Personal Injury Commission

New South Wales

# CERTIFICATE OF DETERMINATION OF MEMBER

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| **CITATION:** | **Wallace v Insurance Australia Limited t/as NRMA Insurance [2026] NSWPIC 465** |
| **CLAIMANT:** | Robert Wallace |
| **INSURER:** | Insurance Australia Limited t/as NRMA Insurance |
| **SENIOR MEMBER:** | Brett Williams |
| **DATE OF DECISION:** | 11 August 2026 |
| **CATCHWORDS:** | MOTOR ACCIDENTS - *Motor Accident Injuries Act 2017;* whether accident caused wholly or mostly by the fault of the claimant; accident occurred when claimant attempted to merge lanes*; Podrebersek v Australian Iron & Steel Pty Ltd* (*Podrebersek*) not applied; *Derrick v Cheung, Marien v Gardiner, Marien v HJ Heinz Company Australia Ltd,* and *AAI Limited t/as GIO v Evic* applied; *Held* – the accident was caused by the fault of the claimant; there was no fault on the part of the other driver; because there was no culpable conduct on the part of the other driver, which could be subjected to comparative examination, the exercise called for in *Podrebersek* can have no application; assessment of whether the accident was caused wholly or mostly by the claimant undertaken by inquiring how far he departed from the standard of care he was required to observe in the interests of his own safety; contributory negligence assessed at 75%; accident caused mostly by the fault of the claimant; costs order made under section 8.10(4)(b) of the MAI Act. |
| **DETERMINATIONS MADE:** | **CERTIFICATE**<br><br>1. For the purposes of s 3.11 of the *Motor Accident Injuries Act 2017* the motor accident on 8 November 2024 was caused mostly by the fault of Mr Wallace. |

2. For the purposes of s 3.28 of the *Motor Accident Injuries Act 2017* the motor accident on
8 November 2024 was caused mostly by the fault of Mr Wallace.

3. A statement of my reasons for this determination is attached to this certificate.

## STATEMENT OF REASONS

### BACKGROUND

1. Robert Wallace (claimant) suffered significant injuries as a result of a motor vehicle accident at Adamstown on 8 November 2024 (accident). He subsequently made a claim for statutory benefits on Insurance Australia Limited t/as NRMA Insurance (insurer) under the *Motor Accident Injuries Act 2017* (MAI Act).

2. On 29 July 2025 the insurer denied liability for the claim on the basis that the accident was caused wholly by the claimant's fault: ss 3.11 and 3.28 MAI Act. After an internal reviewer affirmed the insurer's decision to deny liability, the claimant commenced these proceedings. The dispute before the Commission concerns miscellaneous claims assessment matters: Sch 2 cl 3(d) and(e).

3. Preliminary conferences were held on 23 March 2026 and 21 May 2026. Case management directions were made on each occasion. The insurer was given leave to serve a direction for production on NSW Police. The proceedings were listed for hearing on 6 August 2026.

4. The hearing was conducted by audio visual link (AVL). Mr Jones, of counsel, appeared for the claimant. Mr Gil appeared for the insurer. Both the claimant and Ms Hardes, the other driver involved in the accident, gave oral evidence and were cross examined. During the course of submissions, a number of facts were agreed. At the conclusion of submissions, I reserved my decision.

### STATUTORY FRAMEWORK

5. An injured person is not entitled to statutory benefits more than 52 weeks after the motor accident concerned if the motor accident was caused wholly or mostly by the fault of the person: ss 3.11(1)(a) and 3.28(1)(a) of the MAI Act. A motor accident was caused mostly by the fault of a person if the contributory negligence of the person in relation to the motor accident was greater than 61%: ss 3.11(2) and 3.28(2) of the MAI Act.

6. Sections 3.11 and 3.28 are directed at the extent to which the injured person's failure to take reasonable care contributed to the motor accident and are concerned with contributory negligence for the accident: *AAI Ltd t/as GIO v Evic* (2024) 107 MVR 411; [2024] NSWSC 1272 (*Evic*) at [57].

7. The burden of proving the accident was caused wholly or mostly by the fault of the claimant lies with the insurer: *Insurance Australia Limited t/as NRMA v Richards* [2023] NSWSC 909.

8. The common law and enacted law as to contributory negligence that applies to an award of damages in respect of a motor accident applies to a claim for statutory benefits: ss 3.11(2), s 3.28(2), 3.38(1).

9. The enacted law of contributory negligence includes Div 8 of Pt 1A of the *Civil Liability Act* (CLA). Section 5R(1) provides that the principles that apply in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm. Section 5R(2)(a) provides that, for that purpose, the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person.

10. Contributory negligence is to be assessed on the basis of what is just and equitable in the circumstances of the case, none of the circumstances referred to in s 3.38(2) being relevant, and there being no percentage fixed by the regulations: s 3.38(3)(c).

**REVIEW OF THE EVIDENCE**

11. The documentary evidence relied on by the parties is contained in a joint bundle filed by the insurer. As recorded earlier, both the claimant and Ms Hardes gave oral evidence at the hearing.

12. There is reference, in the transcript of interview between the insurer's investigator and Constable Bernard, to body worn video of the version of the accident given at the scene by Ms Hardes[1]. NSW Police did not, however, produce that evidence in response to the direction for production served by the insurer, despite the footage falling within the scope of that direction. When this was raised with the parties at the hearing, both confirmed they wished the hearing to proceed in the absence of the body worn camera footage. Neither sought an adjournment and neither sought an opportunity to take further steps to procure the footage.

**The claimant's evidence**

13. The claimant relies on the statement he gave to an investigator appointed by the insurer on 3 June 2025. He states that on the day of the accident he was riding his 2014 Wide Glide Harley Davidson on City Road, Adamstown Heights. He was familiar with the route he was taking, having driven it to and from work six times a week for a decade. The claimant was heading towards a service station situated at 317 Pacific Highway, Highfields, and was approximately a couple of hundred metres before the service station when the accident occurred.

14. The claimant states he was wearing a high visibility work shirt, jeans and steel cap boots. The accident occurred at approximately 12.15pm. It was bright and sunny. Visibility was not an issue. As far as he could recall, the traffic "wasn't that heavy".

[1] Transcript of interview Q & A 53 and 54.

15. The claimant states he was travelling on City Road heading in a generally south/southwest direction. He was in the left-hand lane as it was his intention to turn into the service station. He states:

> "[22] There was a small blue hatch back in front of me. We were cruising at 60km per hour, when this blue hatch back started slowing down. It had its left-hand indicator on. I assumed with the way it was slowing down it was going to pull into a driveway.
>
> [23] We both came to a complete stop. I was waiting for him to go into a driveway which he never did. I am pretty sure it is a no stopping zone along there. I had both my feet on the ground at one point. I am guessing I would have been a couple hundred metres before that service station.
>
> [24] I was stopped for maybe 30 seconds when I have realised, he wasn't pulling into a driveway but just stopping in lane 1. Being on a bike you always look behind you to check that it is safe to change lanes. When I looked behind me there were no cars travelling in the middle lane, it was clear for me to proceed. I merged lanes.
>
> [25] Next thing I recall it was Wednesday 2 weeks after the accident…
>
> …
>
> [28] I believe the other car was at fault. Everyone has been told to look twice for bikes. The middle lane was clear when I looked and the driver of the car that hit me, would have seen me in my high visibility shirt and merged anyway. I believe the car in front of me, stopping when he should not have has contributed to the accident…"

16. In oral evidence the claimant confirmed that, other than with respect to the type of helmet he was wearing, his statement "looked pretty good to [him]." The claimant confirmed he had been riding bikes since he was a child and had been riding on the road since he was 16 or 17 years of age. The claimant's evidence was that over the course of those years he had developed a "usual practice" when changing lanes on a motorcycle to not trust anyone. He "looked[ed] every time", meaning that he would look over his shoulder behind him, "everywhere". The claimant's evidence was that he did this on the day of the accident and that there were no cars in lane two. His blinker was on to "pull out". Having seen no cars in lane two, he went to move and did not remember "a thing" after that.

17. In cross examination, the claimant gave evidence that he did not believe he had stopped at the intersection of City and Brunker Roads. He was almost at the service station when he pulled up behind the car in front of him. His evidence was there was no stationary car in front

of that car; the only car in front of him was a “little blue car”. He later gave evidence he could not recall a car parked in front of the little blue car.

18. The claimant’s evidence was that Ms Hardes’ vehicle was not in lane two before the accident and he did not see her in lane three. He did not see any vehicles go past him while he was waiting. The only cars he could see were stopped at the traffic lights behind him. The claimant rejected the proposition that he had no memory of the collision or the moments leading up to it. He was “positive” there were no cars in lane two, saying “otherwise I would not have pulled out”. The claimant “guessed” he was “parked” behind the little blue car for “at least 30 seconds, maybe a minute”. He agreed that, during that time vehicles probably passed in lane two. The claimant’s evidence was that when he turned around to move, the traffic lights were red, and all the cars were stopped. His intention was to change into lane two to pass the stationary car, then re-enter lane one so he could enter the driveway of the service station ahead.

19. The claimant’s evidence was that he had no memory after pulling out of lane one. He agreed the assertion in his statement that Ms Hardes merged into the middle lane from lane three was speculation. He disputed that he drove into the passenger side of Ms Hardes’ car, saying “I would not throw myself in front of a moving vehicle at 60 kilometres an hour…”.

20. I am satisfied the claimant did his best to give honest and accurate evidence. As will be seen, I prefer Ms Hardes’ evidence with respect to key facts.

**Ms Hardes’ evidence**

21. As recorded earlier, the version of the accident given by Ms Hardes to police at the scene of the accident is not in evidence.

22. The earliest version of the accident provided by Ms Hardes that is in evidence is contained in a document described as an Accident Report Form dated 25 November 2024, a little over a fortnight after the accident. Therein she recorded as follows in response to the question “What happened?”:

> “The traffic was moving forward' from the Pacific Hwy/ Brunker Road intersection traffic lights, after being stopped by the lights. I was travelling in the middle lane behind other cars, with cars either side of me. The motorbike rider was in the far-left lane. There was a car parked in the far-left lane, not far after the lights, causing the car in front of the motorbike rider to slow to a stop and wait for a safe time to merge as the traffic was busy. The motorbike rider was stopped behind him. I was driving past with the other vehicles, and then felt my car shunted hard to the right and could tell I had been hit. When I looked in my revision [sic] mirrors to see what had happened, I saw the motorbike rider and his bike on the road behind me. I safely pulled over to the left and

put my hazards on before calling an ambulance for the rider at 12:13pm. The motorbike rider had hit the back left panels of my car and caused damage…”

23. The Accident Report Form also contains a diagram prepared by Ms Hardes that depicts the position of the claimant’s bike, Ms Hardes’ vehicle, and other vehicles on City Road. The form also includes three photographs that show damage to the rear left side of Ms Hardes’ vehicle, at and about the rear left passenger door and the panel that includes the fuel tank door.

24. On 1 July 2025 Ms Hardes gave a statement to an investigator appointed by the insurer. She confirmed the accident occurred at approximately 12.10pm on 8 November 2024 on City Road, Adamstown Heights. There were three lanes of traffic heading towards Charlestown. The speed limit was 60 kmph. Ms Hardes states:

> “[21] …I was required to stop at the set of lights with Brunker Road. I was travelling in the middle lane behind other cars, with cars either side of me.
>
> [22] Lights changed to green and myself and the other vehicles continued to travel along City Road.
>
> [23] I noticed a motor bike rider in the far-left lane. There was a car parked in the far-left lane not far after the lights, causing the car in front of the motorbike rider to slow to a stop and wait for a safe time to merge as the traffic was quite busy.
>
> [24] The motorbike rider came to a stop behind him. I was driving past with the flow of traffic, when I felt my car shunt hard on my left-hand side. I could immediately tell that I had been hit by something. I looked in my rear vision mirror to see what had happened.
>
> [25] I saw the motorbike rider and his bike on the road behind me...”

25. Ms Hardes later states that: “at one point after the collision, I looked at my car and could see damage on the back left panels, as per the images I have supplied. This must have been where the bike rider collided with my car.”

26. Ms Hardes gave oral evidence and was extensively cross examined by Mr Jones. I found her to be an impressive witness. She made appropriate concessions in cross examination. When she had no recollection of a specific matter she said so. She was not prepared to make estimates or “guestimate” about matters she did not recall. She acknowledged that her memory about some matters was diminished due to the effluxion of time.

27. Ms Hardes gave evidence that when travelling on City Road between the intersection and the point at which the accident occurred, she was in the middle lane (lane two). She was not in lane three at any stage and did not indicate to change lanes. She said there were cars “all

around [her]", and that it was a "busy morning". Her evidence was that prior to the collision, she had stopped at the intersection. She was not the first person at the traffic lights. She did not recall how many cars were in front of her.

28. When asked when she first saw the motorbike rider (the claimant), Ms Hardes responded:

> "when we were stopped at the lights probably. But again, I only recall as we were driving past when the car in front of the motorbike rider was slowed to a stop because there was a parked vehicle."

29. She went on to confirm that the only recollection she had was seeing the motorbike rider when he was stopped behind the car in front of him in the left lane (lane one). She did not recall the motorbike rider indicating to merge into the middle lane. Nor did she recall the rider looking over behind their shoulder.

30. In cross examination Ms Hardes confirmed she had driven on that stretch of City Road many times before the accident. She had previously seen cars parked in lane one. She agreed she had seen vehicles travelling in lane one towards parked cars merge into the middle lane, adding "if it was safe to do so". She also agreed that there would be a need for those cars in the left lane to eventually merge to get around the parked car.

31. Ms Hardes agreed that on the day of the accident she had seen the parked car in lane one and had seen the claimant's motorcycle and the car in front both slowing to a stop to wait to merge. She said that when she was at the traffic lights, she had cars in front of her and cars "all around" her. She did not recall seeing the motorbike at the intersection.

32. Ms Hardes did not recall the distance between her vehicle and the vehicle in front, and was not prepared to proffer and estimate, saying it was a "safe distance". Her evidence was that she was "travelling with the traffic". She did not recall if the vehicles stopped in lane, one had their indicator on.

33. Ms Hardes did not agree there was "always a possibility" that either or both the motorcycle rider and the car in front of it may merge into the gap between her vehicle and the car in front of her.

34. Ms Hardes evidence was that as she was travelling on City Road after the intersection, she had increased her speed. She doubted she would have reached 60 kmph when the accident occurred, could not recall if she was accelerating at the time, and was not prepared to "guestimate" her speed. She agreed she did not slow after moving away from the traffic lights. Ms Hardes also agreed she had not checked her speedometer in the period leading up to the accident. Her evidence was that she continued with the flow of traffic. She agreed that after seeing the vehicles come to a stop in lane one, she returned her focus to the traffic ahead. She said she had driven past the claimant when the collision occurred.

35. Ms Hardes evidence was that after she passed the intersection there was a car in front of her and a car to her right. Although she did not recall how many cars were “all around” her, Ms Hardes evidence was that “it was busy” and there were multiple cars. She agreed she had reconstructed as best she could the scene in the diagram she provided with the Accident Report Form and that the diagram did not represent the exact flow of traffic.

36. Ms Hardes recalled giving a statement to police at the scene. She did not know if it had been recorded on body worn camera.

37. Ms Hardes recalled that the impact of the collision shunted her car to the right. She did not know what had occurred, looked in her rear vision mirror, and saw the motorbike and the rider on the ground behind her.

38. Ms Hardes disputed that she had reconstructed events to align with her opinion that she considered herself to be a “good” and “safe” driver. Nor had she been motivated by a desire to lodge a no-fault property damage claim that would not attract an excess.

39. Ms Hardes denied that she had merged from the far-right lane into the middle lane, saying that she had been in the middle lane “the whole time” and was “at no point” in the right lane. She did not recall seeing the claimant with his feet on the ground as she approached him. Nor did she see his indicator, or that of the car in front of him, illuminated to the right.

40. In re-examination, Ms Hardes was asked about photographs of the scene taken from a property on City Road proximate to where the accident occurred. She could not recall if one of the vehicles shown in the photographs was the stationary vehicle. She thought the vehicle that could be seen in front of the ambulance was the car behind the parked car (the small blue car travelling directly in front of the claimant).

41. Ms Hardes’ evidence was that she recalled travelling in the middle lane from the intersection to the point at which the accident occurred. She only moved out of that lane after the collision so she could park her car.

**Constable Bernard**

42. The evidence includes a transcript of an interview between Constable Bernard and an investigator on 15 July 2025. The Constable told the investigator he attended the accident scene at approximately 12.15pm. He and Constable Forstey were the first emergency services personnel to arrive at the scene. Constable Bernard refers to obtaining a version of the accident from Ms Hardes at the scene that was recorded on body worn video. He also refers to a version of events obtained from a witness travelling behind the claimant. In this regard, the transcript records:

> “…

A77 But, yeah, essentially his version was he was travelling behind Robert – Robert Wallace - - -

**Q78 Yep.**

A78 - - - and then has just seen him take immediate sharp right turn just to evade the car that was parked in lane one, and as the result has collided with Emma on her - - -

**Q79 Yep.**

A79 - - - left. Yeah…"

43. The name of the witness is not referred to in either the transcript or the documents produced by police in response to a direction for production.

44. With respect to the presence of a parked vehicle in lane one, a matter that is in dispute, the transcript of interview records:

"A93 No. We spoke with the registered owners of the vehicle that was parked in lane one.

**Q94 Yep.**

A94 There was signs saying that they could park there legally - - -

**Q95 Yep.**

A95 - - - in that line. There was a – I believe, at the time of the incident they could park there with that time.

**Q96 Yep.**

A96 We spoke with them as well at the scene. We advised them that they weren't a fault and that - - -

**Q97 Okay.**

A97 - - - they'd done nothing wrong. We just obviously said, look, if they can avoid parking on the street if they can but - - -

**Q98 Yep.**

A98 - - - they're under no legal obligation to do so…"

45. At A109 and A110 the Constable provided a summary of what he believed had happened in the accident.

**Other evidence**

46. The Application for Personal Injury Benefits was completed by the claimant's son. While

there is a description of the accident in that document, there is no evidence about the source of that version of events. I have not weight to that version of events.

47. I have considered the police reports contained in the evidence and the descriptions of the accident contained in those reports. I have given weight to the COPS report in so far as it records there was a vehicle legally parked in lane one of three outside its registered address.

48. I have also considered the ambulance report, the records from Hunter Brain Injury Service, and Dr Bodel's report.

49. Property damage records from Suncorp relate to repairs to Ms Hardes' vehicle. Relevantly, the repair quote refers to "R+R"[2] of various components located at the "L/R"[3] of the vehicle. I infer from this material that the damage to Ms Hardes' vehicle caused by the accident was located at and about the rear left passenger door and the adjacent panel, as depicted in the photographs attached to the Accident Report Form.

50. There are also photographs of the accident scene taken on the day of the accident and subsequently. To the extent that they depict the layout of City Road and the accident scene generally I have given them weight. They otherwise do not assist me when it comes to resolving the critical factual disputes that arise in the proceedings.

**SUBMISSIONS**

**Claimant's submissions**

51. The claimant relies on written submissions dated 2 July 2026. His case is that he looked behind him and seeing the path was clear, merged into lane two, with Ms Hardes having merged into lane two from lane three at or around that time. In circumstances where he had begun merging and lane two was clear when he merged into it, the claimant submits he was not wholly or mostly at fault for the accident. In the claimant's submission, of particular significance is that he had a clear path of travel and despite being aware of the parked vehicle in lane one and his presence, Ms Hardes merged lanes.

52. To the extent the insurer relies on the police records to prove that certain events occurred or did not occur, it is argued "that is inappropriate" because the "officers" were not present at the scene and the reports are "mere summaries from sources unknown". It is submitted that, given the claimant cannot challenge the makers of the representations on which the police relied, it is unfairly prejudicial to determine what occurred with reference to that evidence. The same, it is argued, is also true in respect of the ambulance records.

53. In oral submissions, Mr Jones referred to the two "diametrically opposed factual accounts of what happened". He also emphasised that the insurer bore the onus, and that it was open for

[2] Removal and Replacement.
[3] Left Rear.

the Commission to find that the onus had not been discharged.

54. Mr Jones submitted that the claimant's version of events, particularly that he looked behind him before merging and, there being no vehicles in lane two, commenced to merge into that lane, should be accepted. He argued that if the claimant's version is accepted, the accident was not caused wholly or mostly by his fault.

55. In Mr Jones' submission, if her evidence is accepted, Ms Hardes nonetheless appreciated there were vehicles ahead that were stopped in lane one and must have appreciated there was a risk of either or both vehicles merging into the gap between her vehicle and the vehicle in front. This was a known risk, not a speculative one. In Mr Jones' submission, Ms Hardes took no steps to keep her vehicle in control in response to what must have been an obvious and foreseeable risk. It was submitted there was no challenge to the claimant that his indicator was on, activated and illuminated and Ms Hardes simply didn't know or didn't see.

56. Mr Jones argued that, in response to the risk, Ms Hardes should have slowed down so as to be able to respond to the foreseeable and known emergence of that risk. She did not and continued with the flow of traffic. That, he argued, was a failing on her part.

57. With respect to the versions of the accident recorded in the police report, ambulance report, various treatment records and Dr Bodel's report, all of which were relied on by the insurer to support findings about disputed facts, Mr Jones argued that those versions should be given limited weight because they had been informed by unknown sources. In support of this submission, reliance was placed on *Lithgow City Council v Jackson* (2011) 244 CLR 352; (2011) 281 ALR 223; (2011) 85 ALJR 1130; [2011] HCA 36.

58. Mr Jones argued a finding should be made that, from an early stage on, Ms Hardes had formed a view about what she did and had sought to excuse herself for any fault for the accident. In his submission, Ms Hardes' evidence about what occurred had been reconstructed "after the fact". Mr Jones argued that, to the extent there was consistency across the written versions of the accident she had prepared, there has been "a continuation of a false narrative across the documents, based upon her perception of events." In his submission, Ms Hardes' evidence should be rejected.

59. Mr Jones argued that the claimant's evidence should be accepted; he was an experienced motorcycle rider and had given evidence about his usual practice when changing lanes. There was, in his submission, no reason to suppose that was not what he did on this occasion. Mr Jones relied on *Connor v Blacktown District Hospital* [1971] 1 NSWLR 713 and *Drivas v Jakopovic* (2019) 100 NSWLR 505; [2019] NSWCA 218 in support of his submission that the claimant's evidence about his usual practice should be accepted.

60. In Mr Jones' submission, in the absence of evidence explaining the damage profile, the

damage to Ms Hardes' vehicle cannot be said to be inconsistent with the claimant's version of events.

61. Mr Jones argued that the claimant's version of events is logical and cogent and should be accepted. In the event Ms Hardes' evidence is preferred, it was submitted that she failed to take any response to the risk unfolding before her. In Mr Jones' submission, in either scenario, it could not be said the accident was caused wholly or mostly by the fault of the claimant. In the alternative, it was submitted that, if the Commission was not satisfied about key events, the insurer would fail because it had not discharged the onus it carries.

**Insurer's submissions**

62. The insurer relies on written submissions dated 22 July 2026. Therein the insurer refers to background matters, the evidence it relies on, and matters it says are not in dispute. The insurer argues that Ms Hardes was keeping a proper lookout for hazards, including the parked vehicle in lane one, the vehicle in front of the claimant, and the claimant. The insurer submits Ms Hardes was entitled to rely on other road users, such as the claimant, obeying the Road Rules and only merging when it was safe to do so. In the insurer's submission, Ms Hardes could not have taken any action to avoid the accident and did not breach the duty of care she owed to the claimant.

63. After referring to *Evic* and *Davis v Swift* (2014) 69 MVR 375; [2014] NSWCA 458 at [52], the insurer argued that the claimant's conduct was such a departure from the standard of care that a finding of 100% contributory negligence should be made for the following reasons: the claimant was not keeping a proper lookout; a reasonable person in the claimant's position changing lanes from lane one to lane two would have checked properly before changing lanes; had the claimant done so, he would have seen approaching vehicles and waited until it was safe to change lanes, and by consciously accelerating, changing lanes, and striking the rear passenger side of Ms Hardes' vehicle, the claimant "consciously put [himself] in [a] position of danger where the harm was inevitable and it was realised."

64. The insurer's written submissions also address the claimant's application for a costs order under s 8.10(4) of the MAI Act. Its objections to that order being made were reiterated in oral submission.

65. In oral submissions, Mr Gil emphasised matters addressed in the insurer's written submissions. He argued the accident was caused by the claimant's fault, and that there was no fault on the part of Ms Hardes or any other driver.

66. Mr Gil argued that it was reasonable for Ms Hardes to rely on the claimant abiding by the Road Rules. He relied on *Kojic v Insurance Australia Limited t/as NRMA Insurance* [2026] NSWPIC 13 at [115] in support of a submission that if all traffic had to travel at a speed in

anticipation of a hazard emerging “the city’s traffic would grind to a halt”.

67. In Mr Gil’s submission, the claimant’s contributory negligence should be assessed at 100% in circumstances where he drove into the side of a vehicle that was there to be seen.

68. Mr Gil argued Ms Hardes’ evidence has been consistent with respect to being in lane two at all material times; that is what she told police, what the police have recorded, what is recorded in the Accident Report Form and in her statement, and what she said when she gave oral evidence.

69. With respect to her oral evidence, it was argued that Ms Hardes was making her best effort to be honest and transparent; what she didn't recall, she didn't recall and she made concessions. It was submitted the sketch contained in the Accident Report Form was illustrative rather than “a scale model of exactly what happened”.

**FINDINGS**

70. There is no dispute that the claimant suffered significant injuries as a result of a motor vehicle accident on City Road, Adamstown, at approximately 12.10pm on 8 November 2024. The following additional facts are not controversial and are established on the evidence:

(a) at the time of the accident the claimant was wearing a high visibility work shirt, jeans, steel cap boots and a helmet;

(b) immediately before the accident the claimant was travelling in a generally south/southwest direction in lane one on City Road;

(c) there were three traffic lanes on City Road for vehicles traveling in the claimant’s direction of travel; lane one (the lane closest to the kerb), lane two (the middle lane), and lane three (the right lane);

(d) the speed limit on City Road at the location of the accident was 60 kmph;

(e) the claimant stopped his motorcycle in lane one behind a small blue car that had also stopped;

(f) alcohol, drugs, fatigue, and medical conditions did not cause or contribute to the accident;

(g) the road conditions, weather, and time of day did not cause or contribute to the accident;

(h) City Road leading up to the accident scene was relatively straight, albeit with a modest incline;

(i) prior to the accident Ms Hardes had stopped at a red-light at the intersection of City and Brunker Roads;

(j) at the time of the accident Ms Hardes was driving within the speed limit;

(k) the claimant attempted to change from lane one to lane two, and

(l) there was a collision between the claimant's motorcycle and the vehicle driven by Ms Hardes.

71. I am satisfied the small blue car immediately in front of the claimant in lane one had stopped behind another vehicle that was legally parked in lane one. Ms Hardes saw that vehicle as did police who attended the scene. As recorded in the transcript of interview between Constable Bernard and the investigator, police subsequently spoke to the owner of that vehicle and advised them they were not at fault and had "done nothing wrong".

72. I find that when she was stopped at the intersection of City and Brunker Roads Ms Hardes was travelling in lane two. I accept her evidence that she remained in lane two at all times up to and including the point at which the collision occurred. I also accept Ms Hardes' evidence that there were vehicles travelling in front of her in lane two. Her evidence about these matters has been consistent, and I have had the advantage of evaluating her while she was giving evidence and being cross examined at length.

73. The evidence does not enable me to make a finding on the probabilities about the distance between Ms Hardes' vehicle and the car travelling in front of her in lane two. I accept her evidence that she was travelling with the flow of traffic. I find that she was travelling at a speed of between 40 – 60 kmph.

74. I find that after moving past the intersection of City and Brunker Roads Ms Hardes saw the claimant and another vehicle (the little blue car) come to a stop behind a parked vehicle. She was aware both vehicles intended to merge into lane two. She did not see the indicator activated on either vehicle. I consider it probable that both the claimant and the driver of the little blue car had activated their right indicators.

75. I accept the claimant's evidence he had developed a "usual practice" when changing lanes on a motorcycle to "not trust anyone" and that he would look over his shoulder, behind him, "everywhere". However, I have found Ms Hardes was, at the time of the collision, travelling in lane two and had been in that lane since at least the intersection of City and Brunker Roads.

76. At the time the claimant attempted to change lanes Ms Hardes was there to be seen. The claimant did not see her. I infer he either didn't look behind him or, if he did look, it was cursory. Either way, he did not keep a proper lookout.

77. I find that when he attempted to merge from lane one into lane two the claimant's motorcycle collided with the rear left side of Ms Hardes' vehicle, at and about the rear passenger door and petrol flap.

**FAULT**

78. As drivers of motor vehicles, both the claimant and Ms Hardes had a duty to take reasonable care having regard to all the circumstances: *Vairy v Wyong Shire Council* [2005] HCA 62;

(2005) 223 CLR 422 McHugh J at [26]. Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger. That requires simultaneous attention to, and consideration of, a number of different features of what is already, or may later come to be, ahead of the vehicle's path: *Manley v Alexander* [2005] HCA 79; (2005) 80 ALJR 413 Gummow, Kirby, and Hayne JJ at [11].

**Was the accident caused by the claimant's fault?**

79. Section 5R of the CLA provides that the principles applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm. The standard of care is that of a reasonable person in the position of the person who suffered harm and is to be determined on the basis of what that person knew or ought to have known at the time.

80. The accident occurred when the claimant was attempting to change from lane one to lane two. The relevant risk of harm was a risk of collision with traffic already in lane two.

81. I have found that before changing lanes, the claimant either didn't look behind him or, if he did look, it was cursory. He did not keep a proper lookout. Had he done so, he would have seen Ms Hardes' vehicle in lane two. A reasonable person in the claimant's position would not have changed lanes. But for the claimant's failure to exercise reasonable care the accident would not have occurred. I find that the accident was caused by the claimant's fault.

**Was the accident caused by Ms Hardes' fault?**

82. There is no dispute that as the driver of a motor vehicle Ms Hardes owed the duty of care described in *Vairy* and *Manley*. Whether reasonable care has been exercised is not determined by asking if different conduct could have produced a different outcome and avoided a collision or accident: *Derrick v Cheung* (2001) 181 ALR 301; (2001) 33 MVR 393; [2001] HCA 48 at [13].

83. A person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable, not insignificant and a reasonable person would have taken those precautions in those circumstances: s 5B(1). Further, as explained by Meagher JA in *Marien v Gardiner; Marien v HJ Heinz Company Australia Ltd* (2013) 66 MVR 1; [2013] NSWCA 396:

> "[36] The driver is not required, however, to know or predict every event which happens in the vicinity of the vehicle so as to be able to take reasonable steps to react to such events. As Hodgson JA (Ipp JA and Gyles AJA agreeing) said in *Hawthorne v Hillcoat* [2008] NSWCA 340 at [47], the driver is only required to take reasonable steps to be in a position to know what is happening or might

happen in the vicinity of the vehicle.

[37] Nor is the driver required to be in a position where he or she can react to everything which may happen in the vicinity of the vehicle. The driver is not required to travel at a speed which is within the "limits of visibility and control" so as to be able to react to whatever ventures into the vehicle's path: per Ipp JA (Heydon and Santow JJA agreeing) in *Cole* at [61], citing *Grove v Elphick* (1985) 2 MVR 74 and *Morris v Luton Corporation* [1946] 1 KB 114. *Derrick v Cheung* was such a case. An unattended infant child emerged from between two parked cars and darted into the path of the vehicle. The driver was not negligent despite the fact that he was travelling at a speed which did not enable him, upon seeing the child, to avoid the collision."

84. I am satisfied Ms Hardes was keeping a proper lookout. She was aware of the presence of the three vehicles in lane one, including the claimant's motorcycle, and that those vehicles had come to a stop. She was also watching the traffic ahead of her.

85. When the collision occurred, Ms Hardes was traveling in lane two with the flow of traffic. She had been in that lane at all times since moving off from the intersection at City and Brunker Roads. At all relevant times she was travelling within the speed limit. Despite not having seen the activated right indicators on the claimant's motorcycle and the vehicle in front, she knew or ought to have known that the drivers of these vehicles intended to change from lane one into lane two. The claimant's motorcycle collided with the rear left side of her vehicle when he attempted to change lanes.

86. Ms Hardes was not required to predict the claimant (or any other vehicle in lane one) would attempt to change lanes when it was obviously unsafe to do so given the presence of vehicles, including hers, in lane two. She was travelling with the flow of traffic within the 60kmph speed limit. I am not satisfied the exercise of reasonable care required her to reduce her speed. Even if she had, the collision may still have occurred.

87. The exercise of reasonable care did not require Ms Hardes to slow to a speed that allowed either or both vehicles in lane one to enter lane two. Nor was she required to travel at a speed that was within the "limits of visibility and control" so as to be able to react to whatever ventured into her vehicle's path.

88. The claimant's motorcycle collided with the rear left side of Ms Hardes' vehicle. She was exercising reasonable care and did not breach the duty she owed other road users including the claimant. I find that the accident was not caused by Ms Hardes' fault.

**Was the accident caused wholly or mostly by the fault of the claimant?**

89. I have found the accident was caused by the fault of the claimant. There was no other "at

fault” driver. Where there is only one culpable party, relative culpability cannot be assessed in accordance with *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529; (1985) 59 ALJR 492; (1985) Aust Torts Reports 80-321; [1985] HCA 34. The following passage in *Axiak v Ingram* (2012) 82 NSWLR 36; (2012) 62 MVR 59; [2012] NSWCA 311 is, by parity of reasoning, germane:

> “[83] I would accept the respondent's submission that the exercise called for in *Prodrebersek* [sic] can have no application to a case such as the present. Part 1.2 of the Act proceeds upon the assumption that the defendant driver is not at fault. Accordingly, comparisons of culpability and of the relevant importance of the acts of the parties in causing the first appellant's injuries is inappropriate….”

90. Here, as in *Axiak*, there is no culpable conduct on the part of Ms Hardes which could be subjected to comparative examination, and the exercise called for in *Podrebersek* can have no application.

91. Consistent with the reasoning in *Evic* at [67] – [70], in a case involving an accident caused by the fault of the claimant but not the fault of another person, assessment of whether the accident was caused wholly or mostly by the fault of the claimant is to be undertaken by inquiring how far the claimant departed from the standard of care he was required to observe in the interests of his own safety.

92. Here, the claimant failed to take basic precautions for his own safety; he either didn't look behind him or, if he did look, it was cursory. He did not keep a proper lookout and changed lanes when it was obviously unsafe to do so. He knew or ought to have known that as a motorcyclist, he faced a greater risk of harm relative to the driver of a car. The risk of harm if he did not exercise reasonable care was significant, as evidenced by the injuries he suffered as a result of the accident.

93. Although the claimant’s departure from the standard of care required of a person in his position was significant, it was not an example of a worst possible case. I find it is just and equitable to assess the claimant’s contributory negligence at 75%. It follows that for the purposes of ss 3.11 and 3.28 of the MAI Act the accident was caused mostly by his fault.

**COSTS**

**Submissions**

94. The claimant sought an order under s 8.10(4) of the MAI Act permitting payment of his reasonable and necessary legal costs incurred in connection with the proceedings.

95. In his written submissions, the claimant argued that the issues that arose in the proceedings were complex. Reference was also made to the need for a hearing, and the “substantial preparation” involved.

96. In oral submissions, Mr Jones pointed to the disputed facts, the issues in dispute, and the need for an oral hearing that involved the cross examination of both the claimant and Ms Hardes.

97. The insurer opposed an order under s 8.10(4) being made, arguing that exceptional circumstances did not exist to warrant an order for the payment of the claimant's legal costs beyond the regulated fees because: there were no expert reports required to be commissioned, considered, or addressed; documents produced by NSW Police did not include any additional substantive information requiring consideration; the claimant prepared one set of substantive written submissions; it prepared the joint bundle; there have been two "brief" preliminary conferences; the circumstances of the accident, whilst disputed, were not complex; contested facts and cross-examination do not necessarily constitute exceptional circumstances, and a decision on the papers does not necessarily constitute "usual practice".

98. In oral submissions, it was argued that this was a "he said, she said" dispute with some supporting documents and there was nothing out of the ordinary in the preparation and conduct of the matter.

**Determination**

99. Success is not a pre-requisite to the Commission exercising its discretion to permit payment of the claimant's costs under s 8.10(4): *AAI Ltd v Moon* (2020) 92 MVR 271; [2020] NSWSC 714 at [82].

100. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional, *Ho v Professional Services Review Committee* No 295 [2007] FCA 388 at [26]; and *San v Rumble* (No 2) [2007] NSWCA 259 at [67].

101. The claimant suffered serious injuries as a result of the accident. Significant potential rights under the MAI Act were in the balance. Critical facts were in dispute. An oral hearing was required. The claimant and Ms Hardes gave evidence and were cross examined. It was appropriate for the claimant to be represented by experienced counsel.

102. I am satisfied "exceptional circumstances" exist and that the Commission should exercise its discretion to permit payment by the insurer of the reasonable and necessary legal costs incurred by the claimant in connection with the proceedings in accordance with s 8.10(4)(b) of the MAI Act, including counsel's fees.