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| IN THE COUNTY COURT OF VICTORIA  AT Melbourne  COMMON LAW DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES |

GENERAL LIST

Case No. CI-14-97888

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| 6DC PTY LTD (a pseudonym) | Plaintiff |
|  |  |
| v |  |
|  |  |
| DAVID DUNLEAVY (a pseudonym) | Defendant |

and

Case No. CI-14-97921

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| RASTON GROUP PTY LTD (a pseudonym) | Plaintiff |
|  |  |
| v |  |
|  |  |
| JAMES PRINCE (a pseudonym) | Defendant |
|  |  |
| and |  |
|  |  |
| DAVID DUNLEAVY (a pseudonym) | Third Party |

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| JUDGE: | HIS HONOUR JUDGE DYER | |
| WHERE HELD: | Melbourne | |
| DATES OF HEARING: | 28 and 29 January and 1 February 2016 | |
| DATE OF JUDGMENT: | 15 February 2016 | |
| CASE MAY BE CITED AS: | 6DC Pty Ltd (a pseudonym) v Dunleavy (a pseudonym); Raston Group Pty (a pseudonym) Ltd v Prince (a pseudonym) | |
| MEDIUM NEUTRAL CITATION: | [2016] VCC 4253 |  |

REASONS FOR JUDGMENT

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Subject: ROAD TRAFFIC ACCIDENT

Catchwords: Truck collision – Duty of care of respective drivers – Regulatory framework – Breach of duty – Relative culpability – Quantification of loss

Legislation Cited: Road Safety Road Rules 2009, r148

Cases Cited: *Sibley v Kais* (1967) [1967] HCA 43; *Manley v Alexander* [2005] HCA 79; *Podrebersek v Australian Iron & Steel Pty Limited* [1985] HCA 34 and (1985) 59 ALR 529; *Macquarie Pathology Services Pty Ltd v Sullivan* unreported, NSW CA 28 March 1995.

Judgment: Apportionment of liability two-thirds against the defendant Dunleavy and one-third against the defendant Prince. Formal orders made in accordance with such apportionment.

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| APPEARANCES: | Counsel | Solicitors |
| For the Plaintiff 6DC Pty Ltd  and the Defendant King | Mr W Cartwright | MacFlood Lawyers |
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| For the Defendant Dunleavy and the Plaintiff Raston Group Pty Ltd | Mr S J Brophy | Wells Thompson Lawyers |

HIS HONOUR:

Introduction

# In the early evening of 3 September 2012 James Prince[[1]](#footnote-1) was driving a B‑double vehicle south along the Hume Freeway near Glenrowan. It was dark at the time, but the traffic and weather conditions were otherwise favourable. The speed limit applicable to heavy vehicles on that section of the Hume Freeway is 100 kilometres an hour.

# The Hume Freeway is a divided road with provision for two lanes of traffic in each direction. It runs generally north/south at the point where the collision occurred and the overall speed limit for all traffic is 110 km/h.

# As Mr Prince was approaching the Glenrowan service centre, another truck driver, David Dunleavy[[2]](#footnote-2), was preparing to re-join the freeway, having stopped at that service centre for a rest break. Mr Dunleavy was also driving a B‑double, towing two trailers which were laden with grain.

# The on-ramp providing access onto the freeway for vehicles leaving the service centre and rest area is of a type commonly found on major highways throughout Victoria. Clearly it is intended to provide vehicles with an opportunity to observe traffic on the freeway and to safely re‑enter the freeway without causing interference to other vehicles. Sadly, this was not the case on 3 September 2012.

# Shortly after Mr Dunleavy had re-joined the freeway a collision occurred when the truck driven by Mr Prince collided with the offside rear of the B‑double driven by Mr Dunleavy. Fortunately neither driver was injured, but there was extensive damage to the prime mover of Mr Prince’s vehicle, and substantial though lesser damage to the rear trailer of Mr Dunleavy’s B‑double.

# The evidence disclosed that police had attended the scene shortly after the collision, but there was no evidence led as to any police action or formal report being prepared. The principal issue between the parties in this proceeding is the question of liability, although evidence was also called in relation to a loss of use claim impacting upon the plaintiff 6DC Pty Ltd[[3]](#footnote-3), the owner of the vehicle being driven by Mr Prince.

The Evidence

# The only oral evidence led at trial was from Mr Dunleavy and Mr Prince, the two drivers. Documentary evidence tendered included a video taken 14 months after the incident showing the relevant section of the Hume Freeway, and a number of still photographs. Counsel for Mr Dunleavy also tendered documentation from the joint court book, which included documents such as incident reports and insurance claim forms.

# The first witness called was Mr David Dunleavy. It is useful to set out in summary form the evidence given by him:

# On 3 September 2012 he was driving a Kenworth prime mover towing two B‑double tipper trailers known as A and B trailers.

# The total length of his vehicle, including the trailers, was approximately 25 metres, and the trailers were laden with grain. The gross weight was between 63 and 65 tonne.

# The collision occurred at approximately 7.45–7.50 pm. It was dark at the time. Weather conditions were clear and the traffic was light.

# The incident occurred on a Monday evening as Mr Dunleavy was travelling from New South Wales to somewhere on the eastern side of Melbourne towards Gippsland.

# Mr Dunleavy had taken a half-hour rest break at the BP service centre on the eastern side of the Hume Freeway, near Glenrowan. He had parked his truck and trailers “in the little dirt section next to the highway opposite McDonald’s.”[[4]](#footnote-4)

# When returning to his truck and intending to drive back to the highway, he had turned all his lights on, and described the lighting as “they’re all working, they’re all LED lights down the side and the back, everything.”[[5]](#footnote-5)

# He described driving towards the on-ramp leading to the freeway, and gave evidence of putting his indicators on at what he described as “the commencement of the slip lane”.[[6]](#footnote-6)

# While travelling in what he described as the slip lane, he had made observations of traffic on the Hume Freeway being “just the headlights about 300–400 metres behind”.[[7]](#footnote-7)

# He had made this observation when he was around the middle of the slip lane and observed the lights to be in what he described as the first lane of the Hume Freeway.

# Mr Dunleavy then described his movements from that point as follows:

“Then I was still going up through gears and I look and there’s sort of enough room there, and I followed until the end of the dotted lines out into the left-hand lane.”

# He described the speed of his vehicle as somewhere in the vicinity of 50–60 kilometres per hour, travelling slightly uphill.

# He then described the collision as follows:

“I was, I suppose, about 100–200 metres past that slip lane, then I just felt these three thumps from behind and I look in the mirror and there’s this truck halfway out into the right-hand lane.”[[8]](#footnote-8)

# His evidence then continued, describing how he pulled over into the breakdown lane, which was the portion of the road immediately to the left of the two southbound lanes on the freeway, and brought his vehicle to a stop within approximately 100 metres. He described observing the other vehicle after the impact as coming to rest in the table-drain on the eastern side of the road, at a diagonal angle to the left of the vehicle. He described the prime mover as being at approximately right angles to the highway, while the trailers were at about 45 degrees.

# Evidence was given by Mr Dunleavy about conversations immediately following the collision. Mr Dunleavy recalled the conversation as follows:

# The other driver spoke first.

# He said he was sorry, that he misjudged.

# He said he had his cruise control on and he had to push the clutch in to disengage it.[[9]](#footnote-9)

# Mr Dunleavy gave evidence of being amazed or bewildered on hearing what the other driver had said. He then began attending to his truck, as there was grain leaking from the damaged area of the rear trailer.

# There was further evidence from Mr Dunleavy that police officers had arrived at the scene, and both he and the other driver had spoken to the police.

# He gave some evidence about his general experience of 35 years as a truck driver and about 30 years’ experience on the Hume Freeway. He agreed that the service station area was apparently used by truck drivers, although he did not stop there that often himself. He later qualified this to driving past that area approximately 90 per cent of the time.[[10]](#footnote-10)

# The final aspect of his evidence concerned his familiarity with the Hume Freeway near the Glenrowan service centre. He agreed that he would use the Hume Freeway approximately four to five times per month, and stated that at night he would have a view of traffic coming back onto the freeway from a point near the off-ramp giving access to the service-station area.[[11]](#footnote-11) If he were to change lanes in a truck without any obstructing vehicles it would take between two and five seconds.[[12]](#footnote-12)

# When cross-examined, it became apparent that there was a degree of confusion surrounding Mr Dunleavy’s use of the expression “slip lane”. In essence, the confusion existed as to whether that expression only covered the portion of roadway leading up to the junction with the Hume Freeway or whether it continued beyond that point, which was shown in various exhibits as being delineated by a dotted line immediately to the left of what had been described as Lane 1 of the southbound portion of the freeway. Ultimately the following passage clarifies the issue:

“When you’re leaving the rest area ... and the dotted lines commence is that the commencement, in your opinion, of the slip lane?---That’s the end of the slip lane.

What do you call the point where the dotted lines diminish and that ceases to exist and becomes just the southbound lane of the highway?  
---That’s the emergency lane.

The dotted lines provide an ever-reducing size of slip lane, don’t they?  
---Yes.

And where they finish is where the slip lane becomes effectively the kerbside lane of the highway?---That’s correct.”[[13]](#footnote-13)

# The other matters relevant to my determination raised in cross-examination can be set out as follows:

# Mr Dunleavy was about 50 metres short of the dotted lines when he saw the lights 300–400 metres behind him.[[14]](#footnote-14)

# When he reached the start of the slip lane he was doing about 50 kilometres per hour and knew that there was a large vehicle behind him at that time.[[15]](#footnote-15)

# He was aware that the speed limit for trucks was 100 kilometres per hour and that his vehicle was heavily laden and travelling up a slight incline so his ability to accelerate was limited.[[16]](#footnote-16)

# He was aware that the vehicle behind him was likely to be travelling at highway speed.[[17]](#footnote-17)

# He estimated the distance from the end of the slip lane to the point of impact as approximately 100–200 metres, and that he had travelled perhaps 150–200 metres after first observing the lights of the other vehicle.[[18]](#footnote-18)

# He maintained that after the first observation in the rear-vision mirror before entering the highway and leaving the slip lane, he had again looked in his rear-vision mirror.[[19]](#footnote-19)

# At about the end of the slip lane he had again observed the lights of the other vehicle, stating:

“He was pretty close then, but I thought he was ... well normal practice people usually move over for you.”[[20]](#footnote-20)

# At the time of that last observation prior to impact Mr Dunleavy estimated the other vehicle was “about 100 metres behind”.[[21]](#footnote-21)

# Mr Dunleavy agreed it was only a matter of seconds after leaving the slip lane that the first of the impacts occurred.

# He agreed that at the time he entered the highway itself the other vehicle was within about 100 metres, travelling at highway speed, and his vehicle was travelling at about 60 or 70 “accelerating up through the gear box”.[[22]](#footnote-22)

# When he had first seen the lights he did not slow down or let the other vehicle pass, but assumed the other vehicle would move over and get out of his way as was normal.[[23]](#footnote-23)

# He agreed he had no knowledge as to the weight or manoeuvrability of the vehicle behind as he was not driving it, and further agreed that with a heavy vehicle it was difficult to change direction within a short space of time.[[24]](#footnote-24)

# He agreed that after driving off from the rest area it would have been a nuisance to have to slow down when he was still trying to gain speed.[[25]](#footnote-25)

# Mr Dunleavy was taken to a claim form completed by him on 4 September 2012, the day after the accident.[[26]](#footnote-26) In relation to this he was challenged that there was no reference made to any admission of liability by the other driver, nor any reference to Mr Dunleavy seeing the lights of an approaching vehicle.[[27]](#footnote-27)

# Although there were other criticisms raised by Mr Cartwright[[28]](#footnote-28) in relation to the claims documentation, I note the somewhat hurried circumstances in which Mr Dunleavy was required by his employer to complete this material, and I do not find it necessary to refer to the other criticisms that were made. The substantive statement attached to the claim form stated as follows:

“With my right-hand indicator flashing as I proceeded along the on-ramp and into the left-hand lane of the Hume Highway, this area is quite open and anyone travelling south would have had plenty of notice to merge right. I was only in the left-hand lane and proceeding south for approx. 100–200 metres from the end of the on-ramp when I was struck from behind on the right-hand rear corner where it appears that another southbound truck had misjudged overtaking me and clipped the rear right corner.”[[29]](#footnote-29)

# Although there was some uncertainty about whether this document had been completed shortly after the incident or perhaps in 2013, it clearly sets out the position consistently advanced by Mr Dunleavy.

# In re‑examination, Mr Dunleavy confirmed that his belief was that the accident happened 100–200 metres from the end of the on-ramp.[[30]](#footnote-30)

# Evidence was then given by Mr James Prince. I set out matters from Mr Prince’s evidence-in-chief which I regarded as material. As to the loss of use claim he stated:

# He was the sole director of 6DC Pty Ltd and effectively driving a truck contracting to Sharp’s of Mt Brambler[[31]](#footnote-31) at the time the accident occurred.

# The conduct of the business involved carting toilet paper, Coca-Cola products and CSR gyprock products between Melbourne and Sydney. His prime mover was a 2007 Feightliner Argosy.

# The prime mover was at that time subject to finance, and after the accident the assessment resulted in it being classed as a total loss.

# He received an insurance payout of approximately $10,000 after sending documentation back to the insurance company around 22 September 2012.

# He then purchased another truck which had to be slightly modified and made compliant with roadworthy conditions before he could recommence work.

# He was advised he could pick up the new truck on a Friday, which he believes was 21 October. He advised Sharp’s Transport that he would have the new prime mover and work was assigned to him as at 28 October 2012.

# The new truck was also subject to a finance contract.

# Mr Prince then gave further evidence concerning the circumstances of the collision which was the main area of dispute in the trial. I noted in particular the following matters:

# On 3 September 2012 Mr Prince was driving south on the Hume Freeway.

# He had left Sydney and was heading to Yarraville. It was a trip he had done regularly. He would do two Melbourne/Sydney return trips in one week and three in the second week. He was familiar with the area near the Glenrowan service centre where the accident occurred.

# He did not always pass the Glenrowan service centre at a particular time, but was familiar with it when travelling at night, as well as at other times.

# He may have stopped at the Glenrowan service centre once or twice, but otherwise did not use it. He was familiar with the re-entry road leading back to the freeway.

# He had taken a video of the section of highway when travelling south in November 2013.[[32]](#footnote-32)

# Mr Prince gave some evidence concerning the location and extent of damage sustained to his truck. This was ultimately not heavily in dispute. He also gave evidence as to the extent of lighting and its placement on the truck and trailers. Again, there was no issue raised in relation to these matters.

# Mr Prince then described the circumstances of the collision, including the following:

# He observed the movement of a truck when his vehicle was about halfway between the exit road and the re-entry road of the Glenrowan service centre.[[33]](#footnote-33)

# The truck was at that time to his left and he kept driving until he made a further observation roughly 200 metres before the exit road from the service centre re-joined the highway.

# He then observed the other truck come out and:

“… I’ve applied the clutch and the break [sic] to sort of try to slow me down as quick as possible and check my right-hand mirror, see it was cleared, hit my indicator and tried to move into the right-hand lane and, yeah, thought I was clear of him but just clipped him with probably about an inch, maybe two inches, of the left-hand corner of my truck.”[[34]](#footnote-34)

# After the impact his vehicle finished on the left-hand side of the road:

“… - off the edge of the road and it was parked on a 45 degree angle to the Hume Highway.”[[35]](#footnote-35)

# At the time he first observed the other truck it was:

“… some lights flickering through the trees, I wasn’t too sure what kind of vehicle it was coming out, or if it was just one - a car moving around in the car park.”[[36]](#footnote-36)

# The traffic on the Hume Freeway at the time was very quiet in that Mr Prince could only see perhaps one vehicle in his mirrors maybe a kilometre behind him.

# His evidence was again directed to the observations of the other vehicle and the actions taken by him. He stated further:

“When I first seen the flickering of lights, as I got further along I noticed the truck coming out, and that’s when I knew I had to do something pretty quickly to avoid it. … I was about 200 metres off of where the broken line starts for the merge back onto the Hume Highway.”[[37]](#footnote-37)

# Mr Prince identified two photographs showing the general location of the BP Glenrowan service centre,[[38]](#footnote-38) and a closer photograph showing the Hume Freeway immediately north of the commencement of a section of dotted lines indicating the area where vehicles may re-enter the highway from the service centre.[[39]](#footnote-39)

# Further photographs depicting various views taken from the exit road from the service centre travelling south to the Hume Freeway had become available during the course of the hearing. Mr Prince’s evidence was interrupted while Mr Dunleavy gave brief further evidence concerning those photographs.

# The extent of that evidence was to satisfy me that the re-entry road from the service centre to the Hume Freeway was approximately 200 metres long, and Mr Dunleavy’s vehicle was at a position shortly south of the position from where photographs in Exhibits 3A and 3B were taken.

# In his evidence Mr Dunleavy agreed with the proposition that he was approximately 100 metres along that road when he observed the lights of Mr Prince’s vehicle.[[40]](#footnote-40)

# Mr Prince’s evidence then continued and I noted the following matters in particular:-

# The point of collision was estimated at being 50 metres south of the northern most point of the junction of the freeway entrance ramp and the freeway.[[41]](#footnote-41)

# Mr Prince’s vehicle came to rest approximately 400 to 500 metres south of the point of collision and approximately 100 metres south of the southern end of the slip lane.[[42]](#footnote-42)

# As to the conversation, Mr Prince stated that Mr Dunleavy had told him that he didn’t see him.

# Mr Prince denied saying to Mr Dunleavy that he was sorry, or that he had used words like “misjudged”.

# The police arrived within 10 or 15 minutes of being called and Mr Prince’s vehicle was towed from the scene.

# Mr Prince was then cross-examined and I noted the following evidence is relevant to my determination:

# Prior to the collision Mr Prince’s vehicle was travelling in the left lane of the freeway at 100 to 101 kilometres per hour with no vehicles close to him.

# He was familiar with the section of road and that the service centre area was a rest stop often used by truck drivers.

# On leaving that service centre area he described the slope of the road as, “it would be more flat than a slight incline.”[[43]](#footnote-43)

# He agreed that even on flat ground it would take a bit of time to gather speed in a B-double, and probably 600 to 700 metres, to get to freeway speed.

# A B-double vehicle using the full slip lane or merging lane would maybe reach 80 kilometres per hour on joining the freeway.

# The merging lane on the freeway starts wide enough for a truck for at least 400 metres, and then starts narrowing. (Or 300 to 400 metres narrowing down in the last 100 to 200 metres)

# He could see the other vehicle moving along the on-ramp but it was difficult to judge the speed at which it was travelling.

# It was a little hard to see vehicles on the on-ramp until probably a couple of hundred metres past the start of the off-ramp because of shrubbery and trees and a slight bend in the road.

# Mr Prince agreed that by the time he’d reached the service centre and McDonald’s restaurant he would have a pretty good view of such traffic.

# When he first observed the other vehicle start moving, Mr Prince, “just took my judgment of I had a clear through and just kept proceeding.”[[44]](#footnote-44)

# There was considerable cross-examination concerning the distances travelled by the two vehicles prior to the collision, and indeed the point of collision itself. Mr Prince agreed with a proposition put by me that if the other vehicle driven by Mr Dunleavy had started from a stationary position and travelled somewhere between 250 to 300 metres to the point of collision, and Mr Prince’s vehicle was traveling roughly twice that speed, he must have been 500 to 600 metres from the point of collision when he first observed the other vehicle commence to move.[[45]](#footnote-45)

# There were further matters raised in cross-examination that I regarded as relevant:

# As an experienced truck driver entering a freeway at less than the freeway speed, he would be heavily reliant on the courtesy of other drivers to get around his vehicle.[[46]](#footnote-46)

# If a heavy vehicle entered the freeway at 50 to 60 kilometres per hour, even if well clear of other traffic, invariably he would be caught by that following traffic.

# The following traffic would be required either to reduce speed or to go around the slower vehicle.

# Such a manoeuvre was common courtesy of drivers on a freeway.

# There was no criticism of the lighting that Mr Prince was able to observe on the vehicle driven by Mr Dunleavy.

# Once Mr Prince had observed Mr Dunleavy’s vehicle moving, he believed he had plenty of time to get past the other vehicle because, “I know he had a longer slip lane after the apex and I should have got past him safely.”[[47]](#footnote-47)

# After he observed Mr Dunleavy’s vehicle actually entering the freeway he would have had to act quickly and roughly within travelling 20 to 30 metres.

# He did not consider changing from the left to the right lane after observing Mr Dunleavy on the on-ramp because:

“… I knew I had enough time to continue along in the left-hand lane and get past him safely and it will be safe for him to be able to merge in.”[[48]](#footnote-48)

# He agreed with the proposition that he would have observed Mr Dunleavy’s vehicle for the full length of the on-ramp and had an opportunity to get into the right lane.

# He generally agreed that it would take probably two to three seconds to move his vehicle from the left lane to the right lane.

# He was somewhat surprised that he actually wasn’t able to get around the other vehicle, as he did his best to manoeuvre and just clipped him with the left-hand corner.

# It was from a distance of roughly 200 metres when he noticed the other vehicle coming out into the left lane instead of following the slip lane.

# He agreed that at the time of impact Mr Dunleavy’s vehicle was squarely in the left lane of the Hume Freeway.[[49]](#footnote-49)

# It was difficult for Mr Prince to manoeuvre his vehicle from the left lane to the right lane as it had a high centre of gravity and could not turn as quickly as a B-double such as a tipper with a lower centre of gravity.

# From a point approximately 200 metres prior to the point of collision Mr Prince did try to move from the left lane to the right lane.

# He had depressed the brake and the clutch pedal to disengage the gears which he stated would make it easier to pull the truck up more quickly.

# The cruise control was set up to be disengaged by the clutch, by slightly tapping it, or by using the brakes.

# Mr Prince agreed that he may have told police officers at the scene that he put his foot on the clutch to disengage the cruise control.[[50]](#footnote-50)

# Sometimes touching the brakes alone would not disengage the cruise control, but the clutch definitely does.

# Applying the brakes over 200 metres would not halve his speed, but would reduce it by at least a quarter.

# At the moment of impact Mr Prince’s vehicle would have been travelling a minimum of 15 kilometres faster than Mr Dunleavy’s vehicle.

# He denied he would have been travelling at a speed closer to 100 kilometres per hour.

# Mr Prince was pressed as to why he had made no effort, until very close to Mr Dunleavy’s vehicle, to move from the left to the right lane and responded:

“… I could see that I had a clear path through before the end of the merging lane or the filter lane and that gave me plenty of time to get up and past him.”[[51]](#footnote-51)

# He further stated that when he saw Mr Dunleavy’s vehicle start merging out on to the freeway, he started applying the brakes and commenced moving to the right lane. This was when his vehicle was approximately 200 metres north of the point of impact.

# Mr Prince rejected the proposition that he had failed to overtake safely due to tiredness or lack of attention.

# There was cross-examination of Mr Prince concerning documentation completed shortly after the incident. Mr Prince agreed that in the report to Sharp’s Transport he had described the incident as “hit back of other truck.”[[52]](#footnote-52)

# He conceded there was no mention of the other vehicle moving across his path. Mr Prince stated that this claim document was just a quick brief answer to explain what had happened.

# Mr Prince agreed that the claims document made no reference to any admission made by Mr Dunleavy.[[53]](#footnote-53)

# The final area canvassed in cross-examination concerned the loss of use claim made by Mr Prince. In this regard I accept Mr Prince’s evidence that the work which was performed on the new truck related to the trailer turntable and the air cleaners, and were items reasonably necessary for Mr Prince to recommence his work contracting with Sharp’s Transport.

# There is no document advanced in cross-examination, or at any other time, verifying the actual day upon which Mr Prince recommenced employment. The only evidence is that given orally by Mr Prince that he commenced work on 28 October 2012.

# When briefly re-examined Mr Prince confirmed that he needed the insurance payout of just on $10,000 to pay the deposit on the new vehicle purchased by him.

Analysis

# Neither of the two witnesses called in this case gave evidence that they were unable to observe the other driver’s vehicle, nor that they were distracted by any other activity shortly prior to the happening of the collision.

# Mr Cartwright on behalf of Mr Dunleavy, relied on Rule 148 of the *Road Safety Road Rules 2009 (Vic)* which provides as follows:

(1) A driver who is moving from one marked lane (whether or not the lane is ending) to another marked lane must give way to any vehicle travelling in the same direction as the driver in the marked lane to which the driver is moving.”

# It was argued that Mr Prince was entitled to assume that Mr Dunleavy would comply with the road rules.

# Mr Brophy[[54]](#footnote-54), on behalf of Mr Dunleavy, essentially argued that given the state of the visibility on the evening of the collision, and Mr Prince’s familiarity with that section of roadway and general driver courtesy, he ought to have either moved to the right lane or reduced his speed to avoid the collision.

# Mr Brophy referred me to long established authorities in *Sibley v Kais,[[55]](#footnote-55)* which is authority for the proposition that the regulations relating to right of way are not definitive of the respective duties of drivers, although they are undoubtedly salutary and attract criminal sanctions. *Sibley v Kais* is authority for the proposition that:

“The common-law duty to act reasonably in all the circumstances is paramount. The failure to take reasonable care in given circumstances is not necessarily answered by reliance upon the expected performance by the driver of the give way vehicle of his obligations under the regulations; for there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties, whether derived from statutory sources or from the common law. … The obligation of each driver of two vehicles approaching an intersection is to take reasonable care. What amounts to ‘reasonable care’ is, of course, a question of fact.”[[56]](#footnote-56)

# I was also referred to a more recent High Court authority in *Manley v Alexander* [2005] HCA 79; 80 ALJR 413. The Court stated in that decision:

“Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger. And much more often than not, that will require simultaneous attention to, and consideration of, a number of features of what is already, or may later come to be, ahead of the vehicle’s path. … But the reasonable care that a driver must exercise when driving a vehicle on a road requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events.”[[57]](#footnote-57)

# Apart from some disagreement as to what was said following the collision, I believe there is little difference between the factual matters related by each of the witnesses in this case. I believe it is appropriate to record my impression that both drivers were doing their best to give an accurate and truthful version of the events surrounding this collision to the best of their recollections.

# The plain fact is the collision occurred, and it occurred between B-double vehicles driven by professional drivers. It also occurred in circumstances where there was no allegation made that neither vehicle was properly illuminated, or that one driver had totally missed observing the other vehicle.

# Mr Dunleavy was intending to re-enter the Hume Freeway driving a heavy vehicle up what he describes as a slight incline in the full knowledge that he would not reach freeway speed by the time he had to merge into the left lane of the freeway. He did make an observation of the lights of Mr Prince’s vehicle as he travelled along the on-ramp. He acknowledged in his evidence that courtesy exists between professional truck drivers, and he perceived Mr Prince’s vehicle as presenting no apparent hazard to him. He had made a good enough observation of the lights of the vehicle to appreciate that it was a heavy vehicle and not simply a motor car travelling along the freeway. He expected that the driver of this vehicle would apply the sort of courtesy expected between truck drivers. Sadly this was not the case on 3 September 2012.

# Notwithstanding the observations made by him and the assumptions that the other driver would find a way around his vehicle, Mr Dunleavy did have an obligation imposed upon him by the Road Safety Road Rules to give way to the vehicle driven by Mr Prince as he re-entered the freeway.

# I accept from the evidence given by both drivers that as a matter of probability the point of impact occurred at a point no greater than 100 metres south of the southern most point of the dotted lines delineating the entrance ramp from the eastern most lane of the Hume Freeway. Taking into account the speed limit applicable to B-double vehicles of 100 kilometres per hour and the acknowledged evidence of both drivers that a B-double vehicle would not have reached that speed prior to re-entering the freeway, I find that the point of collision, being 100 metres or less south of that entrance ramp, places it in a position where the driver of that vehicle has not given way in accordance with the requirement of the Road Safety Rules. I therefore find that on that basis alone, Mr Dunleavy has failed to take reasonable care and is guilty of negligence.

# The circumstances of the collision are such that Mr Prince, as the driver of the following vehicle, had made an observation of Mr Dunleavy’s vehicle at a time when his vehicle was approximately 500 to 600 metres north of the point of collision. The visibility was good, the traffic extremely light, and there was no reason whatsoever why Mr Prince could not have moved his vehicle into the right lane and safely avoided this collision.

# The evidence given by Mr Prince confirms his belief that at the time he first observed the other vehicle moving from within the service centre, he had ample time to continue on in the left lane and overtake that vehicle before it had re-joined the freeway. That observation proved to be incorrect.

# I am not able to find, on the evidence before me, that there was any particular distraction or difficulty to prevent Mr Prince from manouvering his vehicle, or slowing its speed so as to avoid collision. The fact is a collision did occur, and one of the causes of that collision in the circumstances, amounted in my view to an error of judgment on the part of Mr Prince.

# I therefore find both drivers have breached their respective duties of care. The question of apportionment of liability as between the two drivers is perhaps best guided by the principles set out in *Podrebersek v Australian Iron & Steel Pty Limited.*[[58]](#footnote-58)Although *Podrebersek* dealt with the question of contributory negligence, it is accepted that the principals involved in the apportionment exercise in a case such as the present one involving an apportionment of contribution between tortfeasors should adopt the same principles. In a later authority of the New South Wales Court of Appeal in *Macquarie Pathology Services Pty Ltd v Sullivan[[59]](#footnote-59)* Clarke JA stated:

“… the making of an apportionment involved a comparison both of culpability and of the relevant importance of the acts of the parties in causing the damage. To put it another way the court is concerned with considering relative blameworthiness and the relevant causal potency of the negligence of each party.”[[60]](#footnote-60)

# In the present case the question of causal potency is easily resolved as both drivers are in control of heavy B-double vehicles. Each driver has made an observation of the other vehicle and has acted upon a judgment to continue to drive in a manner which ultimately results in collision. It is in the present case the relative blameworthiness of the respective drivers that requires real consideration.

# In my assessment the higher obligation rested upon Mr Dunleavy as he drove his vehicle from the rest area back on to the freeway. He did have a general duty of care as the High Court has mandated, to drive or control his vehicle so as to avoid collision. He did also have the statutory obligation to give way. In my view his contribution to the collision must carry the greater degree of blameworthiness. I assess his contribution to the happening of the collision at two-thirds, and the contribution by Mr Prince at one-third.

# In relation to the quantum of the claim made by 6DC Pty Ltd I accept the evidence of Mr Prince as to the timeframe and the actions involved in obtaining a replacement vehicle and seeking further remunerative employment. I am not satisfied that he has failed to mitigate his damages and I accept that the 44 days claimed in respect of a loss of use claim is reasonable in the circumstances.

Conclusion

# I note that the parties have agreed the respective damages sought in each of the actions save for the loss of use claim, to which I have referred in the preceding paragraph. I note the total of the claim advanced by 6DC Pty Ltd is $120,577.36 in respect of the replacement cost of the vehicle driven by Mr Prince, together with a loss of use claim of $542.92 per day for 44 days. A total of $23,888.48. The total claim advanced in that proceeding is therefore $144,465.84.

# The total claim sought by Raston Group Pty Ltd[[61]](#footnote-61) in respect of the damage to the vehicle driven by Mr Dunleavy was $18,385.34. I will receive further submissions on behalf of the parties in relation to the formal orders and any questions relating to interest or costs.

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1. a pseudonym [↑](#footnote-ref-1)
2. a pseudonym [↑](#footnote-ref-2)
3. a pseudonym [↑](#footnote-ref-3)
4. Transcript (“T”) 24, Line (“L”) 5–7 [↑](#footnote-ref-4)
5. T24, L14–16 [↑](#footnote-ref-5)
6. T25, L5–9 [↑](#footnote-ref-6)
7. T25, L20–22 [↑](#footnote-ref-7)
8. T26, L23–27 [↑](#footnote-ref-8)
9. T29, L5–12 [↑](#footnote-ref-9)
10. T33, L21–22 [↑](#footnote-ref-10)
11. T35, L4–25 [↑](#footnote-ref-11)
12. T36, L5–6 [↑](#footnote-ref-12)
13. T38, L11–24 [↑](#footnote-ref-13)
14. T41, L12–14 [↑](#footnote-ref-14)
15. T41, L15–24 [↑](#footnote-ref-15)
16. T41, L25–T42, L2 [↑](#footnote-ref-16)
17. T42, L8–10 [↑](#footnote-ref-17)
18. T42, L17–T43, L1 [↑](#footnote-ref-18)
19. T43, L16–19 [↑](#footnote-ref-19)
20. T45, L14–17 [↑](#footnote-ref-20)
21. T45, L20–21 [↑](#footnote-ref-21)
22. T46, L11–19 [↑](#footnote-ref-22)
23. T46, L21–30 [↑](#footnote-ref-23)
24. T47, L4–20 [↑](#footnote-ref-24)
25. T48, L12–18 [↑](#footnote-ref-25)
26. Exhibit 5, pages 11–16 [↑](#footnote-ref-26)
27. T55, L3–10 [↑](#footnote-ref-27)
28. a pseudonym [↑](#footnote-ref-28)
29. Exhibit 5, page 12 [↑](#footnote-ref-29)
30. T91, L12–13 [↑](#footnote-ref-30)
31. a pseudonym [↑](#footnote-ref-31)
32. Exhibit A [↑](#footnote-ref-32)
33. T109, L5-11 [↑](#footnote-ref-33)
34. T109 [↑](#footnote-ref-34)
35. T110, L6-8 [↑](#footnote-ref-35)
36. T109, L17-19 [↑](#footnote-ref-36)
37. T111, L10-17 [↑](#footnote-ref-37)
38. Exhibit B2 [↑](#footnote-ref-38)
39. Exhibit B1 [↑](#footnote-ref-39)
40. T132, L8-12 [↑](#footnote-ref-40)
41. T139, L20-25 & Exhibit B1 [↑](#footnote-ref-41)
42. T140, L6-11 [↑](#footnote-ref-42)
43. T145, L6-10 [↑](#footnote-ref-43)
44. T152, L17-19 [↑](#footnote-ref-44)
45. T156, L24-28 [↑](#footnote-ref-45)
46. T157, L19-31 [↑](#footnote-ref-46)
47. T159, L1-3 [↑](#footnote-ref-47)
48. T160, L13-16 [↑](#footnote-ref-48)
49. T166, L27-30 [↑](#footnote-ref-49)
50. T170, L18-24 [↑](#footnote-ref-50)
51. L176, L14-18 [↑](#footnote-ref-51)
52. T182, L8-13 & Exhibit 5 pages 22-23 [↑](#footnote-ref-52)
53. T188, L4-6 [↑](#footnote-ref-53)
54. a pseudonym [↑](#footnote-ref-54)
55. (1967) 118 CLR 424 [↑](#footnote-ref-55)
56. *Sibley v Kais a*t [5] [↑](#footnote-ref-56)
57. *Manley v Alexander* at [11] & [12] per Gummow, Kirby & Hayne JJ [↑](#footnote-ref-57)
58. [1985] HCA 34; and (1985) 59 ALR 529 [↑](#footnote-ref-58)
59. Unreported, NSW CA 28 March 1995 [↑](#footnote-ref-59)
60. Ibid [19] [↑](#footnote-ref-60)
61. a pseudonym [↑](#footnote-ref-61)