained fragmented and broken bitumen or tar pieces, the surface of which was rough and uneven.
>
> 6. On 2 February 1993, the [appellant] was riding his bicycle in a westerly direction along Quorrobolong Road, Kitchener, when an unidentified motor vehicle proceeding in the same direction

brushed against the [appellant] on his right side, forcing him off the sealed bitumen surface onto the said edges of the road whereupon the handle bar assembly of his bicycle broke, causing the [appellant] to lose control of his bicycle, leading him to crash into a ditch on the opposite side of the road, in consequence whereof he sustained severe injuries, loss and damage.

7. The identity of the said motor vehicle, after due search and inquiry, cannot be established.

8. The said injuries, loss and damage occasioned by the [appellant] was caused by the said unidentified motor vehicle which was driven negligently.

...

9. Further or in the alternative, the said injuries, loss and damage occasioned to the [appellant] was caused by the negligence of the [respondent].

PARTICULARS OF NEGLIGENCE

(a) Failing to design and construct the bitumen surface so as to prevent the development of fragmented and broken pieces on the edge of the road.

(b) Designing and constructing the bitumen surface in such a way that it was susceptible to the development of fragmented and broken pieces on the said edges.

(c) Failing to design and construct the roadway so as to provide uniformity in the width of the bitumen surface.

(d) Failing to repair the broken pieces on the said edges.

(e) Failing to ensure that the said edges of the road were completely and evenly covered by a sealed bitumen surface.

(f) Allowing or permitting repairing or patching of the road surface on the said edges that was inadequate and unsafe for traffic users.

(g) Permitting or allowing the break-up of the bitumen surface to occur on the edges of the road.

(h) Failing to inspect or check the road in order to properly repair the edges of the bitumen surface.

(i) Failing to maintain the road in a proper condition.

(j) Failing to erect a sign, notice or other warning indicating to users of the roadway that the edge of the road contained fragmented and broken pieces and that the road surface was rough and uneven.

10. Alternatively, the said injuries, loss and damage were caused by the nuisance in the roadway created by the [respondent], by leaving the said edges of the said road in a dangerous condition for persons lawfully using the same." (emphasis added)

127 It should be pointed out that there was evidence adduced at the trial which at least suggested, that despite the precise location by the pleading of the potholes, "alongside the sealed bitumen surface", potholes and other surface irregularities may have intruded on to the bitumen surface itself. These were not however matters of significance in the appellant's explanation for the accident, which from beginning to end in his evidence, required for its operative cause that there be a negligent driver of an unidentified motor vehicle. That that is so emerges not only explicitly from the appellant's evidence of the accident but also from his safe passage along this roadway on a couple of hundred previous occasions in the previous two years and on many more occasions in the 13 to 15 years before that. The case was pleaded and decided before the decision of this Court in *Brodie v Singleton Shire Council*[102].

128 The action was tried by Master Harrison. The only issue that she had to decide was of liability.

129 Expert evidence was given at the trial. I adopt as a correct, if not quite complete summary of it, part of a passage from the judgment of Giles JA in the Court of Appeal to which the respondent appealed from the judgment of the Master[103]:

> "Could the final fracture have occurred as the [appellant] was following his safe course along the roadway? Quorrobolong Road was not a smooth road, and the [appellant] was riding fast at about 25 miles per hour. Both Dr Thompson, a metallurgist called for the [appellant], and Mr Robinson, a metallurgist called for the Nominal Defendant, said that the final overload fracture could have been caused by the loads generated by encountering potholes, but that it could also have been caused by the loads arising from normal riding on the roadway. Mr Robinson said, for

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102 (2001) 206 CLR 512.

103 *Cessnock City Council v Suvaal* [2001] NSWCA 428 at [12].

example, that the final overload fracture could have been caused by a light impact such as running over a small rock or a branch on the surface of the roadway. Dr Thompson expressed a view, based on sub-critical fractures visible on microscopic examination of the head stem tube, that the sub-critical overloads probably occurred at a similar time to the final overload fracture, which the [appellant] said was consistent with rapid sequential loads from encountering potholes."

130 The appellant contends that the summary of Giles JA overlooks this important exchange in the re-examination of Dr Thompson:

"Q. When Mr Rofe cross-examined you he asked you a series of questions and the Master asked you to assume a series of things based upon the assumption that the sub-critical cracks were already extant an hour or so before the ultimate overload. Do you remember those questions?

A. I do remember those questions, yes.

Q. You then gave some evidence to say that if that had been the case, you would expect to have found something about the pre-existing fatigue cracks?

A. Yes, I would have expected if the bicycle had been used in that condition with the 50 per cent fatigue crack and then the two sub-critical overload impositions – if the bicycle had been used for a few hours or for a period of time and received a sufficient number of cycles of stress or load, then I would expect to have seen evidence of fatigue cracking similar to what accounted for 50 per cent of the cross-sectional area reduction.

Q. Did you see that?

A. No, I didn't.

Q. Are you able to make upon the balance of probabilities a deduction from your failure to see that?

A. My failure to see that, having known that the bicycle had been in use that morning, sways my balance of probability to the fact that the two sub-critical overload impositions were not there prior to the final overload. They would have occurred at a similar time as the final overload fracture."

131 The importance, the appellant submits, of this passage, is that if, as it suggests, there were three fractures in rapid, almost instantaneous succession, much of the criticism of the Master's decision made by Giles JA is unwarranted.

132 A police officer who investigated the accident gave evidence at the trial. He said that the appellant told him that he had been travelling along the road, as he always did, "when he hit a couple of potholes and the handlebars of the push bike came away and he hit a tree". The appellant's first claim, that another, an unidentified motor vehicle had brushed against him and it was this that caused him to lose control was made about two weeks after the accident.

133 The appellant was consistently emphatic throughout the trial that the driver of an unidentified motor vehicle caused the accident. This was, despite his allegation in the alternative in paragraph 10 of his statement of claim, his case, and indeed his *only* case at the trial. He did not offer any other hypothesis for the accident, indeed he expressly rejected that any other explanation was open.

134 The following exchanges which occurred between the appellant and counsel for the Nominal Defendant and counsel for the respondent in cross-examination make that clear beyond argument. They also make it clear that the potholes which affected the bicycle's stability were either on the edge of the bitumen surface or beside it.

> "Q. I am suggesting the real reason: You knew all along that there was no motor vehicle involved in this accident?
>
> A. There was a motor vehicle, sir.
>
> Q. And that the reason the accident happened: You went over a rough section of the road and the handlebars collapsed?
>
> A. No, there was a car.
>
> ...
>
> Q. Your case in this court is that an unknown car coming up behind you brushed or hit you and forced you off a safe position on this roadway into the rough edges?
>
> A. Into the pot holes.
>
> Q. And into the pot holes?
>
> A. Yes.
>
> *Q. If there had been no car you would not have got on to the rough edges and into the pot holes?*
>
> *A. No.*
>
> *Q. It was the car that forced you into that situation?*

A. Yes.

...

Q. Let's assume for the moment there was no such car. Can you give this court any other explanation as to how this accident happened, if there was no such car that forced you off the road?

A. No, there was a car that forced me off the road.

Q. Let[']s assume –

A. I am not assuming anything. The car hit me and that's what happened.

...

Q. So you didn't alter your steering direction, the car forced the steering direction to be altered?

A. Yes.

Q. Are you sure of that?

A. Yes.

...

Q. What you say is that could not possibly have happened unless there was this car that hit you?

A. That's what caused it, it forced me off the edge." (emphasis added)

135 In order to exculpate itself, and to inculpate the other defendant, the respondent, the Nominal Defendant made these submissions through its counsel:

> "The position of the ... Nominal Defendant is that the statements made by the [appellant] immediately after the accident when the ramifications of any personal injuries claim would not have been apparent to him and at a time when it would be expected that he had no reason to other than tell the truth should be relied upon, not his oral evidence in these proceedings or alleged statements or allegations made much later. ... After telling him that there was no vehicle involved and that he was certain about that he then said to Senior Constable Barber that when he was travelling along the road he 'hit a couple of potholes and the handlebars of the pushbike came away and he hit a tree' ...

> It is the Nominal Defendant's position, therefore, that such a statement can be accepted (as distinct from his oral and other evidence as to that matter in the hearing) as to the truth of that issue which on the balance of probabilities would cause the Master to find that the [appellant] did hit a couple of potholes which in turn resulted in the final fracture and the handlebars of the bike collapsing, the [appellant] losing control of the bike and suffering his injury."

136 That submission does not suggest that a sudden loss of concentration was the operative cause of the accident. The most that the Nominal Defendant submitted on the appellant's attentiveness or otherwise was that the appellant was "not looking or concentrating on where he was going", that is to say that the appellant was not keeping a proper lookout.

137 The Master found that no motor vehicle was involved in the accident and entered a verdict in favour of the Nominal Defendant. This finding was made despite the appellant's determined refusal at the trial to countenance the possibility that his loss of control of his bicycle had occurred for reasons other than the presence of a car. His evidence descended to a detail that the car that had forced him off the bitumen carriageway was a station wagon. He stated that he had seen it "for a couple of seconds" before it struck or brushed him.

138 The Master held that the respondent was negligent. She found that the accident occurred because the appellant "lost concentration": that "he caused his bicycle" to change direction towards the left side edge of the road where it struck "uneven potholes and the rough edge of the road". The handlebars then fractured at the head stem and turned anti-clockwise. The bicycle careered to the other, eastern side of the road whereupon the appellant fell and suffered injuries causing quadriplegia. The Master was of the opinion that the appellant was guilty of contributory negligence of which she said:

> "There is evidence to suggest that there is nothing wrong with building a bitza bicycle. The [appellant] was not obliged to make enquiries with qualified persons. He had been riding bikes for many years and was experience[d] in assembling the various components. However the [appellant] should have taken more care when adjusting the head stem to ensure that he did not adjust the head stem above the maximum marking as this added stress to the weaker part of the head stem causing the crack to accelerate. It is my view that the [appellant] was entitled to ride his bicycle at a speed of 25 miles per hour on this narrow road provided he kept away from the potholes, patches and edge breaks at the outer edge of the sealed roadway. The [appellant], for reasons other than the presence of a motor vehicle, lost concentration when he allowed the steering of the bicycle to put him into the potholes and rough edge of the road. I apportion contributory negligence at 20%."

The appeal to the Court of Appeal

139 The respondent appealed to the Court of Appeal of New South Wales on numerous grounds, including that there was no proper basis for a finding of negligence against it and that, alternatively, the appellant should have been held to have been guilty of contributory negligence to a greater extent than the Master found. The Court of Appeal (Powell JA, Giles JA and Rolfe AJA) was of the opinion that the appeal could be disposed of in the respondent's favour on the ground that the Master had no proper basis for a finding in favour of the appellant following her rejection of his pleaded, and repeated, assertion that it was contact with him by, or the proximity of an unidentified motor vehicle to him that caused the marked and sudden deviation of his bicycle into the potholes beside the road, the fracture in the steering mechanism and the fall.

140 The leading judgment of the Court of Appeal was given by Giles JA with whom Powell JA and Rolfe AJA agreed, the last adding some brief observations of his own.

141 Giles JA summed up the respondent's submission to the Court of Appeal[104]:

> "The [respondent] submitted that, if a motor vehicle was not involved and the [appellant] did not alter his steering direction, the more probable explanation for the [appellant] going into the potholes was that the final fracture of the head stem [of the handlebars] occurred as the [appellant] was following his safe course along the roadway, thus steering control was lost, and going into the potholes and all that followed was due to the prior loss of steering control. If so, it said, the accident was not attributable to any negligence on its part."

142 As the appellant submits, in dealing with the expert evidence there was some evidence given in re-examination by Dr Thompson, which Giles JA may have overlooked, or to which his Honour's attention might not have been drawn, for his Honour said this following the passage from his summary of the expert evidence to which I have already referred[105]:

> "Dr Thompson's evidence, however, did not rise above consistency, and could not do so. The Master accepted the evidence of Dr Thompson and Mr Robinson. In my view this included acceptance that the final overload

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104 *Cessnock City Council v Suvaal* [2001] NSWCA 428 at [11].

105 *Cessnock City Council v Suvaal* [2001] NSWCA 428 at [12].

fracture could have been caused by the loads arising from normal riding on the roadway."

The appeal to this Court

143 I do not think that the omission to which I have just referred is a matter of any significance in this appeal. Dr Thompson's evidence was still to the effect that a very minor force would not have caused the final rapid overload fracture, although it was possible that the final rapid overload fracture could have occurred if the bicycle had been travelling along a smooth road at 25 miles per hour. Furthermore, as will also appear, I do not think that the outcome of this case should depend upon any close consideration of the number, age and severity of the fractures, latent or otherwise in the metal of the steering apparatus of the bicycle. These matters really only assumed a significance because of the Master's search for some other hypothesis for the cause of the accident on her rejection of the appellant's only, and repeated, version of it in evidence.

144 In my opinion the Court of Appeal had no option but to allow the appeal. The approach of the Master was an incorrect one. She seemed to think that, rather than decide whether the appellant had proved the case that he sought repeatedly to make at the trial and which she concluded she was bound to reject, she was obliged to find some other explanation for the accident. This was to misunderstand the nature of the task she had to perform.

145 It was not open to the Master to find that a momentary lapse in concentration caused the appellant to deviate from the bitumen surface and into the potholes. That was something that the appellant had not claimed, and which as between him and the respondent, the latter was not required to answer. Even the appellant's first version of the accident, the one that he gave to the police officer at the scene, made no reference to a momentary or any lapse in attention. It was not pleaded in paragraph 10 of the statement of claim, and was not even submitted to be so by the other defendant, the Nominal Defendant. It was, in short, not an issue in the case, and certainly was not an issue between the appellant and the respondent. As an operative cause, momentary inattention seems to have been entirely the invention of the Master. There is a further difficulty about the Master's finding in respect of it. It is that she failed to give any, or any proper, consideration to the question of how the inadvertent nature of the lapse which she purported to identify actually caused the degree of deviation which occurred, and why it should be regarded as amounting to contributory negligence of 20% in the circumstances of the case[106]. She gave no consideration, for example, to the question of the complexity of the appellant's

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106 cf *Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 33 per Kitto, Menzies and Owen JJ.

activity in riding the bicycle, or the need for him, if any, to determine in advance what he would be required to do[107], or the need for the respondent to take account of these matters, which might have a bearing on the appellant's contributory negligence or otherwise.

146 The appellant argued that the submission of the other defendant, that the respondent had negligently allowed potholes in the shoulders of the roadway to develop, put the respondent "in the frame" and argued that the Master's reasoning was within that submission. That is not the position so far as the issues between the appellant and the respondent were concerned. The frame upon which the appellant was, and remained exclusively focussed, always had in it the driver of an unidentified motor vehicle as the cause of the accident. And in any event, there was certainly no clear focus by any party upon a momentary lapse of concentration. Furthermore the appellant was not entitled to succeed on a case not put by him, and indeed one which he dared not put, either in the alternative or otherwise, because it starkly contradicted his true case.

147 The finding by the Master distorted the issues joined between the appellant and the respondent. The latter was not to know, or indeed even to suspect, that a deviation as a result of momentary inattention might be found as the cause of the accident. If it had, then it would no doubt have cross-examined about it. The appellant having asserted and reasserted one cause only of the accident, the respondent was not bound to go on an excursion in cross-examination to identify and refute a version not even hinted at by the appellant. The finding by the Master of a version not advanced by the appellant also inevitably affected the resolution of the issue of contributory negligence on the part of the appellant. If there were no unidentified motor vehicle and he was only momentarily inattentive, why was it that his deviation was so great as to take him to the side of the roadway? Was he not aware of the potholes there? Why did he not correct the deviation before he reached them? Was he not aware of the final fracture of the steering apparatus? What part did it play in his fall? The appellant had no opportunity of exploring these crucial matters in cross-examination, or of making submissions about them and their relevance to an accident in which no car was involved and which was precipitated by a momentary lapse in concentration. The presence of the potholes on the edges of the road only becomes significant if the appellant, as he alleged, was brushed into them. A finding that he was not, but that a momentary lapse in concentration took him into them, is a quite different matter. It gives rise to a question not addressed by anyone at the trial, indeed, not even by the Master, and that is, how it could reasonably be expected that the respondent might and should guard against momentary inattention by eliminating potholes of which the appellant

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107 This is an adaptation of language used by Gibbs J in *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 at 567, a master and servant case.

was well aware, and which were on the edges of a roadway, the characteristics of which were well known to him. Had the respondent contemplated the case found against it, no doubt it would also have wished to make different submissions with respect to the fragility of the bicycle and the part played by that in this changed scenario of the accident.

148 The appellant expressly denied the absence of an unidentified motor vehicle at the relevant time. That denial was rejected by the Master. Its rejection had nothing whatsoever to say about any other cause of the accident. It was probative of nothing and certainly not of any other affirmative cause[108].

149 I agree with Giles JA that the Master's explanation of the accident was no more than "a rationalisation of what occurred ... from final overload before the [appellant] went into the potholes."[109] The principle that findings by judges of first instance are owed much deference because of the judge's advantage over appellate courts by reason of seeing and hearing the witnesses can have little useful application to a case in which the judge has found in favour of a party who was a witness, a version which he has not only not given but which he has also resolutely and repeatedly rejected. The appellant's so-called alternative case in paragraphs 9 and 10 of the statement of claim was not in truth an alternative case at all. For it to have any credibility, or indeed even relevance, required first the essential presence of a carelessly driven motor vehicle.

150 A further submission that the appellant made was that it was not his fault that the respondent did not explore at the trial the ramifications of a finding of loss of concentration by the appellant. The submission must be rejected. It was precisely because the appellant did not claim, indeed because he asserted the contrary of, a loss of concentration, that these were not explored. There may be multi-party cases in which an issue not initially raised between two of the parties, does become an issue between one or more of them and another party who raises it. This is not such a case however. As between the respondent and the appellant the issue that was critical was the one to which the appellant irrevocably committed himself, negligence by a motorist, and uncontrollable propulsion by that negligence on to a section of the roadway which he well knew was not nearly as even as the bitumen surface upon which he was riding.

151 The appeal should be dismissed with costs.

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108 cf *Hobbs v Tinling* [1929] 2 KB 1 at 19-20 per Scrutton LJ.

109 *Cessnock City Council v Suvaal* [2001] NSWCA 428 at [10].