NAVIGATION

*Unfortunately, the product's efficient navigation system with the index to the left of screen cannot be contained in this preview. Just use the scroll mechanism to the right and make sure you see the incredible depth of this publication by perusing the tables/index from p. 3.

KIDD & DARGE'S TRAFFIC LAW

Australian Principles & Precedents (Civil & Criminal)

October 2014

This publication contains over 800 pages of case summaries, quotations of legal principle from High Court, Supreme Court and District Court decisions and numerous Australian Road Rules (ARRs) with annotations.

It will help you to determine whether liability is likely to be established, the likely apportionment of liability, whether a Road Rule is relevant and is helpful re criminal issues and sentencing.

Preface

David Kidd (LLB Hons, BA, GDLP), director of Kidd LRS, was admitted to the Supreme Court of South Australia as a barrister and solicitor in 1994. Since that date he has specialized in providing legal research services to the legal profession. This experience has enabled him to create law publications specifically tailored to meet the practical day to day research needs of legal practitioners.

Trevor Darge (B. juris,LLB) joined the team in December 2011 and will be the major contributor to the civil aspects of this publication. Trevor's involvement in motor vehicle accidents and claims goes back almost 30 years as he spent his school and university vacation time working in claims at a large insurer. Since graduating he has practiced in a wide variety of areas of the law. For the last 18 years he has pursued a special interest in the areas of motor vehicle claims/recovery and contractual disputes. Trevor is a partner at SRB Legal in Perth, a firm which specialises in insurance law including motor vehicle claims and statutory motor vehicle compensation.

The following High Court quote from Kirby J in *Joslyn v Berryman; Wentworth Shire Council v Berryman* 18/6/03 [2003] HCA 34 illustrates the value in, and need for, *Kidd & Darge's Traffic Law – Australian Liability & Apportionment Principles & Precedents*:

> "In Liftronic Pty Ltd Unver…, I pointed out that contributory negligence, and apportionment, are always questions of fact... It is a mistake to endeavour to elevate into rules of law observations 'however eloquent, uttered by judges, however eminent, about the facts of some other case'... Nevertheless, as more decisions upon such questions fall to be made by judges rather than by juries as they once were, and as judicial reasons are examined on appeal, it is probably inevitable and in the interests of judicial consistency (which is a hallmark of justice…), that trial judges and appellate courts should look to the way earlier decision-makers have resolved like factual questions. Those decisions do not yield binding principles of law. However, they do provide some guidance as to the approach that has been taken to the solution of problems, the recurring features of which take on a monotonous similarity when different cases are compared. When appeals such as the present ones reach this Court, it is also desirable for the Court to inform itself of the way in which the issues for decision are being approached by courts subject to its authority. This will help this Court to provide to judges, lawyers, insurance assessors and litigants appropriate guidance for the making of decisions with a measure of confidence that they will not be subject to correction for errors of law or of approach to commonly repeated facts" [100-101].
>
> ***The great volume of precedent in this work provides such guidance.***

Tips For Users

. For annotations to your own State/Territory civil and criminal legislation go to the relevant alphabetical heading e.g. South Australia or Western Australia.

. For legislation and the Australian Road Rules just go to Austlii or your local legislation site.

. Use the extensive cross-references to fully research an issue.

. For keyword and phrase searches use ctrl F or Search Document.

Other loose-leaf & electronic publications produced by Kidd LRS Pty Ltd include:

Kidd's Traffic Law (*Criminal)*
Kidd's Damages (P.I. & Defamation) – *Australian Principles & Precedents*
C'TH & SA Industrial & OHSW Law *(FWA Act annotated)*
Damages SA
SA Workers Compensation Law

Table of Subject and Keyword headings

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Civil Liability Act 1936
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- s47 – Presumption of contributory negligence when injured person knows of driver's intoxication
- s49 – Non-wearing of seatbelt etc
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- s9 – Driving unregistered
- s47A – Numbers and number plates
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- s43(3)
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- s47(3)(a) – Driving under the influence (disqualification)
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- s47J – Recurrent offenders
- s47K – Evidence
- s47K(1) – Breath analysing instrument operated by a person authorised.
- s47K(2a)(a) – Prescribed oral advice
- s47K(3)(a) – Authorisation to operate breath analysing instruments
- s47K(3)(b) – Certification of breath analysing instrument and its use

Presentation note
Percentages given in the case précis are representative of 'blame'/responsibility for the collision unless otherwise stated.

Throughout this publication you will notice **a lot of material is in bold type, including in quotations**. Please be aware that we have not adopted the usual practice of stating 'my/our emphasis' due to the sheer volume of such bolding. Instead **we have indicated when it is not my/our emphasis by stating 'Court's emphasis'.**

The material in green font comprises direct quotations.

Councils/authorities
See also Road – Construction and/or design of (faulty), Road authorities, & Speed – Limit sign - Advisory

Bridge in disrepair
See *Collins* at NSW CLA s5 – General … Disrepair of bridge.

Criminal actions (duty to guard against)
In *RTA of NSW v Refrigerated Roadways P/L* 22/9/09 [2009] NSWCA 263 [(2009) 53 MVR 502] the COA (per Campbell JA) stated that "the **RTA owed a duty of care to motorists … concerning the dropping of rocks from overpasses over freeways, but that the RTA did not breach that duty either by failing to install screens at the time the Glenlee Bridge was constructed, or by failing to retrofit screens to the bridge at a later time**. … The conclusion that there is no breach of duty is initially arrived at on the basis of the common law, after taking into account a mass of evidence concerning the funding available to the RTA, and the steps that it took to respond to the risk of objects being dropped from overpasses. … I reject a conclusion that the trial judge arrived at that section 42 ***Civil Liability Act*** does not apply to this case, but section 42 does not lead me to a conclusion that is different to the conclusion arrived at from the common law. … I reject the RTA's application to rely on section 43A ***Civil Liability Act***, but also conclude that, even if it had been permitted to be relied on, it would not have led to a different result"@14-17.

See *Rankin v Gosford City Council* 2/10/14 [2014] NSWSC 1354 per Button J, where P motorcyclist was seriously injured when he struck **traffic barriers which had been maliciously placed across a roadway by unknown persons**. The barriers on the roadside during roadworks, when filled with water, were extremely heavy. His Honour found that the barriers moved by the persons were empty at the time of being moved, enabling fairly easy movement. A plea of statutory immunity by D under s45 of the Traffic Administration Act was rejected. The section provided immunity for failure to carry out roadworks not for negligent management of the works, as was alleged here. However, on the facts, D was not found liable. The decision in *RTA v Refrigerated Roadways Pty Ltd [2009] NSWCA 263* , where a road authority was found to owe a duty of care (but no breach found) for the actions of a person dropping concrete on P's vehicle from an overpass, was distinguished on the basis that, in the present case, there was no suggestion that the barriers had been interfered with on previous occasions. The **scope of D's duty did not extend to taking reasonable care to forestall the criminal actions of third parties**.

Decision making process
As the *Peko-Wallsend* case and many other cases show, a statutory authority such as the [D] **may be required to take into account all relevant considerations in reaching its decision** even where there is no express statutory list of such matters. **Sometimes, however, legislation specifies matters which are required to be taken into account. In two recent decisions the Court of Appeal of New South Wales has explored what**

needs to be done to satisfy such a statutory requirement. It appears to me that those cases are relevant here, where the requirement to consider matters of safety arises by implication from the Act rather than expressly [106]. In *Weal v Bathurst City Council* (2000) 111 LGERA 181, Bathurst Council determined a development application without specifying maximum noise emissions or levels of plant and equipment to be operated so as to reduce noise. The Council was required under the Environmental Planning and Assessment Act 1979 (NSW) to take into account a number of specified matters as for a province to the subject development. The Court of Appeal held that to discharge this duty, the Council had to reach a proper understanding and undertake a process of evaluation. In *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 the Court emphasised that the statutory obligation to take relevant matters into consideration required that those matters be given weight as fundamental elements or focal points in the Council's determination (at 602 per Spigelman CJ) [107] … Safety, in the sense described above, was a relevant consideration which the Council was bound to take into account in making its decision" [108]. *Davies v Ku-ring-gai Municipal Council* 10/9/03 [2003] NSWSC 840 Austin J. See commentary @ Roundabouts

Delegation
See Non-delegability

Drainage
See *Council of the City of Liverpool v Turano & Anor* 31/10/08 [2008] NSWCA 270 [(2008) 51 MVR 262] from paragraphs 144-160 where Beazley JA considers s42 of the Civil Liability Act 2002 in a case where a **tree is blown over killing a driver**. Council not found to have owed duty in the circumstances. The "Council's failure to properly maintain the culvert outlet so as to drain water flowing to the west: '... more likely than not resulted in the area around the western end becoming almost permanently damp and undermining the stability of the tree by causing root damage and soil degradation'"@130 but "there was nothing to draw the attention of Council officers to any risk such as materialised in this case"@142. Sydney Water however breached its duty. See commentary on this case at, Civil Liability Act (2002) NSW. The **High Court** in *Sydney Water Corporation v Turano* 13/10/09 [2009] HCA 42 [54 MVR 132], however, **allowed appeal** to this decision stating "Sydney Water's conduct in laying the water main in this location in 1981 with the consequential alteration to drainage flows from the culvert and any foreseeable risk to the health of the tree did not impose on it a legal duty of care for Mrs Turano's benefit. The reason for this may be expressed as a conclusion that **injury to road users as the result of the tree's eventual collapse was not a *reasonably* foreseeable consequence of laying the water main**, as the primary judge held. Alternatively, it may be expressed as a conclusion that **in the absence of control over any risk posed by the tree in the years after the installation of the water main there was not a sufficiently close and direct connection between Sydney Water and Mrs Turano**, a person present on Edmondson Avenue in 2001, for her to be a 'neighbour' within Lord Atkin's statement of the principle"@53.

Duty of
See also Road – Construction and/or design of (faulty) & Road authorities

> "[Binks] 111-112 The appropriate test is that set out in Brodie v Singleton Shire Council (2001) 206 CLR 512 … At p 577 the majority stated the duty in the following terms:
>
> '150 … Authorities having statutory powers of the nature of those conferred by the LG Act upon the present [Rs] to design or construct roads, or carry out works or repairs upon them, are **obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users)** which includes the [P]. Where the state of a roadway, whether from design, construction, works or non-repair, poses a risk to that class of persons, then, to discharge its duty of care, **an authority with power to**

> **remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist**.'

113 **Is the duty there articulated owed only to careful road users? The authorities suggest not**. In a case, the facts of which bear a similarity to these, Deane J (with whom Gaudron and McHugh JJ agreed) made it clear that the duty was owed to persons who were not careful road users.

> 'It is clear that the second [R] was in a relationship of proximity with other users of the road on which he left the truck. That relationship gave rise to a duty to take reasonable care to avoid foreseeable injury to such other road users. That relationship and that duty of care were not confined to persons who were careful and sober but extended to all foreseeable users of the road, including bad and inattentive drivers and those whose faculties were impaired either naturally or by reason of the effect of alcohol.' (March v Stramare (1990-1991) 171 CLR 506 at 520).

See also Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 at [26-28]. …

115 … It seems to me that **Brodie draws a distinction between the duty owed to a road user in a vehicle and pedestrians**. The point of distinction is obvious. A pedestrian because of his or her mode of locomotion has more time and more opportunity to examine the surface over which he or she is walking (Brodie [163]). Those advantages are usually not enjoyed by a motorist who is necessarily travelling at a greater speed and who may have other impediments to his or her vision. (See also Edson v Roads and Traffic Authority [2006] NSWCA 68 at [91]).

116 It seems to me that the duty owed by a road authority to motorists is not restricted only to those taking ordinary care. **I cannot see why as a matter of logic there should be a distinction between the duty owed by one motorist to another (as in March v Stramare) and that owed by a road authority to a motorist**. This is particularly so when in March v Stramare one of the vehicles had been left in a dangerous position.

117 The difficulty is to determine what are the appropriate limits to the duty. … What does seem clear … is that **the duty does extend beyond persons who are careful and sober when using the road and it ought have regard to inadvertence and thoughtlessness and those whose faculties are impaired, either naturally or by reason of the effects of alcohol**. The grey area is the extent to which a road authority has to have regard to those persons. As was pointed out in Brodie ([161]) it is the precise nature of the defect which is important when considering the question of those persons to whom the duty extends.

118 On this issue I respectfully accept the analysis of Brodie by Bryson JA:

> '... I respectfully observe that their Honours had not earlier formulated the duty in terms which required that a road be safe only for users exercising reasonable care for their own safety, although the terms of that sentence suggest that they had. In paras [150] to [152] there is no limitation of this kind to the class of road users to whom a duty is owed. The earlier formulation referring to persons using the road and themselves taking ordinary care is found in para [160] dealing with questions of breach of duty.
>
> What their Honours said at [160] treats the proposition that persons using the road will themselves take ordinary care as the starting point when dealing with questions of breach of duty, not questions of the existence of duty, and if there were no duty towards persons who do not exercise reasonable care for their own safety there would be no room for taking the results of inadvertence and thoughtlessness into account as a variable factor. In my respectful view it is not a correct reading of the leading judgment, notwithstanding the terms of the opening sentence of para [163], that Gaudron, McHugh and Gummow JJ intended to establish a qualification which would override what might otherwise be the result of the application of the Shirt Calculus to the facts, and would exclude pedestrians who do not take reasonable

> care for their own safety from any duty of care which might otherwise be owed by highway authorities to pedestrians.' (Sutherland Shire Council v Henshaw [2004] NSWCA 386 at [62-63]).

120 Applying those principles, the Council as a road authority and as the entity supervising the road works through its servant Mr Marsh, owed a duty to the [P] to take reasonable care not to create a foreseeable risk of harm to him as a motorist. In fulfilling that duty it also had to take into account the possibility that as a motorist the [P] might be inattentive, might be driving too fast in the circumstances and that his faculties might be impaired, at least to the extent that his reactions were slowed [119].

It was foreseeable, as the Council appreciated, that unless appropriate signage and other indicia were put in position, the road works at the intersection of Alfred Street and Fitzroy Street could create a risk of harm to road users. On that analysis alone there was an obligation to properly signify and delineate the fact and nature of the road works.

121 The matter can be looked at in another way. Once the road works were commenced and surrounded by safety mesh, further content was given to the duty. An obligation arose to check that the signage and other insignia used were adequate to achieve the original purpose of not creating a foreseeable risk of harm to road users. That common law duty is in line with clause 2.5.7 of the Standard: 'On completion of the erection of the signs and devices and after any change is made in the arrangement, supervisory personnel should carry out an inspection before and after opening to traffic. This inspection should be carried out at the normal traffic speed, along the travel path, and past all of the signs and devices. The same inspection should be carried out at night with dipped headlights. If it is considered that the arrangement is confusing or unsatisfactory, it should be adjusted and reinspected.'

122 It follows from the findings of fact which I have made that after the road works had been commenced and the various warning devices shown in the photographs had been placed in position, it was reasonably foreseeable that drivers travelling South in Alfred Street might gain the impression from the signage and overall configuration of the works that the southbound lane was blocked and act accordingly. That such was a foreseeable risk was readily ascertainable by Mr Marsh had he travelled South in Alfred Street and made his own assessment. This was something which he was obliged to do when performing his function as supervising engineer on behalf of the Council.

123 This same proposition was put slightly differently by Hodgson JA:

> '25 It can be said that a road authority that undertakes work on a road involving risk to road users is so placed in relation to road users as to assume a particular responsibility for their safety.
>
> 26 I do not think Brodie stands against this approach. The general duty of road authorities is to take reasonable care; but in the particular circumstances where the road authority undertakes work involving risk to road users, a circumstance not considered in Brodie, that general duty is overlaid by the more extensive duty that arises because of the risk created by the undertaking of those works. In my opinion, until the High Court says otherwise, this Court should follow Scroop, Fletcher, Palmer and Ainger, and apply that principle.' (Leichhardt Municipal Council v Montgomery [2005] NSWCA 432 [25-26]). [Note successful High Court appeal in Leichhardt re non-delegability. See Leichhardt at Non-delegability]

124 Here it **was foreseeable that the configuration of the road works, together with the absence of adequate signs and markings, would create a foreseeable risk of harm to road users exercising reasonable care**. The **risk was greater, and therefore more likely to occur, in the case of an inattentive driver**, a driver travelling at more than 60 km/h or a driver whose faculties were impaired for whatever reason. What was a reasonable response by the Council? Again assistance is provided by Brodie:

> '151 The perception of the response by the authority calls for, to adapt a statement by Mason J in Wyong Shire Council v Shirt, a consideration of various matters; in particular, the magnitude of the risk and the degree of probability that it will occur, the expense, difficulty and inconvenience to the authority in taking the steps

> described above to alleviate the danger, and any other competing or conflicting responsibility or commitments of the authority. The duty does not extend to ensuring the safety of road users in all circumstances. In the application of principle much thus will turn upon the facts and circumstances disclosed by the evidence in each particular case. …
> 155 The question whether "due care and skill" was taken in design or construction will require consideration of all the circumstances of the case. The circumstances will include the type and volume of traffic expected. Different roads will serve different purposes and need not be constructed to the same standard ..
> 159 The discharge of the duty involves the taking by the authority of reasonable steps to prevent there remaining a source of risk which gives rise to a foreseeable risk of harm. Such a risk of harm may arise from a failure to repair a road or its surface, from the creation of conditions during or as a result of repairs or works, from a failure to remove unsafe items in or near a road or from the placing of items upon a road which create a danger or the removal of items which protect against danger.
> 160 In dealing with questions of breach of duty, whilst there is to be taken into account as a "variable factor" the results of "inadvertence" and "thoughtlessness", a proper starting point may be the proposition that the persons using the road will themselves take ordinary care.
> 161 ... On the other hand, a **trench in the roadway**, whether arising from active digging or decay of the road or structures within it, will more readily give rise to a foreseeable risk of injury, particularly where it cannot easily be seen or avoided by a road user. The nature of the defect, and not the question of whether it arose by action or "nonfeasance", should be significant ...'

125 It is not without significance that the majority in Brodie refer to the proposition that persons using the road will themselves take ordinary care may be an appropriate starting point ([160]), but did not indicate that such was an appropriate end point. It was a factor to be taken into account when balancing the competing considerations in Shirt .
126 The magnitude of the risk, in my opinion, was considerable. Confusion in the mind of a motorist could lead to serious injury or death. The degree of probability of occurrence raises the issue of the extent to which bad drivers need to be considered when assessing what is a reasonable response to the foreseeable risk. Quite obviously **a road authority does not have to plan for extremes of conduct** where drivers might be travelling at very high speeds or whose faculties are so dulled by ill health or substance abuse as to not be able to properly control a motor vehicle. **The response, however, does need to have some regard to not only carelessness and inadvertence but also excessive speed and reduced alertness, either as a result of ill health or alcohol consumption**. Accident statistics make it clear that excessive speed and excessive alcohol consumption are all too common on the part of motorists.
127 There was **no suggestion by the Council that the expense, difficulty and inconvenience associated with better signage and indicia relating to the road works were beyond either its resources or those of the second [D]**. There were no other competing or conflicting responsibilities or commitments identified in the evidence.
128 By application of the Shirt principle, I am of the opinion that the response of the Council was unreasonable. Given the nature of the works and the fact that they would substantially encroach onto the southbound lane in Alfred Street, **the signage and other indicia were inadequate** to sufficiently place motorists on notice that there would be a significant lateral movement to the East. The **vertical 'keep left' sign was patently inadequate**. The only other sign which indicated that anything unusual was occurring (leaving aside the conventional roundabout signs which would not have had that effect) was **the 'changed traffic conditions ahead' sign which was not only too close, but failed to provide sufficient information**. Both signs failed to comply with the Standard
129 An inspection by Mr Marsh (if one had taken place and if it had been carried out with due care and skill) would have revealed that for drivers in Alfred Street travelling South, a confusing and ambiguous situation had been created. Even if the need for obvious and clear signs including LSMs was not apparent before the works were

actually commenced, this should have become obvious once the work commenced and the coloured mesh was put in place.
130 **The problem with these road works or the 'defect' was that they gave the impression to a southbound driver that the southbound lane was blocked**. This was the effect created in daylight. It would have been greater at night. As Mr Jamieson's evidence made clear, while the coloured mesh would have made it clear to a southbound driver that road works were present, that factor itself together with the 'changed traffic conditions ahead' sign, which was too close to the works, did not provide any indication of the precise dilemma which would confront that southbound driver as he or she got closer to the works. As the driver approached the works the perception would have been that the southbound lane was blocked. The decision to be made was whether to reduce speed and/or change direction. **It was only when such a driver was quite close to the intersection that the true position would be revealed**. Drivers such as Messrs Haldezos and Boursicot indicated that this would occur much closer to the intersection than did the experts. It also needs to be kept in mind that at a speed of 60 km/h a motor vehicle would cover 16.7 metres in one second.
131 **Although the Standard is not determinative of negligence, it did provide a useful guide as to good practice**. It is clear that the two most informative signs, ie 'changed traffic conditions ahead' and 'keep left' did not comply with it. There was no indication such as LSMs that the southbound lane remained open and that a southbound driver should expect to move laterally to the East. This was not a situation where the evidence established only that more could have been done. The combination of the configuration of the road works with the inadequate signage created a confusing and ambiguous situation. In a dynamic circumstance involving drivers travelling at night at speeds of 60 km/h or more, such ambiguity and confusion became a source of danger. **More signs, better positioned and containing more information such LSMs were required to reduce this danger. The Council was accordingly in breach of the duty which it owed to the [P]**".
Binks v North Sydney 25/5/06 [2006] NSWSC 463 Hoeben J
Appeal dismissed [2007] NSWCA 245 [(2007) 48 MVR 451] re liability by majority.
See also precis at Telegraph pole

Latent dangers
See para. 111-112 above of *Binks*

Negligent maintenance
"After the [P] had travelled between 10 and 15 metres onto ... [a **one-lane bridge**], the **front wheel of his bicycle descended into one of the gaps in the deck,** the width of which was at least 80 mm, and as a result the [P] was thrown forward striking his head on the deck" [2]. D council's **warning signs were inadequate** in light of amongst other things "the foreseeable preoccupation of a cyclist with the danger which would be created by oncoming traffic, the high risk of injury created by gaps in the planks, the possibility of rider inattention, [and] the relatively low cost of placing appropriate signage at longitudinally planked timber bridges" [18]. **Council knew of bridge's disrepair.** It constituted **a major hazard to cyclists. Negligent maintenance** was also a cause of P's injuries. In some foreseeable circumstances even an adequate warning sign may not have stopped cyclists riding on the bridge. **P's lookout inadequate in failing to see warning sign nearest bridge instructing cyclists to dismount,** but his preoccupation with the possibility of oncoming traffic was understandable as there was a risk of a fast-moving vehicle reaching the bridge while he was on it. **P 25% responsible.** *Indigo Shire Council v Pritchard* 20/5/99 [1999] VSCA 77 Full Court per Charles JA. Tadgell JA would have found P's responsibility to be higher than 25% partly because he thought approaching cyclists should have appreciated the dangerous state of the bridge. Charles JA didn't so find.

Obviousness of risk
See *Carey* commentary at *Obviousness of risk*

Parking signs
See *Boensch* at Parking – Signs (installation of)

Pedestrians injured at site of construction/roadwork

> [Montgomery] "17 **It is necessary to ask whether a reasonable council, in the position of the Council in this case, would have foreseen a risk of injury to pedestrians from work being conducted in the way provided for by the specifications, and by the practices spoken about by the civil engineer**. If such a risk would have been foreseen, then the next question would be what, if anything, would a reasonable council have done to deal with that risk, having regard to the seriousness of any damage or injury that could be caused, and the probability of the risk eventuating.
> 18 In assessing that matter, **a reasonable council would have regard to the remoteness of the likelihood that a competent contractor would lay carpet over a surface which was unstable or otherwise such as to give rise to a danger to pedestrians**. Particularly having regard to the circumstance that the alternatives, such as excluding pedestrians from the footpath altogether, or laying down duckboards or other hard surfaces, were not explored in the evidence below, so that an opportunity was not given to the Council to explore possibly difficulties and disadvantages of those alternatives, it seems to me that the evidence in this case does not justify a finding that the Council breached its duty, when that matter is approached in that way."
> **Leichhardt Municipal Council v. Montgomery** 6/12/07 [2007] NSWCA 361

Resources (relevance to breach of duty)
See *Turner* at Slippery surface

See *Hill v Commissioner for Main Roads (NSW)* 20/6/89 [1999] NSWCA [(1999) 9 MVR 45] re factor of **Council resources**. (*not on austlii) ,Calvaresi v Beare & Ors* 15/2/00 [2000] SASC 21 Doyle CJ @ Vegetation – Roadside & *Walsh* commentary @ Pedestrian crossing - Lighting

Tree had fallen from Council's (A's) roadway reserve during a **very severe windstorm.** It **lay completely across a regularly used rural road.** "Windstorms [were] known to be a relatively frequent occurrence in the area. There was evidence that the tree was 'sickly' by reason of partial ring-barking and a depleted canopy. The trial judge concluded that it showed 'obvious signs that its stability was compromised [but this was not affirmed on appeal]'" [2]. R injured when her car hit tree. The road was only 4 1/2 to 6 m wide and had no gravel shoulder. There were 287 km of sealed rural roads in the shire which A was responsible for. Trial judged erred "in rejecting evidence from the [A] as to its budget not permitting a programme of routine or systematic inspection of trees within the road reserves in its local road network ... When coupled with the additional cost of around $1,200 per day for expertise to be brought in on any application of ... *Shirt* ... it was **simply not feasible or reasonable in cost or manpower terms to set up** such a **system for identifying and removing sick trees** over the vast network of the roads within the Shire. **Nor was it apparent ... that the tree in question should or would have been assessed as 'quite sick'"** [81-82]. A not in breach of duty. *Principles in Brodie & Anor v Singleton Shire Council* applied re **what constituted reasonable steps** by the Council. See *Brodie* at Bridge - Structural issues. *Dungog Shire Council v Babbage* 20/5/04 [2004] NSWCA 160 Full Court per Santow JA

In *RTA of NSW v Refrigerated Roadways P/L* 22/9/09 [2009] NSWCA 263 [(2009) 53 MVR 502] the COA (per Campbell JA) stated that "the **RTA owed a duty of care to motorists …**

concerning the dropping of rocks from overpasses over freeways, but that the RTA did not breach that duty either by failing to install screens at the time the Glenlee Bridge was constructed, or by failing to retrofit screens to the bridge at a later time. … The conclusion that there is no breach of duty is initially arrived at on the basis of the common law, after taking into account a mass of evidence concerning the funding available to the RTA, and the steps that it took to respond to the risk of objects being dropped from overpasses. … I reject a conclusion that the trial judge arrived at that section 42 ***Civil Liability Act*** does not apply to this case, but section 42 does not lead me to a conclusion that is different to the conclusion arrived at from the common law. … I reject the RTA's application to rely on section 43A ***Civil Liability Act***, but also conclude that, even if it had been permitted to be relied on, it would not have led to a different result"@14-17. See commentary at New South Wales – Civil Liability Act (s42).

Responsibility (general)
See *Brodie* commentary @ Bridge - Structural issues & *Calvaresi* @ Vegetation - Roadside

See *Calvaresi v Beare & Ors* 15/2/00 [2000] SASC 21 Doyle CJ at paras 175 … where the **Council's responsibility for give-way signage and road lining at and near T-junctions** discussed, including where thick vegetation causing some sight problems near junction and where signage gave an **inconsistent cue**.

Responsibility of predecessor
The State of SA was joined as a fourth party in the circumstances below because of the actions of its Highways Department. "For the sake of completeness, I indicate that I should not have found the fourth party liable to contribute to the [P's] damages even if I had reached a decision adverse to the Council on the issue of signposting and line marking. The care, control and maintenance of the junction had been the sole responsibility of the Council since 1985. In those circumstances I find that **no residual liability could attach to the fourth party even in circumstances where it was originally responsible for the negligent signposting and line marking**. The **length of time involved** would make such a conclusion untenable" [223]. *Calvaresi v Beare & Ors* 15/2/00 [2000] SASC 21 Doyle CJ

…

Hazards

Articles
Deadly Trees (2004) 19 (1) APLB 8 (Note the High Court decision of *Brodie v Singleton* SC 31/5/01 [2001] HCA 29 [(2001) 206 CLR 512] which says that the ordinary principles of negligence apply in determining liability. Considerations of misfeasance/non-feasance not to the point)

Bog
R **motorcyclist injured while riding on unsealed wet slippery road that was undergoing resurfacing.** It was about 10 am and it had rained heavily and then eased to a drizzle. Adequate signage was erected by A council. **R proceeded cautiously at about 20 kph.** He reduced his speed as the surface became softer. He **sank into a boggy area** and fell over. **A sent a warning on radio about the condition of the road,** but this "could not avail traffic en route not attuned to the relevant radio station, and in particular could not avail motorcycle riders" [headnote]. The road works were dangerous and hazardous and a **flagman should have been posted** to warn of the danger ahead. **R not negligent.** *Inverell Shire Council v Johnson* 17/12/02 [2002] ACTCA 11 Full Court [(2002) 37 MVR 391]

Ditch
See Trench

Valiant sedan and a Holden panel van collided at night on road that had roadworks in progress. The **drivers approached each other from the opposite direction**. The **Valiant driver (V) had a ditch to his right**. The bitumen surface of the road was reduced significantly. It was **only possible for the vehicles to pass each other if the vehicle on the opposite side of the ditch moved off the bitumen surface** on to the loose gravel surface. Both drivers were aware of the ditch and **both assumed the other would allow them passage**. When it was clear that an accident would occur **V slammed on his brakes which caused the front of his vehicle to swing to the right and collide with the Holden**. The Holden driver **(H) was more at fault as he deliberately drove onto the incorrect side of the road to avoid the ditch**. The ditch was on V's right. **V contributorily negligent for not wearing seatbelt (10%) and for not slowing down sufficiently to avoid collision**. **Apport: H=80% V=20%.** *Skinner v Claydon* 2/11/84 [1984] QSC Full Court [(1984) 1 MVR 396] *not on austlii*

P travelling on unfamiliar road in darkness in the early morning ran off into a drainage ditch at end of road. **Signs warning traffic of abrupt ending of the road** and that one should turn right **previously knocked down** by a vehicle. These signs were not replaced by the Council. Street lights which lined the street gave the **appearance that the road on which the P was travelling continued but it was in fact separated by the ditch** and more than 100 m of open reserve. P was taking home a male passenger who was giving her directions to his home. With the street lights creating an illusion P thought she was approaching a major intersection. The passenger had fallen asleep and P was waking him for directions when she crashed into the ditch. Mackenzie J stated "the [P] was momentarily distracted and was not paying full attention to the road for a brief period. I say, 'for some reason', because it emerged in evidence that her **passenger was found naked and unconscious** after the crash, although she says **she had not noticed his state of undress.** There is no evidence that he contributed to causing the accident. It is sufficient to find that **she was momentarily distracted at the critical time** ... [I]n the light then prevailing between first light and sunrise, and in the absence of any reflective or other signs to warn of the end of the road, and with the illusion then existing that the road continued for more than a hundred metres, it was extremely difficult, even if a driver was paying due care and attention, to see that the road ended until the driver was almost at the corner. This combination of circumstances meant that it was **likely that a person unfamiliar with the road but driving at a reasonable speed, which I find the [P] was doing, would assume the road continued straight ahead, and if momentarily distracted, would not detect that the road was about to end until it was too late** ... [A] contribution of 10% is appropriate" [p526-527]. *Gray v Townsville City Council* 17/5/95 [1995] QSC Mackenzie J [(1995) 21 MVR 525] *not on austlii*

Dust
See Dusty conditions
See ARR 297 which states that a **driver must not drive a vehicle if not in control of it or if his or her view is restricted.**

Shire Council after doing road work on a bitumen road left the **road in an extremely dusty condition** and there was an accident when a convoy of trucks created a dust cloud and the P's semi-trailer ran into the rear of another semi. The **Council had placed fill on the side of the road** and had not watered or compacted it. The only warning signs said 'Soft shoulders'. The **hazard was obvious**, the Council must have known about it and there were **no appropriate warning signs**. The truck drivers should have driven at such a speed that they could pull up within the limits of their visibility. **P's speed in entering dust cloud was excessive**. Each of the drivers involved had radio warning. **Council's liability was 55% and the rest was apportioned equally between the semi drivers**. See however commentary at Night driving … re having to pull up within limits of visibility. This not

necessarily considered to be the law. *Turner v Battistuzzi* 21/12/00 [2000] NSWSC 1237 Hulme J

Duty when one creates
See *Lawes* commentary at Warnings – After creation of hazard

Excavations
P was riding his motorcycle along a road at night in light rain when he struck an excavation on his side of the road 7 m by 1.5 m and was injured. **Visibility was restricted** so P was watching the white centre-line as a guide. There were no warning signs. The excavation was carried out by the Council of the Shire of Baulkham Hills, who also employed a hot mix gang to pave over the area but the gang was unable to do so because of the rain. The **excavation was subject to becoming badly pot-holed and was clearly dangerous**. The **Council through its employees should have adequately signposted or barricaded it**. **Council 100% liable.** *Dudley v Baulkham Hills Shire Council* 12/10/87 [1987] NSWSC McInerny J [(1987) 6 MVR 27] *not on austlii*

Holes
P, cyclist was riding on a paved area at about 3am when the **front wheel of his bike fell into a hole**. There were three holes about 4 ft in diameter and about 6 inches in depth. P sustained injury. The **area was moderately lit** and P was riding at about 25 kph. P did not see the hole prior to the front wheel falling into it. The incident occurred in front of the Family Court which is an area shared by pedestrians and cyclists but not other traffic. P's cycle had a light but it was not strong enough to illuminate ahead of him and the **holes were not fenced**. Trees were planted in the holes after the accident. **P failed to keep proper lookout and was riding at an excessive speed in the circumstances**. **D**, Commonwealth of Australia, was **negligent in failing to fence the holes prior to the accident**. **Apport. P=40% D=60%.** *Duncan-Jones v Commonwealth of Australia* 15/12/88 ACTSC Miles CJ [(1988) 8 MVR 247] *not on austlii*

"In this case it is a fair inference that … [A] [who was driving P] had been driving along a stretch of well-graded road and had relatively **suddenly come upon ... piles of gravel which caused him to deviate to the right into ... [a] hole containing ... water.** That hole was 1/2m deep and constituted a trap ... The danger of the situation could have been averted by the grader driver, or some other employee or agent of … [R], filling the hole or removing the mounds of gravel from the road before … [A] arrived on the scene. Alternatively, **adequate warning procedures could have been put in place** by … [R]. The fact of the **'reduce speed' sign 200-300m before the gravel** does not remove the negligence of … [R] ... It is significant that the damaged part of the road was not a small area, but was up to 2 1/2m in diameter and up to 1/2m deep, being of varying depth ... It is a fair conclusion that the chain of causation of the accident was that there was the deviation to the right, the car hitting the water going into the hole, a swerve to the left, with the speed of the vehicle causing the vehicle to roll when it hit the rough gravel on the other side, due to the sideways motion of the vehicle ... [I]t was accepted for … [A] at the appeal that … [A] did not take all the required precautions in the circumstances which he encountered. [e.g. A was going too fast in the circumstances]. However ... the **primary cause of the accident was the negligence of the Shire in dumping the gravel close to the water-filled hole and then not taking adequate precautions to avoid an accident**" [61-68] [p26-27]. **Apport. A=33.33% R=66.66%.** *Flannery v Shire of Leonora* 28/2/01 [2001] WASCA 47 Full Court [(2001) 33 MVR 17]

Illusions
See Gray @ Hazards - Ditch

P, who was driving at night at 90-100 kph, **saw 3 headlights seemingly coming toward her and thought a motorcycle was passing a car.** As she got closer she thought the motorcycle had moved to its right further into her path of travel. Confused, she pulled off to the verge on the left and collided with D's vehicle, which was **in fact not a motorcycle at all, but a car parked about 6 ft from the road on her side facing her with only one head light operating.** It was on high beam. She hit the right hand front of the D's car. D's other **head light had not been working for some days.** D at the time was fixing a flat tyre. **D's responsibility determined to be greater** at 60% as he created the confusing situation. **Apport. P=40% D=60%.** *Belz v Card* 21/4/95 [1995] QCA 141 Full Court [(1995) 21 MVR 38]

Objects on road
See Animals – Dead animals (on road) & Tree On road

See ARR 293 re driver's responsibility to remove when they cause them to be there.

"[**P] was driving the police vehicle** [with colleague]. The vehicle passed over a small crest, descended into a slight dip in the road and then, when about fifty to a hundred metres from the bottom of the dip, they noticed that some **boxes were scattered across the left-hand lane and across about half of the offside lane**. … [P] brought the vehicle to a halt facing in a westerly direction immediately opposite or south of the area where the boxes were strewn. They were scattered in an area roughly circular in shape and about five metres in diameter. The **[P] engaged the blue flashing light on the police vehicle, and left the engine running with the headlights illuminated**. There were some roadworks in progress immediately to the south of where the [P] brought the vehicle to a halt … Where the vehicle came to a halt it had its offside wheels about half a metre onto the bitumen road surface. The rest of the vehicle was on the gravel shoulder to the south of the bitumen. There was no artificial lighting immediately in the vicinity. The nearest street light was some five hundred metres to the west, although there was a single spotlight on a builder's shed about one hundred metres northwest of where the [P's] vehicle came to a halt. There were no buildings or structures anywhere near the front of the police vehicle which would have had the effect of reflecting the light from the headlights towards the centre of the roadway. Furthermore, the position of the front of the police vehicle was more or less opposite the western most edge of the area where the boxes were strewn. Hence the headlights had little effect, if any, in lighting up the road surface in the area of the boxes. The blue flashing light, however, did have some such effect. It was sufficient for the [P] and his colleague to see their way to remove a number of boxes and throw them into a ditch on the southern side of the roadway in the vicinity of the new roadworks. There were still some boxes remaining on the carriageway. **The [P] went to walk across in the direction of those remaining boxes. He took three or four steps and can remember no more** [3]. … **[V]ehicle driven by the [D] … struck the [P] when he was on the northern side of Hindmarsh Drive in the offside lane near the centre line**. … [D] failed to keep a proper lookout and … had allowed herself to become inattentive, driving home at that hour of the night, to the extent that she did not notice the obvious flashing blue light on the police vehicle which at the time of the collision was no more than twenty metres distant. She simply failed to see the [P] at all and an alert driver keeping a proper lookout … would have seen the [P] in sufficient time … [to] take effective evasive action [6]. … [V]ehicles were likely to be travelling on Hindmarsh Drive at a high rate of speed, and although there were no street lights in the vicinity, it was by no means assured that motorists would drive on high beam. … There was only one lane for westward bound vehicles, and the obstruction caused by the boxes … left very little room for traffic to manoeuvre in the vicinity. … [B]y the time the [P] had reached the northern side of the carriageway he was placed in a predicament with the [D's] vehicle approaching him from the west and the Renault approaching from the east. … **[P] turned his back to traffic approaching from the west, a highly dangerous manoeuvre in the circumstances** [8]. … **[P] in attempting to clear the obstruction from the roadway without availing himself**

of the torch and reflective clothing which he had with him, was guilty of a failure to take reasonable care for his own safety. … [H]e failed to keep a proper lookout for the traffic which was approaching or alternatively when he became aware of that traffic he failed to take effective evasive measures by getting out of the way. … The **overwhelming preponderance of fault however lies … on the [D] who simply failed to see the [P] at all** until after the collision" [9]. P's damages reduced by 10%. *Pilarski v Evans* 17/9/87 [1987] ACTSC 65 Miles CJ

"It should be noted that authority is clear that particularly in a case where there is no direct evidence a tribunal of fact is **entitled to draw inferences from even slim circumstantial facts** that exist **so long as that goes beyond speculation.** A prime example is *Incorporated Nominal Defendant v Knowles* [1987] VR 138 where the Victorian Full Court upheld a verdict based basically on **inferences drawn merely from the presence of a piece of timber** (on a highway)" [7]. Sufficient inferences for negligence in this case where **R was working as a runner on a recycling truck and was found unconscious on the highway**. **Defective platform on truck, truck driving close to gutter and freshly broken off tree branch 17 m east of where R lay on the road enough to infer negligence by driver**. *Progressive Recycling P/L v Eversham* 12/9/03 [2003] NSWCA 268 Full Court

See *Nominal Defendant v Genn* 1/9/04 [2004] NSWCA 306 Full Court [(2004) 42 MVR 249] where R noticed a **piece of metal in his lane 3 ft from the centre line** and lost control of his vehicle hitting an oncoming car. He may have hit the metal. It was probable that metal had been left on road by unidentified vehicle as, amongst other things, the accident happened in the country, there were no nearby road works and the metal was manufactured primed, cut and shiny. **To succeed against Nominal Defendant R had to prove fault in the operator of the unidentified vehicle.** Two other Victorian cases referred to where "it was held ... appropriate to make a finding that a piece of wood lying on the road was the cause of the accident and that such wood had fallen from a motor vehicle" [24]. Scenarios in this case, other than the metal having fallen from a motor vehicle, found to be too unlikely.

See *Kitt* commentary @ Signage – Obvious danger for a case where **trail bike rider went around blind corner too fast and ran into dirt pile** left by Territory and a third parties near corner. There was no warning sign but court found **danger** to be **an obvious one**, so Territory not found liable.

In *Sullivan v Stefanidi* [2009] NSWCA 313 2/10/09 the COA confirmed the trial judge's findings that "the **semitrailer which the [R] was driving on the Pacific Highway skidded on diesel fuel [6-9 minutes after the fuel leak commenced] and collided with an oncoming vehicle**. The diesel fuel had leaked from a semitrailer driven by the [A]. A fuel tank on that vehicle had been hit by an object such as a rock as it had earlier passed through. … **Despite hearing the noise of the object hitting his vehicle and feeling a bump, the [A] did not stop**. … [T]he primary judge was correct in finding that it was **negligent for the [A] not to stop and check his vehicle as soon as he reasonably could**. … If the [A] had done this, he would have had **sufficient time to broadcast a warning of the hazard on his two-way radio** and … the accident would have been avoided" @19-21 per MacFarlane JA. Whether or not a driver hearing an object hitting his or her vehicle will have to stop will depend on the circumstances. A's vehicle had vulnerable structures under it, A felt the bump, and the noise was loud.

Obviousness

> [Burch] "106-107 The question whether an alleged hazard should have been obvious to a reasonably careful member of a particular class of road users must ... be considered in all the circumstances of the particular case ... [I]t may well be the situation that imperfections in a road surface which ought reasonably be seen by a pedestrian will not

be such as ought reasonably be seen by a motorist. To conclude that **a duty will not arise unless, interalia, a [P] establishes that the alleged hazard would not have been obvious to a reasonably careful class of road users** of which he or she was one does not mean, of course, that a duty of care will necessarily arise if the hazard would not have been obvious**.** Whether it will do so depends upon whether, in all the circumstances, a road authority's exercise or failure to exercise its powers creates a foreseeable risk of injury to a class of persons-road users-of whom the [P] is one".
In the circumstances of this case where a **motorist's vehicle stalled and was swept off a floodway when attempting to cross it** when the water level was greater than 400 mm the hazard was not considered to be reasonably obvious even to a local resident. See para's 90 ... re discussion of obviousness and the **duty of a highway authority in the case of alleged failure to repair or inadequate repair. Burch v Shire of Yarra Ranges & Anor** 4/11/04 [2004] VSC 437 Ashley J [(2004) 42 MVR 1]

Signs
A sign prohibiting cyclists from riding on a boardwalk potentially created a **dangerous situation** as cyclists were **not given much time to dismount to comply**. P was injured when allegedly attempting to comply with sign. **Council's duty of care discussed**. Judge at first instance found Council liable and P 20% contributory negligent. Matter, however, sent for retrial due to errors in judgment. *Coffs Harbour CC v Fokes* 19/12/03 [2003] NSWCA 368 Giles JA (Full Court)

Stationary vehicles
See also Stationary vehicles heading

Stationary water-tanker was hit in the rear off-side corner by the R who was driving a semi-trailer. A was in the stationary water-tanker which was doing some **road work on a two-lane major highway,** on or close to a bridge. A was occupying left side of road. R said he thought the tanker would move by the time he got there. Even though there were no warning lights or road signs indicating work was being done in the area, the **water-tanker was visible for a substantial distance.** R was driving in the direction in which the A's vehicle faced and could see it about 600 m away. It was a clear day and there was nothing blocking his vision or view. **R** was **aware of the work being carried out on the road** as a result of previous trips he'd made. After R saw A's vehicle, he focused his attention on the road ahead and **only redirected his attention back to A's vehicle when he was very close to it.** He was travelling about 80 kph. He braked but the 24 tonnes of load did not allow him to stop. He swerved to the right but the near side corner of his bullbar caught the R's spray-bars. "The [A] was at fault in causing his vehicle to stand stationary in such a position on a major highway when there was **no warning to oncoming vehicles that it would constitute a continuing obstruction,** particularly to vehicles travelling in the direction which the [R] was taking ... In the present case the [R's] act in … [colliding] with the rear of a stationary vehicle which had been within the range of his view whilst he was travelling some 600 m at a moderate speed must attract some responsibility. In the present circumstances a suitable apportionment is **70% against the [A] and 30% against the [R**]" [p165-166]. Davies JA & Derrington J. *Taylor v Macdonald* 22/3/93 [1993] QSC Full Court [(1993) 17 MVR 164] *not on austlii*

In **heavy rain with visibility of 25-30 m** P was travelling along a highway pulling a trailor when he **saw the D about 30 m ahead of him stationary on his side of the road with his car at right angles to his side of the road and facing it**. P then braked and veered to the left but still hit D. **D was negligent as he'd clearly lost control** of his vehicle. **P's speed was such that he was not able to stop his vehicle within his range of vision** even in dry conditions without a trailor. This was negligent, although he was travelling 65 kph on a highway where the speed limit was 100 kph. He had attempted to drive according to the conditions and the hazard he encountered was not a hazard to be reasonably expected.

Apport. P=1/3 D=2/3 See general commentary @ Night Driving where stated that it is not the law that one must drive so as to be able to stop within the limits of one's vision. *Jennings v Johnson* 4/9/98 [1998] ACTSC 90 Master Connolly

P was driving at about 100 kph along Pacific highway in the right hand lane of three lanes going in his direction when he **saw 200-300m away Ms Daniel's car** hard up against the concrete centre barrier, but **protruding about half a meter into his lane**. He collided with the rear of her car and then spun and hit another vehicle. "**Ms Daniel's vehicle was brought to a halt without fault on her part [she sustained a flat tyre**]; she was **not at fault in failing to manoeuvre her vehicle off the carriageway** at the time it came to a halt; the traffic on the carriageway was moderate to heavy; there was no evidence of a subsequent opportunity for Ms Daniels to safely move her vehicle across the carriageway; the vehicle was stationary on the highway in broad daylight; the vehicle's **emergency lights were on**; all **other vehicles had no apparent difficulty** in avoiding Ms Daniels' vehicle; and the [P] had ample opportunity to see the stationary vehicle, and avoid the collision by the exercise of reasonable care on his part" [25]. A police officer had also attended Ms Daniels before P came along and never suggested she try to move her car to the left side of the highway. **Ms Daniels not considered to have caused or contributed to the accident**. *Freeleagus v Nominal Defendant* 5/4/07 [2007] QCA 116 Keane JA (Full Court) [(2007) 47 MVR 491]

See *Tinworth* at Water across road

Unexpected
See *Tinworth* at Water across road

Warning of
see Warnings of danger

Water across road
See Causeways and Water across road

...

Head lights
See also Lights & Unlit vehicles

Dazzling
See ARR 219

R whilst approaching bend on country road at night saw A's car coming toward bend in opposite direction. **R could see that A's head lights were not dipped. R signalled to A by dipping his own head lights several times, but A did not respond. R slowed to 90 kph as he approached bend, but when he rounded bend and A's lights began to shine brightly in his eyes he was blinded and failed to keep his vehicle on the bitumen**. He lost control of his vehicle and hit an electricity pole. "While it is always possible that an oncoming vehicle will not dip its lights and while the risk that it is not going to do so must be greater if there has been a failure to respond to prompting and while no doubt the risk increases as the cars come closer together without the oncoming lights dimming it is **not unreasonable to expect that the oncoming lights will be dipped eventually**. When two vehicles are coming together on a winding road at a combined speed of 200 km per hour there can surely be very little opportunity to slow appreciably or stop after the moment of realisation that the oncoming lights will not be dipped. In this case there was the added factor that these **cars were not coming directly at each other so that the [R] would not**

have had an opportunity to assess the actual effect of these particular lights on his ability to see ahead. It was **not established in evidence that as a general rule vehicle headlights which are not dimmed are so dazzling as to completely unsight the driver towards whom they are shining** and I would venture to suggest that is not the common experience … Of course extra care should be taken in such circumstances. **Extra attention should be given to the road ahead and every effort should be made not to lose sight of the edge of the road** and if this reasonably requires other steps to be taken such as deceleration, and if there is an opportunity to take such steps, they should of course be taken" [p322 Anderson J]. **The driver who should have dimmed lights should bear the bulk of the responsibility** in such cases. **R was found only 20% negligent** (although this might have been lower) for **failing to slow sooner** than he did which might have meant he wouldn't have met A right on the bend. *SGIC v Toomath* 24/4/96 [1996] WASC Full Court [(1996) 23 MVR 319] *not on austlii*

P's "vehicle failed to continue to take the curve, proceeding instead straight ahead until it left the bitumen shortly before the culvert ... I am not satisfied that the **presence of bright, indeed dazzling, headlights** at the point indicated by the [P] can be said to have caused this conduct on the part of the [P's] vehicle. He knew that he was in the middle of a curved stretch of road as the vehicle approached. His explanation is that, after a temporary dazzle, he tried to steer by looking to the left-hand line, and so mistook the slip lane line for the line marking the ongoing alignment of Sutton Road. But this does not explain ... other than an error of judgment, why this would mean that he proceeded to steer straight ahead instead of continuing to follow a curve, which he knew to be the general alignment of the road ahead ... I am not satisfied that the presence of oncoming bright lights was the cause ..." [35-37]. *Creech v The Nominal Defendant* 29/5/98 [1998] ACTSC 43 Master Connolly

Road works were being undertaken on the Hume Highway by Leighton Contractors pursuant to a contract with the RTA whereby the RTA attempted to assign its responsibilities to them re providing adequate safety measures. **At the road works the highway curved to the right, rather than continuing straight on.** P did not follow curve to right and drove toward another driver who he thought was driving on the highway, but wasn't. **P then drove through some orange webbing** and then into a ditch associated with the road works. **P was oblivious to line marking, a 'curve sign' with a 85-95 kph speed on it and the orange webbing**. "Certainly **he did fail to keep a proper look-out** ... but in any situation it is impossible always to keep a proper look-out, and in his case the vision of an oncoming car [and its **lights] fixated him (although hardly dazzled him**) to the extent that fulfilling his primary duty of looking straight ahead distracted him from noticing warning signs on his left … **D ought to have realized that such an emergency might arise, and taken the precaution of erecting chevron signs** ... in order to deal with it" [7] (p216-217). RTA had complete control of the road, experience, an inspector present, and a duty re signage. Leightons left its **webbing in a dusty state with retro-reflective reflectors obscured.** RTA found 2/3 liable and Leightons 1/3. **P found 10% contributory negligent**. *RTA (NSW) v Fletcher & Anor* 26/3/01 [2001] NSWCA 63 Full Court (Majority) [(2001) 33 MVR 215]

See also High beam sub-heading below and Lights

Flashing
See *Vayne* at Agony of the moment

Head lights not on when poor visibility

> "16 I do not consider that the [P] was negligent in not having his lights in operation prior to the collision [which occurred about 15 mins after sunrise]. In arriving at that conclusion, I distinguish Duurland v Hagestrom, (1965) SASR 196, relied upon by [counsel] for the [D]. In that case the **failure by a motor-cyclist to have the headlight in operation occurred in conditions of dusk or half light**. In this matter the light was

> much better. It may be that had he had his lights on, the [D] may have seen the 1st [P's] motor vehicle in his peripheral vision. However, that does not mean, in my view, that the 1st [P] was negligent in not having his headlights in operation. [Counsel] for the [D], submitted that the obligation to have headlights on differed, depending as to whether a vehicle, was travelling north or south along Happy Valley Drive. Because traffic was heavy in the north-bound carriage, the importance of lights assumed a lesser significance to a driver stopped at Taylor's Road. It was obvious, he submitted, that the stream of north-bound traffic would be seen but not so obvious in the case of south-bound traffic because of the lack of density of such traffic. Whilst I agree in general that, in given circumstances such a submission may be of substance, I do not consider that it applies in this matter. Although overcast, the natural light was sufficient for direct observation. **A driver is not, when the natural light is otherwise adequate, required to have headlights in operation** for fear that another driver may not look in the required direction". **Palmer, Palmer & Palmer v Brownlie** 10/9/93 [1993] SASC 4160 Burley J

High beam
See ARR 218

Failing to have lights on high beam at night on country road not found to be negligent. *Wallace v Norman* 31/5/84 [1984] SASC 7527 Matheson J [(1984) 1 MVR 135] *not on austlii*

See also Lights

Low beam
See *Makim* @ Pedestrians - Hit From behind. Driver of vehicle that hit pedestrian **found negligent for having headlights only on low beam.** Driver said he thought it was illegal in Qld to drive with lights on high beam.

Motorcyclists
See *Motorcyclists – Head lights*

One operating
P, who was driving at night at 90-100 kph, **saw 3 headlights seemingly coming toward her and thought a motorcycle was passing a car.** As she got closer she thought the motorcycle had moved to its right further into her path of travel. Confused, she pulled off to the verge on the left and collided with D's vehicle, which was **in fact not a motorcycle at all, but a car parked about 6 ft from the road on her side facing her with only one head light operating.** It was on high beam. She hit the right hand front of the D's car. D's other **head light had not been working for some days.** D at the time was fixing a flat tyre. **D's responsibility determined to be greater** at 60% as he created the confusing situation. **Apport. P=40% D=60%.** *Belz v Card* 21/4/95 [1995] QCA 141 Full Court [(1995) 21 MVR 38]

Stopping within area illuminated by
See *Lyons v Fletcher* 9/11/12 [2012] NSWDC 207 where P was seriously injured when **crossing a highway near Tamworth in dark clothing after midnight where the road was poorly lit**. P had to climb a barrier to jog across the road and was **heavily affected by drugs and alcohol**. P alleged D was liable for taking his eyes off the road for two seconds and failing to use high beam. After considering expert evidence as to stopping distances the trial judge dismissed P's claim. **D was not obliged to drive at night within his stopping distance** per *South Tweed Heads Rugby League FC Ltd v Cole* (2002) 55 NSWLR 113. Despite finding that **D breached his duty of care to P by looking down when he knew people may be in the area**, Mahony DCJ found that his action was not causative of the loss. D, had he been maintaining a proper lookout, could not have avoided the collision.

Appeal dismissed. See *Lyons v Fletcher* 18/3/14 [2014] NSWCA 67 [66 MVR 219] per Macfarlan, Emmett and Gleeson JJA. Macfarlan and Gleeson JJA overruled the Trial Judge's finding that the failure to use high beam was not negligent. **A reasonable person would have had his headlights on high beam in a completely dark area to maximize his field of vision**. To fail to have his headlights on immediately prior to the accident was a breach of duty. The inconvenience of having to flick the lights on and off when faced with oncoming traffic was no excuse for it not being used. However, both judges agreed with Emmett JA who, in the leading judgment, considered there could be no real doubt that **if P was jogging across the road as the Trial Judge found D would not have had time to see her and avoid hitting her even if he had his high beam headlights illuminated**.

> "31 [I]t was submitted that there was no principle of law or test of negligence that required a driver to drive so as to stop within the area illuminated by a vehicle's headlights on low beam as found by her Honour. It was submitted that to the extent that any such '*principle*' had ever had any currency, it had been completely debunked by the decision of the Full Court of the Supreme Court of Western Australia in *Grove v Elphick* (1985) 2 MVR 74, where Burt CJ observed (Wallace and Kennedy JJ agreeing):
>
> > 'The trial judge appeared to have adopted a principle that a person travelling in the dark must be held to be negligent if he is driving at such a speed that he is not able to pull up safely; that principle rests peacefully in the grave: see *Morris v Luton Corporation* [1946] 1 KB 114 at 115-116'.
>
> 32 In *Morris v Luton Corporation*, Lord Green MR referred to what he described as the '*well-known passage*' in *Baker v Longhurst & Sons Limited* [1933] 2 KB 461 at 468, where Scrutton LJ had appeared to lay down '*a sort of general proposition that a person riding in the dark must be able to pull up within the limits of his vision*'. Lord Green pointed out that that was not a proposition of law but, rather, a finding of fact dependent upon the circumstances of the particular case. Lord Green stated that the observation of Scrutton LJ could not affect:
>
> > '... other cases where the circumstances are different [and] that this suggested principle may rest peacefully in the grave in future and not to be resurrected with the idea that there is still some spark of life in it.'
>
> 33 In *South Tweed Heads Rugby League Football Club Limited v Cole & Anor* (2002) 55 NSWLR 113; [2002] NSWCA 205, Ipp AJA (as his Honour then was) also rejected the proposition that there was any principle of law '*that a person travelling in the dark must be held to be negligent if he is driving at such a speed that he is not able to pull up safely*'. His Honour referred to the ceremonial burial of that principle in *Morris v Luton Corporation*, and the due respect paid to its demise in *Grove v Elphick*.
>
> 34 In *South Tweed Heads Rugby League Football Club v Cole*, the [P], who was highly intoxicated, was struck by a vehicle driven by the [D], Mrs Lawrence, who was driving on her correct side of the road at about 70 [kph], with her headlights illuminated on low beam. The speed limit was 80 [kph]. Ipp AJA at [60] rejected the notion that Mrs Lawrence's speed was excessive. He said:
>
> > '[t]here was no reason to expect pedestrians in the vicinity and Mrs Lawrence's speed was below the legal limit ... There was no particular perceivable risk which Mrs Lawrence should have taken into account but did not. She was driving at a modest speed when there was no particular danger observable; driving at that speed with her lights on dim was a reasonable and a proper response to the traffic conditions prevailing at the time.'
>
> His Honour referred to *Derrick v Cheung* in support of this conclusion. The Court of Appeal's determination in relation to the liability of Mrs Lawrence was not the subject of appeal to the High Court.
>
> 35 *South Tweed Heads Rugby League Football Club v Cole* was different from this case. There, the accident occurred on a roadway, which was probably an expressway, where the speed limit was such that pedestrians would not be expected to be on the roadway, even if they were keeping a proper lookout for themselves. Here, the accident occurred in a built-up area, where, even in the early hours of the morning, pedestrians might have been in the vicinity.

> 36 If, by her conclusion that 45 [kph] was the safe speed at which the first [A] could stop in time within the area illuminated by his headlights, her Honour was intending to follow or apply a principle of law, she was in error, as I have explained. I am not satisfied, however, that this was her intention. Rather, I consider that she was making an ultimate finding of fact based on her earlier finding that the accident occurred at a place where visibility extended only to the area of the road illuminated by a vehicle's headlights. However, if I am wrong and her Honour was intending to apply a principle of law, she erred in so doing".
> ***Evans and Anor v Lindsay*** 11/12/06 [2006] NSWCA 354 Beazley JA (Full Court) [(2007) 46 MVR 531]

Unlit
See Mercer etc at Lights – Unlit vehicles

...

Learner drivers
Alcohol
19 y.o. backseat passenger (A) lying down unrestrained injured when **car driven by 19 y.o. Mrs Southwell(S) collided with tree at midnight**. A and Mr & Mrs **S had drunk a substantial amount of alcohol** between approx. 5 to 10:30 pm. **S was driving with a learner's permit** and **A knew this.** S was also negligent as she was **speeding** and went through an intersection disregarding a give way sign and by failing to negotiate a curve causing her to hit the tree. Further, **as a learner, she did not have the adequate supervision of a licensed driver** sitting next to her as Mr S, who was sitting there was heavily intoxicated. A saw Mrs S drink about 12 middies of standard strength beer whilst drinking with her for 5 hours. See commentary below. A's **contributory negligence amounted to 80%.** *Williams v GIO NSW* 15/3/95 [1995] NSWCA 40208/92 Full Court [(1995) 21 MVR 148]

P, who was 19, and D, who was 16, had spent the evening drinking with friends in a lounge room. P was more experienced at drinking than D and should have been aware of D's inappropriate state for driving and also her age and status. Neither had full licenses and **D, who drove P's powerful vehicle into a power pole, after being exhorted by P to drive faster, drove illegally being a learner** driving without a fully licensed driver in the vehicle. **P's contributory negligence 65%**. *Wheeler v McDonald* 12/6/08 [2008] NSWSC 567 Ass. Justice Malpass

Disobedience of instructions
Appeal by D who injured P who had agreed to teach him to drive. P had instructed D that he was not to put the vehicle in motion on the day in question. He was only to learn the controls. D **deliberately disregarded P's instructions** and crashed into a stobie pole injuring P. D found to be **wholly responsible**. *Syczew v Szewc* 5/10/89 [1989] SASR 1836 Full Court [(1989) 10 MVR 506] *not on austlii*

Instructor's duty to third persons and their property
In *State of Tasmania v Boyd* 29/3/10 [2010] TASSC 13 [55 MVR 197] a learner driver who was very near a brick fence drove forward and damaged the fence rather than reversing as he was instructed to do. The instructor, who had dual controls, was found by Blow J to owe a duty of care to third persons and their property (the owners of the vehicle in this case), but there was no breach of this duty in the circumstances as it was reasonable for him to be looking out for vehicles coming over the crest of the hill.

Instructor regarded as driver

> "10. It is clearly the law that, in the context of insurance, a motor vehicle may have more than one driver. This has probably been good law even before motor vehicles came into existence (Wheatley v Patrick (1837) 150 ER 917) and has been restated in cases such as Riley v Insurance Commissioner of the State of Victoria [1972] VR 265 and Ricketts v Laws (1988) 14 NSWLR 311, a decision of the Court of Appeal that held that a driving instructor, seated next to a learner driver who was at the wheel in a vehicle without dual controls, could nevertheless be said to be driving the vehicle for insurance indemnity purposes." **Insurance Australia Ltd (t/as NRMA …) v Dickason** 18/6/07 [2007] ACTCA 13 Full Court

Instructor's failures

P allowed inexperienced and unlicensed 16 y.o. D (without learner's permit) to drive Landcruiser under his supervision at 70-80 kph on unsealed Larapinta Drive, a road with corrugations. "[A]ccident happened after the … [D] had steered the vehicle to the left side of the road [to avoid blown tyre on roadway) and … the vehicle thereafter crossed to the right hand edge of the road, and then returned sharply towards the centre of the road under acceleration, overturning in the process" [14]. "[I]t was the sharp change of direction to the left after the … [D] had crossed to the incorrect side of the road and to the edge of it which, when coupled with the acceleration, caused the vehicle to move into a position where it overturned" [39]. [P] had no precise information as to … [D's] previous driving experience … **[P] ought to have made it his business to find out details of the … [D's] prior experience** … [72]. I am **not persuaded that the [P] failed to exercise reasonable care for his own safety by permitting the … [D] to drive** at all. The … [D] had to build on the experience his grandparents had given him by some means or other if he was to become an experienced driver, and the [P], himself an experienced driver, had the opportunity to observe and assess the … [D's driving] for a period of no less than two hours before deciding to allow the … [D] to drive in Larapinta Drive" [73]. "[T]here was a need to provide the … [D] with appropriate instruction. …Whilst … **[D] acknowledged that common sense suggested he ought not to have accelerated when he did** and whilst in doing so he failed to comply with his grandmother's instruction … **prudence required that … [P] instruct … [D] … that in the event that the vehicle entered on to the shoulders he ought not to change direction sharply and he ought not to accelerate when seeking to return to the road surface proper** … [84]. … **[P]rudence required that … [P] be instructed not to change direction to pass over an object such as the shredded tyre** which appeared on the road surface. The evidence was that such an object was frequently observed, if not on then beside the road. According to the [P], he observed the tyre remnant which influenced the … [D] to change direction when the LandCruiser was 300 metres away from it … [85]. …[T]he failure to give such instruction constituted contributory negligence" [86]. **P's damages reduced by 30%**. *Imbree v McNeilly & Anor* 5/7/06 [2006] NSWSC 680 Studdert J. **On appeal however** in *McNeilly v Imbree* 2/7/07 [2007] NSWCA 156 [(2007) 47 MVR 536] the Full Court by majority held that P's damages should have been reduced by two thirds, Tobias J stating at [47] that had "the [P] instructed the [D] on approaching the tyre debris to simply drive over it or, if he intended to go around it, to ensure he kept his near-side wheels off the road shoulder, the accident would have been avoided. I also agree with Basten JA at [108]) that it would have been avoided if the [P] had instructed the [D] when his near-side wheels left the carriageway to steer gently back onto the hard road surface and not to accelerate. This being so, the greater proportion of responsibility for the accident falls on the [P] rather than the [D]". [per headnote] "The **trial judge wrongly held that the [D's] actions in deliberately accelerating while steering sharply towards the centre of the road was an act of carelessness beyond what could be attributed to inexperience**: [79]. The [D] breached his duty of care to the [P] in swerving off the road rather than steering around the obstruction, which was a course of action attributable to carelessness rather than inexperience".

******* The **High Court allowed the appeal** in *Imbree v McNeilly; McNeilly v Imbree* 28/8/08 [2008] HCA 40 and determined "that **the standard of care which the driver … [R] owed the passenger … [A] was the same as any other person driving a motor vehicle - to take reasonable care to avoid injury to others**. The standard thus invoked is the standard of the 'reasonable driver'. That standard is not to be further qualified, whether by reference to the holding of a licence to drive or by reference to the level of experience of the driver. **Cook v Cook should no longer be followed**" @27 per Gummow, Hayne & Keifel JJs.

Note also that in NSW s141 of the Motor Accidents Compensation Act 1999 (NSW) was inserted to abolish the effect of *Cook v Cook.*

Thornton v Sweeney 23/8/11 [2011] NSWCA 244 [59 MVR 155] involved a 16 y.o. learner driver R being supervised by a licensed friend who was 21. She lost control of A's vehicle while negotiating a bend. The trial judge concluded that R "approached and entered the bend at a speed [apparently 70 kph] that was not reasonable or safe having regard to her level of experience and the wet condition of the roadway. That being the case, and where there is no evidence that [the A] took any steps at all to instruct or direct or to guide her as to an appropriate speed to enter and negotiate the bend in the wet (sufficiently early or at all), I am satisfied that he breached his duty of care entitling the [R] to a verdict in her favour" @7. **Duty of care of voluntary supervisor discussed**. In this appeal Sackville AJA stated that "At a speed of 70 kph, the [R] was travelling 10 kph below the limit applicable to a learner driver and 30 kph below the speed limit applicable to licensed drivers. **There is nothing to indicate to the [A] that the [R] was driving at a speed or in a manner that contravened the road transport legislation or which should have alerted the [A] that her speed was such that she should have been told to slow down before entering the bend**. It cannot be suggested, therefore, that the [A] failed to take all reasonable precautions to prevent such a contravention" @118. There was no evidence that a reasonable person in the A's position would have considered the bend required special precautions. R had safely negotiated the same bend three times on the same night, even in more adverse conditions. A did not breach his duty of care. Appeal allowed.

See *Thillinaith v Celli* 20/12/13 [2013] WADC 188 per Derrick DCJ. **P was a passenger in a vehicle driven by her learner driver daughter, D2, who she was supervising**. In peak hour traffic D2 positioned her car in the centre of a busy intersection and turned right when the traffic lights facing her changed to amber. Her car was hit by D1 travelling straight through the intersection. Negligence was admitted (without apportionment) on behalf of D1 and D2 but the statutory CTP insurer argued contributory negligence of the part of P. The Trial Judge found that there was nothing P could have done to physically prevent D2 turning as it was a private car without dual controls. However, **bearing in mind the peak hour traffic and the limited vision of oncoming traffic at the intersection P as a learner supervisor ought to have counselled D2 to remain in the intersection until she was certain that it was clear and safe to turn**. The fact that D2 had driven this route several times before did not negate this duty. In effect, P failed to take reasonable care for her own safety. Contributory negligence was assessed at 20%. *CLA s5B considered*.

[See also commentary at Unregistered &/or Unlicensed drivers]

Mistakes
An **amateur instructor**, the friend of a learner driver, took him to a car park to give him a lesson in reversing. The **instructor got out of the vehicle and as the learner reversed the vehicle through two marked lines and towards a guard rail, the instructor was hit** by the car on his right knee pinning him between the rail and the rear of the vehicle. The **learner used only his rear vision mirror to reverse without looking back over the seat**. The accident occurred as the **learner driver's foot slipped on the accelerator** causing the

vehicle to collide with the instructor. The **learner was solely responsible** for the accident. *Squire v David* 12/9/84 [1984] QSC Shepherdson J [(1984) 2 MVR 476] *not on austlii*

See *Zanner* at Car port accidents

See *MacMorran* at Accelerator – Inappropriate application

Standard of care (learner,instructor & examiner)
R learner was pulling out from a parallel park. His view and the A examiner's view to the rear were blocked by a large vehicle parked behind. When R did not stop to check behind him after having pulled out sufficiently to see behind, A sensed danger and braked with his dual control brake. A car coming from rear collided with them. A **not found negligent in requesting R to do parallel parking on busy road and in front of a large vehicle**. Accident solely caused by R's negligence. See commentary below re discussion of **whether a special standard of care between learners and examiners**. *George v Erickson* 6/4/98 [1998] WASCA 78 Malcom CJ (Full Court)

> [George] "In the present case it was submitted on behalf of the [A] at the trial that, because the [R] had been put forward by his instructor and had put himself forward as ready to take the driving test, the [R] owed the [A] a duty to drive with the degree of care and skill which could be reasonably expected of an experienced and competent driver … [R's] contention at the trial was that the relationship and duty of care were the same as found by the High Court in Cook. The learned Judge dealt with these contentions as follows:
>
> > 'In the present case it is clear that the [D] had undergone a number of lessons with a recognised driving instructor. He was regarded by the driving instructor, on the [D's] own evidence, as one of his best pupils and although he was advised that the test would be difficult, it is **inherent in what the [D] said in evidence that the instructor thought he was good enough as a driver to expect to pass the test** - otherwise, presumably, he would not have been allowed to sit for it or encouraged to sit for it by the instructor. It is also clear that the [D] himself considered himself ready to take the test, and if passed, to drive generally. In the course of taking lessons and practising his driving the [D] would have driven on metropolitan and busy roads and would have undertaken the various manoeuvres which he expected to be required to undertake in the course of sitting for the test.
>
> On the other hand, the [D] was not 18 and was obviously an inexperienced driver. His use of the roads and ability to confront difficulties and to make decisions was very limited. Allowing for his nervousness, the [D's] inexperience was borne out by his failure to park the car without hitting the kerb (which I accept occurred).
> In all the circumstances I cannot find that the [D] was in the same position vis-à-vis the [P] as the [D] in Cook's case nor was he in a position analogous to those used as examples by the High Court at p383 ….
> It was **submitted by the [D] that the [D] and the [P] were, in effect, in a master and servant relationship** with the [D's] driving being under the direction and control of the [P] such that those amounted to 'special circumstances' and therefore altered the degree of skill owed by the [D] to the [P] in his driving.
> I **cannot accept that the [P] was in such a position of control** over the [D]. The [P] told the [D] where to drive and what manoeuvre to undertake (although these were very limited in the sense of being outside the normal requirements of driving). The **[P] did not, however, tell the [D] how to drive**, it being the very nature of the test to determine whether the [D] was fit to hold a licence as a road-user.
> In the present case, I consider, **the relationship between the [P] and [D] cannot be described as that of passenger and driver in the sense of a passenger and an experienced driver**.
> There are, on the other hand, in my view, the **special circumstances of the type envisaged by the High Court such as to 'remove the relationship into a distinct category or class' giving rise to a different duty of care**. In their judgment in Cook's Case (supra) at p384, their Honours appear to envisage a 'sliding scale' of duties of

care (and corresponding standards of care) depending on the existence of any special circumstances of the case.

Bearing this dicta in mind, the **standard of care applicable in the present case is, I find, that appropriate to a passenger with some direction over the exercise in which the [D] was involved, and an inexperienced driver but one who regarded himself as ready to hold a motor driver's licence.** '(Such) standard of care remains an objective one. It is however adjusted to fit the special relationship under which it arises' (Cook's case, supra, p384).

Because of the [D's] expressed belief in his ability to drive, and, bearing in mind the experience held by him to the time of the test, and his ability to carry out the test (until the accident) to the satisfaction of the [P], the [D] owed to the [P] a duty of care to drive in a manner consistent with such belief and experience. In my view he failed to comply with such duty of care. He successfully avoided the car in front as he drove out, but having reached a position where he could have seen clearly and confirmed the existence and status of the vehicle east of him, he did not stop and satisfy himself that the road was clear. It was reasonable for the [P] to expect the [D] to do this. In failing to do this the [D] … was negligent in each of the respects alleged by the [P].'

… [On appeal the D pleaded contributory negligence by P].The question was whether the … [P] failed to take reasonable care for his own safety. As to this the learned trial Judge said:

> 'One of the main factors leading to the accident in this case was the requirement by the [P] that the [D] park in a particular parking bay and thereafter pull out of such bay. It was a busy road and the likelihood of traffic in the second lane travelling east was high. Most importantly, however, the [D's] car ended up being parked in front of a large vehicle (probably a combi-van) which obscured the view of the [P] and the [D] to the rear using the dual mirror in the car and limited the view of the [D] to the rear generally, even using his wing-mirror as he was parked and just beginning his turn to the right. Further, the [D's] nervous state was obvious to the [P], and as the [P] was to be a passenger in the car, it was **reasonable … for the [P] to have taken steps to calm the [D] before and during the test - including talking to him. This he failed to do.**
>
> These matters, I consider, amounted to a failure by the [P] to take reasonable care for his own safety and contributed to his injuries and damage suffered by him.'

His Honour then referred to the principles to be applied in making an apportionment which were stated in Podrebersek v Australian Iron and Steel Pty Ltd (1985) 59 ALJR 492 at 494 per Gibbs CJ and Mason, Wilson, Brennan and Deane JJ. His Honour concluded that, in the particular circumstances of this case, a proper apportionment against the … [P] was 30 per cent. How this was arrived at was not explained.

Ground 1 of the grounds of appeal contended that the learned trial Judge was wrong in fact and in law in making this apportionment and further contended that his Honour should have found that moving out into traffic from a parked position in front of a large vehicle was a skill that any reasonably competent candidate for the issue of a driver's licence should possess and that the … [D's] natural nervousness was not a matter which could be controlled by the … [P] in the interests of his own safety and that, accordingly, there should have been no apportionment against the … [P].

In my opinion, the finding of negligence made by the learned trial Judge against the … [D] was entirely correct. While it was also correct to find that the … [D] was an inexperienced driver, but one who regarded himself as ready to hold a motor driver's licence, **his Honour was wrong to conclude that his inexperience was such that the … [P] failed to take reasonable care for his own safety by requesting the … [D] to carry out the 'parallel parking' manoeuvre in the circumstances in which he did**. There was nothing unusually difficult about the manoeuvre which required particular driving skill. The need to edge out of such a parking place until one could see either by the use of a wing mirror or looking back to see whether it was safe to pull out further is a matter of basic common sense, rather than requiring any particular degree of driving skill. It **could not be said that the … [P] was guilty of contributory**

> **negligence by requiring the … [D] to carry out a manoeuvre which the … [P] would be unable to determine was safe, because he himself was unable to see to the east**. The … [P] was not exposing himself to any unnecessary risk. As his Honour, himself, found, it was reasonable for the … [P] to expect the … [D] to stop and satisfy himself that the road was clear before pulling out and proceeding west. In my opinion, there was no evidence to suggest that, had the … [P] responded to the … [D's] attempt at conversation prior to the test, the chances of this particular accident might have been reduced. The finding in this respect was speculative. In my view, the **accident was solely caused by the … [D's] negligence** and the … [Plaintiff/Appellant] is entitled to succeed on ground 1 of the grounds of appeal" [approx. 13-29]. **George v Erickson** 6/4/98 [1998] WASCA 78 Malcom CJ (Full Court)

See *Imbree* precis at Learner Drivers – Instructor's failures. The High Court in *Imbree* overruled *Cook v Cook* in relation to the issue of standard of care owed by learner drivers. Note also that in NSW s141 of the Motor Accidents Compensation Act 1999 (NSW) was inserted to abolish the effect of *Cook v Cook.*

Unsealed roads
See sub-heading above Instructor's failures

See *Simpson* at Children – Driving incidents

Motor Accidents Compensation Act 1999
Articles
Gumbert J, *'Obligations Increase for Motor Accident Claimants and Insurers'* (2008) 46(9) LSJ 62 (this article reviews recent amendments to ss82, 84A, 85A, 86(3)&(4), 96(1), 123. Sch 5 and other provisions)

Aims and Overview of Act
See paragraph 76 of *Gudelj v MAA of NSW* 14/5/10 [2010] NSWSC 436 [55 MVR 357]. Appeal allowed in [2011] NSWCA 158 [58 MVR 342]

s3 - Definitions
In *Zotti v Australian Associated Motor Insurers Ltd* 8/10/09 [2009] NSWCA 323 [54 MVR 111] the COA considered the meaning of the words and phrases **'injury', 'as a result of'', 'collision' and 'caused during'** in s3 of the Motor Accidents Compensation Act (NSW) 1999. Consideration of these terms was given in the context of a **cyclist slipping on oil and injuring himself two hours after a previous collision at the site**. The cyclist sued the third party insurer of one of the drivers involved in the previous collision, but his **action was dismissed because there was no temporal connection between the oil spillage and the bicycle accident and hence there was no 'injury' attracting the operation of the Act**. The COA confirmed that "the injury in this case was not 'sustained during' a collision. It is not open to this Court to hold that, even if the collision could, for some purposes, be the 'proximate cause' of the injury, that the injury was 'caused during' the collision, within the meaning of the Act @33.

See *Doumit* at Motor Vehicles (whether).

In *Ron Lai Plastic Pty Ltd v Ngo* 28/5/10 [2010] NSWCA 128 [55 MVR 1] the COA confirmed that the **knocking down of a plastic extrusion machine by a forklift** constituted a **'motor accident'** pursuant to s3 of the NSW Motor Accidents Act.

In *Galea v Bagtrans P/L* 15/12/10 [2010] NSWCA 350 the COA found that **jolting incidents whilst the A was travelling over pot holes** constituted a 'motor accident or incident' (**an 'incident'** to be precise) pursuant to s3.

See *Chaseling v TVH Australasia P/L* 15/4/11 [2011] NSWDC 24 where **load fell from forklift**
reversing down ramp causing injury to P's right leg. Levy SC DCJ found D negligent and no contributory negligence on P's part. Injury found to have occurred 'during or in the use or operation of a motor vehicle' within the meaning of s3 of MAC Act. Appeal dismissed in *TVH Australasia Pty Ltd v Chaseling* 22/5/12 [2012] NSWCA 149 [60 MVR 535].

In *Nominal Defendant v Hawkins* [2011] NSWCA 93 [58 MVR 362] the **driver of the vehicle slowed and beeped his horn continually in order to harass a cyclist. One of the vehicle's passengers threw an object at the cyclist and struck him**. The cyclist then hit an object on the road and the driver accelerated away. The COA canvassed several similar cases and concluded that the cyclist's injuries were **caused by the fault of the driver of the motor vehicle in the use or operation of the vehicle**, within the meaning of s.3(1) of the *Motor Accidents Compensation Act* 1999. The cyclist's injuries fell within the definition of 'injury' in s3. See also *Leach* at NSW MAA s3A

See *Waterworth & Ors v Bambling and Zurich Financial Services Australia* 15/03/13 [2013] NSWDC 17 per Mahony DCJ. **Three school children were struck by a car after being dropped off by a bus in a rural area in NSW**. The bus company sought indemnity from its CTP insurer. The Court found that the bus company was partly at fault for the accident for allowing children to disembark at an unmarked stop near a blind bend. The claim for indemnity failed. The liability of the bus company stemmed from their use of a dangerous location for the stop. It **did not arise from the fault of the bus driver in the use or operation of the vehicle by either the driving or operation of it per s3(a)** MACA (NSW).

See *QBE Insurance (Australia) Ltd v CGU Workers Compensation (NSW) Ltd* 20/4/12 [2013] NSWSC 377 [64 MVR 1] where a **fork-lift accident occurred due to a defect in the vehicle** due to poor maintenance. Beech-Jones J considered s. 3(a)(iv) was satisfied in the circumstances. Various 'defect' cases in the context of s. 3(a) considered.
See *Izzard* at Trailers – Defects.

s3A – General restrictions on application of Act
In *RG & KM Whitehead Pty Ltd v Lowe* 14/5/13 [2013] NSWCA 117 [63 MVR 375] Per Tobias AJA, with whom Barrett JA and Preston CJ agreed, P was instructed by his employer D to assist in manoeuvring the tines of a forklift into a sleeve. He was struck by the tines and injured when they swang free. At first instance the trial judge found that s3A(1) of the MAC Act applied as the accident occurred **during the "driving" of the forklift** as the incident occurred in the course of the loader doing what it was designed to do. The decision was overturned on appeal. Authority including *Insurance Commission of WA v Container Handlers Pty Ltd [2004] HCA 24* suggested that there was a **clear distinction between the driving of a vehicle in the sense of locomotion and the operation of a lifting device independent of driving**. His Honour found that "...the loader was being operated when its tines were being manipulated but ... was not being driven in any relevant sense if it was otherwise stationary" @56.

In *Allianz Australia Insurance Ltd v Gonzalez* 18/4/13 [2013] NSWSC 362 [65 MVR 286] P suffered physical injuries in a collision. P also claimed that **following the accident and on the next day she was intimidated by the other driver and his friends** and that as a result she suffered psychological injury. Adams J found that **P's psychological injuries were not caused by the driving or the 'use or operation of the vehicle'** as per s3A.

See *Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd)* 6/8/14 [2014] NSWCA 257 where the **A, passenger, was injured by gunshots fired at him by two passengers in a Holden Commodore**. The driver of the Commodore also deliberately hit the vehicle A

was in, but A's injuries were solely as a result of the gun shots. This was a pre-planned attack. A's **injuries not found to be "caused by the fault of the driver of the Commodore in the use or operation of the vehicle** during either the driving of the Commodore or during a collision with the Commodore within the meaning of s 3A of the MAC Act" @4. "[T]he gunfire was the 'dominant cause' or that which was 'proximate in efficiency' and 'the real effective cause' of his injuries. The 'fault' of the driver of the Commodore in colliding with the Mitsubishi was the mere occasion of the injury" @73 per McColl JA, Gleeson JA & Sackville AJA concurring.

See *Eptec Pty Ltd v Alaee* 14/11/14 [2014] NSWCA 390 where at "the time he was injured, Mr Alaee and the co-worker were in the **enclosed platform of a mobile elevated work platform** (**EWP**), otherwise known as a cherry picker. (The enclosed platform was variously described as a bucket … The bucket was attached to the end of an extendable hydraulic arm connected to the EWP" @4. The **evidence did "not address whether the operator of the EWP intended to or had begun to move the EWP forward on its wheels, as distinct from commencing to raise or lower the bucket while the EWP remained stationary**. The evidence is therefore not capable of establishing that the operator was attempting to engage the 'locomotive functions' … of the EWP rather than to raise or lower the bucket … As was held in *Whitehead v Lowe*, if the operator of a dual function vehicle such as a loader or forklift uses the controls to change the position of an attachment to the vehicle while the vehicle itself remains stationary, any injury occurring during this process is **not likely to be a result of or caused during the driving of the vehicle**" @37-38.

s4(1)(b) & (2) - Definitions
In *Ralston v Bell & Smith t/as Xentex Patch & Grout* 31/3/10 [2010] NSWSC 245 [55 MVR 300] Hislop J considered that the owner who hired its vehicle for less than three months to another was still the **owner** of the vehicle. See paragraphs 19-24.

See *Bon McArthur Transport Pty Ltd (In Liq) v Caruana* 3/5/13 [2013] NSWCA 101 [63 MVR 417] where an issue arose as to who was the **'owner' of an unregistered forklift** which was involved in an accident. First appellant (BMT) and related company "alleged to have been the 'owner' of the forklift at the time of the accident because each was a person who 'solely or jointly in common with any other person [was] entitled to the immediate possession of the vehicle': **s 4(1)(b)** of the MAC Act" @12. "[I]f a person is lawfully in actual possession of a motor vehicle, then that person has the immediate possession of the vehicle and is entitled to that possession, and so falls within the description 'any person entitled to the immediate possession'. To my mind, it would not matter that another person, who does not have actual possession, may also be entitled to the immediate possession of the vehicle in the sense that that person is entitled to retake possession at any time. Until the latter person has sought to exercise that entitlement, the person lawfully in actual possession is entitled to be in actual possession, and is fairly described as being entitled to the immediate possession of the vehicle, that being the possession which that person lawfully has" @18. "BMT was in actual possession of the forklift because at the time of the accident it was being used in the conduct of its business" @50.

s7A – Definition of 'blameless motor accident'
See *Axiak b.h.t. D. Axiak v Ingram* 28/11/11 **[2011] NSWSC 1447** [59 MVR 505] per Adamson J. Here a 14 y.o. crossed the road carelessly and was hit by a car. Accident not a 'blameless' one. Appeal allowed in *Axiak v Ingram* 27/9/12 [2012] NSWCA 311. Tobias AJA (other judges concurring) satisfied that "subject only to the anomaly of s 7K(1) … that the primary judge was in error in construing the word *'negligence'* in the definition of *'fault'* for the purposes of s 7A as including non-tortious negligence such as the first appellant's contributory negligence. Accordingly … the first appellant is entitled to rely upon Division 1 of Part 1.2 of the Act and to claim damages under Chapter 5 of the Act" @71. First

appellant's damages reduced by 50% for her contributory negligence in carelessly running across road.

s7F – Contributory negligence
See *Axiak* precis at s7A.

s7K – Claims where child at fault
See *Axiak* precis at s7A.

s7J – Damages for children when driver not at fault
In *Suncorp Metway Insurance Ltd v Wickham Freightlines Pty Ltd & Ors* 30/8/12 [2012] QSC 237 [61 MVR 534] P sought declaratory relief concerning the proper construction of the statutory policy contained in the schedule to the Motor Accident Insurance Act 1994 (Qld). "The first and second respondents are insured by a statutory policy issued by Suncorp under the Queensland Act" @2. They are the owner and driver of a prime mover that collided with a young cyclist (Master Weston) crossing a pedestrian crossing in NSW in 2008. Master Weston claims under s7J "on the basis that the first defendant's prime mover was a motor vehicle that had motor accident insurance cover within the meaning of s 3B(2) of the NSW Act" @3. "Suncorp accepts that the statutory policy issued by it in respect of the first defendant's vehicle responds to Master Weston's claim in negligence. It disputes that the statutory policy responds to the claim to the special entitlement because s 5(1) of the Queensland Act under which the Suncorp policy was issued applies to injuries caused by a **'wrongful act or omission'**. Suncorp disputes that any injury which is 'deemed to have been caused by the fault' of the first respondent or the second respondent in the use or operation of the prime mover that was involved in the accident was caused by a 'wrongful act or omission' within the meaning of the Queensland Act" @5. Applegarth J held that "The terms and purpose of the relevant provisions of the Queensland Act support the conclusion that the statutory policy contained in the schedule to the Queensland Act may respond to the 'deemed fault' of an owner or driver of a motor vehicle in New South Wales pursuant to s 7J of the NSW Act. In such a case the relevant 'injury, damage or loss' does not arise 'independently of any wrongful act or omission'. The law deems it to be the case that the injury was caused by the fault of the owner or driver. Fault is defined to mean negligence or any other tort and this constitutes a 'wrongful act or omission' within the meaning of the Queensland Act" @37. In *Weston v Wickham Freightlines Pty Ltd* 28/6/13 [2013] NSWSC 867 [64 MVR 236] P sought leave to file an amended statement of claim, to plead an alternative claim on the basis of a 'blameless accident'. P's "case is that as a matter of law, even if negligence is not established, he ought to recover on the basis dealt with in *Axiak* on the pleaded facts. The defendants' case was that the amendment sought to introduce a marked and illogical inconsistency with the claim of negligence presently advanced and that it raised a ground or claim inconsistent with those already advanced in the existing statement of claim. Accordingly, the amendment should not be permitted, given the provisions of Rule 14.18" @9. P succeeded. Leave granted.

s33(3A) – Claim against Nominal Defendant when vehicle not insured
In *Maric v The Nominal Defendant* 16/5/12 [2012] NSWDC 69 P suffered injuries in a motorcycle accident on a gravel road. An uninsured motorcycle was involved. Section 33(3A) considered. Appeal dismissed 26/6/13 in [2013] NSWCA 190 [64 MVR 222]. The primary judge had not erred in not concluding that the accident happened on a 'road'. However, the trial judge did err by finding Mr Morrissey negligent, and that therefore A was contributorily negligent.

s33(5) – Definition of 'motor vehicle'
See *Nominal Defendant v Uele* 31/8/12 [2012] NSWCA 271 where an unregistered motocross bike (a 'registrable vehicle') driven by Mr Sellick on a reserve (a road-related area) collided with the R and caused her serious injuries. The primary judge decided the bike

was 'capable of registration' at the time of manufacture and awarded damages to R. The issue was, as the A argued, whether "for paragraph (b)(i) of the definition of 'motor vehicle' in s 33(5) to be satisfied in respect of a vehicle which may be the subject of an unregistered vehicle permit, it is also necessary that there be an actual use proposed in respect of the vehicle, either at the time of its manufacture or at any time subsequent to its manufacture, which would have justified the issue of such a permit for a particular use or use in a specified area" @15. Section 33(5) considered. Appeal dismissed. Held that "the primary judge was correct to conclude that the motorbike was 'at the time of manufacture capable of registration' within paragraph (b)(i) of s 33(5)" @47.

s34 – Claim against Nominal Defendant when vehicle not identified
See also Due inquiry and search
In *Sukkarieh v Nominal Defendant* 14/8/08 [2008] NSWDC 163 the requirements of s34 were discussed by Murrell SC DCJ from paragraph 10. P not required to make futile or charade enquiries. Requirements of section met in this case.

In *Saleh v The Nominal Defendant* 15/5/09 [2009] NSWDC 1 Levy SC DCJ from paragraph 200 considered the requirements of s34(1) and stated that "in the circumstances of this case **due inquiry and search would not have established the identity of the vehicle that was involved in the incident** … because, realistically, the police arrived at the scene promptly to investigate the circumstances whilst other witnesses were still at the scene. It was their duty to try and ascertain the relevant events. The **police investigation did not reveal the identity of the other vehicle** notwithstanding that Mr Jaouhar's statement signalled that another vehicle was involved. This may have been due to limited police resources, pre-occupation with ensuring the [P] received help and clearing the road in peak hour traffic and a limited opportunity to further interview and a limited Mr Jaouhar who was injured and dazed at the time. … Even if Mr Jaouhar had been able to provide a more coherent and detailed statement at the time there is no reason to believe that inquiries would have revealed the identity of the unknown vehicle. I am satisfied that **once the police and the witnesses … had left the scene the trail to be followed to attempt to find the other vehicle was well and truly cold**"@217-218. [note: **Appeal allowed** in *Nominal Defendant v Saleh* 17/2/11 [2011] NSWCA 16 [57 MVR 412] New trial ordered]

In *Nominal Defendant v McLennan* 18/05/12 [2012] NSWCA 148 [61 MVR 1] P was injured in an incident in a car park. D argued that he had not been struck by a car, leading evidence from medical experts that the injury was more likely to have resulted from an assault which, combined with threats P had received prior to the injury and a history of untruths in matters of compensation, ought to have led to an adverse finding on credibility. The trial judge found for P. The decision was overturned on appeal. The CA, in a lengthy decision, found the trial judge had palpably misused his advantage and sent the matter for re-trial. **The judge neither considered inconsistencies between the accident description and the medical evidence nor properly addressed P's history of deceit**. P's account of having lain unconscious in the car park for some four hours without anyone coming to his aid was difficult to accept as was his failure to seek immediate medical attention or report the incident to police that same day. Section 34 MACA 1999 (NSW) considered.

See *Workers Compensation Nominal Insurer v Nominal Defendant* 11/9/13 [2013] NSWCA 301 [64 MVR 542] where **A unsuccessfully sought to argue that "s34's obligation of due inquiry did not apply to an employer (in whose shoes it was effectively standing) in circumstances where it sought indemnity pursuant to s 151Z(1)(d)** [of the Workers Compensation Act 1987] " @34.

s36 – Nominal Defendant as tortfeasor
In *Nominal Defendant v Staggs* 3/9/10 [2010] NSWCA 224 [56 MVR 249] the COA considered whether the R (through its insurer Allianz) gave a 'full and satisfactory

explanation' for failing to give notice within three months of receiving the claim. See also s66 below re 'full and satisfactory explanantion'.

s58(1) - Application
In *Allianz Australia Insurance Limited v Girgis & Ors* 25/11/11 [2011] NSWSC 1424 [59 MVR 548] Adams J decided that a Medical Assessor's certificate under ss 58(1) and 61(2) of the Motor Accidents Compensation Act 1999 is not conclusive evidence of causation of injury by accident for all purposes and that an assessor is not bound by a Medical Assessor findings re causation in assessing earning capacity or economic loss.

s58(1)(d) – Medical assessment (application)
In *Ackling v QBE Insurance (Australia) Limited & Anor* 28/8/09 [2009] NSWSC 881 [(2009) 53 MVR 377] Johnson J considered it appropriate for a medical assessor to consider issues of causation within a s58(1)(d) dispute.

In *Nguyen v MAA NSW & Anor* 3/5/11 [2011] NSWSC 351 [58 MVR 296] Hall J concluded that "There is … no warrant for reading the words *'the degree of impairment of the injured person'* as an impairment of and only of the particular part of a person's body injured in an accident. The reference to *'permanent impairment'* is expressed as related to the injured person (*'of the injured person'*) as a result of the injury caused by the motor accident" @98. "[T]he medical assessment undertaken pursuant to s.60 of the Act was affected by legal error, in that the medical assessor proceeded upon a different basis, namely, that there needed to be a causal connection between the motor accident and a *'primary and isolated'* injury to the right and/or left shoulder(s)" @120.

s60(1) – Medical assessment procedures
In *Licciardo v Hudson (No 1)* 6/11/09 [2009] NSWDC 289 Levy SC DCJ referred the issue of the P's **whole person impairment** to the MAS assessor for further assessment. Power to so remit existed.

s60(2) – Medical assessment procedures
In *Goodman v The MAA of NSW & Anor* 3/9/09 [2009] NSWSC 875 [(2009) 53 MVR 420] Hoeben J did not consider a decision pursuant to this section to refer the P for further medical assessment to be reviewable.

s61 – Status of medical assessments
The relevance of the Medical Assessments Service's assessments in related proceedings considered by Goldring DCJ in *Baker v Smith Snack Food Company Ltd* 20/2/09 [2009] NSWDC 11 from paragraph 47.

In *Ackling v QBE Insurance (Australia) Limited & Anor* 28/8/09 [2009] NSWSC 881 [(2009) 53 MVR 377] Johnson J rejected the "submission that a Medical Assessor (under s.61) or a Review Panel (under s.63) has no jurisdiction to consider and determine whether an injury was caused by the motor accident in question"@81.

See also *Gladanac v Wang* [2009] NSWDC 234 29/9/09 per Bozic SC DCJ from paragraph 16 where the status of medical assessments is considered.

In *Allianz Australia Insurance Limited v Girgis & Ors* 25/11/11 [2011] NSWSC 1424 [59 MVR 548] Adams J decided that a Medical Assessor's certificate under ss 58(1) and 61(2) of the Motor Accidents Compensation Act 1999 is not conclusive evidence of causation of injury by accident for all purposes and that an assessor is not bound by a Medical Assessor findings re causation in assessing earning capacity or economic loss.

See *Frost v Kourouche* 7/3/14 [2014] NSWCA 39 [66 MVR 140] where the COA considered the "content of the **obligation to accord procedural fairness** owed by a review panel reviewing a medical assessment under the *Motor Accidents Compensation Act 1999*" @3. Opportunity to respond to inconsistencies and opportunity for adjournment to consult with solicitor considered.

> [Kendirjian] "187 A MAA Review Panel issued three certificates on 26 August 2005. One certified that the impairments to the appellant's cervical and lumbar spine were permanent and were assessed as giving rise to a whole person impairment which, in total, was greater than 10 per cent. That certificate was conclusive evidence as to the matters it certified: s 61(2), MAC Act. Another certificate issued under s 61(1) found that the appellant had an impairment to his past and future earning capacity as a result of the injury caused by the accident. That finding was not conclusive as to the matters it certified, not being one of the four matters referred to in s 61(2). As a certificate referring to a matter not set out in s 61(2), it was 'evidence (but not conclusive evidence)' as to the matters it certified: s 61(3).
>
> 188 **The effect of a s 61(2)(a) certificate is well established: it opens the door to an award of damages for non-economic loss, but does not impose any statutory restraint (save for the cap provided by s 134) on the amount which may be awarded for non-economic loss**: Hodgson v Crane [2002] NSWCA 276; (2002) 55 NSWLR 199 (at [39]) per Heydon JA (Sheller JA and Davies AJA agreeing).
>
> 189 A s 61(2)(a) certificate does not have a conclusive effect on the issue of damages for economic loss as explained in Brown v Lewis by Mason P (Santow and McColl JJA agreeing):
>
> > '22 It is conceivable that matters certified in accordance with s61(2)(b) (whether any treatment already provided to the injured person was reasonable and necessary in the circumstances) or (c) (whether an injury has stabilised) may afford (conclusive) evidence relevant to a particular aspect of damages assessment, including the assessment of economic loss. *The terms of any certificate "as to any other matter" (cf s 61(3)) or the medical assessor's reasons for his or her finding (cf s 61)(9)) may also assist (non-conclusively) in resolving some issue referable to economic loss*. But the court must never lose sight of the principle *that "damages for both past and future [economic] loss are allowed to an injured plaintiff 'because the diminution of his earning capacity is or may be productive of financial loss. ... It is necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss. Only then will it be possible to assess what sum will put the plaintiff in the same position as he or she would have been in if injury had not been sustained"*(Husher v Husher (1999) 197 CLR 138 at 143[7], per Gleeson CJ, Gummow, Kirby and Hayne JJ, citations omitted). Sections 124-130 of the MACA provide additional restrictions upon the award of damages for economic loss in respect of a motor accident.
> >
> > 23 *Extreme caution is required before anything relevant or useful could be extrapolated from a certificate under s 61(2) for the purpose of calculating economic loss*. Section 61(2)(a) only deals with the threshold issue whether the degree of permanent impairment is greater than 10%. Section 133 points to information (MAA Medical Guidelines and the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition) that does not concern itself with the economic consequences of injury, and excludes information (derivative psychiatric or psychological injury, impairment or symptoms: see s 133(2)) that may be critically important to assessing economic loss. *In short, the statutory concept of (permanent) "impairment" is not to be equated to the notion of incapacity (permanent or temporary) that may be a stepping-stone in a case involving a claim of damages for economic loss*. It is Part 5.2 of the Act (ss124-130) that contains the legislative qualifications upon the common law principles governing assessment of damages for economic loss. Those provisions do not engage the statutory concept of 'permanent impairment'.
> >
> > 24 *It is conceivable that matters certified or reported in the reasons of the medical assessor may have a bearing on factual issues touching damages for economic loss.*

> *But everything would depend on the nature of the particular injury*. Some injuries that would not produce a greater than 10 per cent degree of permanent impairment would have catastrophic economic impact on some plaintiffs (eg the violinist who lost the tip of a finger). Conversely, some injuries that produced a greater than 10 per cent degree of permanent impairment would have minimal economic impact on most plaintiffs.' (courts emphasis added in underline)
>
> 190 Accordingly, the primary judge was in error in observing that the s 61 certificates were conclusive on the issue of the appellant's earning capacity. …"
>
> **Kendirjian v Ayoub** 14/8/08 [2008] NSWCA 194 McColl JA, Full Court

s62(1) – Referral of matter for further medical assessment

In *Garcia v Motor Accident Commission* 2/10/09 [2009] NSWSC 1056 [54 MVR 102] Rothman J considered the meaning of **'additional relevant information about the injury'** and stated that the "term 'additional information' about the injury does not include a restatement of information already received. Nor does it include a summary of information already received. It does include new information about an injury, even though it does not describe the injury or some other feature of the injury. An expert medical opinion as to the cause of injury is relevant evidence and is 'about the injury'. Further, to the extent that an opinion has not previously been expressed (by any expert) it results in the opinion being 'additional information' not previously considered. In those circumstances, an opinion expressed by a medical expert, in circumstances where the Assessor had not previously received expert opinion of that kind, would be 'additional relevant information about the injury'. Such an opinion would satisfy one of the pre-conditions prescribed in s 62(1)(a) of the Act"@38. ***Note that this was decided before s62(1A) inserted.** See *Glover* and *Doyle* below.

In *Licciardo v Hudson (No 1)* 6/11/09 [2009] NSWDC 289 Levy SC DCJ referred the issue of the P's **whole person impairment** to the MAS assessor for further assessment. Power to so remit existed.

In *Glover-Chambers v MAA of NSW & Anor* 3/2/10 [2010] NSWSC 17 [55 MVR 44] McCallum J found that s62 as it stood before the **2008 amendments** applied as P had referred the matter before the commencement of the amendment and the matter was never referred by the proper officer after that date. **The decision refusing P's application for a further medical assessment was in error as it posed the wrong question**, namely – "whether the outcome 'would be altered' if the matter were to proceed to further assessment in light of the additional information"@23. The appropriate question should have been "whether the evidence was capable of having a material effect on the outcome of the previous assessment"@24.

In *Doyle v Glass & Ors* 22/2/10 [2010] NSWSC 94 [55 MVR 156] Associate Justice Harrison stated that "[t]he statutory test in s 62(1A) of the Act is that the matter may not be referred to assessment on the grounds of additional information about the injury unless the additional information is such as to be capable of having a material effect on the outcome of the previous assessment. The Proper Officer applied the test that the additional information may have a material effect on the outcome of the previous assessment … It is my view that **there is a difference between 'may have a material effect' and 'is such as to be capable of having a material effect'**. 'May' is defined as 'expressing uncertainty' and 'capable of' is defined as 'having the ability, strength or fitted for': Macquarie Dictionary Online. It is my view that the proper test is more stringent than the one the Proper Officer applied. The Proper Officer asked herself the wrong question and by so doing made an error of law that is jurisdictional error"@27-31.

In *Meeuwissen v Boden & Anor* 25/2/10 [2010] NSWSC 106 [55 MVR 174] Latham J considered the meaning of 'material' in s62(1A) and s63(3). Appeal allowed in [2010] NSWCA 253 [56 MVR 453]. Latham J found to have misconstrued the legislation.

In *MAA NSW v Mills* 23/4/10 [2010] NSWCA 82 [55 MVR 243] the COA considered the issue of "whether the power in s. 62(1) … to refer again for medical assessment under Pt 3.4 of Ch 3 of the Act could be exercised to require assessment only of the degree of permanent impairment, excluding whether the permanent impairment was as a result of injury caused by the relevant motor accident"@1. It was decided that the referral could not be confined in that way.

In *Alavanja v NRMA Insurance Ltd* 26/10/10 [2010] NSWSC 1182 Davies J considered the meaning of '**additional relevant information**' in relation to **further expert opinions** and stated that "[i]t seems to me that if material before the Assessor has expressed an opinion that particular injuries were caused by the accident, the fact that another expert says the same thing but using different or greater analysis will not mean the information is additional" @35.

In *Trazivuk v MAA of NSW & Ors* 24/11/10 [2010] NSWCA 287 [57 MVR 9] the COA stated that the "correct **exercise of the s 62(1)(b) discretion** is of some general importance. Where denial of procedural fairness in Dr Menogue's assessment is acknowledged, it would be unjust to leave the [A] with the claims assessor's erroneous refusal of his second application for referral again for assessment, even though the [A] may not improve his position on reconsideration of the application or a further assessment. Leave to appeal should be granted" @94.

In *Singh v MAA NSW (No. 2)* 16/12/10 [2010] NSWSC 1443 Rothman J did not consider that further material about A's psychological condition amounted to **'additional relevant information'** pursuant to s62(1)(a). "[T]he combined effect of the DVD, surveillance report and the opinions of Dr Selwyn Smith is to provide material of the same kind as had already been considered. A further medical opinion is only additional information if it is of a different kind (i.e. deals with different issues) than opinions already expressed and considered" @63. **** but see QBE Insurance (Australia) Ltd v MAA of NSW Ltd below***

See *QBE Insurance (Australia) Ltd v MAA of NSW Ltd* 15/5/13 [2013] NSWSC 549 [63 MVR 470] where Rothman J considered whether the MAA "through its Proper Officer, erred when it was not satisfied that material provided by QBE was additional relevant information capable of having a material effect on the outcome of the previous assessment and, to the extent that it erred, whether that error was jurisdictional, or reviewable for error of law" @2. Rothman J concluded that "The **criteria in s 62(1)(a) and s 62(1A) of the *MAC Act* are not jurisdictional facts**. The views expressed by me in *Singh (No 1)* and *Singh (No 2)* cannot stand following *Rodger v De Gelder* in the Court of Appeal. The Proper Officer's decision is not initiated by jurisdictional error in that it: does not misapprehend the nature or limits of its power; deals with the correct question; takes into account all relevant material; does not take account of irrelevant material; does not misunderstand the function to be performed; was not made in bad faith; and accorded procedural fairness. There is **error of law on the issue of whether there is a ground of additional relevant information about the injury**. That was the only error of law. The result would have been the same if the error were not made. The error was not determinative or operative. As a consequence, certiorari should not issue" @87-89.

In *Miles v MAA of NSW & Ors* 12/7/13 [2013] NSWSC 927 [64 MVR 327] Hoeben CJ, in a case concerning judicial review of the exercise of a power of Proper Officer to refer matter for further medical assessment, considered that "**the clear and obvious meaning of the phrase 'additional relevant information' as used in s62 is information which is**

additional to that which was before the medical assessor when the previous medical assessment was carried out. It is not a reference to information which is additional to that which may have been considered by a proper officer in a previous application for a referral for further medical assessment. Such an interpretation is consistent with the purpose of s62, which is to ensure that all relevant information is before the medical assessor to enable an accurate medical assessment to be made. What the section is designed to do is to allow a further medical assessment to occur where additional information has come to light or the claimant's position has changed since the time of the original assessment" @36-37. **P's functus officio submission rejected**. "Section 62 envisages the possibility of multiple applications for referral for medical assessment. The insurer's application of 5 October, which was successful, was not an application to reconsider or re-open. It was a separate and distinct application from that made in April 2012. The application in April 2012 consisted of 154 documents with an extensive description of each one, together with written submissions. The application of October 2012 consisted of two medical reports with short and different submissions which specifically addressed the s62(1A) issue. Although those two reports had been included in the 154 documents previously submitted to the proper officer, the applications were not the same, nor were the submissions" @50.

> [Bouveng] "7 The right conferred on the parties to refer a matter for further medical assessment is exercisable only if the preconditions set out in s 62(1)(a) are met. S 62(1A) imposes a further condition requiring that the deterioration of the injury or additional relevant information be *capable of having a material effect on the outcome of the previous assessment*. These conditions are not imposed in circumstances where the referral is made by a court or claims assessor.
> 8 In order to facilitate referrals by parties, the Authority has established a procedure for an application to be made by the party seeking further referral, a reply by the other party and a determination by the proper officer of the Authority of the question of whether the preconditions for further referral have been met.
> 9 The [D] sought to limit the application of s 62(1)(b) to circumstances where, in the course of the substantive hearing of a claim, a court considered that further referral was warranted. I do not think that restriction can be imposed since s 58(2) requires only that proceedings be before a court. In this case a statement of claim was filed and proceedings commenced on 5 March 2007. In my view the commencement of proceedings in that fashion was sufficient to bring the current application within Part 3.4.
> 10 It was accepted by the [D] that s 62(1)(b) conferred discretion on the court that was not fettered by the conditions imposed upon a party wishing to refer a matter for further medical assessment.
> 11 In those circumstances, I have concluded that the court has the power to grant the relief sought by the [P]. …
> 12 In my view the objects of the Act and the context in which the provisions referred to appear in the Act indicate that, in addition to the requirement that there be proceedings before the court, the principles to be applied in determining whether the relief sought should be granted require that the court keep in mind that a certificate issued by a medical assessor is intended to be conclusive except to the extent that it is established that there is a real basis upon which the court should exercise its discretion to refer a matter for further assessment.
> 13 This principle necessarily involves a requirement to satisfy the court that further referral is likely to produce a different outcome of some substance. I do not consider that it would be sufficient for a party to rely, for instance, only upon an opinion of a medical expert that differed from that of a medical assessor. …
> 26 The [P] claimed to have suffered significant orthopaedic injuries. Dr Gill treated him for those injuries. Dr McLeod, examining the [P] from the point of view of his speciality of neurology, took issue with some of the claims of injury made by the [P] at a time when he did not have access to the records of the [P's] treatment immediately after his accident, including the treatment provided by Dr Gill.
> 27 The only evidence of an orthopaedic specialist before the court on this application was the report of Dr Ghabrial in which he assessed the [P's] Whole Person Impairment

> in relation to his orthopaedic injuries at 27%, not taking into account the head injury. The [D] placed no reports of orthopaedic specialists before the court.
> 28 There were references in all the reports that were provided to the court of the [P's] continuing complaints of considerable pain and discomfort arising out of the claimed orthopaedic injuries.
> 29 In the circumstances, and in the absence of contravening evidence relied on by the [D], I am satisfied that assessment by an orthopaedic specialist could result in an outcome that is substantially different to the assessment of the [P's] Whole Person Impairment. I am satisfied that it is appropriate that the medical dispute between the parties be referred for assessment by an orthopaedic specialist."
> **Bouveng v Bolton** 26/2/09 [2009] NSWDC 19 Sidis DCJ

s62(1A)
See s62(1) above.

s63 – Review of medical assessment by review panel
In *Ackling v QBE Insurance (Australia) Limited & Anor* 28/8/09 [2009] NSWSC 881Johnson J rejected the "submission that a Medical Assessor (under s.61) or a Review Panel (under s.63) has no jurisdiction to consider and determine whether an injury was caused by the motor accident in question"@81.

In *Meeuwissen v Boden & Anor* 25/2/10 [2010] NSWSC 106 [55 MVR 174] Latham J considered the **meaning of 'material'** in s62(1A) and s63(3). Appeal allowed in [2010] NSWCA 253 [56 MVR 453]. Latham J found to have misconstrued the legislation.

Section **63(3)** considered by Hulme J in *Crnobrnja v MAA NSW* 17/6/10 [2010] NSWSC 633

Section **63(2)** considered in *Trazivuk v MAA of NSW & Ors* 24/11/10 [2010] NSWCA 287 [57 MVR 9].

In *Allianz Australia Insurance Ltd v MAA & Ors* 3/3/11 [2011] NSWSC 102 [57 MVR 319] Hidden J considered pre-existing permanent impairment pursuant to **clause 1.33 of the Permanent Impairment Guidelines** in a case where **Mr Cha suffered physical and psychiatric injuries in two accidents from which claims arose involving different insurers**. "For the purpose of each claim, it was necessary to determine whether Mr Cha had suffered the degree of permanent impairment required to enable an award for non-economic loss, that is, more than 10%" @2. "The panel determined that it could not make an **apportionment** for each accident … [and found that the] first accident had caused the condition of major depression with melancholia. However, Mr Cha told his treating psychiatrist that he was starting to recover until the second accident, which exacerbated his condition. Nevertheless, in the days immediately prior to the second accident the psychiatrist observed him to be depressed and commenced him on what the panel described as 'new and specific psychiatric treatment'. As a result, the condition had not stabilised prior to the second accident and the degree of Mr Cha's permanent impairment at that time could not be determined. Accordingly, his whole person impairment was assessed on the basis of the injuries suffered in the second accident" @6. Hidden J held that the Panel erred as "[c]learly, the first accident contributed to Mr Cha's impairment as it was assessed at the time of the review. The panel found that that accident had caused his depressive condition and that the second accident had exacerbated it. If the panel had assessed the permanent impairment caused by the first accident, it would have been in a position to apportion the whole person impairment it found between the two accidents. Clause 1.33 (and, if applicable, clause 1.36) required it to do so" @31.

See also *GIO General Ltd v Smith & Ors Insurance Australia Ltd t/as NRMA insurance v Smith* 5/8/11 [2011] NSWSC 802 (59 MVR 69) where Hoeben J applied *Allianz Australia …*

v MAA above in similar circumstances where the first **D suffered physical injuries in two successive accidents, but his depressive disorder did not occur until after the second accident**. Hoeben J concluded that "error of law on the face of the record is established and that the orders sought by GIO and NRMA should be made. The errors are clear. The two Certificates issued, to the extent that they assert in the case of each motor accident, that the major depressive disorder caused by it is greater than 10 percent WPI are inconsistent with the Review Panel's assessment of the total WPI [17%] caused by both motor accidents. To the extent that the Review Panel took into account concepts of 'fairness' and 'unfairness' in their interpretation of the Guidelines this was an irrelevant consideration. The extent to which the Review Panel's interpretation of the ratio in *Ackling* contributed to the conclusion in the Certificates is not clear, but its interpretation of that decision was clearly wrong. Finally, the Review Panel's interpretation of **Guideline 1.36** was incorrect which led to a wrongful application of that Guideline. That error played a major part in the Review Panel's reasoning and conclusions" @59.

In *Lewis v MAA & Ors* 14/2/12 [2012] NSWSC 56 Adams J stated that "**it is the potential for material error that unfairness might cause which is the crucial issue, not the unfairness *per se***. Accordingly, the assessor was correct to decide that the claim of procedural unfairness was not a matter for him to determine. It may be that he should have gone on to consider the possible significance of the alleged unfairness on the assessor's conclusions. However, the matter was not put to him in that light*"* @7-8. **'Material contribution' test** compared with 'substantial contributing factor' test when assessor mistakenly referred to the applicant motorist as a 'worker'. Assessor did not err in law in determining whether there was reasonable cause to suspect that the assessment was incorrect in a material respect.

s66(2) – 'Full and satisfactory explanation'
Section 66(2) and s109(3)(a) considered in *Stratton v Kairouz* 2/2/09 [2009] NSWDC 7 by Levy SC DCJ

See *Howard v Walker* 13/5/08 [2008] NSWSC 451 where Hoeben J considered whether a **mentally incapacitated claimant** had given a 'full and satisfactory explanation' to the court for the delay in accordance with s109(3)(a). Section 66(2) also considered. **Appeal dismissed** in *Walker v Howard* 16/12/09 [2009] NSWCA 408. The COA extensively canvassed various authorities on the operation of these provisions in an attempt to reconcile conflicting approaches. Claimant's explanation considered 'full' and 'satisfactory' in this case. **Parent's inability to pay for investigation** considered. Mentally incapacitated person still remained as the **'claimant'**. Meaning of **'the conduct'** in s66(2) considered. See full decision for authoritative interpretation of these provisions.

See also *Staggs* at s36 above.

In *Tan v Basaga* 11/10/10 [2010] NSWSC 1143 [56 MVR 470] **McCallum J accepted Dr Tan's explanation for his long delay** in bringing his claim for injuries sustained in a motor accident. Dr Tan's explanation was that he was **unaware he could claim**, he was focussed on recovering, he was working extremely long hours and was focussed on advancing professionally. It wasn't until he heard a P.I. Lawyer's advert on radio that he became aware he could claim for his injuries, which he now was not so optimistic about in terms of his recovery prospects. Dr Tan's cultural background (**coming from a far less litigious society**) factored heavily in the court accepting his explanation.

In *Mortimer v Moon* 25/2/11 [2011] NSWDC 53 Johnstone J, in circumstances where he **had to infer an explanation for P's delay** in commencing proceedings, found that their was no full and satisfactory explanation for failing to bring proceedings in time.

In *Keen v Nominal Defendant* 10/11/11 [2011] NSWDC 173 Johnstone J found their was a 'full and satisfactory explanation' for P not making his claim within six months of the accident **where information from the police subsequently came to light that suggested to P's legal representatives that he had an action against a person he was unaware he could claim against**.

In *Lawrence v Mills* 3/2/12 [2012] NSWDC 4 Johnstone J found that P had a full and satisfactory explanation for delay due to **reliance on his solicitors**.

In *Atie v Tonacio* 5/3/12 [2012] NSWSC 156 [60 MVR 221] Grove AJ satisfied that P had given a full and satisfactory explanation for delay. P was working on a road when a truck hit a power pole and the power lines struck him. P had **limited education** and it **never occurred to him that he had rights other than in the workers compensation sphere**.

See *Parker v Nominal Defendant* 5/3/13 [2013] NSWDC 15 where Levy SC DCJ found there was a full and satisfactory explanation for delay when the **P was an unsophisticated person who had suffered a minor injury and accepted triage nurse's words at Geelong hospital that she couldn't make a claim**. There was also some delay by P's solicitor.

See *Nader v Aboulahaf* 7/2/14 [2014] NSWDC 14 where Cogswell SC DCJ considered the meaning of '**full** and satisfactory' explanation and concluded that the driver had "provided 'full details' of the allegations made. He **provided all the details he had at the time**, which included a lot of information about the claimed role of the unidentified car. I think the word **'allegations' must be understood as allegations at the time the 'full details' are to be provided**. I do not think the provision is mean to preclude the party from making further allegations if the party obtains more information in the future" @11-12.

See *Sweetman v Ritter* 23/5/14 [2014] NSWDC 110 where Taylor SC DCJ considered the meaning of **"*conduct of persons additional to the claimant must feature if relevant*"**. "There can be no debate that the conduct must be '*relevant*' and it must be relevant to what is required by s 109, an explanation for the delay in commencing proceedings. In many cases, the conduct after commencing proceedings but occurring before the explanation is proffered, although within the ambit of the period stated in s 66(2), is simply not relevant to the delay in commencing proceedings. I do not doubt that in some cases that conduct in the post-commencement period could be relevant. This case is not one of them. Similarly, conduct well before the three-year period, although it again is within the s 66(2) period, might not be relevant to explain the delay beyond three years in commencing proceedings, the focus of s 109" @21-22. "In the present case, Ms Sweetman gives a full history of her conduct, beliefs and knowledge up to the time of lodging the claim soon after she consulted her solicitor. Thereafter, the relevant conduct to explain the delay is provided by the solicitor. In circumstances where the plaintiff has no familiarity with the litigious process, I do not see anything unusual or unreasonable in this" @25. It was **reasonable to delay commencing court proceedings whilst following the CARS procedure**. It was also **reasonable for the plaintiff to postpone commencing proceedings whilst pursuing settlement proposals**. Reasonableness of **P relying on solicitor** discussed and confirmed.

s73(3) – Late making of claims
In *Gudelj v MAA of NSW* 14/5/10 [2010] NSWSC 436 [55 MVR 357] McDougall J considered the interrelationship between s73(3)(c) and s92(1)(a) and s92(1)(b). Appeal allowed in [2011] NSWCA 158 [58 MVR 342]. The COA accepted the original assessment of the CARS assessor Ms Boyle where she stated that: "By Mr Gundelj's admission his pain, though prevalent from the beginning, worsened over time since the accident, warranting numerous visits to the doctor. He underwent treatment in the form of physiotherapy, and was

prescribed numerous medications, all of which he presumably had to pay for. In my view a reasonable person in Mr Gundelj's position, suffering ongoing symptoms from the date of accident and paying medical expenses, would have sought information as to his legal rights … I cannot be satisfied that a reasonable person in the position of the claimant would have failed to seek legal advice sooner or would have failed to have complied with the duty or would have been justified in experiencing the same delay" @25. Various issues considered.

s74 – Form of notice of claim
See *Gudelj v MAA of NSW* 24/6/11 [2011] NSWCA 158 [58 MVR 342].

s81 – Duty of insurer re admission or denial of liability
See *Gudelj v MAA of NSW* 24/6/11 [2011] NSWCA 158 [58 MVR 342] from paragraph 60.

See *Smalley v MAA of NSW* 2/11/12 [2012] NSWSC 1456 where Rein J concluded that: "**s 81(2)** deals with **partial admissions** and it is not limited in effect to partial admissions under **s 81(1)** [and] that **s 81(4)** permits the insurer to admit liability to the same extent that it is permitted to do so pursuant to s 81(2), even if it has wholly denied liability previously by notice or is deemed to have wholly denied liability by its failure to issue a notice" @24. "I can see an object that is promoted by the construction which I favour - namely the encouragement of early resolution of compensation claims. To permit insurers to make admissions will reduce the scope for conflict and delay" @29. "[T]he letter of [21/9/11] … which accepted that the accident occurred due to the fault of the insured driver but denied liability 'for this late claim' was a notice which complied with the requirements of s 81(4)" @34. **Appeal allowed** 26/9/13 in [2013] NSWCA 318 [65 MVR 82]. COA did not agree with trial judge's interpretation of s81. **See COA's in depth analysis of s81**.

s82 – Duty of insurer to make offer of settlement
In *Paice v Hill* 7/7/09 [2009] NSWCA 156 [(2009) 53 MVR 114] Ipp JA at paragraph 53 stated that "an insurer would not be entitled to avoid its duty to make an offer of settlement under s 82 on the basis that a full and satisfactory explanation for the delay had not been provided. Under s 82, the duty of an insurer to make a reasonable offer of settlement arose within one month after the injury had stabilised (s 82(1)(a)) or within two months after the claimant had provided the insurer all relevant particulars about the claim (s82(1)(b)). The duty of an insurer under s 82 was not predicated on the existence of a claim that was not a late claim or on the provision of a full and satisfactory explanation for any delay in making a claim". Further Ipp JA stated at paragraph 55 that "a claimant might experience difficulties if an insurer disputed that the claimant had provided all relevant particulars about the claim (as s 82(1)(b) requires). Assessments under s 96(1)(d) – as to whether the insurer is entitled to delay the making of an offer of settlement under s 82 on the ground that any particulars about the claim are insufficient – were binding on the parties: *Hayek v Trujillo* [2007] NSWCA 139 at [47]. This is to be contrasted with an assessment of a dispute as to whether a full and satisfactory explanation for making a late claim has been given. Such an assessment was not binding on the parties: *Hayek v Trujillo* at [48]". Note legislative amendments subsequent to this decision. Note: *Hayek* also considered in *Gudelj v MAA of NSW* 24/6/11 [2011] NSWCA 158 [58 MVR 342].

s85(4) – Duty of claimant to co-operate with other party
Proceedings were dismissed in *Emerton v McDonald* 19/2/09 [2009] NSWDC 26 by Sidis DCJ as P failed to provide certain information as per the requirement of s85(4).

s92(1) – Claims exempt from assessment
In *Gudelj v MAA of NSW* 14/5/10 [2010] NSWSC 436 [55 MVR 357] McDougall J considered the **interrelationship between s73(3)(c) and s92(1)(a) and s92(1)(b)**. Appeal allowed in [2011] NSWCA 158 [58 MVR 342]. The COA accepted the original assessment of the CARS assessor Ms Boyle where she stated that: "By Mr Gundelj's admission his pain, though

prevalent from the beginning, worsened over time since the accident, warranting numerous visits to the doctor. He underwent treatment in the form of physiotherapy, and was prescribed numerous medications, all of which he presumably had to pay for. In my view a reasonable person in Mr Gundelj's position, suffering ongoing symptoms from the date of accident and paying medical expenses, would have sought information as to his legal rights … I cannot be satisfied that a reasonable person in the position of the claimant would have failed to seek legal advice sooner or would have failed to have complied with the duty or would have been justified in experiencing the same delay" @25. Various issues considered.

In *Insurance Australia Ltd t/as NRMA Insurance v MAA Of NSW & Ors* 20/5/10 [2010] NSWSC 478 Barr AJ considered **s92(1)(b)**.

In *Allianz Australia Limited v Tarabay* 1/3/13 [2013] NSWSC 141 [62 MVR 537] "**Allianz sought an exemption under s 92(1)(b) of the Act requesting the Assessor to determine that the claim was 'not suitable for assessment' before CARS**" @4. "The only proceeding heard by the Assessor was an interlocutory proceeding in which the task of Allianz was not to prove the fraud alleged but to satisfy the Assessor, on the basis of an allegation, reasonably put, of fraud so that the matter was not one that should be heard in a CARS assessment. The Assessor asked herself the wrong question and answered it. In doing so she has reached a concluded view as to the substance of the matter alleged, without having heard the parties in full on the issue. In so doing, the Assessor has issued a decision vitiated by jurisdictional error and error of law on the face of the record" @66-67.

s94 – Assessment of claims
In *Insurance Australia Ltd (trading as NRMA Insurance) v Helou* 7/10/08 [2008] NSWCA 240 the COA considered whether the decision of an assessor in the Claims Assessment and Resolution Service (CARS) should be set aside for **jurisdictional error or error of law**. Decision not set aside.

In *Paice v Hill* 7/7/09 [2009] NSWCA 156 [53 MVR 114] Ipp JA at paragraph 54 agreed that "it would always be open to a claimant to cause time under s 109 to be suspended by making a general application for an assessment of the claim under s 94 (that would be irrespective of whether the dispute concerning the provision of a full and satisfactory explanation for the delay had been resolved)".

In *Allianz Australia Insurance Ltd v Ward* 24/7/09 [2009] NSWCA 264 McCallum J considered s94(5) & (6) and s95(2) in the case where the A **challenged an assessor's award because of minor errors**, and where A sought an adjustment. The consequences of jurisdictional error by an administrative body were considered.

In *Allianz Australia Insurance Ltd v Kerr* 29/5/11 [2011] NSWSC 347 [58 MVR 287] Hislop J from paragraph 10 discussed the **obligation in s94(5) to state reasons**. Appeal dismissed [2012] NSWCA 13.

s96 – Special assessments of certain disputes re claims
In *Paice v Hill* 7/7/09 [2009] NSWCA 156 [53 MVR 114] the COA per Ipp JA at paragraph 72 stated that the "application that the [P] made under s 96 for the assessment of the dispute as to whether she gave a full and satisfactory explanation for the delay in making her claim was not an assessment under s 109(2) and did not suspend time running under that section".

s109 – Time limitations
In *Paice v Hill* 7/7/09 [2009] NSWCA 156 [53 MVR 114] the COA per Ipp JA at paragraph 54 agreed that "it would always be open to a claimant to cause time under s 109 to be suspended by making a general application for an assessment of the claim under s 94 (that would be irrespective of whether the dispute concerning the provision of a full and

satisfactory explanation for the delay had been resolved)". The "application that the [P] made under s 96 for the assessment of the dispute as to whether she gave a full and satisfactory explanation for the delay in making her claim was not an assessment under s 109(2) and did not suspend time running under that section"@72.

s109(2) – Time limitations
In *Keller v Keller* 29/6/09 [2009] NSWDC 172 Williams DCJ refused to grant leave to P to commence proceedings more than three years after the motor accident. P's age (18) and ignorance of her rights no answer to why she did not seek legal advice earlier than she did. D would also suffer prejudice re investigating the medical aspects of the claim if leave was granted.

See *Ageyeman-Badu v The Nominal Defendant* 13/4/12 [2012] NSWDC 35 where Gibson DCJ refused to grant leave to the P to commence proceedings out of time. P was an **English speaking Ghanaian immigrant**. P alleged that she was struck by an unknown car on a pedestrian crossing in 2007. She was out of time for the purposes of s109 of the Motor Accidents Compensation Act 1999 (NSW). His Honour found there to be real questions as to whether the accident involved a vehicle at all. D was materially prejudiced by the inability to make further enquiries. D's application to dismiss the action for want of a "full and satisfactory explanation" for the delay per s73 MACA was also upheld. His Honour accepted that due to cultural differences P may not have understood her right to make a claim but **once she had consulted solicitors she behaved in a tardy fashion**. Court also considered **when a notice is 'issued' per s109(2)**. D printed a certificate in May but didn't send it until June. P was in time for June but not May. His Honour found that 'issued' meant the day that the formal administrative decision was made i.e. May and not the date of posting which he described as part of the 'consequential office procedure'.

s109(3)(a) – Time limitations
See *Howard v Walker* 13/5/08 [2008] NSWSC 451 where Hoeben J considered whether a **mentally impaired claimant** had given a 'full and satisfactory explanation' to the court for the delay in accordance with s109(3)(a). Section 66(2) also considered. **Appeal dismissed** in *Walker v Howard* 16/12/09 [2009] NSWCA 408. The COA extensively canvassed various authorities on the operation of these provisions in an attempt to reconcile conflicting approaches. Explanation considered 'full' and 'satisfactory' in this case. **Parent's inability to pay for investigation** considered. Mentally incapacitated person still remained as the **'claimant'**. They were not required to give evidence. See full decision for authoritative interpretation of these provisions. See also *Nominal Defendant v Harris* [2011] NSWCA 70 [57 MVR 492] where similar issues discussed in relation to a P with intellectual disabilities, and where extension granted.

In *Stratton v Kairouz* 2/2/09 [2009] NSWDC 7 Levy SC DCJ found there was a full and satisfactory explanantion for the delay in bringing proceedings due to **solicitor's tardiness** and the fears of the P due to her receiving **death threats from the D discouraging her from suing** for her personal injuries.

See *Sinclair v Darwich* 5/8/10 [2010] NSWCA 195 from paragraph 8 re **onus of proof**. Meaning of 'likely' in s109(3)(b) considered.

See Sharif Zraika (by next friend Halima Zraika) v Rebecca Jane Walsh 20/12/11 [2011] NSWSC 1569 [60 MVR 17] where Rothman J confirmed **leave to commence proceedings out of time must not be granted unless the claimant provided a full and satisfactory explanation to the court for the delay**. P was injured (in utero) in 2002 as a result of a motor vehicle accident. Pursuant to s109 of the *Motor Accidents Compensation Act 1999* leave was sought to commence proceedings out of time. The test was objective - whether a reasonable person in P's position would have been "justified in experiencing the delay". His

Honour accepted that **due to his medical condition and his age P could not have acted any sooner**. His Honour found that there was some prejudice to D. This could be overcome, however, if proceedings were commenced on the condition that P also commenced proceedings against any other party nominated by D. See from paragraph 15 the **High Court's analysis of the term 'full and satisfactory explanation'** in the case of *Russo v Aiello.*

See *Ageyeman-Badu v The Nominal Defendant* 13/4/12 [2012] NSWDC 35 where Gibson DCJ refused to grant leave to the P to commence proceedings out of time. P was an **English speaking Ghanaian immigrant**. P alleged that she was struck by an unknown car on a pedestrian crossing in 2007. She was out of time for the purposes of s109 of the Motor Accidents Compensation Act 1999 (NSW). His Honour found there to be real questions as to whether the accident involved a vehicle at all. D was materially prejudiced by the inability to make further enquiries. D's application to dismiss the action for want of a "full and satisfactory explanation" for the delay per s73 MACA was also upheld. His Honour accepted that due to cultural differences P may not have understood her right to make a claim but **once she had consulted solicitors she behaved in a tardy fashion**.

In *Aeiveri v Boland* 10/9/12 [2012] NSWDC 141 & [2012] NSWDC 155 Levy SC DCJ considered that P had provided a full and satisfactory explanation in circumstances where English was P's third **language** and when he was unaware of his right to claim under the MAC Act. Further, P was **receiving workers' compensation benefits** for his treatment expenses and **still working in his pre-accident employment**.

In *Lyu v Jeon* 21/12/12 [2012] NSWCA 446 [62 MVR 409] trial judge found to have erred by finding that claimant (R) had provided a satisfactory explanation for delay in bringing action for an injury caused in a motor vehicle incident. R had **delayed bringing claim because she did not want to get her friend (A) into trouble, and because A had promised to meet her medical expenses**. R's parents had been advising her to make appropriate claim. A and R were both Korean students studying in Australia. R also had **made a false insurance claim**, which was providing her with some compensation. When A ceased supporting R, R brought claim against her. A reasonable person in R's position would have notified insurer of claim in time and would not have delayed for two years. Reasons for delay not satisfactory.

> [Taylor] "43. The question of what constitutes a full and satisfactory explanation for delay has been more recently revisited in *Walker v Howard* [2009] NSWCA 408. In cases where the [P] has full mental capacity, the relevant inquiry is the explanation for the delay, not the explanation of the actions of those acting on the authority of the [P] : [52 – 53]. The purpose of the need for the [P] to provide an explanation is to enable the court to evaluate the reasons for the delay : [57]. This is in order to determine whether or not the explanation is satisfactory : [58]. If part of the explanation for delay is that the matter was in the hands of the solicitor for the [P], it is also relevant to examine the solicitor's explanation for the delay after the receipt of instructions : [99]. In evaluating the explanation for the delay it must be recognised that since the provisions of s 109(3)(a) and 66(2) of the *MAC Act* are aimed at controlling late claims, the initial part of the evaluation must favour the insurer : [103], following *Smith v Grant* [2006] NSWCA 244 : [2006] 67 NSWLR 735, [10] – [11]. …47. In the circumstances, I consider that the [P] has provided a full and satisfactory explanation for the delay between 29 October 2007 and 29 March 2010. In that time it is clear that the solicitor for the [P] was attempting to put forward an application supported by documentation to demonstrate the merit of the application. I consider that in that period, **a reasonable person in the position of the [P], would not have acted differently and would have left the matter in the hands of a solicitor** to do just that." **Taylor v Chown** 28/4/10 [2010] NSWDC 63 Levy SC DCJ

s109(3)(b) – Time limitations (statutory threshold)
In *Ruiz-Diaz v Aroyan & Ruiz-Diaz v Antal* 6/10/09 [2009] NSWDC 252 Levy SC DCJ found that P had a demonstrated a real chance of meeting the statutory threshold.

See *Sinclair v Darwich* 5/8/10 [2010] NSWCA 195 from paragraph 8 re **onus of proof**. Meaning of **'likely'** in s109(3)(b) considered. It means that there is a 'real chance' or a 'real prospect' that the relevant damages threshold will be exceeded. It does not mean 'more likely than not'. See also *Orilla v Chown* 22/11/13 [2013] NSWDC 226 from paragraph 76.

In *Eades v Gunestepe* 4/7/12 [2012] NSWCA 204 [61 MVR 328] the COA found that s109(3)(b) involved a discretionary exercise and conducted a **review of the discretion** on a *House v King* basis (despite this not being entirely clear). The lower court was "obliged to apply the section correctly, but did not do so. What his Honour was required to decide was whether there was a 'real and not remote chance or possibility' that the [R's] contributory negligence would be assessed at 24 percent or less. He was not required to make a specific assessment of contributory negligence. The task which his Honour had to undertake was that described in *Sinclair v Darwich.* As his Honour did not apply the correct test, it is necessary for this Court to re-exercise his Honour's discretion and carry out the evaluative process which is required by the section" @45-46. **R discharged his onus that there was a real chance or possibility of contributory negligence being assessed at 24% or less**. This case involved a **P changing lanes just before an intersection to go through an amber light and striking a car which turned across his path**. Hoeben JA stated that he could "see no reason in principle why a court in applying s 109(3)(b) cannot make its own predictive assessment of **'likely' damages for non-economic loss** even though an assessment of permanent impairment of more than 10 percent has not been made by a Medical Assessor in accordance with ss 131 and 132 MAC Act" @59.

s110 – Insurer may require claimant to commence court proceedings
In *Kalazich v Yang* 17/10/12 [2013] NSWDC 261 Neilson DCJ held that a s110 notice did not have to be served personally on the P prior to the commencement of the proceedings. P was legally represented. Service on legal representative appropriate. "[T]he notice here given was defective in that it gave the wrong information as to when the [P] as claimant was required to commence the proceedings" @28. Notice was therefore of no effect. Motion for dismissal of P's statement of claim failed.

s112 – Presumption of agency
In *Ralston v Bell & Smith t/as Xentex Patch & Grout* 31/3/10 [2010] NSWSC 245 [55 MVR 300] Hislop J considered s112 from paragraph 25.

s118 – Remedy available when claim fraudulent
See *Checchia v Insurance Australia Ltd t/as NRMA Insurance* 29/9/09 [2009] NSWSC 1005 [54 MVR 55] where Rothman J considered s118 in some depth and concluded on the facts that P did not engage in knowingly false or misleading conduct to obtain a financial benefit. **Appeal allowed** in *Insurance Australia Ltd … v Checchia* 28/4/11 [2011] NSWCA 101 - **meaning of 'purpose', 'a financial benefit' and 'the financial benefit' considered**. In *Checchia v Insurance Australia Ltd t/as NRMA Insurance* 30/5/13 [2013] NSWSC 674 Hall J calculated the financial benefit to which P was not entitled in terms of s118(2).

s122(1) – Damages in respect of motor accidents
See *JA & BM Bowden & Sons Pty Ltd v Doughty* 20/4/09 [2009] NSWCA 82 [(2009) 52 MVR 552] where the **meaning of fault 'in the use or operation of the vehicle' considered**. The majority held that there was no such fault on the facts where a tractor rolled over. The fault was in the system of work, i.e. the **instruction to drive with the roll bar lowered**.

s122(3) – Damages in respect of motor accidents
In *QBE Insurance (Australia) Ltd v Durkin & Ors* 22/3/12 [2012] NSWSC 72 Hall J stated that in "*Insurance Australia Limited v Hutton-Potts* Schmidt J at [32] observed that while s122(3) of the Act required that an Assessor undertake an assessment of damages in the same way as a court, assessors were not obliged to provide reasons for the conclusions reached, in the way that a court was obliged to do given the provisions of s 94(5): see *Insurance Australia Ltd v Helou* (2008) 52 MVR 446; [2008] NSWCA 240 at [61] … [W]hilst elaborate reasons were not required to be given for the conclusions reached by an Assessor in relation to the assessment of future economic loss, he or she was subject to the obligation of identifying the assumptions on which the damages awarded were awarded for future economic loss. The reasons, her Honour stated, could be given concisely but they have to be given" @50-51.

s125 – Damages for PEL or FEL (maximum for loss of earnings)
See *Fkiaras v Fkiaras* 27/5/10 [2010] NSWCA 116 where the meaning of 'earnings' in s125(2) was considered. 'Earnings found to be "a reference to income earned by the exercise of the injured person's earning capacity"@46.

s126 – Future economic loss (Claimant's prospects and adjustments)
See also s13 of the Civil Liability Act 2002 which is in identical terms.

See *State of NSW (NSW Police) v Nominal Defendant* 31/7/09 [2009] NSWCA 225 [(2009) 53 MVR 243] where the COA from paragraph 81 considered the construction of this section. Held that the trial judge should have found pursuant to s126(1) that Senior Constable Moore intended to stay in the police force. The trial judge should also have considered making an adjustment pursuant to s126(2) when assessing future economic loss because of the fact that Senior Constable Moore may not have remained in the police force.

In *Amoud v Al Batat* 14/10/09 [2009] NSWCA 333 the COA stated that the section is not a code, but **assumes the continued operation of common law principles**.

In *QBE Insurance (Australia) Ltd v Cowan* 24/8/10 [2010] NSWSC 933 Hislop J stated at paragraph 45 that the use of the **buffer** renders compliance with s126(2) unnecessary.

In *Allianz Australia Insurance Ltd v Kerr* 29/5/11 [2011] NSWSC 347 [58 MVR 287] Hislop J from paragraph 19 discussed the appropriateness of the assessor's award of a buffer sum of $200,000. Hislop J stated, "the claims assessor has adequately complied with the requirements of s 126. As Giles JA observed in *Parks* : '**The occasion for a buffer is when the impact of the injury upon the economic benefit from exercising earning capacity after injury is difficult to determine**.' This is such a case" @26-27. Appeal dismissed [2012] NSWCA 13.

In *Nominal Defendant v Livaja* 17/5/11 [2011] NSWCA 121 the COA discussed the **meaning and purpose of s126(1) & (2)** in some depth from paragraph 39.

See *Allianz Australia Insurance Ltd v Sprod & Ors* 29/9/11 [2011] NSWSC 1157 [59 MVR 250] where Hoeben J did not consider that the assessor erred re assessing future economic loss. **Appropriate test for reviewing reasons of claims assessor discussed**. Hoeben J stated "I do not see why the approach of the claims assessor to the award of future economic loss should not be treated as the award of a buffer. It is true that he **did not specifically refer to a buffer** (although he did so in relation to past economic loss). Nevertheless, his methodology and approach is the same as that used in the buffer cases. The only difference is that instead of specifying a lump sum, he specified a percentage of the claimant's earnings, by reference to which he calculated a lump sum" @30. The **assessor's award did not offend the 'compensation principle'**. **Appeal allowed** 12/9/12 at [2012]

NSWCA 281 [61 MVR 547]. "There is no explicit explanation of why a residual working life of 18.3 years was chosen or, more precisely, what assumption was made in that respect … Nor is there any reference to the assumption that gave rise to the allowance of 15% for vicissitudes … More significantly, there was no statement by the assessor of the assumption or assumptions underlying the figure of $250 net per week as lost earnings for the balance of the working life … There was … a **failure of the assessor in these respects to engage with and perform the tasks prescribed by s 126**. Once the assessor embarked on a process of calculation, the duties imposed by s 126 were enlivened (they would also have been enlivened, but required potentially very much less by way of explanation of assumptions, had the circumstances exhibited such uncertainties and imponderables as to justify the broad evaluative 'buffer' approach) ... **nothing I have said is intended to suggest that assessors must prepare elaborate statements of reasons and explanations of assumptions**" @33-42.

In *Allianz Australia Insurance Ltd v Cervantes* 8/8/12 [2012] NSWCA 244 [61 MVR 443] Basten JA stated that "It is **not necessary to decide whether, as a matter of law, an upper limit can be placed on the amount of an award of future economic loss by way of a 'buffer'**. Certainly the analysis of principle in the present case did not suggest whether or how that exercise might be undertaken. Any such exercise would have to take into account the large differences in earning capacity which exist amongst individuals. In *Allianz v Kerr*, the claimant was a nursing assistant who undoubtedly had a far lower earning capacity than the **claimant in the present case, who was a general physician** with a speciality in renal disease. The exercise would also need to take into account the cap on damages for economic loss which, at the time of the assessment, was a little under $4,000 per week net: *Compensation Act*, s 125, the figure having been adjusted pursuant to s 146, allowing for changes in average weekly earnings" @48.

In *NRMA Insurance Ltd v Pham* 3/5/13 [2013] NSWSC 468 [63 MVR 326] Hall J stated that "The claim, whilst premised on the fact that Mr Pham had been for many years **self-employed and intended, but for the accident, to continue to do so**, was **assessed upon the hypothesis, for which there was no evidence, that he would be forced by economic circumstances to change and to work for wages** in an employed capacity. The decision, and the certificate of assessment accordingly, was made and issued on a basis contrary to the statutory requirements in s 126 of the *MAC Act*" @131. R's tax records suggested his business was very unprofitable, but this was unlikely to be the case. **Evidential onus on claimant where tax records are not a reliable indicator of actual income discussed**.

> [Kallouf] "89 Section 126, as Giles JA observed in The Nominal Defendant v Lane [2004] NSWCA 405 (at [61]) '"enshrines in legislation **the method for asserting an uncertain career path** that was adopted in Norris v Blake (No 2)" [as] has been noted by Professor Luntz in *Assessment of Damages for Personal Injury and Death*, 4th ed (2002) para 1.28 [sic, 11.2.8]'.
> 90 The combined effect of s 126(1) and s 126(3) is to require the Court to identify and state the 'assumptions about future earning capacity or other events on which the award [of damages for future economic loss] is to be based', while s 126(1) requires satisfaction that these assumptions 'accord with the claimant's most likely future circumstances but for the injury'. Section 126(2) requires an adjustment of the 'amount of damages for future economic loss that would have been sustained on those assumptions' by reference to the 'percentage possibility that the events might have occurred but for the injury'; and s 126(3) requires the Court to state 'the relevant percentage by which damages were adjusted': Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone [2004] NSWCA 145 (at [3]) per Hodgson JA (Stein AJA agreeing); see also Bryson JA (at [52]) (speaking of s 13 of the *Civil Liability Act* which is in identical terms to s 126).
> 91 These requirements were, no doubt, inserted in the legislation to which we have

> referred to require courts to make clear the basis on which awards for future economic loss are founded." **Kallouf v Middis** 11/4/08 [2008] NSWCA 61 Full Court

s128 – Damages for economic loss (attendant care services)
See *Kaszubowski v McGuirk* 12/9/08 [2008] NSWCA 219 [(2008) 51 MVR 22] from para. 82 and *Tu Tran v Dos Santos (No 2)* 1/5/09 [2009] NSWSC 336 per Smart AJ from para. 21.

In *Allianz Australia Insurance Ltd v Roger Ward & Ors* 30/11/10 [2010] NSWSC 720 [57 MVR 327] Hidden J stated that **claims under s15B and s128 of the MAC Act must be separately assessed** and that "[b]efore a future claim can succeed it must be shown that the threshold will be met in the future" @21. "It is now clear that a claimant cannot recover damages for gratuitous services unless they are, or are to be, provided for at least 6 hours per week and for a period of at least 6 months. (The use of the term 'consecutive' in subs (3)(b) makes it clear that that period must be a continuous one.) Accordingly, the approach in *Geaghan v D'Aubert* has been restored, and it is applicable to **s 15B(2)(c)** of the CL Act" @32.

In *Thiering v Daly* 11/11/11 [2011] NSWSC 1345 [60 MVR 42] Garling J considered the following questions: (1) "Has the right of an individual who is catastrophically injured in a motor vehicle accident, and who becomes a lifetime participant in the LCS Scheme, to damages in accordance with s 128 of the *Motor Accident Compensation Act* 1999, been completely abolished; and … (2) If not, who, as between the LCS Authority and a motor vehicle tortfeasor (in reality the CTP insurer) is responsible for paying the appropriate compensation either by way of damages, or other payments, for the provision of services which are otherwise gratuitous as that expression is to be understood from G v K" @13. … [and] (3) Does the second defendant (LCS Authority) have an obligation under the Motor Accidents (Lifetime Care and Support) Act 2006 (NSW) to pay for **gratuitous care and assistance provided by the second plaintiff ('the mother') to the first plaintiff** ('the injured person') up to the date of judgment?" @169. **Griffiths v Kerkemeyer damages not found to be abolished**. Section 128 carefully considered in the above context. Appeal dismissed in *Daly v Thiering* 20/2/13 [2013] NSWCA 25 [63 MVR 14]. **Appeal allowed** 6/11/13 in [2013] HCA 45 [65 MVR 376]. High Court concluded that "On the proper construction of s 130A of the MAC Act, Mr Thiering has **no entitlement to recover damages in accordance with s 128 of the MAC Act with respect to the provision of gratuitous attendant care services** from Mr Daly or his CTP insurer" @46.

> [Ridolphi] "11 Section 128(3) in its current form was inserted by the *Civil Liability Legislation Amendment Act* 2008, s 4, Sch 2. The amendment was given retrospective effect (Sch 1, cl 32) and thus applies to the present case.
> 12 Section 128(3) raises difficult questions of construction. In *Hill v Forrester* [2010] NSWCA 170, this Court unanimously held that the requirement that services be provided (or are to be provided) for at least six hours per week is ongoing (at [1], per Tobias JA; at [26], per Handley AJA; at [98], per Sackville AJA). Thus the [A] in the present case is not entitled to recover damages in respect of any period during which gratuitous services were not provided (or are not to be provided) for at least six hours per week.
> 13 *Hill v Forrester* also decides that a claimant cannot recover compensation for attendant care services unless such services have been provided for at least one period of six consecutive months: at [2], per Tobias JA; at [105], per Sackville AJA. The question of whether the qualifying period of six months is satisfied if services are provided throughout that period, albeit at a rate of less than six hours per week, was not decided in *Hill v Forrester*: see at [4]-[11], per Tobias JA; at [106]-[108], per Sackville AJA. …
> 27 Although it is not necessary to decide, I would accept the respondent's submission that the evidence does not establish that the [A] is likely to acquire attendant care services on a commercial basis. The [A's] submissions do not identify any evidence indicating that he is likely to take that course. His apparent reluctance to envisage being

> elsewhere than with his sister suggests that he is unlikely to utilise commercial care services in the future. No submission is made that an award should be made by reference to the chances that the appellant may require and utilise attendant care services in the future: cf *Miller v Galderisi* [2009] NSWCA 353, at [14]-[24] …
> 28 For these reasons, I do not think that the damages awarded to the [A] should include compensation for attendant care services." **Ridolph v Hammond (No. 2)** 4/4/12 [2012] NSWCA 67

s131 – Impairment thresholds for awards of damages for NEL
In *Nguyen v MAA NSW & Anor* 3/5/11 [2011] NSWSC 351 [58 MVR 296] Hall J concluded that "There is … no warrant for reading the words *'the degree of impairment of the injured person'* as an impairment of and only of the particular part of a person's body injured in an accident. The reference to *'permanent impairment'* is expressed as related to the injured person (*'of the injured person'*) as a result of the injury caused by the motor accident" @98. "[T]he medical assessment undertaken pursuant to s.60 of the Act was affected by legal error, in that the medical assessor proceeded upon a different basis, namely, that there needed to be a causal connection between the motor accident and a *'primary and isolated'* injury to the right and/or left shoulder(s)" @120.

s134 – Maximum amount of damages for non-economic loss

> [Kendirjian] "[I]t must always be borne in mind that the assessment of non-economic loss is an evaluative process in respect of which minds may reasonably differ: Woolworths Ltd v Lawlor [2004] NSWCA 209 (at [14]). An appellate court will not interfere with a trial judge's assessment of damages 'simply because it would have awarded a different figure had it tried the case at first instance': Precision Plastics Pty Ltd v Demir [1975] HCA 27; (1975) 132 CLR 362 (at 369) per Gibbs J. in Khan v Polyzois [2006] NSWCA 59 Hislop J (with whom Mason P agreed) said the Demir principle applies to the assessment of non-economic loss under s 16 of the *Civil Liability Act* 2002, and, *a fortiori*, they would apply , too, to the assessment of non-economic loss under s 134 of the MAC Act.
> 175 In short, an appeal from an assessment of damages for non-economic loss in relation to personal injuries from a judge sitting without a jury is to be determined in the same manner as an appeal from the exercise of discretion by a trial judge. An error within the terms of House v R [1936] HCA 40; (1936) 55 CLR 499 (at 504 – 505) must be identified: Franklins Limited v Burns; Burns v Franklins Limited [2005] NSWCA 54 (at [49]) per McColl JA (Beazley and Tobias JJA agreeing).
> 176 Accordingly, an appeal court may only alter the trial judge's decision if the judge acted on a wrong principle of law, misapprehended the facts or made 'a wholly erroneous estimate of the damage suffered': Moran v McMahon (1983) 3 NSWLR 700 (at 719 and 723) per Priestley JA (with whom McHugh JA agreed); Jones v Bradley (at [117]) per Santow JA (with whom Meagher and Beazley JJA agreed); see also Diamond v Simpson (No 1) [2003] NSWCA 67; (2003) Aust Torts Reports ¶81-695 (at [15]–[17]); Ghunaim v Bart [2004] NSWCA 28; (2004) Aust Torts Reports ¶81-731 (at [100])."
> **Kendirjian v Ayoub** 14/8/08 [2008] NSWCA 194 McColl JA, Full Court

s136(4) – Mitigation of damages
In *Choy v Arnott* 4/3/09 [2009] NSWDC 17 Levy SC DCJ was satisfied that P had taken reasonable steps to mitigate his loss of earning capacity. See from para. 39. **Appeal allowed** in [2010] NSWCA 259. Only care, case management, PEL and FEL affected.

s137 – Payment of interest
Section 137 and the issue of interest considered generally in *Helou v NRMA Insurance Aust. Ltd* 26/3/09 [2009] NSWSC 197 [52 MVR 446] by Hulme J

s137(4)
This sub-section regulates the payment of pre-judgment interest on damages and is considered in detail from paragraph 8 of *Najdovski v Crnojlovic (No. 2)* 30/10/08 [2008] NSWCA 281 Basten JA, Full Court

In *Tu Tran v Dos Santos (No 2)* 1/5/09 [2009] NSWSC 336 Smart AJ did not consider that the requirements of s137(4)(a)(i) were satisfied to establish an entitlement to **interest on past economic loss**.

s138(2)(a) – Contributory negligence (alcohol or drug-related offence)
In *Chan v Heak* 21/12/11 [2011] NSWCA 420 both the A passenger and R driver, who had been drinking together throughout the night, were heavily intoxicated. A was injured in a car accident while R was driving. COA confirmed finding that **A's contributory negligence was 40%**. It would have been obvious to A that R was unfit to drive. A could have found another way home.

s138(2)(d) – Contributory negligence (helmets)
See *Schoupp v Verryt* 14/4/14 [2014] NSWDC 28 per Levy SC DCJ, where P **school boy was not wearing a helmet whilst riding a skateboard (skitching) and holding on to D's car**. D was "**unable to identify any statutory or regulatory legal requirement that a skateboard rider must wear a protective helmet**" @61. The words 'required by law' "should be construed as referring to specific statutory or regulatory legal requirements, and not to an implied requirement according to the common law … Therefore, in this case, absent any specific requirement within a statute or an applicable regulation providing for skateboard riders to wear protective helmets on public streets, I find that on a proper construction of s 138(2)(d) of the *MAC Act*, there is no scope in this case for a mandatory finding of contributory negligence" @63-64.

s149 – Regulations fixing maximum costs recoverable by legal practitioners
See *Najjarine v Hakanson* 8/7/09 [2009] NSWCA 187 where Hodgson JA and COA consider this provision.

s222 – Service of documents generally
In *Kalazich v Yang* 17/10/12 [2013] NSWDC 261 Neilson DCJ considered that s222 was facultive rather than mandatory or directory. See from paragraph 16.

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