HIGH COURT OF AUSTRALIA

McHUGH ACJ,
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matters No. S122/2003 and S123/2003

JACK PLEDGE APPELLANT

AND

ROADS AND TRAFFIC AUTHORITY & ORS RESPONDENTS

Matters No. S124/2003 and S125/2003

NADIA CATHERINE RYAN
BY HER TUTOR HEATHER RYAN APPELLANT

AND

JACK PLEDGE & ORS RESPONDENTS

Pledge v Roads and Traffic Authority; Ryan v Pledge
[2004] HCA 13
11 March 2004
Matters No. S122/2003, S123/2003, S124/2003 and S125/2003

ORDER

1. *Appeals allowed with costs.*

2. *Judgment and orders of the Court of Appeal of the Supreme Court of New South Wales on 10 April 2002 set aside.*

3. *Matter remitted to the Court of Appeal to determine re-apportionment of liability among the Respondents to the second appeal and other matters that were before the Court of Appeal but not dealt with in its judgment including the matter of costs in that Court.*

On appeal from Supreme Court of New South Wales

Representation:

Matters No. S122/2003 and S123/2003

D F Jackson QC with J M Morris for the appellant (instructed by Abbott Tout)

D L Davies SC with S Woods for the first respondent (instructed by Crown Solicitor for New South Wales)

J D Hislop QC with G J Gemmell for the second respondent (instructed by McCabe Terrill)

A S Morrison SC with S E Torrington for the third respondent (instructed by Stacks – The Law Firm with Tom Goudkamp)

Matters No. S124/2003 and S125/2003

A S Morrison SC with S E Torrington for the appellant (instructed by Stacks – The Law Firm with Tom Goudkamp)

D F Jackson QC with J M Morris for the first respondent (instructed by Abbott Tout)

J D Hislop QC with G J Gemmell for the second respondent (instructed by McCabe Terrill)

D L Davies SC with S Woods for the third respondent (instructed by Crown Solicitor for New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Pledge v Roads and Traffic Authority; Ryan v Pledge

Negligence – Apportionment of liability – Assessment of causative factors in motor vehicle and pedestrian accident – Role of appellate court – Whether Court of Appeal justified in preferring own findings of fact to those of trial judge – Disadvantages faced by appellate court in assessing evidence – Where Court of Appeal made own assessment of photographs in evidence in preference to oral evidence of witnesses at trial – Where trial judge had undertaken viewing of accident site – Where Court of Appeal made speed, distance and timing calculations not proposed at trial.

Words and phrases – "appeal".

Evidence Act 1995 (NSW), s 54.
Supreme Court Act 1970 (NSW), s 75A.

1 McHUGH ACJ. The facts and the issues in these appeals are set out in the judgment of Callinan and Heydon JJ which I have had the advantage of reading. Their Honours hold that the Court of Appeal of New South Wales erred in three respects in exculpating the Roads and Traffic Authority of New South Wales and the Blue Mountains Council from responsibility for the harm suffered by the plaintiff. They were:

(1) no proper basis for preferring observations of the photographic exhibits to the oral evidence of four witnesses whose evidence was accepted by the trial judge;

(2) reliance on time, speed and distance calculations that involved so many imponderables as to make the calculations little more than speculation;

(3) failing to give sufficient weight to the advantage that the trial judge enjoyed by viewing the scene of the accident.

2 For the reasons given by Callinan and Heydon JJ, the Court of Appeal erred in these three respects. It follows that these appeals must be allowed and the matters remitted to the Court of Appeal to re-apportion liability between the three defendants and to determine the issues not dealt with by the Court of Appeal in the appeal to that Court.

3 KIRBY J. I agree, for the reasons given by Callinan and Heydon JJ, that error has been shown on the part of the Court of Appeal of New South Wales in exculpating the Roads and Traffic Authority of New South Wales and the Blue Mountains Council from responsibility for the damage suffered by the plaintiff. I also agree with the additional reasons of Hayne J and his analysis of the issues raised in these appeals.

4 It follows that I agree that the appeals must be allowed with costs. The proceedings must be remitted to the Court of Appeal to determine the outstanding issues and to reapportion liability between the three defendants in the light of the conclusions of the Court of Appeal with which this Court has agreed. These are the lack of causative negligence in (1) the absence of the propounded traffic sign; and (2) the provision of parking bays at an angle of 90 degrees to the service road.

5 The orders proposed by Callinan and Heydon JJ should be made.

6 HAYNE J. I agree with Callinan and Heydon JJ that the appeals should be allowed with costs and the matters remitted to the Court of Appeal. I agree generally with their Honours' reasons. I add something on my own account, first, in order to amplify what is said about the issues of causation that arise and, secondly, to say something more about what issues will have to be dealt with when the matters are remitted to the Court of Appeal.

7 As is so often the case when a motor accident is examined closely, there were many features of the history of the event in which Nadia Ryan was struck by the vehicle driven by Mr Pledge which may be thought to have contributed to its happening. Neither the injured pedestrian, Nadia, nor the driver of the vehicle that struck her, Mr Pledge, saw the other until too late. The father of the injured pedestrian did not see the vehicle that struck her until too late. The driver's opportunity to see pedestrians, and the pedestrians' opportunity to see approaching traffic, was reduced by the foliage on the median strip which divided the highway from the service lane. The pedestrians (father and daughter) did not take enough care to look properly for oncoming vehicles. The driver's attention was distracted by the consequences of a vehicle coming out of the parking bays at the side of the service road. There were no signs warning drivers of pedestrians, or requiring, or suggesting, a reduction in speed. The driver was driving within the speed limit but at a speed which the trial judge found to be faster than was reasonable in all the circumstances.

8 Many of these factors were under the control of either the pedestrians, or the driver. But not all were. The state of the foliage on the median strip had been brought about by either or both of the Roads and Traffic Authority of New South Wales ("the RTA") or the Blue Mountains Council ("the Council"). (Whether it was the RTA or the Council which was, or both which were, responsible for the state of the foliage will have to be determined on remitter of the matter to the Court of Appeal. So too will any question of apportionment of that responsibility.) It was the Council which designed and permitted the use of off-road parking, at 90 degrees to the direction of travel, in bays beside the service road. It was the Council which would have provided warning signs. Why then should there be a distinction drawn between the legal significance which is attached to the presence of the foliage and the significance attached to either the off-street parking or the absence of a warning sign?

9 The distinction is not to be found by attempting to identify *the* cause of the event. Examination will usually reveal that the event came about as the result of a complex mixture of acts or omissions. It may be right to say of each of those acts or omissions that, but for its happening, the accident would not have happened as it did. It would be wrong, however, to argue from that observation to a conclusion that one or other of those acts or omissions (for example, the driver's failure to keep a proper lookout) is to be given special significance. Equally, it would be wrong to argue from the identification of every act or omission which played a role in the accident happening as it did to the

conclusion that legal responsibility attaches to all of those responsible for every one of those acts or omissions. As Windeyer J said in *Faulkner v Keffalinos*[1], "lawyers must eschew this kind of 'but for' or sine qua non reasoning about cause and consequence"[2].

10 The questions that are relevant to legal responsibility are first, whether, as a matter of history, the particular acts or omissions under consideration (here the acts or omissions which led to the presence of the foliage, and the parking bays, and the absence of warning signs) *did* have a role in the happening of the accident. It is necessary then to examine the role that is identified by reference to the purpose of the inquiry – the attribution of legal responsibility[3]. It is at this second level of inquiry that it may be necessary to ask whether, for some policy reason, the person responsible for that circumstance should nevertheless be held not liable[4]. But that kind of policy inquiry apart, it is necessary to identify the nature of the role which the conduct in question played in bringing about the damage suffered.

11 What role did the foliage, the parking bays, and the absence of signs have in the happening of this accident? It is convenient to deal first with the parking bays.

12 To say that the driver was distracted by the vehicle coming out of the parking bays and the consequent reaction of the oncoming vehicle, is no more than a particular and positive statement of the negative proposition that he was not keeping a *proper* lookout. What attracted his attention was, as the Court of Appeal said, an event of an otherwise unremarkable kind, namely, the entry of one vehicle on to the carriageway from a point outside the bounds of that carriageway and the reaction of another vehicle into the path of which the first vehicle was moving. It was not suggested that the driver of either of those other

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1 (1970) 45 ALJR 80 at 86.

2 See also *Chappel v Hart* (1998) 195 CLR 232 at 243-244 [24]-[26] per McHugh J, 268-270 [93] per Kirby J, 284 [120] per Hayne J.

3 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 269 [38]-[40] per Gleeson CJ; *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* (2001) 202 CLR 351 at 375-376 [82]-[84] per Gummow J; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 128 [56] per Gaudron, Gummow and Hayne JJ; *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 29 per Lord Hoffmann; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at 71-73 [50]-[58] per Lord Hoffmann.

4 Stapleton, "Unpacking 'Causation'", in Cane and Gardner (eds), *Relating to Responsibility*, (2001) 145 at 166-173.

vehicles caused or contributed to the happening of the accident. Rather, the trial judge found that the authority which had permitted cars to be put in the position from which the first vehicle had come was to some extent responsible for the accident.

13 No doubt the positioning of the parking bays and their use on the day of the accident were events which form a part of the history which led to Nadia Ryan being struck by the vehicle which Mr Pledge was driving. But did the presence or design of the bays play a role which, in the context of an inquiry about negligence, can properly be described as causative? If the provision or the design of the parking bays (as distinct from driving in or out of one of them in a particular way, or at a particular point in the traffic flow) played any role in the happening of this accident it was so slight as properly to be discarded from consideration in assessing legal responsibility. There are at least two related reasons why that is so. First, the danger created by the presence of the parking bays was at all times evident. It was evident because any danger lay not in the fact that cars parked off the carriageway, it lay in the movement of cars into and out of the parking bays. And that was obvious. The bays stood at the side of a sufficiently long stretch of straight road for the view of vehicles entering or leaving them to be uninterrupted for a long distance. Secondly, what distracted the attention of Mr Pledge was, as I have said, the movement of the vehicle out of a parking bay and the reaction of another vehicle coming, past the emerging vehicle, towards Mr Pledge. All that the design and placement of parking bays did was provide the opportunity for this combination of events. In the circumstances of this case, that should not be held to have been a cause of the accident in which Nadia was injured.

14 The issue about the parking bays may be contrasted with the foliage on the median strip. The foliage was as obvious as were the parking bays. But what was *not* obvious was that pedestrians could and did cross the median strip at an otherwise unmarked point in the strip. And as they did so, they were hidden from the view of drivers approaching that point, and cars were hidden from the pedestrians' view. It was the presence of the foliage (in its then state) which hid pedestrian from driver, and vehicle from pedestrian.

15 The role which a particular act or omission played in the occurrence of an event can often be identified by asking what would have happened if the act or omission had not occurred. This kind of counterfactual inquiry may not always be easy. In this case, asking what would have happened if the foliage had been trimmed or cleared from the vicinity of the edge of the median strip led the Court of Appeal into attempting to calculate the time for which the pedestrians would have been visible to Mr Pledge. There were too many uncertainties in the evidence for the Court to make a calculation of that kind. Further, the conclusion drawn from the calculation (that Mr Pledge still would not have seen the pedestrians until too late) depended upon assuming that Mr Pledge's field of vision was very narrow, and directed to only one part of the roadway ahead. But

vision and awareness of colour and movement are far less precise than the assumption that was made.

16 It was well open to the trial judge to conclude that, had the foliage been less, Mr Pledge's attention would have been attracted to the pedestrians and the accident avoided or the impact lessened.

17 The absence of a sign warning of the possibility of pedestrians crossing, or a sign requiring or suggesting a speed slower than the generally applicable speed limit on roads like the service road was dealt with by the trial judge very shortly and by way of conclusion rather than articulation of reasons. Evidence was given, at trial, that a sign reading "LOCAL TRAFFIC ONLY DRIVE SLOWLY" might have been erected in the area. Such signs were in use at the time and were usually accompanied by a speed restriction sign requiring a speed less than 60 kmh. But the trial judge made no clear finding that the Council had been negligent in failing to provide either the warning sign or a speed restriction sign. The trial judge said only that he was satisfied that there was "a need of warning signs *or* a notice limiting the speed of vehicles (*or* directing them to proceed slowly) *etc*" (emphasis added). This "need" was treated by the trial judge as a corollary of the likelihood of pedestrians crossing where the foliage was too dense and 90 degree parking bays were inappropriate. No doubt this treatment of the subject of warning signs owed much to the way the trial proceeded. At trial the chief focus of debate was upon three issues: first, the lookout kept by the driver; secondly, the significance of and responsibility for the state of the foliage on the median strip; and, thirdly, the provision of parking bays at 90 degrees to the direction of travel on the carriageway. These were the only subjects explored in the cross-examination of Mr Pledge, the driver. The subject of warning signs was not raised with him in the course of his evidence.

18 In the Court of Appeal, the absence of signs was understood to present two issues: one about breach of duty and the other about causation. Ipp AJA concluded that it was "questionable" whether the Council was duty bound to have erected a sign of the kind suggested but that "there were insufficient grounds to hold that a sign of the kind postulated would have caused [the driver] to drive in any different way". I, too, would very much doubt that not to erect a sign of the kind suggested was a breach of any duty owed by the Council to the injured pedestrian[5]. But whether or not that is so, there was no evidence that the presence of a warning sign would have affected the way in which the driver drove on this day. There was, therefore, no basis in the evidence for concluding that the absence of a sign was a cause of the accident. And there was, in any event, no finding that the Council was negligent in failing to provide signs of the kind discussed.

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5 *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431.

19 These conclusions do not dispose of all the issues that were raised in the proceedings in the Court of Appeal. As between the Council and RTA there remains undecided in this Court what role each played in designing or maintaining the foliage on the median strip. What has not been determined, therefore, is what responsibility each had for the state of the foliage at the time of the accident. That will be a matter for the Court of Appeal. It follows that whether the amount of any damages which the Council may otherwise be liable to pay is affected by Pt 6 of the *Motor Accidents Act* 1988 (NSW) is a question for the Court of Appeal. It also follows that apportionment of responsibility between the parties found to have been negligent is a matter which should be determined by the Court of Appeal. Finally, Mr Pledge's cross-appeal to that Court remains undecided.

20 CALLINAN AND HEYDON JJ. The question in this appeal is whether the Court of Appeal of New South Wales was right to disturb an apportionment of negligence between defendants made by a trial judge who had the benefit of a view of the locality in which a motor vehicle accident occurred.

The facts

21 The Great Western Highway ("the Highway") passes through the town of Blaxland in New South Wales. It consists of a service road, about 7.4 metres wide, a fairly densely planted nature strip about 3.4 metres wide bisected by an almost continuous post and rail fence, two traffic lanes for Sydney bound traffic and two traffic lanes for Katoomba bound traffic. Coughlan Road forms a T-junction with the Highway on the side of the Katoomba bound lanes. On the side of the Sydney bound lanes, between them and the service road, was a well trodden path across the nature strip through a gap in the fence. It was that path that Nadia Ryan ("the plaintiff") followed shortly before she was struck by a vehicle driven by the appellant, Mr Pledge. It was frequently used by other pedestrians to cross the service road. It was also located within comfortable walking distance of a marked pedestrian crossing on the Highway controlled by traffic lights. Off the service road was a car park which ran from a point level with the marked crossing and the T-junction on which parking at an angle of 90 degrees to the Highway was the practice. One of the purposes of the dense planting on the nature strip was to shield passing vehicles from the glare of headlights at night.

22 The provision of the service road and nature strip was part of a scheme for the widening and improvement of the Highway, and the design of the service road and nature strip were all the work of the Roads and Traffic Authority of New South Wales ("the RTA"). The Blue Mountains Council ("the Council") was responsible for the maintenance of the nature strip. It had also designed the car park beside the service road.

23 During the afternoon of 9 July 1994 the plaintiff, who was then nine years old, her sister and their father, Mr Ryan, crossed from the Katoomba bound lanes of the Highway and reached the nature strip. They passed through the post and rail fence and paused momentarily. Mr Ryan said that he thought that they had stopped about 18 inches to two feet from the kerb of the service road.

24 It was then that Mr Ryan apparently released the plaintiff's hand. Mr Pledge was driving his vehicle in a northerly direction, towards Katoomba. His view of the family was partially obscured by vegetation. Mr Ryan's vision was also reduced. The plaintiff moved forward one or two steps. She was struck by Mr Pledge's vehicle. Mr Ryan had tried to grasp the plaintiff's hand immediately before the impact but missed it by about a foot. At this stage the plaintiff was the only one of the family who was on the road surface.

25 At the time of the accident another vehicle was reversing at an angle of 90 degrees from the car park in front of a hardware store.

The trial

26 The plaintiff suffered very severe injuries in the collision. She sued Mr Pledge, the RTA and the Council for negligence in the Supreme Court of New South Wales. The only issue at the trial which was heard by Dunford J was liability.[6] During the trial, his Honour had what he rightly saw as the particular advantage of a view of the site of the accident. Relevant changes in the vicinity were pointed out at that time.

27 The trial judge turned first to the case against Mr Pledge. His Honour accepted his evidence generally but was of the view that he had underestimated his speed at the time of the collision. He held that he was negligent in travelling at a speed which was excessive and in failing to keep a proper lookout.

28 His Honour then considered the case against the RTA and the Council. He held that the RTA was negligent in the design, construction, planting and maintenance of the vegetation on the nature strip. He found that the negligence of both the RTA and the Council in those respects "contributed to the plaintiff's accident". He was of the opinion that the Council was negligent in two other respects, in allowing parking bays at an angle of 90 degrees beside the service road, and in failing to erect an appropriate traffic sign. The former was said by his Honour to offer a distraction to motorists proceeding along the service road.

29 The trial judge concluded that the RTA and the Council were both liable to the plaintiff, and that the appropriate apportionment of responsibility was as to Mr Pledge 50 per cent, the RTA 25 per cent and the Council 25 per cent. He also made a finding of contributory negligence of 10 per cent against the plaintiff.

The appeal to the Court of Appeal of New South Wales

30 The RTA and the Council appealed to the Court of Appeal (Meagher and Giles JJA and Ipp AJA) against the findings of negligence against them, and in respect of some other currently non-relevant matters. Mr Pledge cross-appealed, but only as to the extent of the contribution assessed against him.

31 The Court of Appeal allowed the appeals by the RTA and the Council for reasons given by Ipp AJA with whom the other members of the Court, with one

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6 *Ryan v Pledge* (2001) 33 MVR 453.

minor exception stated by Giles JA, agreed. These were, first, that for some significant distance before the point of impact Mr Pledge's vision was not affected by the vegetation on the nature strip. Secondly, any failure of the RTA and the Council to clear the vegetation on the nature strip to the extent of one metre as suggested by non-binding guidelines did not cause the collision. Thirdly, failure by the Council to erect warning signs of any kind would not have caused Mr Pledge to drive in any different manner from the way in which he did. And fourthly, the finding that the provision of 90 degree angle parking bays was negligent was not "justified", as the presence of the bays was not a causative factor in the collision.

32 Ipp AJA dwelt in his reasons upon the visibility of Mr Pledge as he approached the point of impact and related matters. In doing so his Honour had regard to some photographs in evidence and what he considered could be deduced from them:

> "Constable Mills, a police officer who attended the scene, stated that the vegetation on the nature strip constituted an obstruction to visibility for pedestrians and drivers but did not say to what extent and from what point the view of drivers was impeded. In cross-examination he agreed that 'as a consequence of [his] investigations, including [his] examination of the scene,' he formed the opinion that Mr Pledge had no vision of Nadia until she had commenced to walk out onto the road. The weight of this view, however, is questionable as Constable Mills appears to have obtained his information largely from one of the policemen at the scene and not from any eye witness to the collision.
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> Constable Schneiders, another police officer who attended at the scene, also described the visibility to drivers and pedestrians in the vicinity of the collision as 'poor'. He said:
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> > 'There is a slight gap where the pedestrians go through but the vegetation still extends up to the kerb and you could not see a pedestrian coming off the kerb'.
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> The 'slight gap' where pedestrians crossed the nature strip was nine metres wide. It is obvious from photographs that, for some distance (significantly more than nine metres) to the south of the point where Nadia stepped on to the service road, a pedestrian standing at that point would be clearly visible to a driver proceeding from south to north. The evidence as to visibility, given by the police witnesses, Mr Ryan and Mr Pledge, has to be qualified by this fact. To the extent that their evidence suggests that a pedestrian would not have been visible at all, or difficult to see-irrespective of the position of such a driver, it is plainly wrong. There was however no direct evidence as to the distance over which such a

pedestrian would readily have been visible to the driver. None of the witnesses dealt with this question.

A photograph, exhibit C2, showed a police officer with a yellow reflective jacket standing 'pretty close' (according to Constable Schneiders) to the point of impact. The officer concerned was standing virtually on the kerb. It is obvious from the photograph that the view from the photographer to the police officer was entirely unimpeded (the photographer was on the service road as if driving north). There was no evidence, however, as to the distance between the photographer and the police officer.

Exhibit C2, was taken a distance further to the south of the point of impact than another photograph, exhibit C7. Exhibit C7 is a photograph of the nature strip and the service road showing the point of impact (and also indicating that the view from the point of impact to the camera was unimpeded). According to Constable Schneiders the distance from the photographer of exhibit C7 to the point of impact was approximately 30 metres. If that is correct then the distance from the point of impact to the photographer in exhibit C2 would be greater and, on my assessment, could be about 50 metres. Mr Garling SC, senior counsel for Mr Pledge, submitted however that the 30 metres to which Constable Schneiders testified (in regard to exhibit C7) must be a mistake, and the photographer of exhibit C7 must have been much closer to the point of impact than 30 metres. Although Constable Schneiders was not cross-examined about this estimate, there is force in Mr Garling's submission.

A photograph of some significance is exhibit C3, which was taken at what appears to be virtually the same distance from the point of impact as exhibit C2. Exhibit C3 differs from exhibit C2 in that the police officer with the reflective jacket is not standing on the edge of the kerb of the nature strip but a metre or two west of the kerb. Only his head and shoulders are visible and these are difficult to see. Exhibit C3 is compelling evidence of the difficulty that drivers travelling south to north along the service road would have had in seeing a pedestrian standing about a metre or more to the west of the eastern kerb of the nature strip.

The fact is that it is not possible from the evidence to determine with any precision or even approximate reliability the point at which Nadia, her sister and her father first would have become visible to Mr Pledge as he was driving from south to north along the service road.

The reasons of Dunford J, however, do throw some light on this issue. His Honour's findings in this regard are of particular value as he held a view on site during the trial when various features of the scene were pointed out (albeit that the vegetation was then in a different condition).

In addition, he drove along the service road in the same direction as Mr Pledge drove on the day in question.

Dunford J found that Mr Pledge's speed of close to 60 kilometres per hour as he came along the service road was excessive 'having regard to the narrowness of the road and the limited vision on account of the trees and shrubs on the nature strip which [were] liable to obscure the presence of persons there who might be heading in the direction of the hardware store'. Dunford J accepted that when Mr Pledge became concerned about the traffic in the area of the parking bay he took his foot off the accelerator but he was not satisfied that Mr Pledge's speed was reduced significantly thereby.

Dunford J concluded:

> 'I am satisfied that if he had been keeping a proper lookout on both sides he would, notwithstanding the foliage, have been able to see [Nadia] in sufficient time to stop or swerve to avoid her, at least if he had been travelling at a more appropriate speed in the light of the road conditions to which I have referred'.

This finding was not challenged. It follows that Mr Pledge's vision of the point where Nadia was standing was, for some significant distance, not impeded by the vegetation. This is consistent with the photographs exhibits C3 and C7."

33 Ipp AJA dealt separately with the parking bays:

"The provision of parking bays at such an angle [of 90 degrees], having regard to the width of the service road, was in conflict with the relevant Australian Standard. Dunford J said that having regard to the Standard 'and the opinions expressed by the expert witness Mr Wingrove', designing the parking bays so that they were in conflict with the Standard amounted to negligence. His Honour gave as his reason for this conclusion the fact that 'vehicles reversing out of the parking bay, even if intending to travel south on the service road, necessarily had to back out onto the northbound (or opposite) side of the service road'. This, he found, 'created a potential hazard for drivers proceeding north on the service road when a vehicle was backing out of the bay in that it distracted them from other matters requiring their attention directly ahead, particularly the possibility of pedestrians moving off the nature strip to cross the road'. His Honour considered that the provision of parking bays in these circumstances constituted negligence on the part of the Council which contributed to the collision.

The Standard was not mandatory, but was a guide only. Matters such as width of carriageway, abutting land use, speed characteristics and vehicle volumes were all relevant in deciding whether to permit angle parking. Generally 90 degree angle parking was permitted in streets that carried predominantly local traffic (such as the service road). Nevertheless, according to the Standard, the width of the service road was such that only parallel parking should have been provided.

Mr Wingrove said:

'There is nothing to say you have to always comply to the Standard'.

This is manifest from the Standard itself.

In my view, neither the Standard nor the evidence of Mr Wingrove justified the finding that the provision of 90 degree angle parking on the service road was negligent.

In any event, in my view, on a common sense basis, the provision of the parking bays was not causative of the collision.

Mr Pledge said that he could see a potential traffic hazard occurring 'between the car backing out and the one coming rather quickly down the service road towards me'. He had ample time to take appropriate action.

The movements of the vehicles concerned were quite ordinary, and often experienced in the ordinary course of suburban driving. The parked car began to reverse out of its parking bay. It was passed by the oncoming vehicle that continued safely along the service road. The potential hazard was simply one of a kind that occurs frequently in everyday life. It has to be coped with by careful driving.

There is nothing to suggest that, had the parking bays been of the parallel kind, and had the parked car moved out in front of the oncoming vehicle behind it, Mr Pledge's attention would not have been distracted.

In my opinion, therefore, Dunford J erred in finding that the Council was negligent in providing 90 degree angle parking bays and that its negligence contributed to the collision."

34 Ipp AJA reversed the finding of negligence made by the trial judge in respect of the absence of a traffic sign on this basis:

"I now turn to the finding that the Council was negligent in failing to erect a warning sign or a notice limiting the speed of vehicles or directing them to proceed slowly.

It was submitted that the warning sign should have reflected a speed of below 60 kilometres an hour or the words 'Slow down: Pedestrians'. It was, however, not general practice at the time to restrict the speed limit on minor roads to speeds below 60 kilometres an hour. Secondly, there was no evidence as to the speed limit that should have appeared on the sign. Thirdly, there was expert evidence to the effect that there was no warrant for warning signs to be erected. In my opinion, the finding that the Council was duty bound to have erected a sign of the kind suggested is questionable.

In any event, Mr Pledge accepted in cross-examination that he knew that particular care was required in the area where the collision occurred and said that he had driven along the service road on a number of occasions. He was familiar with the area. A sign would not have told him anything he did not already know. Nevertheless, his knowledge made no difference to his driving. In my view, there were insufficient grounds to hold that a sign of the kind postulated would have caused him to drive in any different way."

35 The Court of Appeal, whilst rightly noting and attaching weight to the fact that the trial judge inspected the scene of the accident, made no reference to s 54 of the *Evidence Act* 1995 (NSW) ("Evidence Act") which elevates an inspection to the status of evidence in that it can provide a foundation for the drawing of inferences. It is as follows:

"**54 Views to be evidence**

The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection."

The appeal to this Court

The appellant's submissions

36 Mr Pledge seeks in this Court the restoration of the judgment of the primary judge. His submissions focused upon the substitution by the Court of Appeal of its opinion as to his visibility of the locale for that of the trial judge. He emphasized that the trial judge actually accepted the evidence of several witnesses that in fact a driver in his situation, and persons in that of the plaintiff's family would have had their vision obscured.

37 The plaintiff's father could only see Mr Pledge's vehicle "through some shrubbery". It was very difficult for pedestrians in his position, and for drivers in Mr Pledge's situation to see each other because of the state of the vegetation. The plaintiff's father was a tall man. The plaintiff was on his left and would have had even less opportunity to see an approaching vehicle.

38 Mr Pledge's evidence which was for the most part accepted by the primary judge, was that the plants and shrubbery on the nature strip were "very full ... very bushy hanging over the kerb maybe 300 or 400 mill[imetres]": he did not see the plaintiff before the moment of impact; his only explanation for failing to see the plaintiff and her family was the foliage. And it was in the light of that evidence that the trial judge found that the foliage significantly restricted his vision.

39 Reference should also be made to the evidence of Constable Mills, the weight of which the Court of Appeal questioned for want of a reliable or identifiable source. It was not however directly challenged in cross-examination or contradicted by other evidence and it largely coincided with Constable Schneiders' evidence that visibility each way was poor. Their evidence was not weakened in cross-examination.

40 It followed, Mr Pledge submitted, that in circumstances in which the trial judge had accepted credible, indeed substantially unchallenged evidence that the foliage *in fact* affected vision on the day, the Court of Appeal erred in engaging in its own analysis, based particularly on photographs, and culminating in a conclusion contrary to that of the trial judge.

41 Mr Pledge made similar submissions with respect to the reversal by Ipp AJA of the trial judge's findings of negligence on the part of the Council and the RTA in respect of the location of the car park beside a service road of only about 7.4 metres in width, and the absence of a warning sign.

42 The primary judge's view, he submitted, as to the design of the parking bays was also open: it involved the acceptance of oral evidence of an expert, Mr Wingrove. His Honour specifically found that a potential hazard was created, and that the consequences of it manifested themselves on the day. That a potential hazard may be "of a kind that occurs frequently in everyday life" and may have "to be coped with by careful driving", does not mean that it may not be one of a number of causes of an accident. The primary judge's view of the desirability of a sign was based on the presence of several potential hazards, including the density and closeness to the kerb of the foliage on the nature strip, and the location of the parking bays, as well as the evidence of the expert, Mr Wingrove. Accordingly, it was submitted, there was no reason to set it aside.

The decision

43 Statements in the joint judgment of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*[7] are of relevance to this appeal:

> "In New South Wales a right of appeal from a judgment of the District Court lies to the Supreme Court pursuant to the *District Court Act* 1973 (NSW), s 127(1). In the present case such appeal lay as of right[8]. Within the Supreme Court such an appeal is assigned to the Court of Appeal[9]. The character and features of the appeal are governed by the *Supreme Court Act* 1970 (NSW). Section 75A of that Act provides, relevantly:
>
> '(5) Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing.
>
> (6) The Court shall have the powers and duties of the court … from whom the appeal is brought, including powers and duties concerning:
>
> (a) …
>
> (b) the drawing of inferences and the making of findings of fact, and
>
> (c) the assessment of damages and other money sums.
>
> (7) The Court may receive further evidence.
>
> (8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.
>
> (9) …
>
> (10) The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought

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7 (2003) 77 ALJR 989 at 993-995 [21]-[25], [27]; 197 ALR 201 at 206-209.

8 *District Court Act* 1973 (NSW), s 127(3). See also s 127(2)(c)(i).

9 *Supreme Court Act* 1970 (NSW), s 48(1)(a)(iv) and (2)(f).

to have been given or made or which the nature of the case requires.'

The nature of the 'rehearing' provided in these and like provisions has been described in many cases. To some extent, its character is indicated by the provisions of the subsections quoted. The 'rehearing' does not involve a completely fresh hearing by the appellate court of all the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits. No such fresh evidence was admitted in the present appeal.

The foregoing procedure shapes the requirements, and limitations, of such an appeal. On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'[10]. On the other, it must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record[11]. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share[12]. 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[13].

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10 *Dearman v Dearman* (1908) 7 CLR 549 at 561. The Court there was concerned with s 82 of the *Matrimonial Causes Act* 1899 (NSW) which provided that "on appeal every decree or order may be reversed or varied as the Full Court thinks proper": see (1908) 7 CLR 549 at 558.

11 *Dearman v Dearman* (1908) 7 CLR 549 at 561. See also *Scott v Pauly* (1917) 24 CLR 274 at 278-281.

12 *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634 at 637; [1985] 1 All ER 635 at 637 per Lord Scarman with reference to *Joyce v Yeomans* [1981] 1 WLR 549 at 556; [1981] 2 All ER 21 at 26. See also *Chambers v Jobling* (1986) 7 NSWLR 1 at 25.

13 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (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.

Nevertheless, mistakes, including serious mistakes, can occur at trial in the comprehension, recollection and evaluation of evidence. In part, it was to prevent and cure the miscarriages of justice that can arise from such mistakes that, in the 19th century, the general facility of appeal was introduced in England, and later in its colonies[14]. Some time after this development came the gradual reduction in the number, and even the elimination, of civil trials by jury and the increase in trials by judge alone at the end of which the judge, who is subject to appeal, is obliged to give reasons for the decision[15]. Such reasons are, at once, necessitated by the right of appeal and enhance its utility. Care must be exercised in applying to appellate review of the reasoned decisions of judges, sitting without juries, all of the judicial remarks made concerning the proper approach of appellate courts to appeals against judgments giving effect to jury verdicts[16]. A jury gives no reasons and this necessitates assumptions that are not appropriate to, and need modification for, appellate review of a judge's detailed reasons.

Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'[17]. In *Warren v Coombes*[18], the majority of this Court reiterated the rule that:

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14 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-620; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq*) (1999) 73 ALJR 306 at 322-325 [72]-[80]; 160 ALR 588 at 609-613.

15 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667 citing *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 386; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257-258, 268-273, 277-281.

16 eg *Hocking v Bell* (1945) 71 CLR 430; (1947) 75 CLR 125 at 131-132; cf *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 271-272 [2], 274-275 [16], 282-283 [41]-[42], 288-290 [57]-[58], 310-311 [119]-[123].

17 *Dearman v Dearman* (1908) 7 CLR 549 at 564 citing *The Glannibanta* (1876) 1 PD 283 at 287.

> '[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.'
>
> ...
>
> [Other cases do not] derogate from the obligation of courts of appeal, in accordance with legislation such as the *Supreme Court Act* applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute."

44 There is no doubt that the Court of Appeal in this case strove to carry out its statutory appellate duty in accordance with the statements of principle that we have quoted. In our opinion it succeeded in doing so in discarding, as causative factors, the absence of any traffic sign, and the provision of parking bays at an angle of 90 degrees to the service road. The reasons for this are comprehensively stated by Ipp AJA. In addition, the proximity of parking bays to a service road is in no way remarkable. A service road is of quite a different character from an open highway. Motorists should proceed with caution along such a road because it necessarily will be used by motorists and their passengers proceeding to and from the establishments which it is designed to service.

45 We are unable to reach the same conclusion however with respect to the rejection by the Court of Appeal, of the nature, density and location of the vegetation on the nature strip as a causative factor of the collision. It cannot, in our opinion, be doubted that it was a contributing cause. It obscured not only the visibility of Mr Pledge, but also the visibility of the plaintiff and her father. Its presence inevitably brought the plaintiff close to the roadway before she could obtain any useful view of passing traffic. Similarly, its presence produced the same consequence for Mr Pledge with respect to any opportunity that he might have had to see the plaintiff. Its presence would also suggest to any motorist proceeding as Mr Pledge was, that any pedestrian would need to be, and would be, cautious in proceeding through and from it on to the roadway. It is no answer to say that Mr Pledge did not in any event see the plaintiff before the impact and

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18 (1979) 142 CLR 531 at 551.

that therefore the presence of the foliage was of no significance. The eye may be attracted by a shape, or a movement, or contrasting colour. Mr Pledge would have had a greater opportunity to catch a glimpse of these phenomena had the foliage been less dense. The denial of that opportunity, by reason of an obstruction in the form of the dense foliage, probably contributed to this accident. The denial of an opportunity, by the presence of an obstruction such as dense foliage, to catch a glimpse of these can and must necessarily have contributed, as the trial judge found, to this accident.

46 In our opinion Mr Pledge has successfully demonstrated that the Court of Appeal fell into error in exculpating the RTA and the Council. The errors were threefold.

47 First, their Honours had no sufficient basis for preferring what they thought the photographs showed to the evidence accepted by the trial judge and coming from several and opposed sources, namely the plaintiff's father, Mr Pledge, two police officers and an expert, Mr Wingrove. The circumstances of the accident themselves point strongly to that error.

48 Secondly, their Honours' reliance on the calculations that Ipp AJA made was unjustified. They depended on too many imponderables which were really little more than matters of speculation: estimates based on the plaintiff's father's evidence as to how long the plaintiff paused before she moved, and how long it took her to walk to the point of impact; that the appropriate extent of clearing of foliage should be one metre only, as indicated by the non-binding guidelines; Mr Pledge's estimated speed; the distance of his vehicle from the plaintiff as she stood on the nature strip before leaving it; and the effectiveness of Mr Pledge's attempts to decelerate[19]. It is not irrelevant that the calculations in question were not sought to be made during the trial by any party where the assumptions upon which they were based could have been fully tested and explored.

49 The third error was the failure of the Court of Appeal to have sufficient regard to the utility of the trial judge's experiences in inspecting the site of the accident and driving along the road towards the accident site, particularly the enhanced utility accorded to it by s 54 of the Evidence Act. *Abalos v Australian Postal Commission*[20], a case relied on by Mr Pledge, and which affirmed the

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19 See comments as to the difficulties of such calculations in *Public Transport Commission (NSW) v Perry* (1977) 137 CLR 107 at 114-115 per Barwick CJ, 143 per Stephen J. See also *Reville v Simpson* (1950) 24 ALJ 217 and *Fox v Percy* (2003) 77 ALJR 989 at 1017 [149]; 197 ALR 201 at 239.

20 (1990) 171 CLR 167 at 178.

special position of the trial judge, was a case in which the trial judge had enjoyed an analogous advantage, of an in-court demonstration. Even before the enactment of the Evidence Act, appeals courts customarily accorded significance to a demonstration or view at first instance. It was not accorded the weight that it deserved here. It is also relevant to the first error that has been identified. It must have supplied to the trial judge the valuable third dimension that the photographs necessarily lacked, and which formed the basis for much of the intermediate court's exculpation of the RTA and the Council.

50 We would allow the appeals. But that does not mean that the trial judge's apportionment should necessarily stand. His Honour does seem to have had regard to the absence of a sign, and the provision of angle parking as negligent, and causative factors. Because in our opinion they were not, re-apportionment of negligence as between Mr Pledge, the RTA and the Council should now be made. Other issues arose before the Court of Appeal. The identification of the issues that remain to be determined and their resolution should be left to the Court of Appeal. As the Court of Appeal will need to decide these in any event, and because some of them relate at least to the respective obligations and liabilities of the RTA and the Council inter se, it is better that the Court of Appeal undertake any re-apportionment of liability rather than this Court.

51 Each appeal should be allowed with costs. The judgment of the Court of Appeal of the Supreme Court of New South Wales should be set aside. The proceedings should be remitted to the Court of Appeal for reapportionment of liability among Mr Pledge, the RTA and the Council consistently with the decision of this Court and for the determination of the other issues before, and not decided by, the Court of Appeal, including the costs to date in the Court of Appeal having regard to the decision of this Court.