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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. SC 884 of 1986

BETWEEN:

CHERYL LEE McDONALD
Plaintiff

AND:

TANYA MICHELLE COX
Defendant

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 20 March 1995)

The plaintiff sues the defendant for damages for pain, suffering and loss of the amenities of life, as a result of personal injuries she claims she sustained as a passenger in a motor vehicle driven by the defendant, when it rolled over on Saturday 27 July 1985. The defendant says that the plaintiff was not a passenger, and was driving the vehicle in which she - the defendant - was a passenger at the time of the accident.

The plaintiff's account

The plaintiff was born in Melbourne and left school at age 16, after gaining her Leaving Certificate. She then worked in a number of casual jobs, before undertaking a year's study at Stott's Secretarial College

by which she gained a certificate as a typist/clerk in November 1980. She was then 17 years of age. Exhibit P2 includes references from various employers for whom she worked, from 1979.

She then worked in telephone sales for 3 months in early 1981, before being employed for 2½ months, July - October 1981, as a process worker assembling mobile telephones. Her certificate of service shows that she left "to start nursing training". She then went to Sydney where after doing casual waitressing for a few months she was employed as a receptionist/telephonist and clerical assistant for Better Secretarial Services Pty Ltd for 8 months from May 1982 to January 1983. When that office closed she moved to Brisbane to obtain work. There she worked as a sales representative for Carrera Marketing, later running its Gold Coast operation until early 1984 when that office also closed. She was then about 21 years of age. She travelled to Mackay. For 3 or 4 months she obtained a variety of casual jobs through the Mackay Community Youth Support Scheme; she also did a bar-and-waitressing course through the Scheme. She then returned to Sydney, because work opportunities were better there. She worked full time for about 7 weeks in July - August 1984 as a secretary to the general manager of Town and Country Real Estate Pty Ltd, before that company closed. She then worked for some 6 months under a Community Employment Program as a full time typist/bookkeeper for Techelp Co-operative Ltd, September 1984 - March 1985.

Her certificate showed that she left that employment to enrol in a Child Care Course in another State. She was then 22 years of age. She returned to Mackay, because she had become interested in becoming a child care worker, and thought that it would be easier to obtain entry into a training course in Queensland. This proved not to be the case. There was not much work available in Mackay but she gained casual employment through the C.Y.S.S. in an after-school activities program for children, 5 afternoons per week for 3 hours daily. She was also, voluntarily, the secretary of the Community Support Centre for 6 months. All of her certificates relating to her various employments speak highly of her.

About this time she met the defendant who was then shortly to leave her work with the ABC in Mackay, in mid-1985. They shared a house for about 1 month. They discussed travelling around Australia in the defendant's panel van. The plaintiff testified that the defendant had told her that she owned the van, but had borrowed money to buy it, the repayment of that loan having been guaranteed by her father. She also said that the defendant had told her that she had been the driver in a 'roll-over' vehicle accident at Lismore.

In due course the two of them set off on their holiday in the van. At that time the plaintiff had been in Mackay for some 4-5 months. They intended to drive through North Queensland to Darwin, and thence to the west coast of Australia and down to Perth. Several weeks into

their holiday - having taken in Airlie Beach, Cape Tribulation, and Townsville - they arrived in Mt Isa where they spent 2 days. They left Mt Isa on the middle to late morning of Saturday 27 July 1985, travelling west into the Northern Territory. The previous night at Mt Isa they had had a "night on the town" with 2 friends, Narelle and Clair, during the course of which they both drank liquor, the defendant more so than the plaintiff. They were both tired when they set off on 27 July; they stopped for some time to refresh themselves at Camooweal. They planned to reach Three Ways that evening en route to Darwin, where the defendant hoped to obtain work in radio, and the plaintiff hoped to gain entry to a child care course. It was well after midday when the accident occurred on the Barkly Highway in the Northern Territory, about 74 kilometres west of Avon Downs.

The plaintiff's account of the accident was as follows. She was in the passenger bucket seat. She had a probationary driver's licence the term of which had then expired; the defendant was aware of that fact. Both the plaintiff and the defendant were wearing seat belts of the sash type; that is, they were across-the-shoulder only. They were not seat belts of the 'inertia reel' type. The plaintiff's seat belt came across her left shoulder, down and across her body, and was secured at the centre "console" on her right. The defendant was driving. Both door windows were wound down at the time; the van had no airconditioning. They had various items of equipment in

the back of the van together with 2 dogs. The plaintiff was dozing when the accident happened. It happened very quickly. She heard a loud bang. At the time they were on a bitumen road (the Barkly Highway), travelling at speed of about 100 kilometres per hour. She testified as follows (transcript p13):-

> "I heard a very loud bang. And Tanya [the defendant] and I screamed. She screamed: 'Jesus Christ', because from my side the windscreen was shattered. We veered off to the left of the road and - - - there was all dust and stones and everything flying everywhere out the side of the window. And the next thing I remember was coming - Tanya just pulling the car back and hitting the brakes. The car started to roll and there was just stuff everywhere. I was rolling - I had been wearing my seatbelt very loosely because we were - I was just sleeping at the time, dozing on and off. And we rolled across the highway.
>
> How many times?---I'd say at least five times we would have rolled. Remember. It's very hard. The door - remember seeing the road - the door - I think that more door - I don't think, I'm sure that both at some stage had opened, and I know that when the vehicle stopped my door was slammed in shut, because Tanya had to take me out the other side of the car, out through the driver's side of the car.
>
> When the vehicle came to a stop where was it in relation to its correct position?---Where we had been - it was - the wheels - we landed on our wheels.
>
> Which way was it facing?---We were on - we had landed on the opposite side of the highway, and we were facing out that way."

Questioned about what happened during the roll-over, she said:-

> "Where were you being thrown around?---From left to right, hitting the door and the [centre] console. I remember hitting the - feeling like

I'd been thrown off my seat and hitting the floor, all around that side of the car.

What do you mean when you say, 'that side of the car'?---Well, we were just - I was being thrown even to the driver's side and back again, the front of the car though. I didn't get thrown into the back of the car.

Can you remember any part of your body striking any part of the car?---Yes.

What part of your body can you remember striking what part of the car?---I remember the lefthand side of my body striking heavily against the door and the - around the edge of the car and - being, hitting the [centre] console, the floor like I said. My head hitting the roof, my face hitting the side of the chair.

Just taking it step by step - - -?---Sorry.

You said you remember your lefthand side of your body, round your - did you say - - -?---Round this area, my left side.

You're indicating the area of your hips, is that right, and you can remember what part of the car you struck or struck you on that area?---Yes. There was a - on that left side of the car. Sorry.

What part of the car did you strike with your left hip?---Oh, I struck the handle that comes out the side, like a - I don't know the name of it - a - it's like a doorhandle but it's an armrest. I was hitting the armrest.

You mentioned that you struck the console?---Yes.

Can you remember what part of your body struck the console?---My backside.

Where, on the left or right or in the centre of your body?---I can't remember exactly. I remember hitting the console though.

Can you remember what part of the console you hit?---Yes, there was a handbrake.

A handbrake?---I remember hitting that.

Can you describe what the console looked like?---I can't really remember very much. I just - I

> think it was just a standard, it didn't actually have a lift-up console or anything. It was just a standard console with the handbrake there.
>
> HIS HONOUR: You're describing a pull-up handbrake from the console?---Yes. I can't remember exactly I'm sorry.
>
> MR REEVES: Can you remember where the gearstick was, whether it was in the centre or on the - - ?
> ---The gearstick was also in the centre of the console, from memory.
>
> You said that you can remember getting scratches, cuts, can you remember how that happened? If you can't you just say so?---I can remember hitting the driver's seat. I smashed - like my face was being hit against the driver's seat.
>
> Where on the driver's seat?---Around the top of it.
>
> On which side, the passenger side or the - - -?
> ---On the inside.
>
> I'm sorry?---Next to the console.
>
> Next to the console?---This side, the left side of the driver's seat, the right side of me."

She described a "pull-up" type handbrake, together with a gear stick, in the centre.

She said she was "being thrown around quite heavily", was "very scared", and "actually thought 'I might die'". She said that she was "being thrown all over the place". Earlier, she had said that her seat belt was "very loose".

The van ended up on its wheels facing north, off the north side of the east-west highway. Both doors had come open as the van rolled, but the passenger door had slammed shut and remained jammed shut. The plaintiff said

that at that time she was wholly within the car. In cross-examination she agreed that she had later told Constable Coleman at Tennant Creek that "when [the vehicle] stopped I was hanging outside the passenger door, though my seat belt was still holding me in the car". However, in her testimony she said that this was not the case, explaining that she had made her statement to Constable Coleman whilst "in a lot of pain".

She said that the defendant, the driver, "jumped out" through the driver's doorway. At this time the plaintiff was "very distraught, suffering a lot of pain" in her pelvic region, her legs and back. She had a few cuts and scratches, one to the face and one to the inside of the right knee. The defendant was crying and running around frantically. There was a lot of petrol around. She saw the defendant try unsuccessfully to open the passenger side door. The defendant then dragged her over the centre console or hump, past the steering wheel and out through the driver's doorway; it took some time to do so as the defendant was slightly built and the plaintiff was a "lot bigger", though she assisted by using her hands. The defendant dragged her away from the vehicle and she was trying to "crawl along", because they thought that the van "was going to blow up". The defendant made her comfortable by the side of the bitumen on a type of bed under a tarpaulin. She said that the defendant at this time was "very upset, very distraught" and not long

afterwards had said to her: "Sorry, I lost it. I hit the brakes too hard. I should have known."

Eventually, some motorists came by and stopped, Soudan Station was notified and sent a nurse, Mrs Wales, who gave the plaintiff Pethidine for her pain by injection, and police arrived from Avon Downs Station. She said that the police and the nurse "arrived around the same time". The nurse provided assistance to her at the scene. She saw the police speaking to the defendant, but did not hear their conversation.

The plaintiff and the defendant were driven to Soudan Station - during the course of that drive she "was in tremendous pain" - and then flown by the Flying Doctor Service to Tennant Creek where they were both admitted to hospital. The next morning, 28 July, police took statements from them. The plaintiff signed her statement with a cross. Before making it, she had had "a great amount of pain killers". In that statement, Exhibit D5, she said:-

> "My full name is Sheryl (sic) Lee McDonald and am currently unemployed though do work as a Receptionist Typist.
>
> On Saturday, 27th July 1985 I was the passenger in a white Ford Escort Panel Van NSW JBD-876 travelling west on the Barkly Highway just past Sudan-Station. I was in company with Tanya Cox who was driving the vehicle and is also the registered owner.
>
> It was about three o'clock in the afternoon and we were travelling on a straight stretch of road which was bituminised. We were travelling at about 100 KPH as it is a good road, with two lanes. It was about this time that another vehicle, travelling east went past us. I think

> it was yellow in colour. Just as the vehicle went past, a rock was thrown up onto the windscreen, causing it to shatter completely. Tanya and I couldn't see out the windscreen. Tanya and I panicked and then I can remember Tanya losing control of the vehicle in the gravel on the right hand side of the road. The vehicle then turned over about five or six times, starting the first roll on the drivers side and finally came to rest on its wheels. When it stopped I was hanging outside the passenger door, though my seat belt was still holding me into the car. The next I remember was Tanya trying to get me out of the car. She finally did and then made me comfortable. She then went to the edge of the road to get help from a passing motorist. We were about 12 feet off the road and the vehicle easily visible to passing motorists.
>
> I haven't currently any fixed address in the N.T., though my address in Victoria to my parents and can be contacted through them.
>
> I have read this statement before signing it." (emphasis mine)

After a few days the defendant was fit enough to be discharged and to travel to Darwin. The plaintiff had suffered fractures in her pelvic region, particularly on the left side but also on the right, and remained as an in-patient in Tennant Creek Hospital for some 17 days. Whilst there she was in a lot of pain in her hip region, back and legs. Her right arm was strapped at the hospital; she later told Professor McNeuer that it was "bruised and painful". On discharge she travelled to Darwin where she became an outpatient at Darwin Hospital. She ceased having medical attention after about 3 months, in October 1985. She explained that her major pain was on the left side of her body. She claimed that the Darwin

doctors were unsympathetic to her, saying that her fractures were on the right side of her body not the left. She said however that this was due to the Tennant Creek X-rays having been wrongly marked "with the right side marked as left and the left side marked as right". She had been on crutches, and remained on them until about Christmas 1985. Meanwhile, she was totally incapacitated for work. She shared accommodation with the defendant, who stayed in Darwin for a couple of months until she was paid out by her insurance company for her claim in respect of her van.

The plaintiff remained in Darwin for almost 4 years. Prior to the accident she had become interested in obtaining qualifications as a child care worker. In Darwin she was admitted to the TAFE course in child care, early in 1986; she completed about 3 months of that course, and was given good grades. However, after 2 days of her first practical work experience, she found the pain too much and withdrew from the course. This depressed her. It was at about this time, some 9-10 months after the accident, that she first sought legal advice; hitherto she had thought that her pain would get better. She was unable to obtain secretarial or clerical work and felt that she was now physically unable to carry out bar or waitressing work. She managed to obtain employment with the Australian Electoral Commission in Darwin as a clerical assistant grade 2 from 17 November 1986 to March 1987. She later had a month's work with the Northern

Territory Electricity Commission. She also worked voluntarily with the Northern Territory Arts Council from mid-1986. She entered into a relationship with the man who is now her husband, from early 1987. Their first child was born on 20 June 1988; she suffered a lot of pain in the pregnancy, in her lower back and pelvis, particularly on her left side. She undertook a 6 weeks (32 hours) part-time TAFE course on word processing.

She left Darwin with her family in July 1989, and obtained part-time employment in Melbourne in October 1989 with a company called Access Training, doing clerical and secretarial work with that firm until the end of 1992. She was secretary to the managing director and carried out the duties of office manager. At first this amounted to working 24 hours per week, but later it was 20 hours per week on a 4 day week basis. Her second child was born in October 1991. She worked part-time because of her young child, and her feeling that she could not cope with longer hours by working full time. On occasions when she tried to work full time she suffered a lot of pain and took Panadol. She found she had some difficulties in carrying boxes to the post office and in moving office furniture around.

She did a 2 week course with the ANZ Bank training to be a transaction teller. Early in 1993 she and her family decided to move to Queensland; the major reasons were that there was a better chance of gaining

employment, and the cold in Melbourne caused her pain. They presently reside in Mackay.

She claims that she had recuperated as far as she could by 1987, but since then she cannot work in jobs which require lifting, sitting for long periods, stooping or bending; as a result she can no longer do the kind of work she had done before the accident - waitressing, bar work and sedentary clerical work. She claims that her opportunities for gaining work are therefore limited. She says that she always suffers pain, every day, in the lower back and groin; it is worse on the left side and it fluctuates in severity. She also suffers pain after sitting in the same position for an hour or so. She can no longer jog or play squash or tennis, and suffers pain if she walks for more than half a kilometre or so. She is unable to engage in a lot of the participation with her children that an uninjured mother can do, and she is helped by her husband. She is now nervous when travelling in motor vehicles. She has difficulty with vacuuming.

Until she came to court she had not seen the defendant for the last 6 years, since 1987. In that period she had spoken to her twice by telephone. The first occasion was in December, "some time" before Christmas 1992, when she returned the defendant's call. The plaintiff had received from her solicitor interrogatories directed to the defendant. Her evidence was that the defendant telephoned her, saying that she had

been told by the insurer that she might be required in court. Her testimony was (transcript pp50-51):-

> "Firstly, I asked Tanya what she was calling me about, and she wanted to know if there was any way that we could settle this matter out of court, and I said, 'Well, the court date has been set, [you've] had a long time to admit your negligence', and I said to her that I had some interrogatories there and would she mind telling me what she intended to say in court.
>
> Did she agree to that?---Yes. We talked about many things, we were talking about what we'd done and the conversation had - was very amicable."

According to the plaintiff, the defendant "said that she knew she had over-corrected and that she had panicked and lost it." In cross-examination, she said (transcript p114) that the defendant said "- - - she wasn't prepared to come to court"; and that she (the plaintiff) said that she hoped it "would settle out of court".

The second telephone conversation was in February 1993. The defendant had meanwhile been served with a subpoena to give evidence at the trial of the action. The plaintiff testified (at transcript p115):-

> "What did [the defendant] tell you then in February of 1993, Ms McDonald?---She rang me and told me that she'd been subpoenaed to appear in court, your Honour, and she said 'I'm going to say that you were driving.' And [the defendant] said, 'I'm going to tell the truth', and I said, 'You know what the truth is, Tanya.' - - - And she said 'That's all I've got to say. I'm going.' And she hung up the phone."

The defendant's account

The defendant commenced residing in Mackay in February 1985. It was approximately one month later, in

March 1985, that she met the plaintiff through some friends.

In April 1985 the plaintiff and the defendant commenced sharing accommodation.

During this period the defendant was employed as a reporter for the ABC radio in Mackay. The plaintiff worked at a community centre.

The defendant, who owned a 1974 Ford Escort panel van (the vehicle involved in the accident) occasionally assisted the plaintiff, who did not have a vehicle, by taking her to and from her work.

In July 1985 the plaintiff and the defendant decided to travel to Darwin via Northern Queensland, to see some friends. They departed Mackay in the first week of July 1985 and travelled to various locations in Northern Queensland: Airlie Beach, Townsville, Ingham, Cape Tribulation and back to Townsville. From Townsville they travelled across to Mount Isa. They spent two days in Mount Isa and left there at "mid-morning" of 27 July 1985.

On the previous night at Mt Isa they had had a "night on the town" with two friends, Narelle and Clair, during the course of which they both drank liquor. I observe that the defendant testified (at pp285 and 302 of the transcript) that prior to leaving Mt Isa she was aware that the plaintiff's driving licence had expired, but was unsure as to when or where they had discussed this fact.

On leaving Mt Isa, they had originally planned to reach Three Ways that day, but they subsequently changed their minds and decided to drive as far as Barkly Homestead, a shorter distance. They travelled to Camooweal where they stopped for lunch and to freshen up.

The defendant had driven all the way from Mackay to Camooweal. After leaving Camooweal the defendant testified that the following sequence of events occurred (pp285-287 of the transcript):-

> "After you left Camooweal did anything happen?---Yes, Your Honour.
>
> Could you tell His Honour what happened?---After leaving Camooweal, I'm not quite sure how far I drove but I did begin to feel tired and I asked Cheryl if she would take over the driving and she did, Your Honour.
>
> Did you stop in order for that to occur?---Yes, Your Honour.
>
> What happened when you stopped?---We swapped drivers, Your Honour.
>
> Do you recall how long out of Camooweal that was?---Half an hour to an hour.
>
> Was there any particular reason or any reason at all why you changed from being a driver to being a passenger?---Yes, Your Honour. I was becoming very tired and refused to drive further in case of an accident.
>
> Did you have a conversation with Ms McDonald at the change-over?---Yes, we would have had a conversation.
>
> What did you discuss when you changed over?---Just how tired I was and I didn't want to fall asleep at the steering-wheel and have an accident and that she would drive.
>
> After you changed driver did you continue to travel towards, I think you were saying, the Barkly Homestead?---Yes, that's correct.

Did anything happen after you changed from being a driver to a passenger?---Yes, Your Honour.

Would you tell His Honour what happened?---I fell asleep, Your Honour, and I'm not sure how long I was asleep for, but I woke up and the car was into - dirt and rocks coming up under the car which woke me. When I woke up I realised that we were in the dirt beside the road. I'm not sure whether - what my reaction was but I did obviously something to stir Cheryl, and she - - -

Just stopping you there; you said you did something to stir Cheryl - what was Cheryl doing when you woke up?---I think she was asleep, Your Honour.

At that time, she was driving the motor vehicle?---Yes.

After you stirred her, as you said, what happened next?---She awoke; corrected the car back onto the road and then I don't know - the car started to roll.

Do you know how many times the car rolled over? ---I'm not really sure how many times the car rolled, but it seemed to be like forever.

It eventually came to a standstill, did it?--- That's correct.

Prior to the stirring of Cheryl, can you recall if you had your seatbelt on?---Yes, I had my seatbelt on.

Can you recall if Cheryl had her seatbelt on?--- Yes, she did have her seatbelt on as well.

Can you recall what sort of a motor vehicle it was?---Yeah.

Sorry, not what sort of motor vehicle it was - what sort of seatbelts were in the motor vehicle?---The retractable - well, inertial - that word, inertia - - -

Inertia reel seatbelts?---Inertia reels, that's the one, yes.

So that the seatbelts came over your shoulder and around your waist?---That's correct.

> Following the rollover and the motor vehicle coming to rest, in what position were you in the motor vehicle?---I was still in the passenger's seat with my seatbelt still on.
>
> Where was Cheryl?---Cheryl was sitting on the dirt beside the driver's side of the car.
>
> Did she have a seatbelt around her or not?---Yes, she did.
>
> What did you do after the car came to a rest with you in the passenger's seat?---I released my seatbelt and jumped out through the driver's side of the car over Cheryl; I noticed that the petrol cap area was all damaged and I became scare (sic) of fire so I quickly went to Cheryl undid her seatbelt and then dragged her probably 12 to 15 feet away from the car.
> - - -
> Did you at any stage attempt to get out of the passenger door?---No, the passenger's side was jammed; I could not move it.
>
> How did you conclude that it was jammed?---I tried to push on the door and had no luck at all.
>
> And the condition of the driver's door - where was the driver's door as you came out of the vehicle?---The driver's side door was up against the front driver's side mudguard - guard.
>
> The motor vehicle was a Ford Escort panelvan?---Yes, that's correct.
>
> Did it have a console?---No, it did not have a console."

The Defendant also testified that as a result of the accident, she suffered severe cuts and bruises to her left elbow and shoulder and that the plaintiff had obviously hurt her pelvic area: "She was bruised from inside her groin, and down the inner side of her legs to her knee - - - ".

In evidence, the defendant admitted that she had given false statements in relation to the accident on several occasions: to the Avon Downs Police at the scene; to the Tennant Creek Police, next day; to her insurance company; and had sworn false answers to the plaintiff's interrogatories on two occasions, 19 June 1990 and 13 January 1993. She stated her reasons at transcript p307:-

> "for car insurance reasons, I wanted to get the money recovered from my car. Also I did not want this burden of this loan [obtained to pay for the car, and not yet paid off] to go on to my father as he was a guarantor at the time. Also I was made to - - - understand by Ms McDonald [the plaintiff] that this matter [of her claim] would not go any further [that is, it would not actually go to Court], but it has. And at the time it was easier to swear on paper than to - - - lie face to face with a judge."

In other words, she was saying she was prepared to lie, but not in Court; initially, to benefit herself by obtaining money from her insurance company for her damaged van, money she would not have been paid had the insurance company known she had permitted the unlicensed plaintiff to drive at the time of the accident; later, to assist the plaintiff with her damages claim, and no doubt to maintain her own consistency in her story.

The defendant testified that she had five conversations with the plaintiff between the accident on 27 July 1985 and February 1993, the contents of which were consistent with her present account that in effect she conspired with the plaintiff to defraud, by both of them

giving an account that the defendant was driving at the time of the accident.

The first alleged conversation took place after assistance had arrived at the accident scene; she testified at p290 of the transcript:-

> "The conversation [with the plaintiff] was about the car and the [fact] that Cheryl did not have a licence. The car was driven by an unlicensed driver. I'm not exactly sure what we - what the exact words were but we decided then to change our story and tell the police that I was driving the car, for car insurance reasons." (emphasis mine)

The plaintiff and defendant were then driven to Soudan Station and subsequently flown to Tennant Creek Hospital.

The second alleged conversation took place on the morning of 28 July 1985 at Tennant Creek Hospital, before the police visited them there; at p293 of the transcript:-

> "Prior to the police attending at the hospital on 28 July 1985, did you and Ms McDonald have a conversation about what you would tell the police? ---Yes, I think we did.
>
> And did you agree to tell the police what is set out in the statement I've taken you to?---Yes, we did."

The third alleged conversation occurred in Darwin in 1985:-

> "We discussed that the car was not fully paid off as it was under a loan; in regards to the damage to the car we discussed that Cheryl would help me out in regards to the car.
> - - -
> I asked her if she would help me out in regards to the car - - -

> Why did you do that?---Well she damaged the car, she - she was the driver, she was the one that did all the damage.
>
> What was her response to your request that she help you out?---She said she would."

In its context, the "helping out" was clearly a reference to telling the insurance company that the defendant was driving.

The fourth alleged conversation took place after the plaintiff had sued and the defendant was notified of the plaintiff's interrogatories. She said at p304 of the transcript:-

> "What did you say?---I asked her [the plaintiff] what was going on.
>
> And what did she say?---She told me that I would have to answer to some interrogatories. I asked her, what are they? And she said to me, 'just questions about the road width and the direction, how fast the car was going and stuff like that' and I said, 'Oh, all right, that's okay then.' I told her also that if it comes to court I would not get up in court and lie under oath, and I asked her also if she was going to settle out of court.
>
> And what did she say?---She said she was.
>
> As a result of receiving that information did you do anything?---I answered the interrogatories."

The fifth alleged conversation took place in February 1993, after the defendant had received a subpoena to appear in court; she testified at p305 of the transcript:-

> "- - - Firstly, do you recall the precise words that were said during this telephone conversation? ---Yes, I can.
>
> Can I ask you to tell His Honour what you said to Ms McDonald in the telephone conversation in 1993? ---Yes. I said to her that: 'I have been subpoenaed to appear in court to tell the whole truth and nothing but the truth'. She said: 'The truth is that you were driving', and I said: 'No, Cheryl, we both know what the truth is' and - - -
>
> Yes, go on, finish your answer?---And I said: 'See you in court', and hung up the phone.
>
> So that is all that was said during that telephone conversation?---That's it, yes."

So much for the defendant's account.

The amended Defence

On 26 February 1993, the defendant applied to amend her Defence. The plaintiff consented to the order sought, which was made, as far as material, in the following terms;

> "1. The defendant have leave to amend her Defence in accordance with annexure "A" to the affidavit of John Thomas Stewart sworn 23 February 1993 and filed herein."

Par1 of Annexure "A" states:-

> "The defendant denies the allegation contained in paragraph 1 of the amended statement of claim that at all material times she was the driver of the Ford Escort panel van motor vehicle registration No. (NSW) JPD-876.

Particulars of Denial

At all material times, the plaintiff was the driver of the [vehicle]."

The effect of the defendant's falsely sworn answers to interrogatories

It is clear from *Gannon v Gannon* (1971) 125 CLR 629 at 640, per Menzies J that an admission in an answer to an interrogatory can be contradicted by other evidence given by the party making the admission, but it cannot be withdrawn. See also *Hollis v Burton* [1892] 3 Ch 226.

Rule 30.11 of the Supreme Court Rules renders answers to interrogatories admissible in evidence at trial, but the weight of that evidence is for the court. The weight is assessed by looking to the party's source of knowledge and to the circumstances in which the answers to the interrogatories were made; see *Lustre Hosiery Ltd v York* (1935) 54 CLR 134 at 143-144.

Here, the defendant had direct knowledge of what occurred; she was in a position to answer the interrogatories accurately. However, the surrounding circumstances in which she answered the interrogatories must be considered. That consideration necessarily involves the question of the respective credibility of the plaintiff and defendant.

In relation to the defendant's answers to the interrogatories, Mr Reeves made the following submission:-

"The first submission is that the defendant is not credible; your Honour won't be surprised to see that I refer to the fact that she confessed

> to lying to all sorts of people so I won't restate that."

He referred to *R v Secretary of State for the Home Department; ex p. Mughal* [1973] 3 All ER 796 at 803, where the present assertion that lies had been told in the past was to secure a benefit, and submitted:-

> "- - - your Honour should have the same approach to Ms Cox who's "cried wolf" now to just about every institution that she's dealt with - the police, the insurance company, this court - in her answers to interrogatories for eight years and now she wants to tell you that 'they're all lies, and really, I'm tell the truth now.'"

On the other hand Mr Southwood of counsel for the defendant, submitted (at pp387-8) that:-

> "The defendant came up with the initial story [that she drove the van at the time] because - - - the plaintiff was unlicensed and the insurance on the [motor vehicle] required there to be a driver's licence [held by the driver]. She was concerned about recovering insurance money - - -
>
> Why we say the evidence of Miss Cox should be preferred is that her change in story came about in these circumstances. She was informed at some stage prior to the matter coming on for trial that the insurer was looking after the matter, and evidence is given of that. Shortly prior to trial she was subpoenaed. Following the subpoenaing of the defendant by, in fact, her own and the insurer's solicitors, Miss Cox then endeavoured to contact the plaintiff, Miss McDonald, and also contacted the plaintiff's solicitors and also contacted her own solicitors, advising them of the true story in this matter.
>
> Her explanation for that was that she didn't wish to give perjured evidence to this court, she was not prepared to come before the court and lie orally on oath. She made a number of admissions which have to be admissions against

> interest. She admitted that she had told untruths to the police, she admitted that she told untruths to the insurance company in respect of the property damage to the motor vehicle, and she admitted that she made false oaths when she swore the answers to interrogatories in this matter.
>
> And essentially, the effect of her evidence is that she was prepared to go along with the false story on the basis that all of this would, in effect, go away. The matter would be settled out of court and that would be the end of the matter. However, that was not to be. As it turned out, the matter was not settled, and the matter proceeded to trial."

I conclude that while the Court must have regard to the sworn answers to the interrogatories of 20 June 1990 and 13 January 1993, little weight should in the end be given to those answers; the reasons for this will appear later in the judgment.

Proof of who was driving at the time of the accident

Mr Reeves of counsel for the plaintiff invited me to deal with the central question of who was the passenger and who was the driver of the van at the time of the accident, in alternative ways. However, I propose to examine the independent evidence and to assess it in so far as it bears on the probabilities of who was driving, as well as assessing the credibility of the plaintiff and defendant, to ascertain whether the plaintiff has established on the balance of probabilities that the defendant drove the motor vehicle at the time of the

accident on 27 July 1985. I turn first to the independent non-expert evidence.

(1) The non-expert evidence bearing on who was driving

(a) The evidence of Constable Kinsella

Constable Kinsella was called by the plaintiff to give evidence as to what he had observed on 27 July 1985 when he attended the scene of the accident from Avon Downs Police Station, at about 5.20pm, some 2 hours after the accident. He said that Mr and Mrs Wales were already at the scene, assisting the plaintiff and defendant.

Constable Kinsella noted in a memorandum that day (Exhibit P6) that on arriving at the scene of the accident -

> "I observed a white 1976 Ford Escort panel van about 6 metres off the north side of the road in an upright position - - - The passenger of the vehicle, she was suspected of having a broken pelvis, shock and suffering internal injuries. [He was clearly referring to the plaintiff]. Standing nearby was another female, Tanya Michelle Cox the driver of the motor vehicle, she was suffering a lacerated left arm and possible fracture."

He also there noted that the plaintiff had "severe bruising from the seat belts"; unfortunately, he did not note on which shoulder the bruising had occurred. See p146 of the transcript and Exhibit P7.

In his handwritten document of 27 July 1985 and in an internal memorandum of 1 August 1985 Constable Kinsella recorded that:

> "On speaking to the driver, Cox [the defendant] stated that the accident occurred at about 3.30 pm whilst they were travelling west on Barkly Highway. They passed an oncoming motor vehicle which threw up a stone shattering the windscreen completely blocking the view - - -.
>
> I had statements taken from both victims on the Sunday morning by members of Tennant Creek Police Station at the hospital, these are consistent with the story that Tanya Cox told me on the highway."

He testified that he spoke to the plaintiff and defendant at the scene of the accident on several occasions to ascertain what had happened. He said that the plaintiff told him that -

> "She was the passenger in the vehicle and they were driving along the highway towards Tennant Creek and there [had] been a passing car and a stone was thrown up onto the windscreen and smashed it and they lost vision and they veered off the road and then when they were trying to regain control - - - control was lost of the car and it rolled some times - - - five or six times - - -".

He said that the defendant told him a very similar story.

Mr Reeves, in examination in chief, asked Constable Kinsella: "Why didn't you make any further enquiries about who was the driver and who was the passenger"; he answered:

> "- - - looking at the scene, the way the vehicle ended up, the skid marks, the tracks in the dirt and - - - the drain and what they had told me I felt it was a reasonable conclusion exactly as

> they stated. So I had no reason to doubt them - - -" (p147 of transcript).

I observe at this point that both the plaintiff and defendant gave samples of blood for alcohol analysis; there was a recorded finding of a 'nil' alcohol level for both.

Constable Kinsella also prepared a road accident report (see Exhibit P6) in which he included a sketch plan prepared with the aid of tape measurements taken by the Police at the scene.

Constable Kinsella described the sketch plan and the southern shoulder of the road. In cross-examination, he said the vehicle had 'veered off' the road, completely leaving the bitumen and travelled along in the drain. The tyre marks prior to skid number 1 suggested that the car veered off the road, in a gentle angle, with the tyres in alignment, but came back on to the bitumen in a much sharper angle. The witness gave a considerable amount of evidence about the skid marks he observed and marked.

Constable Kinsella said that at the accident site he had only a cursory look around the vehicle when inspecting it for damage, and that he had no independent recollection of the damage the car suffered. I note that in his handwritten document (Exhibit P6), he wrote: "the vehicle was totally wrecked - - - I believe that no mechanical fault attributed to the accident."

He said that "I honestly don't believe the vehicle rolled over on the bitumen at all." He also

stated that the motor vehicle was fitted with inertia-reel type seatbelts. The front windscreen had completely gone. He was unable to recall if the passenger door window had been smashed, or simply wound down. There was damage to the top right hand of the passenger door and to the roof immediately above that portion of the door. He also said that he could not recall whether the left hand front tyre of the car was inflated or replaced at the scene.

(b) Mrs Wales' evidence

As at 27 July 1985, Mrs Wales was living on Soudan Station. Her husband was the station manager.

As the wife of the station manager, Mrs Wales had responsibilities in respect of the Flying Doctor Service; however, as she was also a registered nurse, she had available extra medical and first aid equipment, if necessary. It was her practice to attend at roadside accidents in the area. Mrs Wales attended this motor vehicle accident on 27 July 1985.

Upon arriving at the scene, she made several general observations about the state of the scene generally and more specific observations about the plaintiff's and defendant's injuries.

She also gave evidence that whilst she was attending to the plaintiff on the ground the defendant, who was standing there, had a conversation with the plaintiff in her presence. Her evidence on the point,

elicited by Mr Southwood was as follows, at pp265-267 of the transcript:-

> "So take your time, think about it, and if you could just tell his Honour what, as close as you can, the person who was standing up said?--- Right. As close as I can remember the words, the girl standing up [the defendant] said they were going to report the accident as being the opposite to what it was, as far as the position of drivers and passengers were concerned.
>
> Right?---There was a reason for that, and I remember the words of either 'no licence' or 'temporary loss of licence' being used.
>
> And did the person on the ground [the plaintiff] say anything in response to that?---Initially, the woman injured on the ground was shaking her head in the negative sense, not agreeing with the woman standing up. As close as I can remember, the few words she said were, 'No, don't worry about it' or 'No, don't do that'.
>
> Then, did the person standing up respond?---Yes.
>
> What did the person standing up then say, as best you can?---As best as I can remember, it was a repeat of what she said initially.
>
> Yes?---It was a repeat conversation.
>
> And was there a further response from the person lying on the ground?---Yes, at first it was a negative response.
>
> Yes?--And then the woman standing up, as close as I can recollect, repeated the conversation again.
>
> Yes?---And then the woman who was lying on the ground was in agreement, and she showed that agreement by nodding her head, north to south, up and down.
>
> Did you subsequently become aware that the police had arrived at the scene?---Yes, I was aware the police had arrived at the scene.
>
> Did you see the person who was standing up do anything?---Well she had walked - she walked over to the policeman and she spent some time conversing with the policeman but I did not overhear the conversation.

> After she had done that, did you see her do anything else?---She returned to where I was attending the woman lying down.
>
> Did you then notice that she spoke to the person lying on the ground again?---She did.
>
> Can you recall as best you can what she said, if anything?---As best as I can remember, as closest to what I remember, she [the defendant] said that she had told the policeman what she said she was going to tell him.
>
> Did the person on the ground respond in any way to that?---She did.
>
> How did she respond?---She nodded her head; she didn't verbally say anything but she did nod her head." (emphasis mine)

In cross-examination, Mr Reeves put to Mrs Wales that her recollection of this conversation, and of its contents, was very hazy and that her memory of the events was "refreshed or updated". However, the witness maintained her position that the conversation between the plaintiff and defendant, albeit one sided, took place in the manner she described it. She said it was "not really" hazy, because the accident was:

> "- - - unusual, and I remember it because of the feeling that was left with me that the reason the conversation took place was because of something of serious consequence - - -" (p281 of the transcript).

After being referred to a letter she had written to Tennant Creek Hospital (Exhibit P22) Mrs Wales' evidence was that the plaintiff had bruising to her neck area, the exact location and extent of which she could not

recall, though it was in the front of the plaintiff's body. Mrs Wales also gave evidence that the plaintiff suffered bruising to "- - - the right, the centre, and the left of [the perineum]"; that was all the bruising she could recall.

(2) The expert evidence bearing on who was driving

(a) The evidence of Mr Hall

Mr Hall, a consultant engineer, who has a considerable amount of experience in assessing motor vehicle accidents (see Exhibit P9) gave evidence bearing, inter alia, on whether the plaintiff or defendant was the driver at the time of the accident.

Mr Hall had prepared two reports (Exhibits P10 and P11) in which he set out his opinion as to how the accident of 25 July 1985 occurred. His opinion was based on the following materials, which had been provided to him: the Police file in relation to the accident (Exhibit P6), the answers to interrogatories sworn by the defendant (Exhibits P15 and P16), four enlarged photographs of the damaged vehicle (exhibits D1-D3 and D7) and Australian Design Rule No. 8.

The admission into evidence of both of Mr Hall's reports was objected to, on the basis that the portions of the reports which refer to the windscreen are opinions based on hearsay, as the type of windscreen with which the vehicle was fitted at the time of the accident had not

been proved, or the relevant standards as to windscreens. However, these portions of the reports bear on the issue of whether the driver was negligent, not on who was driving, so they are not presently relevant.

The reports were prepared on the basis that the defendant was the driver, as was stated in the Police file (Exhibit 6).

Mr Hall was present in Court when Constable Kinsella testified. Clearly, in Mr Hall's opinion, the account initially given by the plaintiff and defendant was consistent with the evidence adduced from Constable Kinsella.

However, in cross-examination, Mr Southwood put the following proposition to Mr Hall, a proposition which accords with the account currently given by the defendant:

> "The general manner in which this vehicle has ended up is consistent, is it not, with a situation where the driver falls asleep, goes off the road; the passenger realises that the driver has fallen asleep, wakes the driver up, the driver overreacts in terms of trying to return to the bitumen, the car then skids across the road and rolls over, ending up in a north-easterly direction?---It is a consistent scenario, yes."

In the end, I consider that Mr Hall's evidence is of no utility in deciding who was the driver at the time of the accident. As he freely admitted in evidence, the evidence available is "too inconsistent" to determine who was the driver and how the accident actually occurred.

(b) The evidence of Dr McLean

Dr McLean, an expert in road accidents (see Exhibit D12), gave evidence bearing, inter alia, on who was the driver in this case.

Dr McLean had prepared 3 reports (Exhibit D13-D15) in which he set out his opinion as to who was the driver at the time of the accident. His opinion was based on the following materials: Mr Hall's report, the defendant's answers to interrogatories of 20 June 1990 and 13 January 1993, facsimile photographs of the damaged vehicles Exhibits D1-D3 and D7, and the Police report (Exhibit P6).

Initially, all three reports were received into evidence without objection. However, in the course of his evidence, it became apparent that Dr McLean had referred "in a general sense" to three articles which he had co-authored. Mr Reeves then objected on the grounds of relevance and fairness to those parts of the reports prepared by Dr McLean in which he had referred to the articles.

It is not necessary to rule on this issue insofar as his evidence bears upon the identity of the driver; the part in question relates to negligence. The two later reports (Exhibits D14 and D15) in relation to which Dr McLean referred "in a general sense" to the two articles (pelvic tolerance and protection criteria in side impact and characterization of rollover casualties) clearly related, however, to matters within his field of

expertize, biomechanics: see *Clark v Ryan* (1960) 103 CLR 486 and *Weal v Bottom* (1966) 40 ALJR 436.

In chief, Dr McLean admitted that the available evidence is contradictory; he testified as follows in cross-examination by Mr Reeves:-

> "- - - I'm suggesting that one of the central aspects of your - - - theory about who was in what position inside the vehicle at the time of the accident - - - is that the plaintiff was located in or hanging out of the driver's seat after the accident or after the vehicle came to a standstill. That's right, isn't it?---No, my conclusion about which person was in which seat is based primarily on the damage to the vehicle and the injuries sustained.
>
> Right?---The evidence relating to position that - after the accident, I believe, is consistent with the conclusions I've based on the other evidence which I've just mentioned.
>
> - - - If the person in the driver's seat was restrained within her seatbelt, and if the driver's side door was open during most of the rolling process, you would have to look for something inside the vehicle, apart from the door, to explain - - - the injuries being sustained, wouldn't you?---No.
>
> Why not?---Because a seatbelt does not - a seatbelt provides restraint but not absolute restraint. But I would expect in a side impact, whether it be an impact from a vehicle going sideways into an object - - - or, as in this case, striking the ground during a roll over, I would expect a person restrained by a seatbelt to move some considerable distance laterally. - - - A seatbelt is not a rigid restraint.
>
> No, but the seatbelt restrains the person in the position that they're in, in relation to their lateral alignment, doesn't it?---No, a seatbelt is less effective laterally than forwards in that respect.
>
> - - - if a person is restrained within their seatbelt, the left side will still - - - remain on the left side within a limited range and the right side of the person will remain on the right side within a limited range. They'll sit

within that approximately position, won't they?---To the extent that right does not become left, yes.

Yes, they won't be able to turn round at 90 degrees, will they, to their original position in the seat?
---If - if they are normally restrained by the seatbelt - and I emphasise 'normally' meaning that the lap position is still across the upper torso - - -

Yes?---And that the seat has not collapsed, they have not, to use the common term, "submarined" - slid out from under the lap belt - I would agree. If however the person has in some way come from the normal position in relation to the seatbelt, which is entirely possible in a roll over, well then one can be less sure but - even to the extent of the reported evidence of being at least partially outside the vehicle when the vehicle came to rest, but possibly still with the seatbelt around them.

Well, are you seriously suggesting that the driver of the vehicle could be outside the driver's side of the vehicle in such a way that her left-hand side could have struck something like the ground?---I would regard that as not impossible but certainly - - -

Highly unlikely, surely?---Yes, highly unlikely.

Yes. So if His Honour accepts that the blow which caused the injuries was a blow to the left-hand side of the plaintiff's body and she was sitting in the driver's seat, you would look for something inside the motor vehicle to cause that, wouldn't you?---Yes.

- - -

MR REEVES: - - - If you assume that the force which caused the injuries to the plaintiff came from the left-hand side, impacted on the left-hand side of her pelvis, and if you also assume that there was no central console in this motor vehicle, could you tell us what other part of the motor vehicle you think she might've struck, or might've struck her, to cause the injuries?---The - the evidence in the photographs suggests that the seats were roughly in the same alignment, fore and aft, so I would rule out the back of the - the side of the back of the other seat. The other object coming in - potentially

coming into contact with the left side of her pelvis would be the other occupant of the vehicle.

Right. Now if you add to that that the force impacting with her left-hand side would've had to have been a substantial force, you would agree with me, wouldn't you, that you'd expect there to be some equivalent injury to the passenger that she struck?---Not necessarily. The - in the incident - - -

That's the likelihood, isn't it?---It would depend on the relative strength, if you will, of the pelvic bones of the two individuals.

That's the likelihood, isn't it?---No, I'm not saying that's the likelihood. I'm saying it would depend on the relative strength of the pelvic bones of the two individuals.

- - -

If we take your theory and assume that Ms McDonald is sitting in the driver's seat, that she sustained an injury which has been caused by a substantial blow to the left-hand side of her pelvis and that Ms Cos is sitting in the passenger seat and that that blow is as you've speculated, caused by Ms Cox coming into contact with Ms McDonald's pelvis on the left-hand side, you would expect there to be some evidence of some contact on Ms Cox' body, wouldn't you?---I would just like to clarify that this is not my theory. I'm answering your questions. I believe the impact was on the right-hand side [of the plaintiff as driver]. But - - - if I'm asked to assume that the impact was on the left-hand side [of the plaintiff as driver], - - - if - - - there were an impact between the two individuals at the level of the pelvis, we know that one of these two individuals sustained fractures of the pelvis, if the other person did not sustain a fractured pelvis I would expect there to be some bruising which may possibly not become evident until a day after the accident, but I would expect there to be some bruising at least.

Some evidence of the contact?---Yes.

Okay. Now apart from striking the passenger and you've ruled out the seats, can you think of anything else that a driver, sustaining a left impact injury, substantial left impact injury,

might've struck?---There was a - a loud speaker box which, in the photographs, is shown immediately behind the seats, which I gather was not tied down in any way, it is perhaps conceivable that that may've been involved but I would regard that as unlikely. And I - I'm not aware of what other objects were in the vehicle. In a roll over, naturally enough, anything that is not tied down is free to move around inside the vehicle and where it is - where it comes to rest after a multiple roll over such as this, where it finally comes to rest is not necessarily an indication of where it was during the roll.

Yes, but you 'consider that's unlikely?---Yes, I (inaudible).

There is really no other object which could've struck a substantial blow to the left-hand side of the driver, is there?---I agree, to the pelvis.

- - -

If she [the plaintiff] was on the passenger side of the vehicle after this accident, if she was restrained within her seatbelt, the likelihood is that she was the passenger immediately before the accident?

- - -

- - - It is inconceivable to me that if two people were in a car, each restrained by a seatbelt, that after a roll over such as this they would somehow or other exchange positions and be restrained by the other seatbelt.

Yes. So the answer is yes, isn't it, that the absolute certainty would be that if she was in the passenger seat, restrained by the seatbelt after the accident, that the absolute certainty is that she would've been in that position immediately before the accident?---I dislike absolute certainties but I cannot conceive of an alternative explanation."

Notwithstanding that Dr McLean expressed an opinion on the materials placed before him as to who the driver of the motor vehicle probably was at the time of

the accident - the plaintiff - I consider that his evidence is of little utility on the point, particularly when viewed in light of the medical evidence.

(c) Professor McNeuer's evidence

Professor McNeuer, an orthopaedic surgeon, gave evidence on two occasions, 3 and 4 March 1993 during the course of the trial, via a video link. I found him a credible witness.

On the issue of whence the blow was received which caused the plaintiff's pelvic injuries, Professor McNeuer testified that he had examined the plaintiff on 3 occasions (see Exhibit P17): 20 November 1987, 5 December 1990 and 3 July 1992. His diagnosis was that she had suffered, inter alia, a fractured pelvis in 5 locations.

His report of 23 November 1987 states: "she stated that she ended up on the ground outside the car". When asked the context in which the plaintiff made that statement, Professor McNeuer said "I don't think that there was any specific context to it. It was just a statement that she made to me."

When examined in chief, Professor McNeuer testified as to the direction of the blow which caused the plaintiff's pelvic injuries, as follows:

> "You're aware that there's some issue about whether she was the passenger or the driver of the vehicle?
> ---I've been informed of that, yes.
>
> Looking at the nature of the injuries, are you able to say in your opinion what type of blow, what severity of blow and where on the body that blow would've been struck to achieve those

> injuries that you observed on the X-rays and from examination?
> ---That - that type of fracture pattern is only received on a - from a - on a severe blow from the side of the pelvis.
>
> And to which side in her case?---Well - well, taking everything into consideration it would appear that the blow was on the left side.
>
> What factors lead you to that conclusion in particular, doctor?---Number one was the fact that Tennant Creek found it necessary to X-ray the left femur, which indicates that there must've been some more pain on the left side than on the right in order to request that. Number two, there was a fracture through the floor of the acetabulum, left acetabulum, which is the hip joint, and number three, ever since the accident - well, at least all the time - each time I have seen her her complaints have been left-sided." (emphasis mine)

Mr Southwood, in cross-examination, tested Professor McNeuer's version, particularly as to the direction of the blow, quite vigorously; see pp12-18 of Exhibit P20 and pp4-13 of Exhibit P21. However, Professor McNeuer adhered to his opinion that the plaintiff was struck on her left side, for the reasons he had stated, notwithstanding the following attack made in respect of his reliance on the factor "number one" (above):

> "In relation to Tennant Creek, you suggested that because there was an X-ray taken of the left femur, that there must've been complaints or concerns about the left side?---Yes.
>
> However the X-ray is marked 'right'?---Yes.
>
> So that could equally suggest, could it not, that the complaints were about the right side but there has simply been an error as to which side has been
> X-rayed?---Well, your assumption is just as good as mine. I wouldn't have a clue.

> You agree that that's a possibility though, in relation to that?---Well, it would have to be an illogical possibility."

It is to be noted that in cross-examination (pp9-13 of Exhibit P21) Mr Southwood clearly put to Professor McNeuer the proposition about which Dr Sinha had testified (pp33, 50 of Exhibit P20), which went to the question of where the causative blow struck on the plaintiff's body. Dr Sinha considered that the plaintiff:

> "- - - did not fracture the acetabulum as such, but the fracture from the superior pubic ramus extended up to the base of the [acetabulum fossa] - - -".

Professor McNeuer rejected this proposition; and see below under (d). The importance of this suggestion, together with the comments of Mr Reeves at p5 of Exhibit P20, is that the plaintiff and Professor McNeuer were put on notice that his opinion as to where the blow struck, was contested.

(d) Dr Sinha's evidence

Dr Sinha, a general surgeon, gave evidence that he examined the plaintiff Ms McDonald on two occasions: 14 February 1991 and 3 February 1993 (see Exhibits P18, P19 and D9).

However, in relation to the issue as to whether the blow causing the pelvic injuries to the plaintiff

struck her left side, Mr Southwood of counsel for the defendant ultimately informed me that:-

> "In relation to the evidence of Mr Sinha, I will not be submitting to your Honour at the end of this case, that his evidence [at pp24-25 of Exhibit P20] in relation to what forces caused the accident, should be accepted."

Indeed, in Mr Southwood's closing address and reply, Dr Sinha's theories of the cause of the injuries were not pressed. It is unnecessary at this point to canvass the remainder of Dr Sinha's evidence, which goes to quantum of damages.

(e) Dr Johnstone's evidence

Dr Johnstone's report (Exhibit D16) was admitted into evidence, although he was not called to testify.

In his report dated 15 July 1986 (after seeing the plaintiff on 27 May 1986) Dr Johnstone states:-

> "Complaints
>
> (1) Constant ache in right groin.
>
> - - -
>
> Examination
>
> (1) Indicated site of pain - both sides of groin but more so on the right - - -
>
> (2) Tender on pressure over the symphysis pubis.
>
> (3) Tender in right groin on distracting the pelvis.
>
> (4) - - -
>
> (5) Full flexion of the right hip joint produces pain in the right groin. No trouble with flexion of the let hip joint.
>
> - - -"

During the course of the trial, the following proposition was put to Professor McNeuer in cross-examination:-

> "Now in relation to the left side complaints, would your opinion change if in May 1986 the following complaints were made and the following examination results were obtained by Doctor Johnstone. Doctor Johnstone examined the plaintiff on 27 May 1986. When he did so he noted as complaints, firstly, that there was a constant ache in the right groin. He conducted an examination and after his examination he noted that there was pain on both groins but more so on the right, that after prolonged standing, etcetera, both groins were affected and that full flexion of the right hip joint produced pain in the right groin. There was no trouble with flexion of the left hip joint; and that abduction of the hip joints causes pain in both groins. Would that affect your opinion in terms of the nature of the complaints?---No.
>
> Why wouldn't it affect your opinion?---Because the
> X-rays don't agree with that. The X-rays don't show that that would be a logical conclusion."

In re-examination Professor McNeuer went on to clarify this response in cross-examination, in the following terms:

> "Following on from that, - - - my learned friend - - - read out to you - - - an examination conducted in May of 1986?---Yes.
>
> Referring to the right side?---Yes.
>
> You said that that didn't affect your opinion. Do you remember that?--- - - -I do, yes.
>
> Why wouldn't it affect your opinion?---Because - - - the symptoms, as he describes them, or the findings as he describes them, do not fit in with the injuries shown radiologically and - - - I believe they would only be of any significance if subsequent examinations had shown - - - the same thing.
>
> All of your examinations showed the opposite in relation to the side of the body that the pain

was experienced on?---She had pain on both sides but more - much more and consistently more on the left."

I accept Professor McNeuer and accordingly I give no weight to the report of 15 July 1986.

(f) Mr Schmidt's report

(i) The background

Mr Schmidt's report (Exhibit D17) dated 30 March 1993 was later received into evidence. Its reception came about in the following way.

On Thursday 5 March 1993 after the defendant had finished giving her evidence, Mr Southwood said at p343 of the transcript:-

"MR SOUTHWOOD: That, at this stage, subject to seeing the X-ray returned by Professor McNeuer is as far as the defendant's case goes, Your Honour. There may be a - - - further medical report that I will seek to tender, - - - ." (emphasis mine)

Later, he said at p346:-

"- - - essentially that is it, subject to being given the opportunity to consider that marking of the acetabulum on the X-ray, if anything flows from that.

HIS HONOUR: - - - you haven't had a chance to look at that yet?

MR SOUTHWOOD: No.

HIS HONOUR: All right; but you're reserving your position in case something surprising to you arises?

MR SOUTHWOOD: Something emerges from that, then it may be we need to do something in response to it, if Your Honour pleases." (emphasis mine)

On Friday 26 March 1993, when the Court resumed Mr Southwood orally applied for an adjournment to call Mr Schmidt to testify, as a result of having seen the X-rays for the first time the day before. The application was granted on terms; see the written reasons for the ruling of 26 March.

The hearing resumed on 13 May 1993, Mr Southwood sought to tender a report by Mr Schmidt; the tender was opposed. Mr Schmidt considered that the pelvic injuries could have been caused by a blow from a different direction to those to which Dr Sinha and Professor McNeuer had advanced. His report had been sent to Professor McNeuer who had died, I was informed, before he could provide his final views on certain matters to Mr Reeves. Mr Southwood then informed me that Professor McNeuer had in fact provided a report of 19 April 1993 in response to Mr Schmidt's report, and it had been partially discovered to the defendant. Mr Reeves took objection to this, on the basis that Mr Southwood had wrongly disclosed to the Court certain matters which had been discussed on a "without prejudice" basis between the parties. Mr Southwood said that the discussions had not been entered into on that basis; he pressed the tender of Mr Schmidt's report.

I ordered, ex tempore, as follows:-

> "I consider that the report of Mr Schmidt, should be received into evidence - - -. I should say that in ruling that that report is admitted into evidence I've taken no account of the - - - matters allegedly the subject of 'without prejudice' discussions between the solicitors or between counsel."

I also ordered that any costs thrown away by the late start on the Thursday were by consent to be borne by the defendant.

The reason for ruling in that way was that the general conduct of the defendant's case, the way in which the plaintiff had conducted her case, placing practical importance on the issue of the direction of the blow which caused the pelvic damage, and in particular the defendant's line of questioning in the cross-examination of Professor McNeuer (especially on 4 March 1993), the reservation made by the defendant in generally closing her case - all these matters clearly had put the plaintiff on notice that Professor McNeuer's opinion as to the interpretation of the X-ray films could still be sought to be challenged.

(ii) <u>The report</u>

Mr Schmidt's report sets out some initial matters, and then refers to the fractures identified on both the right and left hand side of the pelvis, from various X-rays taken at various times.

At pp2-3 of his report, Mr Schmidt sets out his opinion, based on those X-rays, viz:-

> "This woman has sustained "T" fractures to the left acetabulum in its anterior aspect and fractures to the pelvic ring.
>
> Isolated anterior wall "T" fractures of the acetabulum are caused by a blow to the greater trochanter of the femur with the femur externally or outwardly rotated. The blow must come from behind. An example of such a fracture could be seen in a roller skater who falls direction on to the outer aspect of the hip.
>
> The pelvic ring injury seen with fractures of the superior and the inferior pubic rami bilaterally including the injury to the symphysis pubis is most commonly caused by a lateral force from either side or very occasionally from a crush injury from anterior to posterior (front to back). These can be either low or high energy injuries. For the pelvis of a healthy young person to fracture from a low energy injury it is necessary for the side of the pelvis opposite the direction of the force to be fixed. Such an injury is a crush injury. With the higher velocity injury such as being struck by a bumper bar then the energy can be dissipated through the pelvis causing bilateral fracture.
>
> For the fracture pattern in this case to have occurred in a motor vehicle accident the patient would have had to have been struck by a severe blow on the oblique/posterior aspect of the hip with enough energy to fracture the acetabulum then the pelvis.
>
> It would be unlikely that this fracture combination would occur as a result of the patient just being thrown about the interior of a vehicle in a rollover as the energy forces were probably not high enough. One could hypothesise that one could, in isolation, break an acetabulum or a pelvis but it would be unlikely to see both fractures created without a high energy impact.
>
> An ejection injury where the individual is thrown from a vehicle or comes out of a vehicle and strikes the ground or some object could reproduce this fracture pattern where the patient lands obliquely on the left buttock.

> This would cause an initial direct force on the greater trochanter significant enough to fracture the acetabulum. Driving the femoral head inwards would then allow dissipation of the remainder of the energy through the pelvis which could then result in the fracture pattern seen. An example of this type of fracture is seen in the individual who comes off his motor bike at speed landing with considerable energy on his hip.
>
> This fracture pattern could not occur in a person who was a passenger in a motor vehicle that rolled over where she was restrained by a seat belt and remained within an intact passenger cabin."

(iii) The weight to be given to Mr Schmidt's report

In his final address Mr Reeves submitted that:

> "- - - Mr Schmidt's report should be given little if any weight in the circumstances in which it is tendered."

In support of this submission Mr Reeves argued that:

(a) Mr Schmidt had not examined the plaintiff;

(b) Mr Schmidt's theories of the cause of the injuries were not put to Professor McNeuer; therefore, the rule in *Browne v Dunn* was not complied with in this case, and the consequence should be that no weight is given to Mr Schmidt's report. See *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 and *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362; and

(c) Mr Schmidt was not cross-examined and therefore the Court was not given an opportunity to assess the conviction with which he holds those theories: this argument seems to found on the rule in *Jones v Dunkel* (1959) 101 CLR 298.

In his reply Mr Southwood, inter alia, submitted that:

(a) in relation to the *Browne v Dunn* submission the plaintiff's submissions could not be sustained because:

(i) The nature of the defendant's case, as far as it involved expert evidence, and as far as it put in issue who was the driver at the time of the accident and how the plaintiff's pelvic injuries could have been caused, was put to Professor McNeuer. He had been cross-examined about the direction of application of the force, and, at length, about the nature of the fractures and the sort of forces which could produce them. Mr Southwood admitted that -

> "what wasn't precisely cross-examined on was, [that] the direction could be oblique posterior, and this notion of high energy versus low energy

impact - apart from that, the nature of the case was clearly put."

(ii) The calling of Mr Schmidt to testify had been foreshadowed by the defendant. Mr Southwood referred to what had occurred since, including obtaining a report from Mr Schmidt, the delivery of that report to the plaintiff, and the plaintiff's obtaining a report from Professor McNeuer in response to Mr Schmidt's report.

Mr Reeves objected to this being put to the Court (particularly the last part) as (i) disclosing 'without prejudice' communications between the parties; and (ii) being an attempt by the defendant to re-open her case, in reply. Mr Southwood sought to deal with this objection by submitting an affidavit, sworn by his instructing solicitor, Mr Stewart, on 17 May 1993, to support a contention that the rule in *Browne v Dunn* had been complied with in the "most manifest" way.

This dispute led to some unusual developments.

To resolve the question whether the affidavit of Mr Stewart disclosed 'without prejudice' communications (the resolution of that question in turn bearing on the resolution of the question whether the rule in *Browne v Dunn* had been complied with) both counsel, by consent,

agreed to refer the matter to the President of the Bar Association to obtain his ruling, the parties undertaking to be bound by that ruling. That would in practice resolve the question whether the Court should receive the contents of the affidavit of Mr Stewart into evidence. It was submitted that

> "If the ruling is in favour of the defendant, then we [would] ask your Honour to have regard to Mr Stewart's affidavit and to the submissions made in relation to my learned friend's point on *Browne v Dunn* in relation to Mr Schmidt's evidence.
> - - -
> If the ruling of the President is against the defendant, then we would ask your Honour to disregard the submissions and to disregard the [affidavit] of Mr Stewart."

I indicated that "the outcome of these proceedings [should] result in a letter signed by both counsel setting out to me what you ask me to do, because that will be a consensual matter". I received a letter, signed by both counsel, on 13 July 1993, the relevant part of which is as follows:-

> "In substance the President's ruling was as follows:
>
> A. The two facsimile transmissions and the fact of the delivery of the report of Professor McNeuer were not 'without prejudice' and therefore could be disclosed to the Court.
>
> B. If any privilege did attach to these communications, it was <u>waived</u> as soon as Mr Reeves asserted that the plaintiff was prejudiced by reason of Mr Schmidt being able to give evidence. Such assertion (if not expressed) was implied in his reliance upon the rule in *Browne v Dunn* in

submitting that little weight should be attached to the evidence of Mr Schmidt.

The effect of the agreement and ruling is that you may take notice of :

(a) the fact that Mr Schmidt's report was given to Professor McNeuer;

(b) the fact that Professor McNeuer prepared a report in response to Mr Schmidt's report;

(c) the fact that the plaintiff did not seek to tender the report of Professor McNeuer;

(d) all of the submissions made by Mr Southwood in reply." (emphasis in original)

The relevant submissions by Mr Southwood in reply were as follows:

(1) The defendant had foreshadowed the calling of Mr Schmidt;

(2) The Court had intimated that leave would be given to call evidence in rebuttal, from Professor McNeuer;

(3) The hearing had been adjourned so that a full and detailed report from Mr Schmidt could be obtained, and submitted by the plaintiff to Professor McNeuer, for any further report;

(4) The plaintiff submitted Mr Schmidt's report to Professor McNeuer, who provided a further report to the plaintiff which the plaintiff did not seek to tender;

(5) No request was made by the plaintiff to have Mr Schmidt available for cross-examination on his report;

(6) In those circumstances the rule in *Browne v Dunn* was not applicable against the defendant;

(7) In the circumstances the rule in *Jones v Dunkel* (1958-59) 101 CLR 298 operated against the plaintiff, as regards the drawing of inferences favourable to the defendant from Mr Schmidt's report, in that the plaintiff had not sought to cross-examine him; see *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd* (1990-91) 22 NSWLR 389 at 418-9, per Handley JA.

I observe that his Honour's remarks were directed to the situation where a party failed to question his own witness in chief on some topic, indicating thereby as the most natural inference that he feared to do so, because thereby he would have exposed facts unfavourable to him. This rationale does not apply to the circumstances here, in relation to Mr Schmidt's opinion that the force applied was from an oblique posterior direction, his analysis in terms of high energy/low energy, and that the plaintiff's pelvic injuries were inconsistent with those to be

suffered by a person in a seatbelt in an undamaged passenger compartment.

In the circumstances I consider that the rule in *Browne v Dunn* was not applicable in that Professor McNeuer was given an opportunity to respond to Mr Schmidt's report. He in fact did so, but the plaintiff did not seek to tender that report.

In these circumstances, I received the contents of the affidavit of Mr Stewart sworn on 17 May 1993; I considered that *Jones v Dunkel* (supra) had no application in this case.

As to the defendant's submission (7) on p49: in essence, I take the defendant to be saying that as the plaintiff did not cross-examine Mr Schmidt and did not tender Professor McNeuer's later report to contradict Mr Schmidt's theories, an inference should be drawn that Professor McNeuer would concur in the analysis of Mr Schmidt.

In *Jones v Dunkel* (1959) 101 CLR 298 at p320-321, Windeyer J cited from Wigmore on Evidence 3rd ed., (1940) vol.2, s285, p162:-

> "'The failure to bring before the Tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one

> than the party's fear of exposure. But the propriety of such an inference in general is not doubted.'
> This is plain commonsense."

Applying that "commonsense" principle to what occurred in this case, I consider that the election by the plaintiff not to tender in evidence the report made by Professor McNeuer after Mr Schmidt's report had been placed before him, enables me to give considerable weight to the opinions expressed in Mr Schmidt's report.

The contents of Mr Stewart's affidavit of 17 May 1993

It will be recalled that the defendant sought to rely on the contents of an affidavit sworn by Mr Stewart on 17 May 1993 at a later stage. There is a question whether that course is permissible.

Pursuant to r49.01(1) the Court has a discretion "as to the order of evidence and addresses and generally as to the conduct of the trial". Rules 49.01(2)-(6) provide for the usual order of evidence and addresses. Here, the order of evidence and addresses complied with Rules 49.01(2)-(6). The plaintiff, bearing the legal onus, had opened her case and called several witnesses. The defendant then opened her case, called several witnesses, tentatively closed her case, and later tendered Mr Schmidt's report and closed her case. The plaintiff's counsel then made his closing address.

In *Murray v Tigge* (1974) 4 ALR 612 at 613-614, Muirhead J said, after reviewing several authorities, considered that fresh evidence should be admitted after the hearing has been completed only when:-

> "(a) it is so material that the interests of justice require it;
>
> (b) the evidence if believed would most probably affect the result;
>
> (c) the evidence could not by reasonable diligence have been discovered before". (emphasis mine)

In *Downs Irrigation Co-operative Associated Ltd v National Bank of Australia* [1983] 1 Qd. R. 130 at 141 Thomas J said:-

> "If it becomes necessary later, [the defendant] will rely upon the Court's discretion as to the calling of rebuttal evidence, which [the defendant] will obtain in appropriate cases. [The defendant] will obtain such leave when some line emerges in the [plaintiff's] case which was not reasonably foreseeable; or when the [defendant] has been misled or taken by surprise; or generally when the interests of justice require it, even though the rebutting evidence may be confirmatory of the [defendant's] own case" (comments mine)

Here, Mr Southwood submitted that Mr Reeves in his closing address introduced a line of argument which took the defendant by surprise, that is, that little weight should be attached to Mr Schmidt's report because, inter alia:

(i) he was not available to be cross-examined; and

(ii) his theories had not been put to Professor McNeuer.

The defendant submitted that on this basis and in the interests of justice this Court should allow the contents of the affidavit of Mr Stewart to be received into evidence.

Mr Reeves submitted that to receive the contents of the affidavit in reply went outside the proper parameters of what should be received in reply. I consider that the affidavit material in all the circumstances was properly received into evidence as Exhibit D18. It was directed to rebutting Mr Reeves' submission, in (i) and (ii) above. The affidavit sets out, inter alia, that:

> "On 6 May 1993, I received from Messrs Cridlands, solicitors for the plaintiff, a facsimile message, a true copy whereof is annexed thereto and marked "JS1". The message was accompanied by a facsimile medical report by Dr J. Clarke McNeuer dated 19 April 1993."
>
> Annexure "JS1" states:
>
> "Re: McDonald v Cox
>
> Herein copy of those parts of the report by Professor McNeuer on which we are seeking to rely.
>
> In the circumstances, we shall oppose any application to call Mr Schmidt to give further evidence, should you seek to call Mr Schmidt to give further evidence, then the matter should be brought before Kearney J. so that the matter can be fully argued.
>
> - - -"

It was not sought to be contradicted. Clearly, Mr Reeves' submissions (i) and (ii) on p52 must be rejected.

Significance of a prior consistent statement by defendant

At pp319-320 of the transcript, the defendant gave the following testimony in cross-examination:-

> "Is your mother still alive?---Yes.
>
> Did you lie to your father about who was driving this vehicle on this day?---No, I did not, Your Honour.
>
> So you told him the truth, did you?---Yes, I did, Your Honour.
>
> Or did you tell him that you were driving?---I told him that Ms McDonald [the plaintiff] was driving the car, Your Honour.
>
> When did you tell him that?---That night after the accident.
>
> How did you do that?---On the telephone I told him that.
>
> On the telephone?---Yes.
>
> Where from?---Tennant Creek Hospital.
>
> - - -
>
> Where is your father now?---He's in Lismore in New South Wales.
>
> Was your mother living there then?---Yes.
>
> Did you speak to both your mother and father that night?--Yes, they were both very concerned.
>
> Yes, I imagine they were. Did you tell both of them that Ms McDonald was driving the car?---Yes, I did, Your Honour."

In his closing address Mr Reeves submitted that an adverse inference should be drawn against the defendant in relation to this evidence, as the defendant could have called her mother and father to give evidence of the alleged prior statement to them consistent with the thrust of her evidence in Court that she was not driving the van at the time of the accident; she had failed to do so. In general, such evidence by the defendant's parents would not be admissible. However, Mr Reeves submitted, in the circumstances of the present case it was admissible, being an example of a 'recent invention' exception indicated by Windeyer J in *Nominal Defendant v Clements* (1960) 104 CLR 476 at 495. This was because the credit of the defendant was impugned by the plaintiff who contended that the defendant's account that the plaintiff was driving at the time, was a recent invention, inconsistent with the account the defendant had earlier pleaded.

The evidence in question was elicited by Mr Reeves in cross-examination. In these circumstances I see no reason for drawing an inference against the defendant because she did not call her parents to support her evidence of their conversation.

Conclusions on who was driving

It is clear that the burden lies on the plaintiff of proving the critical fact that the defendant was driving the van at the time of the accident. That is to say, the plaintiff must persuade the Court that the

evidence on the issue is such that the proper conclusion is that it is more probable than not that the defendant was driving at the time.

I have tried to set out in fairly cursory form the great amount of the diverse evidence directed to this narrow but vital matter.

Both the plaintiff and the defendant presented as credible witnesses. By the plaintiff's account, the truth had been told consistently by both plaintiff and defendant as to how the accident occurred - a passing vehicle throwing up a rock which smashed the windscreen being the root cause - until the defendant dramatically changed her account in recent times. The plaintiff presented as an apparently truthful witness. By the defendant's account both she and the plaintiff had lied from the word "go"; initially, this was clearly enough for the defendant's benefit in enabling her to obtain from her insurance company money to compensate for the damage to her van and to enable her to pay out what was owing on it. Further, by her account, she was prepared to maintain the lie as to who was driving, to assist the appellant in her claim, but she drew the line at telling lies when testifying in Court.

Were it a matter of oath against oath, the task of ascertaining whether the plaintiff's account was probably true in the sense I have mentioned, would have been very difficult. There is of course a measure of inconsistency between the account the plaintiff gives, and

the passage emphasized in the account she gave to Constable Coleman at Tennant Creek the day after the accident, see p9; however, she explained that away by her pain at the time, the effect of pain killers she was taking, and her state of stress.

The defendant admits to having given a lying account to the Police at Avon Downs, the Tennant Creek Police, the FAI Insurance Company, and in her answers to interrogatories in June 1990 and January 1993. Clearly, this gives great pause for thought about the credibility with which her testimony should be treated. Her account now is of course that both she and the plaintiff lied throughout, and she changed to giving a truthful account only when faced with the prospect of having to lie in Court.

I do not think that her present account of being the passenger is not credible, as Mr Reeves suggested. It was in fact a very simple lie which he says they concocted and the motivation to have done so is very clear in the circumstances. Such cases are not unknown.

I have set out the medical evidence which bears on this issue. In the circumstances of a vehicle rolling over some 5 times, I consider that to infer that it is more probable that the plaintiff was in the passenger seat because she suffered her pelvic injuries on the left side, is to draw a "long bow". In the final result, I do not consider that the medical evidence assists in determining whether the plaintiff was more probably in the passenger's

seat than in the driver's seat; I note that Mr Schmidt's views at pp42-5 appear to be consistent with the account given by the defendant as to where the plaintiff was after the accident.

For similar reasons, the evidence of the experts on motor vehicle accidents does not assist in determining the point in issue. Their evidence really does no more than leave it open that the plaintiff could have sustained her injuries if seated in the passenger's seat. It will be recalled that the plaintiff said that her seatbelt was "very loose".

In my opinion the vital evidence in this case on the point in question is the evidence of Mrs Wales as to what she heard at the scene; see pp27-29. Mrs Wales impressed me as a transparently honest witness, obviously doing her best, with quite good recall, and with "no axe to grind". She was not shaken in cross-examination. Mr Reeves submitted that what Mrs Wales had heard at the scene between the plaintiff and the defendant was a conversation about car insurance, and that she did not hear a discussion about a driving licence. She had been cross-examined at some length on that point, and was completely unshaken. I observe that the plaintiff testified at one point that the defendant was aware at the time that the plaintiff's probationary driver's licence had expired, though later this became unclear.

In the result I accept the account given by Mrs Wales of what she overheard pass between the plaintiff

and the defendant at the scene of the accident, probably within 2 hours or so of its occurrence, as accurate. In practical terms that is determinative of the question presently in issue.

I find that the plaintiff has failed to discharge the onus she bears of showing on the probabilities that at the time of the accident the defendant was driving the van. To the contrary. I consider the probabilities are that at that time the plaintiff was driving the van, a story was subsequently "cooked up" between the plaintiff and the defendant to the contrary at the defendant's instigation, and maintained for years; in short, the probabilities are that the account given in court by the defendant is the true account of how the accident happened.

In those circumstances the plaintiff was the author of her own misfortune. She has failed to establish a cause of action against the defendant, and the questions which would have been "live" had she done so, do not arise for decision. There will be judgment for the defendant in the action, with costs, subject to the costs orders made during the hearing.
