Shepperbottom v Territory Insurance Office [2005] NTSC 81

PARTIES:	SHEPPERBOTTOM, Lee Dennis
	v
	TERRITORY INSURANCE OFFICE
TITLE OF TRIBUNAL:	MOTOR ACCIDENTS COMPENSATION TRIBUNAL
JURISDICTION:	CIVIL
FILE NO:	M2 of 2004 (20409939)
DELIVERED:	19 December 2005
HEARING DATES:	28 and 29 November 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MOTOR ACCIDENTS COMPENSATION – PERSONAL INJURIES

Reference to Motor Accidents (Compensation) Tribunal – liability of Territory Insurance Office - caused by or arising out of the use of a motor vehicle – whether the applicant used the motor vehicle in a manner creating a substantial risk of injury to the applicant – applicant riding in the back of a utility – hit by a falling branch – decision of the board set aside – applicant entitled to benefits

Anderson v Territory Insurance Office (1999) 126 NTR 16;
Darwin City Council v McDonnell and Ors (1998) 8 NTLR 106;
Fawcett v BHP By-products Pty Ltd (1960) 104 CLR 80;
Government Insurance Office (NSW) v R J Green & Lloyd Pty Ltd (1966) 114 CLR 437;
McMillan v Territory Insurance Office (1998) 57 NTR 24;
March v E & M Stramare (1991) 171 CLR 506;
Pollard v Territory Insurance Office (1997) 6 NTLR 142;

Shannon v Territory Insurance Office (1993) 3 NTLR 144, applied.

Motor Accidents (Compensation) Act s 4 and s 9(1)(e)

REPRESENTATION:

Counsel:

Applicant:	G Clift
Respondent:	I Nosworthy

Solicitors:

Applicant:	De Silva Hebron
Respondent:	Cridlands

Judgment category classification:	B
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IN THE MOTOR ACCIDENTS (COMPENSATION) APPEAL TRIBUNAL AT DARWIN

Shepperbottom v Territory Insurance Office [2005] NTSC 81
No. M2 of 2004 (20409939)

IN A MATTER under the
Motor Accidents Compensation Act

BETWEEN:

SHEPPERBOTTOM, Lee Dennis
Applicant

AND:

TERRITORY INSURANCE OFFICE
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 19 December 2005)

Background

[1] The applicant resides at Moulden in the Northern Territory. He works as a sales assistant in a fishing tackle shop. The applicant has a brother, Wayne Steven Shepperbottom. In August of 2003 both the applicant and his brother worked for Metroll. At 2.00 pm on Friday 15 August 2003, the applicant and his brother travelled from Darwin to Mr Eddie Page's home at Kurlak Outstation which is located in the Daly River Region of the Northern Territory. They arrived at Mr Page's home at about 6.30 pm. The applicant and his brother travelled to Mr Page's home in his brother's new dual cab, two wheel drive Hilux utility. The purpose of travelling to Mr Page's home

was so that they could go hunting and fishing the following day with Mr Page and his partner, Rachel.

[2] At 5.00 am on 16 August 2003 the applicant, his brother and Mr and Mrs Page travelled to a place called Chilluk near Wagon Wheel Swamp to go hunting magpie geese. They went hunting in an old single cab four wheel drive Hilux utility (the utility) that was also owned by the applicant's brother. When they left Kurlak Outstation Mr and Mrs Page were seated in the front of the utility and the applicant and his brother were seated in the back load space of the utility behind the cabin. Mr Page was driving the utility. The party stayed out hunting and fishing until about midday when they began the journey back to Mr and Mrs Page's home at Kurlak Outstation. While they were travelling along Woodycupildiya Road on the return journey an accident occurred and the applicant fell out of the back of the utility. He sustained extensive bruising to the whole of his body, fractures of his cervical spine at the level of C4 and C5, a left brachial plexus lesion at the level of C6 of his cervical spine resulting in weakness and paraplegia to the left arm and a fracture of the calcaneum of the right foot resulting in a misalignment of the right foot and shortening of the applicant's right leg. As a result of his injuries the applicant sustained a loss of earning capacity. He was unable to perform any work for the period from 16 August 2003 to 10 April 2005 and he was only able to perform light work from11 April 2005 to 15 May 2005.

[3] On 26 August 2003 the applicant made an application for benefits for his injuries pursuant to the Motor Accidents (Compensation) Act (the Act). The application was received by the Territory Insurance Office on 29 August 2003. It was rejected by the designated person on 28 January 2004.

The reference

[4] This is a reference pursuant to s 29(1) of the Act. The applicant is aggrieved by a determination of the Board of the Territory Insurance Office (the board) that was made on 31 March 2004. The board upheld the determination of the designated person dated 28 January 2004. The designated person determined that: (a) at the time of the occurrence on 16 August 2003, the applicant was using a motor vehicle in a manner that created a substantial risk of injury to the applicant and the applicant consciously and unjustifiably disregarded the risk or was recklessly indifferent to it; and (b) pursuant to s 9(1)(e) of the Act the applicant is not entitled to the benefits referred to in s 13 and s 17 of the Act.

[5] The reference to the Tribunal was filed on 30 April 2004. An amended reference to the Tribunal was filed on 14 August 2004. In reply to the amended reference the respondent relies on an amended answer to the amended reference dated 21 February 2005. In the amended answer to the amended reference the respondent also disputes that the occurrence on 16 August 2003 was an accident within the meaning of the Act. The respondent argues that the accident was not an occurrence caused by or

arising out of the use of a motor vehicle because the applicant's injuries were caused by an airborne piece of wood striking the applicant while he was seated in the back of the utility and as such the occurrence was caused by the airborne piece of wood not the use of the utility.

[6] Only liability is in issue. The quantum of the applicant's claim for benefits pursuant to s 13 of the Act has been agreed between the parties at $43,461.84. The benefits are for a closed period of loss of earning capacity from 16 August 2003 to 15 May 2005. The parties are yet to agree the extent of permanent impairment that the applicant suffered as a result of the accident.

[7] Where a matter is referred to the Tribunal, it shall conduct such hearings into the matter as it thinks fit and may make such determination as the board could have made thereon as the Tribunal considers proper in the circumstances having regard to the intention of the Act, and such determination is binding on the Board. The primary purpose of the Act is to establish a no fault compensation scheme in respect of death or injury in or as a result of motor vehicle accident. The emphasis and policy of the Act is that personal injuries in motor vehicle accidents should not go without compensation: *McMillan v Territory Insurance Office* (1998) 57 NTR 24 at 28.

Issues

[8] There are two principal questions in this proceeding. First, was the accident caused by or arising out of the use of a motor vehicle? Secondly, is the applicant excluded from benefits because the accident occurred while the applicant was using a motor vehicle in a manner that created a substantial risk of injury to the applicant and the applicant consciously and unjustifiably disregarded the risk or was recklessly indifferent to it?

[9] The applicant bears the burden of proof in relation to the first issue. The respondent bears the burden of proof in relation to the second issue as the issue does not involve a denial of the essential ingredients in the applicant's claim but a statutory ground of avoidance of the applicant's claim pursuant to s 9(1)(e) of the Act.

[10] In my opinion the reference to the Tribunal should succeed and the determination of the board should be set aside. The accident was an accident within the meaning of the Act as it arose out of the use of a motor vehicle and the use that the applicant was making of the motor vehicle was not a use contrary to s 9(e) of the Act.

Caused by or arising out of the use of a motor vehicle

[11] Subsection 13(1) of the Act provides as follows:

> A person who suffers an injury in or as a result of an accident that occurred in the Territory or in or from a Territory motor vehicle –
>
> (a) who was, at the time of the accident, a resident of the Territory; and

(b) whose capacity to earn income from personal exertion (either physical or mental) is, in the opinion of the Board, reduced as a result of the injury,

shall be paid such compensation for that loss of earning capacity as is provided in this section."

[12] Subsection 17(1) of the Act provides as follows:

"In addition to any other benefit payable under this Act, a resident of the Territory –

(a) who suffers permanent impairment in or as a result of an accident that occurred in the Territory or in or from a Territory motor vehicle;

(b) who survives that accident for a period of 3 months; and

(c) whose permanent impairment is assessed by the Board at a percentage of the whole person equal to not less than 5%,

shall, subject to subsection (2), be paid compensation equal to that assessed percentage of the prescribed amount."

[13] Accident so far as is relevant to this reference is defined in s 4 of the Act to mean an occurrence on a public street, as defined by the Motor Vehicles Act, caused by or arising out of the use of a motor vehicle.

[14] To be entitled to benefits pursuant to the Act the applicant must establish that he suffered injuries and permanent impairment in or as the result of an occurrence on a public street caused by or arising out of the use of the utility. There is no dispute that being a passenger in the back load space of a utility while it is travelling from one place to another constitutes a use of a motor vehicle: *Pollard v Territory Insurance Office* (1997) 6 NTLR 142; *Anderson v Territory Insurance Office* (1999) 126 NTR 16. It is also settled that the word "occurrence" as used in s 4 of the Act contemplates but one

occurrence: *Darwin City Council v McDonnell and Ors* (1998) 8 NTLR 106. The word occurrence does not refer to any number of factors that have occurred in a public street that are causally related to the applicant's injuries. The relevant occurrence in this case occurred when the applicant was knocked out of the back of the utility when he was hit by the piece of iron wood.

[15] What is a cause is a question of fact to be determined by applying common sense to the factual circumstances of the case: *March v E & M Stramare* (1991) 171 CLR 506 at 515 to 519. For an occurrence resulting in injury to be treated as "arising out of the use of a motor vehicle", the vehicle must have been used at the time for a purpose which such vehicle is generally used. There must also be some causal or consequential relationship between the injuries sustained in the occurrence and the user of the vehicle but it need not be shown that the use of the vehicle was the proximate cause of the occurrence causing the injuries that were sustained. The concepts to be applied should be broad and practical taking into account the basic policy and purpose of the Act: *Shannon v Territory Insurance Office* (1993) 3 NTLR 144. "It may be that an association of the injury with the use of the vehicle while it cannot be said that the use was causally related to the injury may yet be enough to satisfy the expression arising out of as used in the Act": *Government Insurance Office (NSW) v RJ Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 442 to 443; *Fawcett v BHP By-products Pty Ltd* (1960) 104 CLR 80 at 87.

Section 9(1)(e) of the Act

[16] Section 9(1)(e) of the Act provides that a person is not entitled to a benefit referred to in s 13 or s 17 in respect of an injury received in or as a result of an accident that occurred while the person was using a motor vehicle in a manner that created a substantial risk of injury to the person and the person consciously and unjustifiably disregarded the risk or was recklessly indifferent to it.

[17] Section 9(1)(e) of the Act was introduced for the purpose of exempting persons from benefits where they deliberately behave recklessly and cause substantial risk to themselves in motor vehicles: Second Reading Speech, Hansard 12 May 2000. There are four elements that must be proven to establish the exemption from benefits created by the section. First, it must be established that the person claiming benefits was using a motor vehicle. Secondly, the use must be in such a manner that it creates a substantial risk of injury to the person. Thirdly, the person must consciously and unjustifiably disregard the risk. Fourthly, and alternatively, the person must be recklessly indifferent to the substantial risk of injury that is created by the manner in which he is using the vehicle. Whether the elements of the section are made out is a question of fact. A substantial risk is a significant and appreciable risk. When considering whether or not the risk is significant and appreciable, it is necessary to have regard to the nature and extent of any injury that falls within the risk created by the manner of use of the motor vehicle.

[18] Consistent with the Court of Appeals decision in *Darwin City Council v McDonnell and Ors* (1998) 8 NTLR 106 the relevant risk is the risk which manifests itself at the time of the single occurrence that results in the applicant's injuries. In this case the relevant risk was the risk of the applicant being hit by the falling piece of iron wood while being seated behind the cabin of the utility when the utility was in motion on the Woodycupildiya Road. Accident has the same meaning in s 9(1)(e) as it is ascribed in s 4 of the Act.

[19] The element of conscious and unjustifiable disregard of the substantial risk created by the manner the person was using the motor vehicle requires a deliberate and intentional disregard of a substantial risk of which the applicant had actual knowledge. To be recklessly indifferent is to have a lack of concern for the consequences which a person actually foresees as the probable consequence of his or her action. The purpose of the introduction of s 9(1)(e) of the Act was to stop people who had deliberately engaged in dangerous acts such as car surfing from receiving compensation. The purpose of the section is not to prevent people who are merely guilty of contributory negligence from receiving compensation. Such a construction would be contrary to the policy of the Act which abrogated common law rights and would go well beyond the mischief identified in the second reading speech of the Bill that introduced the section into the Act.

Admissions

[20] In the amended answer to the amended reference the respondent makes the following admissions. The applicant was at all material times a resident of the Northern Territory as defined by s 4 of the Act. The applicant suffered an injury as the result of an occurrence that occurred on a public road. In addition it was agreed between the parties that the applicant sustained a loss of earning capacity from 16 August 2003 until 15 May 2005. There was no issue between the parties as to whether or not the utility was a Territory motor vehicle.

The evidence led on behalf of the applicant

[21] The applicant gave evidence. In addition evidence was led on behalf of the applicant from the applicant's brother, Wayne Shepperbottom (Mr Shepperbottom) and Mr Eddie Page. The applicant also tendered two bundles of photographs. One bundle of the photographs was taken of the utility that was in use at the time of the accident. The other bundle of photographs was of that part of the Woodycupildiya Road where the accident occurred.

[22] The applicant's evidence is summarised as follows. In August 2003 the applicant and his brother both worked for Metroll. On Friday 15 August 2003 the applicant and his brother finished work at about 2.00 pm. After they finished work they loaded Mr Shepperbottom's brand new two wheel drive dual cab Hilux utility. They then drove to Mr Eddie Page's home at

Kurlak Outstation in the Daly River region of the Northern Territory. The purpose of travelling to Mr Page's home was to go on a fishing and hunting trip the next day. The applicant and Mr Shepperbottom arrived at Mr Page's home at about 6.30 pm. After they arrived they unloaded the two wheel drive dual cab utility and settled in for the evening meal and a quiet night. The applicant had four Victoria Bitter beers that evening. He went to bed at 9.30 pm. On Saturday 16 August 2003 the applicant, Mr Shepperbottom and Mr Page got up at 6.30 pm and loaded the four wheel drive single cab Hilux utility (the utility) which had been left at Kurlak Outstation. They loaded the four wheel drive utility because some of the country that they would be travelling through on the hunting and fishing trip could not be accessed without a four wheel drive vehicle and they did not want to damage Mr Shepperbottom's new two wheel drive dual cab utility. Once the utility was loaded the applicant, Mr Shepperbottom, Mr Page and his partner Mrs Rachel Page, all got into the utility and drove to the locations where they would be hunting and fishing. The applicant does not remember very much after this point. He remembers talking to Mr Shepperbottom while they were travelling along the Woodycupildiya Road on their way back to Kurlak Outstation about a pig he had shot. He remembers at the time of this conversation Mr Shepperbottom and he were seated in the back load space of the utility. He was sitting on a spare tyre on the passenger side of the utility directly behind the cabin. He was facing in the direction that the utility was travelling. The applicant remembers nothing after this point in

time about the day in question. The next thing he remembers is Mr Shepperbottom coming into the hospital and telling him that his mother was on her way to the hospital. The applicant still suffers some physical impairment as a result of the injuries he sustained.

[23] The applicant identified the utility that he and the others went hunting in as the vehicle shown in the photographs being exhibit A1.

[24] During cross examination the applicant acknowledged that it was his free choice to ride in the back of the utility. He admitted that he was aware that you are not supposed to ride in the back load space of a utility and that there were reasons of safety behind the road rules that a person should not ride in the back of a utility and should wear a seat belt. However, the applicant denied that he knew that there was a danger that he might fall out of the back of the utility on a rough road. He said that such a thought never entered his mind. He also denied that he took a chance that something might happen to him if he was seated in the back load space of the utility. He said that they could not have used the new twin cab two wheel drive utility to go hunting and fishing because that vehicle did not have enough ground clearance and there was a danger of it getting caught on a stump or a termite mound or the sump being damaged on a rock. He also said that some of the country that they had to travel through on the hunting trip required the use of a four wheel drive vehicle. The applicant admitted that the utility that they went hunting in had a bench seat in the front of the vehicle that was capable of seating three people. He told the court that there were two spare

tyres in the back of the utility. They were beside each other, hard up against the cabin of the utility and were used by Mr Shepperbottom and the applicant as seats. He said that there was space for his feet on either side of the tyre. The applicant was not cross examined about what caused him to fall out of the utility.

[25] Mr Shepperbottom gave similar evidence to the applicant about how they came to go to Kurlak Outstation and what they were doing there. His evidence in chief surrounding the accident may be summarised as follows. He said that the vehicle that they used to go hunting in was a 1985 model Toyota Hilux four wheel drive single cab utility. The utility was owned by him. He had owned the utility for about 10 years and it was roadworthy. There was nothing wrong with it. He and the applicant used the utility for hunting and fishing trip because it had higher clearance than the two wheel drive utility, he did not want to drive his new dual cab two wheel drive utility out in the bush. It was not built for that purpose. Out in the bush it was too rough for a normal vehicle.

[26] When they went hunting on the morning of 16 August 2003 Mr Page was driving the utility, his wife, Rachel, was seated in the front passenger seat and the applicant and he were seated in the back load space of the utility. They were sitting in two tyres that were located behind the cabin. The two tyres had no rims in them so you could sit in the centre of the tyres and put your feet on either side of the tyres. He said that the width of the tyres was 25 to 30 centimetres. The applicant and he sat facing in the direction that

the utility was travelling. The applicant was seated on the passenger side of the vehicle and he was seated behind the driver. When they arrived at their destination they hunted some wild pigs and some magpie geese and they went fishing. They took a dozen beers with them in an esky and over a period of six or seven hours they each drank three full strength beers.

[27] When they finished hunting they returned to Kurlak Outstation. On the return journey they travelled part of the way along Woodycupildiya Road. The road was a normal graded dirt road that was nice and clear on either side. The road was in good condition. It had just been graded. There were no pot-holes or ruts in the road. During the trip back the applicant and Mr Shepperbottom were seated as they were on the way to the location that they went hunting. They were seated in the back load space of the utility on tyres behind the cabin. The applicant was on the passenger side and he was on the driver's side. They were holding onto the tie bar behind the cabin. They could not see over the cabin from where they were sitting. They had to look to the side of the vehicle to see where they were going. Immediately prior to the accident the road was straight. There were no overhanging trees. He could see about 500 metres ahead. Mr Shepperbottom estimated that immediately prior to the accident the utility was travelling at about 60 kilometres an hour down the middle of the road.

[28] He and the applicant were talking about how successful there hunting trip had been. At some point in time he was distracted by something on the side of the road and he looked the other way. When he did so he heard a big

bang. When he looked back he could see the applicant's feet on a 45 degree angle going out the back of the utility. He grabbed the applicant by the legs. Unfortunately this pulled the applicant against the side of the utility and then the wheel caught the applicant. Mr Shepperbottom lost his grip of the applicant and the applicant went straight under the rear left wheel of the utility. Mr Shepperbottom then stood up and banged on the roof of the utility as loud as he could to get Mr Page to stop the utility. Mr Page was not going that fast. When the utility came to a stop the applicant was only 10 metres behind the vehicle. After the vehicle stopped they ran to assist the applicant. Mr Shepperbottom could see complete tyre marks straight over the applicant's shoulder and he noticed an abrasion on the applicant's right shoulder which looked as if something had hit the applicant and he believed that is what caused the applicant to be knocked out of the back of the utility. It was windy at the time of the accident.

[29] Mr Shepperbottom said that photos 8 and 12 of exhibit A4 look like the location where the accident happened on Woodycupildiya Road.

[30] After an ambulance had taken the applicant away he looked over the utility and he noticed an ironwood log in the back of the load space of the utility. The log was a metre long and about 100 millimetres in diameter. You could see that the log had been snapped. He looked at the roof of the car and you could see a dent about the size of a 10 cent piece with some wood chips in it that was located more towards the passenger's side of the roof of the utility.

[31] Mr Shepperbottom was cross examined about an interview he had with an enquiry agent. The interview was tape recorded. However, counsel for the respondent did not put the tape recording to Mr Shepperbottom. Instead he elected to put an unsigned transcript of the interview to Mr Shepperbottom. The unsigned transcript was not adopted by Mr Shepperbottom and the enquiry agent who conducted the interview was not called to prove the question and answers that were contained in the unsigned transcript. Mr Shepperbottom nonetheless admitted to being asked some of the questions in the transcript of interview and to giving some of the answers. Even those questions and answers were not tendered in evidence. Some of the answers that Mr Shepperbottom admitted to giving the enquiry agent during the interview were inconsistent with his evidence before the Tribunal. He did not tell the enquiry agent the full details of what had occurred. For example he did not tell the enquiry agent that he had grabbed hold of the applicant's legs and that this may have caused him to come into contact with the wheel of the vehicle. Nor did he tell the enquiry agent all of the reasons why he did not use the new dual cab two wheel drive utility or that there was a dent in the roof of the vehicle. However, because of the manner in which the cross examination of Mr Shepperbottom was conducted it is very difficult to draw any adverse view of Mr Shepperbottom's evidence. It was not possible to tell whether the inconsistencies in Mr Shepperbottom's account existed because of the manner in which the interview by the enquiry agent was conducted or because the interview was

not a full and complete interview. Overall I accept Mr Shepperbottom's evidence as to how the accident happened. His evidence is corroborated to some degree by the applicant's evidence and the evidence of Mr Page.

[32] During cross examination Mr Shepperbottom denied that the sole reason he did not use the new dual cab two wheel drive utility to go hunting was that it was a new vehicle and he did not want to scratch it. In substance his evidence was that much of the country they traversed during their hunting and fishing trip was unsuitable for a two wheel drive utility. He also disagreed that the utility would have been travelling between 60 and 70 kilometres an hour at the time of the accident. He said it was more like 50 to 60 kilometres per hour. I do not accept Mr Shepperbottom's estimate of the speed that the utility was travelling at the time of the accident. It is extremely difficult for someone situated in the back of a utility to estimate the speed at which the utility is travelling.

[33] Mr Edward John Page's evidence in chief is summarised as follows.
Mr Page resides at Kurlak Outstation. The applicant and Mr Shepperbottom arrived at his home in the evening on 15 August 2003. They had a few beers and then retired for the night at 10.30 pm. They left to go hunting and fishing at 5.30 am the next day. They left at this time because they wanted to shoot the geese while they were flying. They travelled in the four wheel drive Toyota Hilux utility to a place called Chilluk near Wagon Wheel Swamp. The reason they went in the four wheel drive utility was that it was "terrain country" where they would be going and the utility was needed. He

drove the utility and his wife sat next to him on the front seat of the utility. The applicant and Mr Shepperbottom sat in the back load space of the utility. The applicant was sitting on the passenger side of the vehicle and Mr Shepperbottom sat on the driver's side of the vehicle. They were each sitting in the middle of a spare tyre. They hunted and fished until about 12.30 pm. While they were hunting he drank about four full strength beers. He was drinking about one beer per hour and he had his last beer at about 11.00 am. When they started the return journey from Wagon Wheel Swamp back to Kurlak Outstation everyone was seated as they had been on the trip out from Kurlak Outstation. The applicant and Mr Shepperbottom were seated in the back load space of the utility, he was driving and Mrs Page was seated in the front on the passenger side of the front seat. The applicant and Mr Shepperbottom were seated up towards the front of the back load space near the cabin. They were each hanging onto the tie bar of the utility. They were sitting comfortably right inside each tyre. He was not paying much attention to whether the applicant and Mr Shepperbottom could see over the top of the cabin of the utility or not. The accident happened on Woodycupildiya Road. The accident happened on a straight stretch of road about 40 or 50 metres after a bend in the road and about 250 yards before a creek that ran across the road. The road was about four metres wide. He was driving at a speed of between 30 kilometres an hour and 35 kilometres an hour. The road had been recently graded and was fairly smooth. The accident was brought to his attention when he heard a whack on the roof and

Mr Shepperbottom said, "The stick hit Lee and he has fallen off." He stopped the utility and they ran back to the applicant. The applicant was facing towards the back of the utility. He was no more than 10 metres from the back of the utility. You could see that there were tyre marks all over the applicant. When he fell over the left rear tyre of the utility it must have pulled him underneath. They assisted the applicant to the best that they could and then Mr Shepperbottom drove the utility back to Kurlak Outstation with the applicant in the front of the utility. He and Mrs Page sat in the back of the utility. When they got back to his home at Kurlak Outstation they arranged for an ambulance to come and take the applicant to hospital.

[34] During cross examination Mr Page said that the new dual cab two wheel drive utility was not suitable for driving in the country where they went hunting. It would not get down there. He would not take it down there and he did not know anyone else who would take it down there. The place where they chose to go was four wheel drive country. He disagreed that he would have been travelling as much as 40 kilometres per hour at the time of the accident. He said that he would have been travelling between 30 and 35 kilometres per hour. Mr Page agreed that at one stage he asked the applicant and Mr Shepperbottom if they wanted to get in the front. The proper inference to be drawn from this was that he asked them if they wanted to swap positions. At no stage was it suggested to Mr Page in cross examination that he had either lost control of the utility or that it had hit a

pot-hole or that the surface of the road was unstable or that lateral forces were being exerted on the utility at the time of the accident.

The evidence led by the respondent

[35] The respondent led evidence from an expert witness, Mr Chris Hall, and a private enquiry agent, Jodie Nicole Horsnell. The respondent also tendered the expert report of Mr Hall, a video of the utility and the road and related roads where the accident occurred and two photographs of the utility with a person sitting on the tread of a spare tyre in the back load space of the accident vehicle.

[36] Mr Hall is an expert who specializes in road accidents. He is well qualified to give the evidence that he did. However, he did not have an opportunity to investigate the accident or to view the accident scene. Mr Hall's evidence in chief and in his report may be summarised as follows. Travelling in the rear of a utility presents a risk of injury in several ways, including: (a) ejection from the tray area during a roll over; (b) ejection from the tray area due to surface induced forces; and (c) impact from roadside objects. The ejection from the rear tray results from the lack of a seat belt system available in that section of the vehicle. The risk of forces generated when a surface irregularity is encountered depends on a number of factors such as the size and shape of the irregularity (bump, pot-hole etc), the speed at which the vehicle is travelling, the direction of motion at the time of disturbance, the height of the sides of the tray of the vehicle relative to the

person's centre of gravity and the ability of the person to hold on. If a person in the tray is unable to hold on during a bump or a turn the likelihood of ejection is dependent on the ability of the sides of the utility to arrest the movement of the occupant. If the occupant is sitting at the same height or above the height of the tray sides on a tyre, then there will be very little resistance to that person falling from the tray. The higher the centre of gravity of a person, the more readily they would fall once the imbalance has been induced. The forces generated when a person strikes a pot-hole will be both lateral and longitudinal. Hence there can be an imbalance towards the sides of the vehicle induced upon an occupant. At a vehicle speed of 40 to 50 kilometres per hour the generated forces can easily exceed that which can be resisted by the occupant by holding onto something.

[37] The risk of being struck by a roadside object depends on where the occupant is seated in the rear of the utility. The risk is negligible if the occupant is seated adjacent to the rear of the cabin and in the centre of and on the floor of the tray. If the occupant chooses to sit in an elevated position to one side of the centre there is a much greater risk of contact with roadside objects such as overhanging tree branches. Mr Hall was of the opinion that there was an obvious and substantial risk of injury to a person seated on a wide tyre to one side in the rear of a utility tray top which was travelling to speeds of up to 40 to 50 kilometres per hour on a very bumpy road.

[38] During his oral evidence I asked Mr Hall what would be the risk of ejection from the back load space of a utility if the following assumptions were

made: (a) the road was four metres wide; (b) there was no overhanging vegetation; (c) the road was clear; (d) the road was relatively smooth as it had recently received a one blade grade; (e) the motor vehicle was travelling at 35 kilometres per hour; (f) the person seated in the rear of the vehicle was 5 foot 6 inches in height; (g) the person was sitting in the centre of the tyre which was below the outside rim of the tyre; (h) the person in the back of the utility was holding onto the tie bar at the rear of the cabin of the utility; (i) the person seated in the back of the utility was looking in the direction that the vehicle was travelling; and (j) there was no loss of control by the driver? His answer was that in those circumstances there is a relatively low risk of ejection.

[39] During cross examination Mr Hall was asked to make an assessment of the speed that the vehicle was travelling based upon the description of the accident given by Mr Shepperbottom and the fact that when the vehicle stopped the applicant's position on the ground was only 10 metres from the rear of the utility. Based on various assumptions about the time that it would have taken Mr Shepperbottom to bang on the cabin roof of the utility and the time that it would take for Mr Page to respond and stop the vehicle, Mr Hall gave a range of speeds of between 15 kilometres per hour and 30 kilometres per hour. Mr Hall was asked about the risk of ejectment if a utility was travelling at speeds of between 20 and 25 kilometres an hour. His evidence was that the risk of ejectment at such speeds was a much lower risk than at 40 kilometres per hour because you would not expect substantial

lateral forces that may be causative to falling out to be developed at such speeds. He was then asked about the risk of being struck by an object such as the log that was found in the tray of the utility. Mr Hall's evidence was so long as the seated person's head was below the level of the cabin or the tie bar they would have a reasonable amount of protection. He said that the chances of a person being struck by a free falling branch a metre long are very low. He also said that it was not impossible for the piece of wood in question to have passed through under the tie bar.

[40] Ms Horsnell's evidence in chief may be summarised as follows. She had taken various measurements of the utility that was involved in the accident and its tyres. The width of the tyres was 320 millimetres. The height of the side tray of the utility was 305 millimetres. The height from the ground to the top side of the utility was 1420 millimetres. The height from the top surface of the tray of the utility to the top of the tie bar was 830 millimetres.

[41] During cross examination Ms Horsnell agreed that the utility's tyres fell away from the width of the tread towards the centre of the tyre and that the tread of the tyre and the rim formed a dish shape.

The facts

[42] I make the following findings of fact. At 5.30 am on 16 August 2003 the applicant, his brother, Mr Shepperbottom, Mr Page and Rachel Page went hunting and fishing near Wagon Wheel Swamp in the Daly River region of the Northern Territory. They went hunting and fishing in a single cabin four

wheel drive Hilux utility that was owned by Mr Shepperbottom. They finished hunting at about 12.30pm at which time they started to drive back to Kurlak Outstation where Mr and Mrs Page lived. On the return journey Mr Page was driving the utility and Mrs Page was seated in the cabin of the vehicle on the passenger section of the front seat which was a bench seat. The applicant and Mr Shepperbottom were seated in the rear load space of the utility. Each of them was seated in the middle of a spare tyre that was located immediately behind the cabin of the utility. The spare tyres had rims in them. I reject Mr Shepperbottom's evidence in this regard and prefer the evidence of Mr Page and Ms Horsnell. The applicant's and Mr Shepperbottom's feet were placed on either side of each tyre that they were seated on and they were holding onto a tie bar that ran along the back of the cabin of the utility at a height slightly above the cabin roof. Mr Shepperbottom was seated on the driver's side of the back tray. The applicant was seated on the passenger side of the back tray. Both of them were facing forwards in the direction that the utility was being driven by Mr Page. The tops of their heads were slightly above the tie bar that was located immediately behind the cabin of the utility. I find this last fact on the basis of Ms Horsnell's evidence.

[43] Part of the return journey to Kurlak Outstation was over the Woodycupildiya Road. The road was a dirt road in good condition. It had recently received a single grade. Although there were trees along either side of the road there were no branches overhanging the road. The road was four metres wide and

Mr Page was driving along the road at a speed of 30 kilometres per hour. I interpret Mr Page's evidence to be that his speed of travel varied between 30 and 35 kilometres per hour. Mr Page's evidence, combined with the range of speeds calculated by Mr Hall, enables me to conclude that at the time of the accident the utility was travelling at a speed of 30 kilometres per hour. At about 2.00 pm on 16 August 2003 on a straight stretch of the Woodycupildiya Road 50 metres after a left hand bend and 250 metres before a creek that ran across the road the applicant was struck by a piece of iron wood that had broken from a tree. The piece of iron wood was 100 millimetres in diameter and about one metre long. The piece of ironwood ricocheted off the roof of the cabin of the utility and underneath the tie bar. Being struck by the metre long piece of ironwood caused the applicant to be knocked over the side of the utility. Before the applicant hit the ground Mr Shepperbottom grabbed hold of his legs and tried to prevent him from falling further. Unfortunately Mr Shepperbottom was not able to maintain his grip on the applicant and the applicant fell under the rear left hand wheel of the utility. The applicant sustained serious injuries as a result of being knocked over the side of the utility and as a result of being run over by the left hand rear wheel of the utility. The occurrence was caused by and arose out of the use of the utility. The forward motion of the utility contributed both towards the impact between the log of ironwood and the applicant and the force of the impact.

[44] The applicant's use of the utility did not cause a substantial risk of injury to himself. The utility was being driven at a safe speed that was suited to the road conditions and the applicant was seated in a manner and in a position that minimised any risk of injury to him from an airborne log. The applicant was seated in the centre of a tyre immediately behind the cabin and was holding onto the tie bar at the time the piece of iron wood hit the roof of the cabin of the utility. Mr Hall's evidence, based on the assumptions that I asked him to make, was that there was a relatively low risk of ejection from the utility. There was a low risk of the applicant being injured in the manner that he was injured. Further, it was not proven that the applicant was conscious of the risk of being struck by a falling log or that he was not concerned about such a risk that had been foreseen by him. The mere fact that road rules were breached and that the applicant was aware that there were safety reasons for the road rules does not establish that a substantial risk of injury was created by the relevant use of the utility or that the applicant was conscious of the risk that manifested itself at the time of the accident. Not every breach of the road rules gives rise to a substantial risk.

Orders

[45] I make the following orders:

(1) The decision of the Board of the Territory Insurance Office is set aside.

(2) The respondent is to pay the applicant s 13 benefits in the sum of $43,461.84.

(3) The applicant is entitled to benefits in accordance with s 18.

[46] I will hear the parties as to costs and as to permanent impairment.