Look both ways:

Brajkovic v Black [2006] ACTSC 1

By Graeme Gunn

The ACT Supreme Court's decision in *Brajkovic v Black* illustrates the high level of responsibility attributed to a driver when manoeuvring among cyclists, pedestrians and other road-users.

THE FACTS

The plaintiff was riding her bicycle along the footpath of a busy Braddon street. The footpath runs parallel to the road on one side and a row of buildings on the other. A driveway intersects the footpath and provides access to a small car park between two buildings. The defendant regularly parked her car in that car park. One lunch-hour, the defendant was exiting the car park by reversing her car. As she reversed out, she stopped at the end of the driveway immediately before the footpath. The buildings on either side blocked her vision. While stationary, she sounded the horn and waited for around 30 seconds while a few pedestrians walked past the rear of the car. She then proceeded slowly to exit the driveway. The defendant reported having not seen the plaintiff/cyclist approaching, only realising that they had collided when she heard the 'thud'. The court had to consider if (and to what degree) the defendant was responsible for the collision.

THE DECISION

For the plaintiff's part, the court accepted that had she taken proper care for her own safety, the collision would not have happened. Notwithstanding, the judge found that the dangerous nature of exiting a blind driveway across a footpath attracts a very high standard of care. The judge stated that it was "patently inadequate for her (the defendant) to sound her horn only once, 30 seconds or thereabouts prior to moving from her stationary position". The defendant should have sounded the horn immediately before moving off or even moved incrementally across the footpath until her line of sight was clear. The defendant was found to be negligent for failing to do so.

THE PRINCIPLE

Master Harper reiterated that the driver of a vehicle has a high level of responsibility to other road and footpath-users. In any accident where a motorist and a cyclist/pedestrian are involved in a collision, which is apparently caused by both parties equally, the motorist is more culpable because of their capacity to cause considerable damage. In the law of negligence, a driver attempting a risky manoeuvre owes a very high standard of care to everyone who shares the road. ■

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Australian-born aliens:

Koroitamana v Commonwealth of Australia

By Patrick McCarthy

As noted by Justice Kirby, this matter is the latest in a series of cases where the High Court of Australia has considered the constitutional meaning of 'alien' and its antonym, 'Australian national'.

This matter involved two Australian-born sisters: Lomani, born on 26 August 2000, and Mereani, on 3 September 1998. The Court unanimously held that the two girls were 'aliens' in accordance with s51(xix) of the Australian Constitution, upholding the earlier decision of the Federal Court. Lomani and Mereani have remained in Australia continuously throughout their lives. They have three siblings who are Australian citizens. Their parents are Fijian citizens. In accordance with Fijian law, the two girls are entitled to apply for registration to become citizens of Fiji, but no registration had been made for either girl.

The two girls were placed in immigration detention in 2002. They subsequently commenced legal proceedings to challenge s189 and s198 of the *Migration Act*, which provide that unlawful non-citizens may be detained and removed, respectively.

The majority of the Federal Court followed the reasoning of the High Court in *Singh v Commonwealth*, despite the factual differences between the two cases.[2] The Court in *Singh* made two important findings:

1. being born in Australia does not mean that a person is beyond the reach of the power conferred on the Parliament by s51(xix); and
2. at the time of Federation, the concept of 'alienage' did not have an established and absolute legal meaning that deprived Parliament of legislative choice in the matter.

A majority of the High Court determined that Lomani and Mereani did not satisfy the criteria of citizenship by birth, as prescribed by s10 of the *Australian Citizenship Act* 1948 (Cth), because they had not yet reached the age of ten.[3] The High Court therefore upheld the decision of the Federal Court – that parliaments may decide that an Australian-born child, of foreign national parents, is not automatically entitled to citizenship. ■

Notes: **1** [2006] HCA 28 (14 June 2006). **2** (2004) 78 ALJR 1383; 209 ALR 355. **3** Section 10(2)(b) of the *Australian Citizenship Act* 1948 (Cth) provides that persons born in Australia after the commencement of the *Australian Citizenship Amendment Act* 1986 shall be Australian citizens by virtue of their birth only if they have been, throughout the period of ten years commencing on the day on which they were born, ordinarily resident in Australia.

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