

AUSTRALIA / JUDGMENT

Khodor v Murphy [2024] NSWDC 364

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District Court

New South Wales

Medium Neutral Citation: Khodor v Murphy [2024] NSWDC 364

Hearing dates: 25 March 2024

26 March 2024

Date of orders: 26 August 2024

Decision date: 26 August 2024

Jurisdiction: Civil

Before: Waugh SC DCJ

Decision: (1) Judgment for the Defendant

(2) Plaintiff to pay the Defendant's costs

Catchwords: TORTS – Trespass to person – Assault – Battery – Self Defence - Civil Liability Act section 52 and 53

Legislation Cited: Civil Liability Act 2002

Evidence Act 1995

Cases Cited: Croucher v Cachia [2016] NSWCA 132, (2016) 95 NSWLR 117

Fox v Percy (2003) 214 CLR 118

Irlam v Byrnes [2022] NSWCA 81

Nevin v B & R Enclosures [2004] NSWCA 339

State of New South Wales v McMaster [2015] NSWCA 228

Texts Cited: Fleming's the Law of Torts (11th edition, 2024 by Sappideen and others)

Category: Principal judgment

Parties: Mr Jihad Khodor (Plaintiff)

Mr Mark Murphy (Defendant)

Representation: Counsel:

Mr R Hanrahan (Plaintiff)

Mr D Hanna (Defendant)

Solicitors:

Morgan Ardino & Co Solicitors (Plaintiff)

Ray Wehbe & Co (Defendant)

File Number(s): 22/67897

Publication restriction: Nil

Judgment

1. Mr Khodor, the plaintiff, claims damages from Mr Murphy, the defendant, for assault.
2. Mr Murphy concedes that he punched Mr Khodor, but says that he only hit him once, in self-defence.
3. The facts about what happened at the time of the alleged assault are heavily contested.
4. The only witnesses to give evidence at the hearing were Mr Khodor and Mr Murphy. They each gave diametrically opposed accounts of the critical events. The two accounts cannot stand together.
5. Each claims that the other was the aggressor.
6. Both liability and quantum are in issue. I will address liability first.

LIABILITY

A. Liability: issues raised on the pleadings

1. In his statement of claim, Mr Khodor alleges (paragraphs 3 and 4) that "on 8 March 2019 and after the Plaintiff and the Defendant had been driving their ... vehicles, a conversation took place between them in Woodward Road, Miller NSW" and "arising out of the set conversation ..., the Defendant assaulted the Plaintiff by hitting him multiple times around his body". He alleges (paragraph 6) that as a result of the assault he sustained multiple injuries and disabilities.
2. In his defence, Mr Murphy (paragraph 2) "admits that a conversation took place between the parties but says that this was not the sole instance of communication between them that occurred on the ... day". He denies the allegation of assault and sustaining of multiple injuries and disabilities as alleged by the Khodor (paragraph 3).

3. Mr Murphy pleads (paragraph 4) that if he is "found to have assaulted (Mr Khodor) as alleged in the statement of claim or at all, then he says that such assault was occasioned by reason of (his) self-defence".
4. The following particulars of self-defence are then set out:
 - (a) The plaintiff, at the relevant date and time, had assaulted the defendant by verbally abusing him, pursuing the defendant's vehicle in another vehicle and approaching him on foot in a threatening and hostile manner;
 - (b) The first instance of bodily contact between the plaintiff and defendant consisted of plaintiff committing battery on the defendant;
 - (c) The plaintiff's actions referred to above caused the defendant to hold reasonable fear for his own safety;
 - (d) Any actions taken by the defendant were done with the belief that they were necessary to defend himself; and
 - (e) The defendant relies on sections 52 and 53 of the Civil Liability Act 2002 (NSW) in respect of any alleged liability to the plaintiff.

B. Liability: legal principles

1. Notwithstanding that Mr Khodor pleaded his case as an assault, counsel for Mr Murphy submitted that it was really a common law case for the tort of battery, but governed in places by the Civil Liability Act, 2002 and particularly sections 52 and 53 in relation to self-defence. Counsel for Mr Khodor did not suggest otherwise.
2. The difference between assault and battery is that battery is committed by intentionally bringing about the harmful or offensive contact with another person's body, whilst assault consists of intentionally creating in another person an apprehension of imminent harmful or offensive contact. If the threat is actually carried out, the whole incident is properly described as an "assault and battery". See "Fleming's the Law of Torts" (11th edition, 2024 by Sappideen and others) at [2.60] and [2.70].
3. Battery and assault are 2 of the 3 forms of trespass to the person, the other being false imprisonment, and they are conventionally labelled as intentional torts: *Croucher v Cachia* [2016] NSWCA 132, (2016) 95 NSWLR 117 (Leeming JA; Beazley P and Ward JA agreeing) at [20].
4. A defendant who directly causes physical contact with the plaintiff will commit a battery unless the defendant proves that the defendant was "utterly without fault": *Croucher* at [21], [24]-[25].
5. Trespass to the person caused by a blow does not require the plaintiff to prove anything about intention: *Croucher* at [23].

6. Sections 52 and 53 of the Civil Liability Act 2002 (found in Part 7) apply "in respect of an intentional act that is done with intent to cause injury" (s.3B(1)(a)(ii)).

7. They provide:

52 No civil liability for acts in self-defence

(1) A person does not incur a liability to which this Part applies arising from any conduct of the person carried out in self-defence, but only if the conduct to which the person was responding—

(a) was unlawful, or

(b) would have been unlawful if the other person carrying out the conduct to which the person responds had not had a mental health impairment or a cognitive impairment at the time of the conduct.

(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary—

(a) to defend himself or herself or another person, or

(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional or reckless infliction of death only—

(a) to protect property, or

(b) to prevent criminal trespass or to remove a person committing criminal trespass.

53 Damages limitations apply even if self-defence not reasonable response

(1) If section 52 would operate to prevent a person incurring a liability to which this Part applies in respect of any conduct but for the fact that the conduct was not a reasonable response in the circumstances as he or she perceived them, a court is nevertheless not to award damages against the person in respect of the conduct unless the court is satisfied that—

(a) the circumstances of the case are exceptional, and

(b) in the circumstances of the case, a failure to award damages would be harsh and unjust.

- (2) If the court determines to award damages on the basis of subsection (1), the following limitations apply to that award—
 - (a) Part 2 (with the exception of Division 3 of that Part) applies with respect to the award of damages despite section 3B(1)(a), and
 - (b) no damages may be awarded for non-economic loss.
1. The onus is on a defendant to prove the circumstances which give rise to the operation of section 52 (or section 53 or section 54): *Irlam v Byrnes* [2022] NSWCA 81 per Cavanagh J (Simpson AJA & N Adams J agreeing) at [184], citing *Presidential Security Services Of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241 at [162] (Ipp JA). See too *Croucher* at [43].
2. In the present case, by s.52 Mr Murphy "does not incur liability", that is he has a complete defence, if:
 - 19.1 The conduct to which he was responding was unlawful (s.52(1)(a)).
 - 19.2 He believed the conduct he carried out was necessary to defend himself (s.52(2)(a)).
 - 19.3 And the conduct he carried out was a reasonable response in the circumstances as he perceived them (s.52(2)).
1. By s.53, if Mr Murphy establishes the first 2 of those 3 requirements under s.52, but not the third, the Court is nevertheless not to award damages against him unless the Court is satisfied that:
 - 20.1 The circumstances of the case are exceptional (s.53(1)(a)).
 - 20.2 And in the circumstances of the case, a failure to award damages would be harsh and unjust (s.53(1(b))).
1. If the Court awards damages against Mr Murphy under s.53, then except for Division 3 of Part 2, Part 2 of the Civil Liability Act applies with respect to the award of damages, and no damages may be awarded for non-economic loss (s.53(2)). Division 2 of Part 2 concerns fixing damages for economic loss. Division 4, interest on damages. Division 6 is made up solely of s.21 and concerns exemplary, punitive and aggravated damages.
2. If Mr Khodor proves his case and Mr Murphy does not bring himself within s.52 or s.53, then it is common ground that damages are to be assessed according to ordinary common law principles, unmodified by any provisions of the Civil Liability Act 2002.
3. The reference in s.52(1)(a) to the conduct to which the person was responding was "unlawful" is not confined to criminal conduct but extends to tortious conduct or civil wrongs: *State of New South Wales v McMaster* [2015] NSWCA 228, (2015) 328 ALR 309 at [200]-[204]. In this context tortious conduct probably does not merely mean that the elements of the tort had been established, but also that no defence has been made out: *Croucher* at [42].

4. The requirement under s.52(2)(i) that the person believes the conduct is necessary to defend himself is subjective: Irlam at [183]; Croucher at [44]. A subjective state of mind may be inferred from circumstances other than the person's own statement as to his perceptions: Croucher at [104].
5. The requirement under s.52(2) that the conduct the person carried out was a reasonable response in the circumstances as he or she perceived them contains both objective and subjective elements: Irlam at [183]; Croucher at [44].

C. Liability: the facts – some anchor points

1. There are very few anchor points in the evidence that are established either as common ground or by reference to objectively ascertained facts or contemporaneous records. To the extent that there was any common ground, it emerged very slowly in the course of the oral evidence.
2. It is common ground that the events occurred on 8 March 2019 in Miller, a suburb of Sydney; that Mr Khodor and Mr Murphy passed one another in their vehicles at the intersection of Cartwright Avenue and Cabramatta Avenue; and that the assault is alleged to have happened in Woodward Crescent, opposite the Green Valley Hotel.
3. Objective evidence in the form of an aerial photograph with road markings gives the layout of the streets and the location of the hotel.
4. Contemporaneous records show that both Ambulance and Police officers attended to Mr Khodor on the day and that he was taken to Liverpool Hospital.
5. I will return to the objective evidence and contemporaneous records after setting out Mr Khodor's and Mr Murphy's evidence of what they say happened before analysing their evidence and making my findings.

D. Liability: the evidence

Mr Khodor's evidence of what happened

1. Mr Khodor gave his evidence with the assistance of an Arabic interpreter, although there were many points at which he gave his evidence in English and responded to questions without waiting for a translation. He gave his evidence in this way during his examination-in-chief and in cross-examination on the first day of the hearing. On the second day of the hearing he was recalled into the witness box to give further evidence about the aerial photograph I have mentioned, after Mr Murphy had given evidence-in-chief and in cross-examination. Mr Khodor did not have the assistance of an interpreter when giving his evidence on the second day.

2. Because it has a significant impact upon the assessment of his credibility, it is important to understand Mr Khodor's evidence in the sequence in which he gave it, which is the sequence I will follow.
3. Mr Khodor's evidence-in-chief was disjointed and at times difficult to follow.
4. In his evidence-in-chief:

34.1 Mr Khodor agreed with the questioner (his counsel) that he was driving along Woodward Road and "as he was wanting to make a U-turn" a car was approaching him. Mr Khodor said the car was speeding and nearly collided with him. He agreed that he said this was "the defendant's car". When asked if the driver did something as he went past, Mr Khodor demonstrated that the other driver stuck his middle finger in the air. He said the other driver also was shouting things in English that he did not understand.

34.2 Mr Khodor was adamant that the other driver sped up. He said "he knew that I was turning right and then he sped up and raised his finger for me". He said that "As soon as I tried to turn right he was far away then he sped up towards me". In answer to the question "So did you observe him speeding, did you, increasing his speed?", Mr Khodor said "Yeah, if I didn't stop quickly he would have collided with me, would have hurt me."

34.3 Mr Khodor was not asked and did not say where this took place on Woodward Road.

34.4 As I have mentioned, at the start of his evidence about what happened on the day, Mr Khodor agreed with the questioner that he was wanting to make a "U-turn". Subsequently, when asked "what sort of turn did you want to make?", Mr Khodor said (in English) "I wanted to go in the shop in Miller". These questions and answers then followed:

Q. Is that a right-hand turn to--

A. WITNESS: Right, yeah, then, then, and then a left.

A. INTERPRETER: Yeah, I had to turn right and then turn left.

Q. Okay, so you're turning right across the traffic?

A. WITNESS: Right and then the left. Shop in the left and just like--

Q. Did you indicate?

A. WITNESS: Turn left, the shop in the left and just like--

Q. All right, thank you. So you're not making a U-turn; is that correct?

A. INTERPRETER: No, no, no, I'm going to the Miller shopping.

Q. Did you indicate as you were commencing your right-hand turn?

A. WITNESS: Of course.

A. INTERPRETER: Of course I did.

34.5 Mr Khodor said that after Mr Murphy went past, "I continued on my way and I stopped next to the Miller shopping centre". Mr Khodor said that Mr Murphy "went ahead of me", "he ... parked behind a car and I came and parked in front of that car. So there was a car between me and him.". Mr Khodor said that Mr Murphy's car was already parked before he parked. They were parked on the street. He said that his own car was parked straight and not at an angle.

34.6 Mr Khodor was not asked and did not say which street they had parked on.

34.7 In response to the question "Before you parked ... were you following the defendant's vehicle?", Mr Khodor replied "I'm going to my brothers shop in the shopping".

34.8 Mr Khodor said that after he parked, "I got out of my car and I was still standing next to my car and he was staring at me and, and he - so I got out of the car, stood next to my car, he stared at me and he approached me." He said Mr Murphy "looked like angry", "not normal".

34.9 After he got out of his car, Mr Khodor says that he did not remember the exact conversation but he remembered saying "Why, why did you speed up? You nearly collided with me? You would have, you would have hurt me. Why are you gesturing for me? Do I know you? Do we know each other?". Mr Khodor said that Mr Murphy then attacked him and started hitting him. When asked if Mr Murphy answered before he started hitting, Mr Khodor said "He started swearing at me after I ask him, 'Do I know you and why did you do that?' he starts swearing at me. ... He said many words in English which I couldn't understand".

34.10 When asked whether he hit Mr Murphy first, Mr Khodor said (in English) "No way. No way".

34.11 In answer to the question "did you say that you dropped your phone after he hit you?", Mr Khodor said "the first happened that I fell to the ground (sic). He's started hitting me with his right hand and while I'm underneath him".

34.12 He said that Mr Murphy hit him multiple times, making contact mainly with his left shoulder and his face. He said he fell on his knees with the force and he was trying to protect himself by holding both of his hands up around the top of his head while Mr Murphy kept hitting him with his right hand. Mr Khodor said that people started gathering around and Mr Murphy rushed towards his van. When this happened he asked "where's my phone?", which he says a lady then gave him and he used to take a photo of Mr Murphy and his numberplate.

34.13 Mr Khodor says that he rang the police and waited for 53 minutes but they did not come. He said the ambulance came after 53 minutes and while he was on the ground and injured the ambulance driver said to him "why didn't you go to your GP?". In response to the question "did you have an argument with the ambulance driver at that stage?", Mr Khodor said "I tell him, 'go away from my face.', I told him, 'call taxi, I'm going to hospital.'".

34.14 Mr Khodor said that the police then came, in 4 cars.

34.15 He said that a second ambulance came and took him to hospital.

34.16 Mr Khodor agreed that at the hospital he was examined by a doctor and scans were taken of his head, neck, right knee and left shoulder.

1. In his cross-examination:

35.1 Mr Khodor agreed that he was on Cartwright Avenue (not Woodward Avenue as he had agreed in in his evidence in chief) trying to make a right turn into Cabramatta Avenue when Mr Murphy went past him on Cartwright Avenue.

35.2 Mr Khodor said he was "shocked" the way Mr Murphy went past, saying "he could have caused a dangerous accident". He said "as I'm about to turn right he speed up. He was maybe intentionally trying to collide with my car. That is what I thought."

35.3 When asked if he made "the right-hand turn that he always wanted to make", Mr Khodor said that he was going to his brother's barbershop, and that he turned right then left to go there.

35.4 Mr Khodor denied making a U-turn and chasing Mr Murphy. His evidence on this was:

Q. But you ended up parking right next to the car that had passed you and driven on down the road, didn't you?

A. INTERPRETER: And what's the problem with that?

A. WITNESS: When I don't know--

A. INTERPRETER: What's the problem with that?

A. WITNESS: I, I don't have any problem with him. It's normal. I parking anywhere.

A. INTERPRETER: I have no problem with him.

A. WITNESS: Anyway, a car park anyway, why, it's not allowed I parking where I want? It's normal.

Q. The truth is that you did a U-turn and chased him--

HANRAHAN: Is that a question?

HANNA

Q. --isn't that right?

A. WITNESS: Why?

A. INTERPRETER: What do I want from him? Do I know him? Does he know me? Do I have any problem with him previously?

A. WITNESS: Why?

A. INTERPRETER: Why?

A. WITNESS: Yeah, ask, 'cause it was - can you ask the same point?

Q. I am putting it to you that you did a U-turn and you chased after Mr Murphy's vehicle; do you agree or disagree?

A. WITNESS: I don't do that. Never. Never

A. INTERPRETER: Never.

Q. Right, so your evidence is that you turned down a completely different street while this other car has gone off down the road and you end up parking right next to him; is that your evidence?

A. INTERPRETER: No, the same road, not different drives and I parked one car after him as well and there's a car spot there.

Q. You weren't driving in the same direction as Mr Murphy, you were facing in the opposite direction, weren't you?

A. INTERPRETER: At the beginning, yes, I was going to turn right going up to the shop in Miller. When I just start he came from the other side, this side.

Q. You said that after he passed you he kept driving down the road; isn't that right?

A. INTERPRETER: I didn't look where was he going. It doesn't worry me. I don't know him. I don't--

A. WITNESS: It could be any, any person in the street. I don't know him.

A. INTERPRETER: Could be any person in the street.

A. WITNESS: Where he going I don't care. I don't, I don't know him. I don't want to talk with him. But what he did, it would happen big accident if I don't be careful.

Q. The truth is you--

A. WITNESS: He put me, my, my, my, my life in the dangers, sir. He driving ...

Q. The only way your car ended up next to his was by you chasing him; isn't that right?

A. WITNESS: No, I don't chase.

A. INTERPRETER: No, I, I wasn't chasing his car. I went and parked in, where I, after he parked and there's one car between me and him and I'm free to park in anywhere I can park. Doesn't mean if I park in the spot he can, he has the right to come and hit me and I, I don't know him previously and I have no, you know, no, no, no interaction with him at all before.

35.5 After giving further evidence that Mr Murphy "nearly killed" him and Mr Murphy was driving "dangerously", and that he (Mr Khodor) was "most upset about him is because he's swearing and his gestures", Mr Khodor denied that he went up to Mr Murphy to confront him because he was angry, saying "no way, I don't care about him. I don't care". Mr Khodor then gave this evidence:

Q. Is it your evidence that after Mr Murphy drove past you and endangered your life, in your opinion, you came across his parked car completely by accident; is that your evidence?

A. INTERPRETER: To be honest I never looked where did he go after he'd gone past me. I have no intention of causing any problem with anyone. I was going to the barber shop so I could cut my hair.

Q. There are many places to park on that street, aren't three?

A. INTERPRETER: Yeah, I said three down, I can park away, around.

Q. Which street do you say you were on when this happened?

A. INTERPRETER: I don't remember the name of the street. It's right next to the Miller shopping centre and sometimes I go to the club.

A. WITNESS: Sometimes, yeah.

Q. So is it your evidence that the only available parking space was the one next to Mr Murphy's vehicle; is that your evidence?

A. INTERPRETER: I just came. I wasn't, it wasn't in my mind at all. I found a parking spot. I just parked. I never expected that he would come up and attack me. I don't know why he hit me. I, if I knew from before maybe there is a previous problem then we could have an argument and have a fight or attack but I don't know him and he doesn't know me, and I don't want to cause any trouble with him.

Q. So it is your evidence that you didn't even know it was the car that passed you and endangered your life until after you'd parked yourself?

A. INTERPRETER: Yes, I knew it was his car but what can I do? The street is not for me. The street for anyone to park in.

A. WITNESS: Normal, yeah.

Q. So you knew it was his car and you parked next to him deliberately to go and confront him, didn't you?

A. INTERPRETER: And did I hit him?

A. WITNESS: Evidence, do we have evidence of that too? Do you have some kind of videos? Do you have witness?

1. In re-examination:

36.1 Mr Khodor was asked to clarify what sort of turn he did after Mr Murphy drove past. His evidence was:

Q. When it was put to you that you did a U-turn on Cartwright Avenue to do back towards the Miller shops which you had just passed on the left-hand side of the road you answered, "No;" is that correct?

A. INTERPRETER: Yes, I did turn. I did turn. I didn't say U-turn.

Q. What sort of turn did you do after the defendant drove past you?

A. INTERPRETER: I turned right.

Q. If you turned right you would have turned into Cabramatta Avenue; is that correct?

A. WITNESS: Mm.

Q. Okay, where is your brother's barber shop? Do you know the address of his barber shop?

A. INTERPRETER: Inside the shopping centre.

Q. Do you know the name of the street where the shopping centre is?

A. INTERPRETER: I don't remember going on this street.

36.2 It was at this stage of the evidence that I informed the parties that I did not have a clear picture at all about what the layout of the street was where the incident happened and I asked why someone had not produced a plan if the layout was in issue. Following some discussion with counsel for both parties, I directed the parties to prepare an agreed diagram showing where Mr Khodor was waiting to turn right in the first place and where their cars stopped where the alleged assault occurred. If the parties could not agree, I directed them each to mark separately those locations on the diagram.

36.3 After I made that direction, counsel for Mr Khodor continued his re-examination. Mr Khodor's evidence was:

Q. Do you remember the route that you took after you turned right on Cartwright Avenue to get back to Miller shops?

A. INTERPRETER: Yeah, I remember.

Q. What streets did you travel on?

A. INTERPRETER: There was only street. I turned right and then I turned left. It's not far. It's not far.

Q. What is the street that you turned right at?

A. INTERPRETER: I turned, I turned right then I turned left.

Q. Did you turn right into Cabramatta Avenue?

A. WITNESS: Mm.

Q. Then the next left turn is not until many kilometres later and you wouldn't be going toward Miller shops if you took that turn.

A. INTERPRETER: I turned left the next--

Q. Can you remember the name of the street that you next turned onto after you got onto Cabramatta Avenue?

A. INTERPRETER: I don't know. I don't remember. I don't--

1. Mr Khodor was re-called to give further evidence on the second day of the hearing. By then, Mr Murphy had given his oral evidence and the aerial photograph I have mentioned (with road markings giving the layout of the streets and the location of the hotel) had been admitted into evidence. Whilst giving his evidence, Mr Murphy marked the aerial photograph using a red pen. He drew a line around the perimeter of the Green Valley Hotel, wrote the word "Hotel", drew an arrow from the word "Hotel" to the outline of the hotel, and drew a solid red rectangular or elongated oval shape on the side of Woodward Crescent to indicate where he parked his van after passing Mr Khodor on Cartwright Avenue and then turning left into Woodward Crescent. The aerial photograph was Exhibit 4.

2. When re-called to give further evidence, Mr Khodor said in chief:

38.1 Upon being shown the aerial photograph:

Q. On exhibit 4, could you have a look at it. Do you see in Woodward Crescent outside the hotel there's a marking on the roadside in red?

A. Yeah.

Q. The defendant has said that that's where the defendant parked his car. Do you agree with that or not--

A. Yeah.

Q. --at the time you came across him? You agree with that?

A. Yeah.

Q. You came upon him after he had parked his car, do you agree with that?

A. I did not follow him.

38.2 Mr Khodor was then given a dark blue pen:

Q. I'm giving you a blue pen. Would you take that one and first of all would you show me whereabouts on that aerial photograph you were waiting to turn right on Cartwright Avenue.

A. Here.

Q. Mark on the map where the right turn was. You've written all the way from the turn to the place where you say you parked. Now, could you draw in your car where you parked it on that road.

A. Where the parking was, when he enters the parking, the shopping centre.

Q. So just near where--

A. Yeah.

Q. --the shopping centre entrance is?

A. Yeah.

Q. Can you mark where it is. Put it in the same size as the red marking so that we can see where your car is and what size it.

A. There was car here.

38.3 As the questions and answers I have just set out indicate, Mr Khodor used the dark blue pen to draw a line from the point in Cartwright Avenue where he was waiting to turn right all the way to the position he says he parked in Woodward Crescent immediately before the alleged assault. He drew arrows on the line indicating his direction of travel. He marked the position of his parked car with a solid shaped rectangle or oval, smaller in comparison to the size of the shape Mr Murphy had drawn for the position of his vehicle. Upon looking at the aerial photograph with the markings in blue pen made by Mr Khodor it is immediately obvious that the line he drew follows the path of a U-turn from his starting position in Cartwright Avenue at the corner of Cabramatta Avenue back down Cartwright Avenue and then left into Woodward Crescent.

38.4 After he marked the aerial photograph, Mr Khodor gave the following evidence:

Q. You recall marking the document here a moment ago showing your route from the time you were waiting to turn right at Cartwright Avenue until the time where you parked your car in Woodward Crescent--

A. Yes.

Q. --in blue ink. That route that you showed indicates that you not only turned right at Cabramatta Avenue, but you made a full U-turn back down Cartwright Avenue before turning left as you said into Woodward Crescent. Do you agree that that's what you did on the day in question, that you made a U turn?

A. Say again.

Q. Did you make a U-turn at Cartwright Avenue on the corner of Cabramatta Avenue before travelling back along that road and then turning left onto Woodward Crescent before you parked your car on the day in question?

A. Yeah.

1. This is a copy of the aerial photograph as marked by Mr Murphy with a red pen and by Mr Khodor with a dark blue pen (Exhibit 4):
2. Mr Khodor was then cross-examined and re-examined on his further evidence.
3. In re-examination when giving his further evidence, Mr Khodor said:

Q. All right. Tell me this then. You've been asked a number of times about U turns and right turns. What is the difference in your mind between a U-turn and a right turn?

A. In my opinion, a right turn just mean a right of turn.

Q. What do you understand a U-turn to mean then?

A. That is back.

Q. Say again?

HIS HONOUR: A U-turn is back he said.

WITNESS: Back.

Mr Murphy's evidence of what happened

1. In his evidence in chief, Mr Murphy said that he was an electrician and that he had been working at the Green Valley Hotel that morning from about 7.00 am. When he passed Mr Khodor on Cartwright Avenue he was returning to the hotel from John R Turk's, an electrical wholesaler on Hoxton Park Road.
2. Mr Murphy said that he was travelling along Cartwright Avenue in roughly a westerly direction when he noticed Mr Khodor's car waiting for traffic to pass so that he could turn right from Cartwright Avenue into Cabramatta Avenue. He said that Mr Khodor's car was in a right turning lane on Cartwright Avenue and was stationary. When asked what speed he was driving at he said "I would have been doing – well, you come straight over a speed hump. There is a school right there so it would have been 40, 40 to 50 ks if that.". Asked again to estimate his speed, he said that he was in a van and had "just come over speed hump so it would have been very slow". When asked what happened at the intersection with Cabramatta Avenue he said "Well, there, there was a car trying to push out in front and, and then I drove past and he just started beeping on the horn and yelling out and I sort of just waved it off. I, what, like I didn't know what he was – it's the first I've seen him and that was my only time with that car at the time.". Mr Murphy said he "had to veer left a little bit, not much". He said he heard beeping and "he might have been yelling. I couldn't hear it luckily though, no.". Mr Murphy noticed that it was a black car.

3. Mr Murphy said he then turned left into Woodward Crescent and parked on the side of the street parallel to the kerb in a spot close to the hotel. As he got out of his vehicle, he noticed Mr Khodor's car turn the corner from Cartwright Avenue onto Woodward Crescent "and then he's come and parked me in on an angle". He noticed that Mr Khodor's car was "moving pretty quick" and "he was in a rush to get where I was".
4. Mr Murphy said that Mr Khodor then proceeded to get out of the car and was "just yelling and screaming to me". He was speaking in English and said, a lot, "Fuck you, you Aussie dog", and also "I'll kill you", amongst other things. When saying these things, Mr Murphy said that Mr Khodor "got right up in my face", "half a metre away". Mr Murphy said that he probably did swear something back but it was more on the lines of "what the – what are, I don't even know what". He said his response was "more a confusion but angry at the same time because someone is yelling at me like that, not with – and but it was just a – year, I took it. I was confused."
5. Mr Murphy said that Mr Khodor kept yelling and he (Mr Murphy) "went to proceed to get back in the car to leave because I was just, I wanted to just drive away from the incident", "I wanted to get myself out of that situation".
6. Mr Murphy said that the next thing that happened was that Mr Khodor "spat on me" "and then he started to throw punches". Mr Murphy said that Mr Khodor threw multiple punches directed at his neck, shoulder and face. He said that Mr Khodor threw maybe 5 or 6 punches before he retaliated. Mr Murphy said that he then hit Mr Khodor in the face once and Mr Khodor fell to the ground.
7. When asked why he hit Mr Khodor, Mr Murphy said "Well, I had to, to defend myself. I couldn't just let him keep hitting me."
8. Mr Murphy denied doing anything to Mr Khodor's left shoulder.
9. Mr Murphy said that after he hit Mr Khodor and he fell to the ground, Mr Khodor stayed there for a little bit, then got up and moved off and sat on the footpath on the opposite side of the road to where Mr Murphy had parked.
10. Mr Murphy said that he then got in his car, reversed back out and went around and left. He says that he then went straight home because he was "just shaken up" and "couldn't work".
11. I have already described how Mr Murphy marked the aerial photograph (Exhibit 4) with a red pen. Mr Murphy also described in words the location of the speed hump he had referred to earlier in his evidence, without marking it on the aerial photograph. The speed hump is shown on the aerial photograph near the eastern end of Cartwright Avenue about halfway down the right-hand side of the photograph, above what Mr Murphy described as an athletics field. He said that the speed hump is shaded red with the pedestrian crossing.

12. In cross-examination, Mr Murphy said that he had gone to John R Turk's, electrical wholesaler, to purchase materials for the job and he was coming back to the job. He said he purchased cable and electrical equipment. He said that there was no rush for him to get back to the job. He said he was working on his own that day.
13. It was suggested to him that he left the scene because he wanted to avoid speaking to the police. Mr Murphy did not agree with this. He said "I just wanted to leave the other party", "I just left for my own safety". He agreed that he decided to leave without regard to anyone else saying "I had my own safety at thoughts, yes". When asked "The guy that you'd just punched was sitting on the ground. How we are concerned about your safety in that situation?", Mr Murphy said "At the time I probably, I don't think I – I just wanted to leave because it was still escalating."
14. Mr Murphy agreed that at the time he passed Mr Khodor on Cartwright Avenue the school speed zones did not apply and that the speed limit would have been 50 kilometres per hour. He was asked if he picked up speed after going over the speed hump. He said "Yeah, well I generally would, over a speed hump, yeah, I picked up a little bit of speed".
15. He agreed with the questioner that his "car" is a hi Ace vehicle with materials on top, tubes and things for putting cabling in. He agreed that the photo which became Exhibit G showed his "car" with him standing beside it. He said he believed that the photo was taken on the day of the incident. I have put the word car in inverted commas because the photo shows a vehicle that would more ordinarily be described as a van of the type often used and driven by tradesmen around Sydney. The van in the photo has long tubes on either side of the roof and what appear to be ladders in between.
16. Mr Murphy denied that he made a gesture with his middle finger up in the air as he went past Mr Khodor. He said he waved Mr Khodor off, which he demonstrated by holding both his hands up angled from the elbow up with open palms. He also demonstrated the gesture using just one arm.
17. Mr Murphy said that he wasn't happy about being beeped, but he would not say that he was angry and he was definitely not enraged.
18. Mr Murphy denied that he hit Mr Khodor more than once: "No, no definitely not". He denied pushing Mr Khodor and said, "it was definitely just one punch".

Ambulance records

1. According to the Hospital copy of the "Ambulance Electronic Medical Record", two ambulances, numbers 841 and 845, attended on Mr Khodor at Miller Shopping Centre, Woodward Crescent, Miller. Ambulance 841 arrived first.
2. The record includes a "case description". It does not disclose the author of that description so far as I can see. The case description is as follows:

40 YOM, AMBULANT AND LIVES AT HOME, PT STATES WAS INVOLVED IN ALLEGED ASSAULT THIS PM STATES WAS PUNCHED SEVERAL TIMES TO HEAD/ BODY, HE ?OFFENDERS HAD METAL OBJECT IN THEIR HANDS WHEN THEY PUNCHED HIM, STATES FELL TO THE GROUND AS A RESULT, DENIES LOC PT INITIALLY CALLED 000 FOR HIS INJURIES POST THIS ASSAULT. WHEN CREW FROM 841 ARRIVED ON SCENE TO ASSESS PT, SITUATION ESCALATED WHERE PT WAS ALLEGED TO BECOME AGGRESSIVE TOWARDS PARAMEDICS ON SCENE, POLICE CALLED R1 AND 845 ARRIVED ON SCENE TO BACKUP ORIGINAL CREW. POLICE ARRIVE ON SCENE AND PLACE PT IN CUSTODY. AS PT HAS INJURIES FROM PREVIOUS ASSAULT, HE IS TX FOR MEDICAL ASSESSMENT IN 845 WITH POLICE ESCORT. O/E PT ALERT, ORIENTATED AND WARM TO TOUCH. PT HAS HAEMATOMA TO RIGHT CHEEK AND RIGHT SIDE OF HEAD WITH ASSOCIATED PAIN. PT C/O PAIN TO LEFT SHOULDER AND HAS ABRAISION AND ?SOME SWELLING TO SHOULDER REGION. NEUROVASCUALR OBS TO LEFT ARM APPEAR NORMAL AT THIS TIME. PT DOES NOT C/O CERVICAL NECK PAIN AT THIS TIME AND IS ABLE TO AMBULATE FREELY ON SCENE. PT DENIES SOB. PT DENIES CHEST PAIN. PT DENIES ABDO PAIN AND IS ABDO SOFT TO PALPATE. PT HAS ABRAISIONS TO BOTH ELBOWS AND KNEES. PT REQUESTS ICE FOR HEAD PAIN AND ACCEPTS PARACETAMOL FOR ANALGESIA AT THIS TIME. PT TX FOR MEDICAL ASSESSMENT WITH POLICE ESCORT AND IS ABLE TO REMAIN CALM AND COOPERATIVE ENROUTE

1. The "secondary survey" on examination recorded (bold emphasis in original):

abrasion/ graze >> LEFT SHOULDER, BOTH ELBOWS AND KNEES; pain >> HEAD, LEFT SHOULDER AND KNEES; bruising/ haematoma >> TO RIGHT CHEEK AND RIGHT SIDE OF HEAD; able to weight bear; behaviour agitated >> INITIALLY, RESOLVED WITH REASSURANCE AND POLICE PRESENCE

Noshort of breath ; vomiting

1. The second ambulance arrived at the scene at 1:19 PM and took Mr Khodor to Liverpool Hospital, arriving there at 1:52 PM.

Liverpool Hospital records

1. The emergency Department discharge referral of Liverpool Hospital dated 8 March 2019 records that:

64.1 The language that Mr Khodor spoke at home was Arabic, but no interpreter was required.

64.2 The history obtained was: "assaulted by another man; punched multiple times, no weapons involved; thinks he had a LOC; fell to the ground at some point, abrasions to right hand and knees; no vomiting; under police custody".

64.3 On examination he was observed to have "right peri-orbital bruising", "bruising over right parietal scalp", "chest clear, no tenderness or bruising", "ASNT, no bruising", "tender left ACJ and distal clavicle" and "abrasions over both pre-patella regions, left full ROM, right flexion limited to 45 degrees".

64.4 Following CT imaging and x-rays, his assessment was stated as "soft tissue injuries".

64.5 The plan was: "discharge home; simple analgesia as needed; follow up with GP".

1. A brain and facial bones CT final report records that:

65.1 A CT of Mr Khodor's brain and facial bones was performed on 8 March 2019 at 4:34 PM.

65.2 The CT showed: "Scalp haematoma overlying the right temporal region with right periorbital haematoma extending over the zygomatic region."; "Bilateral orbits are intact."; "Bilateral TMJ and zygomatic arches are intact."

65.3 The impression of the radiologist was: "No acute intracranial injury. Right periorbital, zygomatic and temporal scalp haematoma. No calvarial or facial bone fracture."

1. A cervical spine CT final report records that a CT of Mr Khodor's cervical spine was performed at the same time. The conclusion of the radiologist was "No acute cervical spine fracture identified."
2. Another final report shows that an x-ray was performed on Mr Khodor's right knee on 8 March 2019 at 4:04 PM. The conclusion of the radiologist was "No acute fracture of the right knee is identified."
3. A fourth final report records that:

68.1 An x-ray was performed on Mr Khodor's left shoulder at the same time.

68.2 The findings of the radiologist included "The left shoulder joint is enlocated. No acute fracture or dislocation is seen. The left acromioclavicular joint is intact."

68.3 The conclusion of the radiologist was "No acute fracture or dislocation of the left shoulder."

1. A final report of the Emergency Department "Case History Notes" mirrors the information set out in the discharge referral but has the added detail following the "Plan" for Mr Khodor that "Jihad is safe to return to police custody".

Photographs of Mr Khodor's injuries

1. There were 2 relatively contemporaneous photographs of Mr Khodor in evidence.
2. The first photo (Exhibit B) is a photo of Mr Khodor's face and head taken by a friend 2 days after the incident. In the photo, Mr Khodor's head is angled slightly so that it is possible to see the right-hand side of his face and right ear. The photo shows that Mr Khodor has what would be colloquially described as a black eye around his right eye. The photograph shows that the bruising extends below, above and around the right eye. No other bruising appears to be shown in the photo.

3. The second photo (Exhibit A) is a photo of Mr Khodor's leg, which he took at some stage during the week following the incident. He did not say which leg is in the photo. It appears to be Mr Khodor's right leg and is a close-up of the knee. The photo shows what appears to be one large section and a number of smaller sections of dried blood.

Mr Murphy's conviction

1. An Advice of Court Result read together with a Court Attendance Notice shows that on 21 November 2019 Mr Murphy was convicted in the Local Court at Liverpool of the criminal offence of assault occasioning actual bodily harm to Mr Khodor under section 59(1) of the Crimes Act 1900 and fined \$500. At the same time a charge against Mr Murphy under section 195(1)(a) of the Crimes Act of intentionally or recklessly damaging Mr Khodor's iPhone was dismissed with a finding of not guilty after a hearing.
2. Limited use can be made of this evidence because of sections 91 and 92 of the Evidence Act, 1995. Section 91 provides that evidence of the decision, or of a finding of fact, in an Australian proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding. Section 92 provides that in a civil proceeding, this does not prevent the admission of evidence that a party has been convicted of an offence.

Mr Khodor's conviction

1. The ambulance and hospital records I have referred to show that Mr Khodor was taken into Police custody at the scene and that the Police escorted the ambulance to the hospital.
2. Oral evidence was led from Mr Khodor by his own counsel that the Police charged Mr Khodor with assault of the first ambulance driver to arrive at the scene. Mr Khodor said, "unfairly". Mr Khodor agreed that he was convicted of assault and fined \$1000, but said the judge was "unfair".
3. Once again, limited use can be made of this evidence because of sections 91 and 92 of the Evidence Act, 1995.

E. My analysis and findings about what happened on 8 March 2019

1. As I mentioned at the outset, Mr Khodor and Mr Murphy give diametrically opposed accounts of the critical events.
2. In summary, on Mr Khodor's account of events:

79.1 Mr Khodor was trying to turn right.

79.2 Mr Murphy was speeding as he came down the road towards him.

79.3 As he went past, Mr Murphy stuck his middle finger in the air and said "some dirty words" in English that Mr Khodor could not understand.

79.4 When this happened, Mr Khodor was shocked. He was concerned that Mr Murphy could have caused a dangerous accident. He thought that maybe Mr Murphy was intentionally trying to collide with his car. He thought Mr Murphy nearly killed him.

79.5 After Mr Murphy went past and continued down the road, Mr Khodor did not follow him or chase him. Mr Khodor never looked where Mr Murphy went after he went past. It didn't worry Mr Khodor where Mr Murphy was going and he didn't care.

79.6 After Mr Murphy went past, Mr Khodor turned right and left. He did not make a U-turn.

79.7 Mr Khodor found a parking spot and just parked, one car ahead of Mr Murphy's van. Before he parked, he knew Mr Murphy's van was the vehicle that had passed him and endangered his life. He did not park there in order to confront Mr Murphy. He parked there because it was an available spot and he wanted to go into the shopping centre.

79.8 After Mr Khodor got out of his car, Mr Murphy stared at him and approached him. Mr Khodor then asked Mr Murphy a series of questions, which led Mr Murphy to swear at him and say many words in English he could not understand and at the same time (or before or after) attack Mr Khodor and start hitting him.

79.9 Mr Khodor fell to the ground and Mr Murphy kept hitting him with a closed fist.

1. In summary, on Mr Murphy's account of events:

80.1 He is an electrician and had been working at the Green Valley Hotel in Woodward Crescent that morning.

80.2 When he passed Mr Khodor on Cartwright Avenue, Mr Murphy was returning to the hotel after purchasing some materials for the job he was doing there from John R Turk's, electrical wholesaler, on Hoxton Park Road.

80.3 When he first saw Mr Khodor, Mr Khodor was in the turning lane on Cartwright Avenue waiting to turn right into Cabramatta Avenue.

80.4 On approaching Cabramatta Avenue, Mr Murphy went over a speed hump in his van. His speed would have been very slow because he had just come over the speed hump.

80.5 At the intersection of Cartwright Avenue and Cabramatta Avenue, the car in the turning lane was trying to push out and as Mr Murphy drove past it, the driver started beeping on the horn and yelling out. Mr Murphy's response was to wave it off and continue on down the road to his destination at the hotel.

80.6 He took the next left-hand turn off Cartwright Avenue, into Woodward Crescent, and parked on the street opposite the hotel.

80.7 As he got out of his van, Mr Murphy noticed Mr Khodor's car turn the corner from Cartwright Avenue onto Woodward Crescent. It was moving quickly and came and parked Mr Murphy in on an angle.

80.8 Mr Khodor then got out of his car yelling and screaming at Mr Murphy. Mr Khodor "got right up in (his) face", half a metre away.

80.9 Mr Murphy went to proceed to get back in his van and leave, but Mr Khodor spat on him and started throwing punches. Mr Khodor threw maybe 5 or 6 punches before Mr Murphy retaliated.

80.10 Mr Murphy then hit Mr Khodor once, in the face. Mr Khodor fell to the ground and Mr Murphy got in his van and drove away.

Some legal principles

1. The civil standard of proof applies in these proceedings. By s.140 of the Evidence Act, 1995 the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. Without limiting the matters the court may take into account in deciding whether it is so satisfied, it is to take into account (a) the nature of the cause of action or defence, and (b) the nature of the subject-matter of the preceding, and (c) the gravity of the matters alleged.
2. The matters alleged by Mr Khodor against Mr Murphy are of some gravity. He alleges that Mr Murphy engaged in a serious unprovoked assault. I must take that into account when deciding whether I am satisfied that Mr Khodor's case has been proved. The same may be said about the matters alleged by Mr Murphy against Mr Khodor in self-defence. He too alleges that Mr Khodor engaged in a serious unprovoked assault. I must take that into account when deciding whether I am satisfied that Mr Murphy's defence has been proved.
3. I need to test what both Mr Khodor and Mr Murphy say against any contemporaneous materials, objectively established facts and the apparent logic of events: *Fox v Percy* (2003) 214 CLR 118, per Gleeson CJ, Gummow & Kirby JJ at [31].

I do not accept Mr Khodor's evidence that he did not follow Mr Murphy with the intention of confronting him

1. Mr Murphy was not challenged on his evidence that he had been working at the Green Valley Hotel in Woodward Crescent earlier that morning and was returning to the hotel when he passed Mr Khodor in Cartwright Avenue.
2. By the end of the evidence, it was common ground that Mr Murphy was travelling down Cartwright Avenue (in a westerly direction) when he went past Mr Khodor at the intersection of Cartwright Avenue and Cabramatta Avenue. The aerial photograph shows that the next street along Cartwright Avenue past Cabramatta Avenue in Mr Murphy's direction of travel was Woodward Crescent, a left-hand turn off Cartwright Avenue (when travelling west). By the end of the evidence, it was also common ground that the incident occurred in Woodward Crescent.

3. Mr Murphy's evidence, which was not challenged, was that after going past Mr Khodor at Cabramatta Avenue he continued down Cartwright Avenue and turned left into Woodward Crescent. That is to say, he went directly to where by the end of the evidence it was common ground he parked opposite the hotel. There is no suggestion that Mr Murphy took a detour. It would not have taken very long for Mr Murphy to drive down Cartwright Avenue, turn left into Woodward Crescent and park his van after going past Mr Khodor. The aerial photograph confirms that it was only a short distance to travel.
4. As I have already mentioned, it is obvious that the line Mr Khodor drew on the aerial photograph showing where he went after Mr Murphy went past follows the path of a U-turn from his starting position in Cartwright Avenue at the corner of Cabramatta Avenue, back down Cartwright Avenue and left into Woodward Crescent. This evidence represents a clear and unambiguous admission by Mr Khodor that he executed a U-turn after Mr Murphy went past.
5. Added to this, after marking the aerial photograph, in response to questions asked by his own counsel Mr Khodor admitted that he made a U-turn. I have already set it out, but his evidence on this was:

Q. --in blue ink. That route that you showed indicates that you not only turned right at Cabramatta Avenue, but you made a full U-turn back down Cartwright Avenue before turning left as you said into Woodward Crescent. Do you agree that that's what you did on the day in question, that you made a U turn?

A. Say again.

Q. Did you make a U-turn at Cartwright Avenue on the corner of Cabramatta Avenue before travelling back along that road and then turning left onto Woodward Crescent before you parked your car on the day in question?

A. Yeah.

1. The notion that Mr Khodor may not have understood the difference between a right-hand turn and a U-turn was dispelled by the answers he gave to his own counsel in re-examination when giving his further evidence. I have already set out what he said.
2. These admissions came at the end of his evidence despite saying repeatedly in earlier evidence that he did not make a U-turn but instead turned right.
3. Having regard to his clear and unambiguous admissions, I find that Mr Khodor made a U-turn after Mr Murphy went past and that Mr Khodor physically followed Mr Murphy.
4. Why did he do that?
5. Mr Khodor volunteered in his evidence-in-chief that when he was waiting to turn right before Mr Murphy went past, he "wanted to go in the shop in Miller" (T 20:36). When asked in evidence-in-chief whether he was following Mr Murphy's vehicle, Mr Khodor said "I'm

going to my brother's shop in the shopping" (T 44:19). In cross-examination he agreed that before Mr Murphy went past, he was "trying to turn right into Cabramatta Avenue" (T 60:32; T 61:30). When asked in cross-examination after Mr Murphy had gone past "then did you make the right hand turn that you always wanted to make?" Mr Khodor answered, "I'm going to the barber shop, to my brother's shop." (T64: 44). Mr Khodor said his brother's shop was in the Miller shopping centre (T64: 48). In cross-examination, when asked to agree that he and Mr Murphy were facing in opposite directions before Mr Murphy went past, Mr Khodor said "at the beginning, yes I was going to turn right going up to the shop in Miller" (T65: 50).

6. At no stage in his evidence did Mr Khodor suggest that he was intending to go anywhere other than the Miller shopping centre.
7. Mr Khodor either said or agreed repeatedly in his evidence that he was waiting to or intending to turn right at Cabramatta Avenue before Mr Murphy went past.
8. The evidence establishes that when Mr Khodor was travelling along Cartwright Avenue (in an easterly direction) before chancing upon Mr Murphy it would have been possible for him to have made a right-hand turn from Cartwright Avenue into Woodward Crescent to go to the Miller shopping centre, or a right-hand turn from Cartwright Avenue into Cabramatta Avenue to go into the Miller shopping centre. Mr Khodor agreed when it was put to him by his own counsel in re-examination on his further evidence that when travelling on Cartwright Avenue in the direction he was travelling, it was possible, if he wanted to go into the shopping centre at Miller, to turn right at Woodward Crescent. That fact is also established by reference to the aerial photograph. It shows that there was a right-hand turning lane from Cartwright Avenue into Woodward Crescent. The aerial photograph also shows that it was possible to go into the Miller shopping centre by turning right at Cabramatta Avenue, then right at Shropshire Street, then right again at Lady Woodward Place which then runs into Woodward Crescent. It follows that there was no need for Mr Khodor to make a U-turn in order to go into the Miller shopping centre or to his brother's barber shop. He could have arrived at that destination just as easily by travelling down Cabramatta Avenue, albeit that it may have taken slightly longer.
9. In re-examination when giving further evidence Mr Khodor's own counsel asked him why he didn't turn right at Woodward Crescent, before getting to Cabramatta Avenue. His evidence was:

Q. You were travelling on Cartwright Avenue in the direction that you were travelling. It's also possible to turn, if you wanted to go into the shopping centre at Miller, is to turn right directly at Woodward Crescent rather than go further along to Cabramatta and have to turn around and come back again. Do you agree with that?

A. Yeah.

Q. So why didn't you turn right at Woodward Crescent? There's a right-hand turn lane there as well, isn't there?

A. Because I remember all I - talk with my brother in his shop. After I go down there and have to back to my brother..(not transcribable)..

Q. Did that thought come into your mind after you'd passed the turnoff at Woodward Crescent, between Woodward Crescent and Cabramatta Avenue?

A. Yeah.

Q. So then you decided you want to come back again.

A. Yeah.

1. Without the benefit of a transcript, counsel for Mr Murphy submitted this evidence suggested for the first time that there was some last-minute decision by Mr Khodor to go and see his brother after passing Woodward Crescent and this led him to make a U-turn at Cabramatta Avenue.
2. I must say that I have difficulty understanding this evidence. Precisely what the "thought" was or the ramifications of having it after passing the turnoff at Woodward Crescent were not explored. Counsel for Mr Khodor did not make any submissions about how I should use it. It carries little weight by reason of being led from the witness. It makes no sense in light of the fact that he could have gone to the shopping centre by driving down Cabramatta Avenue anyway. In all the circumstances I place no reliance upon it.
3. In my view, Mr Khodor gave no sensible reason as to why, once Mr Murphy went past, he did not continue his right hand turn into Cabramatta Avenue as originally intended but instead chose to do a U-turn.
4. Counsel for Mr Murphy submitted that Mr Khodor was angry and he clearly made the U-turn to chase down Mr Murphy, and in some way hold him accountable or confront him. Counsel for Mr Khodor submitted that in the witness box Mr Khodor's explanation as to why he would follow Mr Murphy was that he wanted to have a discussion with him to find out why it was that he was gesturing like that, like a human being having respect for the other person. Counsel submitted that it was not that Mr Khodor wanted to confront Mr Murphy, it was more an anxious desire to ascertain what was wrong. An investigation motivated by his fear and anxiety about the possibility of injury to himself, and find out whether he knew this person. Counsel submitted that they both had the same destination, Mr Khodor was parking there and it was not some kind of intentional chase going on.
5. In my view 3 very strong factors point in the direction of accepting the submissions made for Mr Murphy, rather than Mr Khodor.
6. The first is that Mr Khodor gave no sensible explanation for changing his mind from intending to make a right-hand turn but actually then making a U-turn. The obvious inference is that he made the U-turn for the specific purpose of following Mr Murphy.

7. The second factor is that even on his own evidence, Mr Khodor had a reason to be angry, or at least agitated. I referred to this earlier when setting out a summary of Mr Khodor's account of events. On his own evidence, he said Mr Murphy stuck his middle finger in the air and said "some dirty words" in English that he said he could not understand as Mr Murphy went past. When this happened, Mr Khodor said he was shocked. He said he was concerned that Mr Murphy could have caused a dangerous accident. He thought maybe Mr Murphy was intentionally trying to collide with his car. He thought Mr Murphy nearly killed him.
8. The third factor is that even on his own evidence, the first thing that Mr Khodor did when he arrived at the scene was to confront Mr Murphy. On his own evidence, Mr Murphy said nothing before Mr Khodor began to speak. Mr Khodor gave a number of different accounts or versions of what he said when he got out of his car. For example, at T68:15 his evidence was 'Just I asked him I was near my car, "Why you put your – why you still do it? Why you making finger? Do you know me? Do you have a problem? Do you know me before?'. At T68:21, "You know me before? Why you making finger? What's happened? What's wrong with you?". At T21:36 "Why did you gesture for me? What did I do for you? Do you know me from before or have any problem between you and me?". At T22:48, "Why, why did you speed up? You nearly collided with me? You would have, you would have hurt me.". At T23:23, "You could have, you could have collided with my car. I would have hurt me and why you gesturing for me? Do, do I know you? Do we know each other?". From an objective point of view, even if one accepts Mr Khodor's evidence about what he said, the language he used was confrontational.
9. For all of those reasons (not just the last three 3 factors), I do not accept Mr Khodor's evidence that he did not follow or chase Mr Murphy and that he parked near Mr Murphy without the intention of confronting him.
10. I infer that Mr Khodor made a U-turn and followed Mr Murphy and parked nearby because he was angry or agitated and he wanted in some way to hold Mr Murphy accountable or to confront him.
11. These findings impact heavily on an assessment of Mr Khodor's credibility generally because Mr Khodor repeatedly asserted in his evidence that he did not make a U-turn, did not follow or chase Mr Murphy and had no intention of confronting him.

What objective evidence is there about how many times Mr Khodor was hit?

1. A major point of difference between Mr Khodor and Mr Murphy concerns how many times Mr Murphy hit or punched Mr Khodor.
2. Mr Murphy says that he hit Mr Khodor once, in the face.
3. Mr Khodor's evidence was: at T24:23, he agreed that Mr Murphy hit him "multiple times"; at T24:50, "Mainly on my shoulder and my face... My left shoulder"; at T25:6 "and my eyes and my head and I fell on my knees with the force while he's hitting me and I was trying to

protect myself and he start – kept hitting me" – in giving this evidence Mr Khodor was holding his hands up around the top of his head, both of his hands, demonstrating what he was doing when he said he was on his knees and Mr Murphy kept hitting him; at T29:47, "he hit me in my eyes and my shoulder" – indicating the right-hand side of his head and his left shoulder; at T69:18, "he pushed me right to the ground and start hitting me many times".

4. There is some objective contemporaneous evidence which may be relevant to the question of how many times Mr Khodor may have been hit.
5. First, there is the photograph showing Mr Khodor's black eye. I agree with counsel for Mr Murphy's submission that the bruising shown in the photograph is consistent with one punch to that region of Mr Khodor's face, which is where Mr Murphy says he hit Mr Khodor.
6. Second, there are the Ambulance and Liverpool Hospital records. I set out the relevant entries earlier. Counsel for Mr Khodor undertook a survey of these records in submissions and invited me to draw the inference from various entries that they provided proof that Mr Khodor had been punched or hit more than once.

114.1 Counsel for Mr Khodor submitted that in the case description of the Ambulance officers, and in the secondary survey on examination, the reference to "bruising/haematoma to right cheek and right side of head" was a reference to 2 different sites of bruising and therefore 2 separate punches to the head. Similarly the reference in the hospital records to "right peri-orbital bruising" and "bruising over right parietal scalp", it was submitted, indicated bruising in 2 different locations, and therefore 2 separate punches to the head. A similar submission was made about the findings of the CT of Mr Khodor's brain which record that there was "Scalp haematoma overlying the right temporal region with right periorbital haematoma extending over the zygomatic region.". On my very basic understanding of anatomy, in each of these instances the suggested 2 different sites or locations are very close together on the head. It is quite possible that they indicate no more than a spreading of the same bruise over the wide area shown in the photograph of Mr Khodor's black eye.

114.2 Counsel for Mr Khodor submitted that the ambulance officers' record of complaints of pain to the head and left shoulder indicate that Mr Khodor was hit or punched in those areas. In my view, whether or not the complaint of pain in the left shoulder was indicative of being hit or punched in that area is debatable. It is common ground that Mr Khodor ended up on the ground after Mr Murphy hit him. Counsel for Mr Khodor submitted that the abrasions to Mr Khodor's elbows and knees observed and recorded by the ambulance officers are consistent with being sustained once Mr Khodor ended up on the ground. However in their case description, the full entry in relation to the left shoulder records, allowing for the common abbreviations used: "patient complained of pain to left shoulder and has abrasion and ?some swelling to shoulder region". Then in their notes of the secondary survey on examination the ambulance officers record "abrasion/graze" to the left shoulder, as well as both elbows and knees. If the abrasions to Mr Khodor's elbows and knees are consistent with Mr Khodor's contact with the ground, as his counsel submitted, so too the abrasion to his left shoulder is consistent with contact with the

ground. In those circumstances it seems to me that it is equally likely that any injury to Mr Khodor's left shoulder was caused by coming into contact with the ground as much as with Mr Murphy's fist.

114.3 Counsel for Mr Khodor submitted that the hospital's discharge referral record on examination of "tender left ACJ and distal clavicle", although being very, very close in terms of anatomy, is consistent with at least 2 hits to the shoulder because the ACJ and distal clavicle have been described separately. If the 2 locations are so close in terms of anatomy, which on my basic understanding they are, then I fail to see how the entry is indicative of there being 2 impacts to the shoulder, let alone that those impacts came about by the shoulder being struck with a fist as opposed to coming into contact with the ground.

1. In any event, counsel for Mr Murphy submitted that I should exercise caution in going too far down the path of undertaking my own analysis of the Ambulance and Hospital records for the purpose of determining whether or not they provide evidence that Mr Khodor had been punched more than one time. Counsel submitted that what should have been tendered by the plaintiff was an expert report from an orthopaedic surgeon or some kind of surgeon who had read the clinical notes and interpreted them with a view to offering an opinion as to whether or not they provided evidence of the number of impacts from punching received by Mr Khodor. I agree with that submission. I am not prepared to draw the inferences and conclusions from the Hospital and Ambulance records that counsel for Mr Khodor invited me to draw on this question. In my view it was properly a matter for expert medical opinion, which has not been provided to the court.
2. By way of further proof that Mr Khodor had been hit more than once, counsel referred to an expert certificate made by Dr Nicholas King on 30 July 2019. The certificate states, and the hospital records show, that Dr King was the one who examined Mr Khodor at Liverpool Hospital on 8 March 2019 - the hospital records show that Dr King wrote and verified the Emergency Department case history notes which were reproduced in the discharge referral. It is clear that the certificate is based on and prepared from the more contemporaneous hospital records. In my view, the certificate does not add to or subtract from what might relevantly be taken from the hospital records.
3. Counsel for Mr Khodor submitted that what Mr Khodor said on the day about how many times he had been hit, and again when he first saw an orthopaedic surgeon, provide some proof of Mr Murphy hitting Mr Khodor more than once.

117.1 In their case description, the ambulance officers recorded:

"STATES WAS PUNCHED SEVERAL TIMES TO HEAD/ BODY, HE ?OFFENDERS HAD METAL OBJECT IN THEIR HANDS WHEN THEY PUNCHED HIM, STATES FELL TO THE GROUND AS A RESULT, DENIES LOC".

117.2 In the hospital Emergency Department case history notes and discharge referral, Dr King recorded:

"assaulted by another man

punched multiple times, no weapons involved

thinks he had a LOC"

117.3 In his report of 11 April 2019 (one month after the incident), Mr Tamer Kahil, consultant orthopaedic surgeon, recorded after seeing Mr Khodor that day:

"Jihad presents complaining of left shoulder pain. He was involved in a fight on 8 March 2019 where he was hit on the face and on his left shoulder."

117.4 At most, the ambulance record is objective evidence that Mr Khodor told the ambulance officers that he was punched several times to the head/body. However, as counsel for Mr Murphy pointed out, no one has suggested in evidence that more than one person punched Mr Khodor or anyone had a metal object in the hands. It may well have felt like that to Mr Khodor, because he was knocked to the ground. However these extra details found only in the ambulance records and nowhere else in the evidence indicate that either the ambulance record itself is an unreliable record of what Mr Khodor said, or what Mr Khodor said did not reflect what happened. The extra details may also indicate, as counsel for Mr Murphy submitted, that "the story had got better in the telling" whilst Mr Khodor was waiting for the ambulance to arrive.

117.5 The hospital record provides objective evidence that Mr Khodor told Dr King at the hospital that he had been "punched multiple times".

117.6 There is an inconsistency between the ambulance record and the hospital record as to whether or not Mr Khodor had a loss of consciousness. According to the ambulance record he denied having a loss of consciousness, whilst according to the hospital record he thought he had a loss of consciousness. The inconsistency calls into question the reliability of one or other of the records, or alternatively indicates that Mr Khodor gave an inconsistent account of what happened regarding loss of consciousness.

117.7 Mr Kalil's report provides objective evidence that Mr Khodor told Mr Kalil a month after the incident that he was hit on the face and on his left shoulder. This appears to be the first record of Mr Khodor saying that he was hit on his left shoulder.

1. Counsel for Mr Khodor submitted that the medicolegal report obtained by the solicitors for Mr Murphy from Dr David Croker, consultant occupational physician, provided some proof that Mr Murphy hit Mr Khodor more than once. On page 2 of his report Dr Croker referred to the Emergency Department discharge summary and said that the examining doctor outlined that there was evidence of right periorbital bruising and over the right parietal scalp. Based on that observation, counsel submitted that this indicated there were 2 locations of bruising, and so 2 blows to Mr Khodor's head. Dr Croker was also provided with the radiological investigations. At page 6 of this report under the heading of "medical opinion" Dr Croker said that it is apparent that Mr Khodor was found to have soft tissue trauma of the face at the time of examination at Liverpool Hospital following the incident.

Dr Croker then refers specifically to there being documentation of right periorbital bruising which Dr Croker described as a black eye. Dr Croker does not seem to make any separate reference to separate bruising over the right parietal scalp at this point in his report. It is not clear to me that Dr Croker himself distinguished between bruising of the right periorbital area and bruising of the right parietal scalp as submitted.

2. I should note that Dr Croker expressed the opinion that he considered it is likely that Mr Khodor sustained soft tissue trauma to the region of the left shoulder girdle as a consequence of the incident. That expression of opinion must be read with the description of the incident given to Dr Croker by Mr Khodor. That is set out earlier in his report. Dr Croker said that "Mr Khodor reported that the other male person was 'boxing me'. He stated that he was struck to the regions of the face, left side of the neck and left shoulder. He then reportedly fell to the ground.". Dr Croker does not appear to have considered the possibility that Mr Khodor may have injured his shoulder by coming into contact with the ground when he fell.

My observations and impressions of Mr Khodor's credibility and reliability as a witness

1. I have already indicated that the findings I have made that Mr Khodor made a U-turn and followed Mr Murphy and parked nearby because he was angry or agitated and he wanted in some way to hold Mr Murphy accountable or to confront him impacts heavily on an assessment of his credibility because Mr Khodor repeatedly asserted in his evidence that he did not make a U-turn, did not follow or chase Mr Murphy and had no intention of confronting him. These matters impact heavily on the assessment of Mr Khodor's credibility generally because they go to a central issue in the case and that is who is likely to have been the aggressor in the undoubted confrontation that took place.
2. Speaking generally, Mr Khodor was not an impressive witness. Without being exhaustive, I say that because:

121.1 His answers were often non-responsive to the question, even sometimes to questions posed by his own counsel. For example, when asked by his own counsel "did you have your indicator on?, The answer was "but when, when he saw me turning and he sped up" (T20). On the same page when asked "what sort of turn did you want to make?" The answer was "I wanted to go in the shop in Miller". When asked by his own counsel "what did you do then after you'd parked your car?", his answer was "I don't remember the exact conversation but I remember saying..." (T22). He gave a series of non-responsive answers to his own counsel when asked about being charged by the police in relation to his interaction with the ambulance man (T26). A further example is provided by the answers Mr Khodor gave his own counsel when asked about the police charge against Mr Murphy for damage to Mr Khodor's phone was dismissed after a full hearing (T41 – 42).

121.2 On occasion he made long speeches, instead of confining himself to the question he had been asked. For example at T66, T70 – 71.

121.3 He answered questions with questions, rather than addressing the question directly or at all. An example is provided by his evidence in cross-examination when asked about making a U-turn and chasing Mr Murphy. I have set this evidence out already in paragraph 35.4 above. A number of other examples are provided in the transcript, for example when it was put to him that he started the fight and he was the first one to make bodily contact (T44). At one point I had to ask Mr Khodor to stop answering questions with questions (T72:16).

121.4 He was argumentative. For example, when asked about a motor vehicle accident in 2015 (T46:45 and T47:40). When asked if the reason he stopped where he did was because he wanted to argue with Mr Murphy (T67). When Mr Murphy's account of events was put to him in cross-examination (T68 – 73).

121.5 He was evasive. For example, when asked about the claim he was making in 2019 for the 2015 motor vehicle accident (T48:36 – T51). When asked about the statement of particulars and list of injuries for that case filed on 27 November 2019 (T52 – 53). When asked about his attendance at Bankstown-Lidcombe Hospital on 26 February 2019 when he was allegedly assaulted by 2 individuals, punched in the face, nose and cheeks according to the discharge referral of the hospital and had a CT performed of his facial bones according to the same records (T55: 22 – T57: 14). Further, whilst the discharge referral to the hospital gave a history of allegedly being punched in the face, nose and cheeks, Mr Khodor insisted in his evidence that there was no punching or hitting, just pushing (:T56:35, T57:6 and T58:37). When being asked about his direction of travel in relation to Mr Murphy's car, including in response to my own questions (:T61:33-T63:21). When asked if Mr Murphy's van was already parked when he stopped (T67).

121.6 There were many inconsistencies in his evidence. By way of example, in his evidence in chief he said that after Mr Murphy hit him he fell to the ground, but in cross-examination he said that Mr Murphy "pushed me right to the ground and started hitting me many times" (T 69).

1. None of these matters are the hallmarks of a witness who is attempting to provide full and frank evidence to the court. In my view, many of the matters I have just mentioned tell against both Mr Khodor's credibility and reliability as a witness.

My observations and impressions of Mr Murphy's credibility and reliability as a witness

1. By contrast, and again speaking generally, Mr Murphy was the opposite of Mr Khodor. He was straightforward and direct in addressing the questions he had been asked and responding to them. He readily made concessions without hesitation. He was not argumentative or evasive.

2. Counsel for Mr Khodor submitted that Mr Murphy minimised the effect of his behaviours whilst acknowledging certain things happened, but did not provide any examples, albeit I note that he did not have a copy of the transcript.
3. Mr Murphy's reliability as a witness was demonstrated by his description of the area in which the events occurred, including the right-hand turning lane from Cartwright Avenue into Cabramatta Avenue, the existence and location of a speed hump on Cartwright Avenue before Cabramatta Avenue when travelling in a westerly direction along Cartwright Avenue and the location of the Green Valley Hotel in Woodward Crescent when compared to the aerial photograph.
4. My impression was that he was attempting to be full and frank and clear in the evidence he was giving to the court.

General considerations

1. Some further general considerations are relevant.
2. Mr Khodor's evidence that Mr Murphy was speeding down Cartwright Avenue is implausible given the size of Mr Murphy's van (shown in the photograph) and the fact that he had just come over a speed hump – a fact, I might add, that Mr Khodor failed to mention. Whilst Mr Murphy's van may have been gathering speed after coming over the speed hump, it is unlikely that he was speeding at the time he approached Cabramatta Avenue.
3. Mr Khodor's ultimate admission that he made a U-turn and followed Mr Murphy into Woodward Crescent is consistent with Mr Murphy's account of Mr Khodor appearing around the corner from Cartwright Avenue after he had parked and gotten out of his van.
4. Having found that Mr Khodor arrived in Woodward Crescent in an angry or agitated state wanting in some way to hold Mr Murphy accountable or to confront him it is difficult to accept Mr Khodor's evidence about what happened next.
5. By contrast, and as submitted by his counsel, Mr Murphy had no reason to be angry or agitated after he went past Mr Khodor in Cartwright Avenue because he had the right-of-way. He continued on, going about his business returning directly to the hotel.
6. Even on Mr Khodor's version of events, he is the one who started talking after he got out of his vehicle. This is consistent with Mr Murphy's account. I have already referred to the confrontational language Mr Khodor used according to his own evidence. On Mr Murphy's evidence, his language was stronger and even more threatening.
7. The one contemporaneous photograph in evidence is consistent with Mr Murphy's account that he hit Mr Khodor only once and in the face. Whilst there is considerable doubt about what else they may show, the ambulance and hospital records are also consistent with Mr Murphy's evidence that he hit Mr Khodor in the face.

My conclusions

1. Having regard to all of those matters I do not accept Mr Khodor's evidence about what happened after he turned the corner into Woodward Crescent after following Mr Murphy. I accept Mr Murphy's evidence about what happened.
2. I find that Mr Murphy turned left into Woodward Crescent and parked on the side of the street parallel to the curb in a spot close to the hotel. As he got out of his van Mr Khodor's car turned the corner from Cartwright Avenue onto Woodward Crescent, came along Woodward Crescent quickly and parked Mr Murphy's van in on an angle. Mr Khodor then got out of his car and approached Mr Murphy, yelling and screaming at him, saying amongst other things "'Fuck you, you Aussie dog", and also "I'll kill you". As Mr Khodor did this he got right up in Mr Murphy's face, within half a metre. As Mr Khodor kept yelling at him Mr Murphy attempted to get back into his van to leave in order to get himself out of the situation. Mr Khodor then spat on Mr Murphy and started to throw punches at him, directed to his neck, shoulder and face. Mr Khodor threw maybe 5 or 6 punches before Mr Murphy retaliated. Mr Murphy then punched Mr Khodor in the face, once and Mr Khodor fell to the ground. Mr Murphy punched Mr Khodor because he felt he had to defend himself and could not just let Mr Khodor keep hitting him. Mr Murphy did not hit Mr Khodor again. After a short time, Mr Khodor got up and moved off and sat on the footpath on the opposite side of the road to where Mr Murphy had parked. Mr Murphy then got in his van, reversed back out, went around Mr Khodor's car, and left for his own safety.

F. My findings on liability

1. In light of the facts I have found, I am not satisfied that Mr Khodor has proved his pleaded case that Mr Murphy assaulted him by hitting him multiple times around his body, and that as a result he has sustained multiple injuries and disabilities.
2. However, I have found as a fact that Mr Murphy punched Mr Khodor once, in the face. Ordinarily this would constitute a battery of Mr Khodor by Mr Murphy unless Mr Murphy can prove that he was utterly without fault. By his defence, Mr Murphy has pleaded that he is without fault because he acted in self-defence.
3. Mr Murphy submitted that Mr Khodor did not make out his pleaded case and that he (Mr Murphy) was therefore entitled to judgment.
4. Mr Khodor submitted that because Mr Murphy hit him with one punch (as he admitted and I have found), he committed an assault (or perhaps more accurately a battery) and in order to avoid liability he had to rely on his defences under s.52 and s.53 of the Civil Liability Act, 2002.
5. I agree with Mr Khodor's submission. In my view, the Court cannot ignore the finding I have made that Mr Murphy punched Mr Khodor once in the face.

6. It is necessary therefore to consider the defences raised by Mr Murphy under section 52 and section 53.

7. I set out the questions that arise under section 52 earlier in these reasons. Mr Murphy does not incur liability if:

142.1 The conduct to which he was responding was unlawful (s.52(1)(a)).

142.2 He believed the conduct he carried out was necessary to defend himself (s.52(2)(a)).

142.3 And the conduct he carried out was a reasonable response in the circumstances as he perceived them (s.52(2)).

1. On the facts I have found, I find that the conduct to which Mr Murphy was responding was unlawful. Mr Khodor spat on him and threw punches at him.
2. I have accepted Mr Murphy's evidence that he believed the conduct he carried out was necessary to defend himself. Although it is not necessary to do so in light of my acceptance of Mr Murphy's evidence, I would also infer from all the circumstances that Mr Murphy held that belief when he punched Mr Khodor.
3. I find that it was a reasonable response in the circumstances as Mr Murphy perceived them for Mr Murphy to have punched Mr Khodor once. I have already found that Mr Murphy attempted to get back into his van to leave in order to get himself out of the situation when confronted by Mr Khodor. It was reasonable to respond with force once Mr Khodor had thrown maybe 5 or 6 punches at him. Whilst his punch was forceful enough to knock Mr Khodor to the ground, the hospital records show that it was not so forceful as to cause a fracture.
4. It follows, and I find, that pursuant to section 52 Mr Murphy does not incur liability to Mr Khodor.
5. Mr Murphy is therefore entitled to judgment on Mr Khodor's claim against him.

QUANTUM

1. The practice of judges of this Court who propose to find for the defendant in personal injury cases is to assess damages in order to avoid the cost and expense, as well as the inconvenience in taking up valuable court time and resources, of a new trial limited to the issue of damages should there be a successful appeal on the issue of liability: *Nevin v B & R Enclosures* [2004] NSWCA 339 at [74].
2. I therefore proceed to assess damages on a contingent basis.

3. In theory, there are 2 contingencies or counterfactuals to consider. I referred to the 2 possibilities at the start of these reasons. One possibility is that damages would fall to be assessed under section 53 of the Civil Liability Act, 2002. The other possibility is that they would be assessed according to ordinary common law principles.
4. In practical terms, in light of the facts and the parties' submissions, the only real difference is whether or not Mr Khodor would be entitled to damages for non-economic loss, or in the old parlance general damages.
5. Counsel for both parties provided a schedule of damages which they addressed in closing submissions, in the process helpfully and quite properly narrowing the issues to be determined. I will address the heads of damage referred to in those schedules and submissions.

Non-economic loss / General damages

1. If damages are assessed under the Civil Liability Act, 2002 because section 53 applies, then no damages may be awarded for non economic loss (s.53(2)).
2. If general damages are assessed under common law principles, counsel for Mr Murphy submitted that the only qualified medical evidence before the court, in the form of Dr Crocker's report, establishes that Mr Khodor sustained a black eye, which was a soft tissue injury, and appears to have sustained a left shoulder injury at a very low level. Counsel for Mr Murphy submitted that the black eye has resolved itself. Further, that the injury comes in the context of multiple other injuries, including some received that year from other fights or incidents and also a claim that Mr Khodor was bringing at the same time in relation to a motor vehicle accident of March 2015. Counsel submitted that when one removes any element of overlap and looks at the traditional components of general damages, that is pain and suffering, loss of amenities of life and disfigurement, then there is a low level shoulder problem which according to Dr Crocker does not cause a need for treatment.
3. Counsel for Mr Khodor did not dispute this broad assessment of the position.
4. Counsel for Mr Murphy submitted that an appropriate allowance for general damages would be \$20,000. Counsel for Mr Khodor did not cavil with that figure.
5. On that basis, I would have awarded \$20,000 for general damages if assessing damages on common law principles.

Past economic loss

1. Counsel for Mr Khodor submitted that Mr Khodor should be awarded damages for past economic loss at the rate of \$10,000 per annum for 4 years, giving a total of \$40,000.
2. Counsel for Mr Murphy submitted that Mr Khodor had not proved any entitlement to past economic loss.

3. As counsel for Mr Murphy pointed out, Mr Khodor did not present any objective documentary evidence to support his claim for past economic loss. He did not put into evidence a single tax return, bank statement, business activity statement, accountant's report or any of the things that a person claiming a loss from their own business would ordinarily tender in support of their claim, bearing in mind that Mr Khodor's claim was for a past loss of income in relation to a burger stand business that he set up for the first time 6 months or so after the accident.
4. Further this was so notwithstanding that Mr Khodor actually had some tax returns. He agreed in cross-examination that he had lodged tax returns in Australia. Copies of the tax returns for the years ended 30 June 2020, 2021 and 2022 were evidently available because both counsel referred to them during the hearing, but they were not put into evidence.
5. Counsel for Mr Khodor based his submission that there was a loss of \$10,000 per annum on the proposition that Mr Khodor had agreed in cross-examination that his taxable income after expenses for the year ending 30 June 2020 was \$7600. The problem with that submission is that Mr Khodor did not agree with the propositions that were put to him. It was put to him that his "tax return for the year 2020 to 2021 says net small business income of \$7,656". He did not agree with that proposition. It was then put to him that for the financial year ending June 2020 he earned \$7,656 between October 2019 and June 2020. He did not agree with that proposition. He was asked "For the financial year end June 2021, your tax return says your total business income was \$19,560. Would you agree that's what it shows on your tax return that that's what it was?" and his response was "Yeah, yeah, it depends on how, how many, how many times I work. When they, when the, previously I had my injury was, effect on me was high. I couldn't work as much but later I could work a bit more.". He was asked "For the financial year end June 2022 your total business income after expenses was \$17,592 according to your tax return; is that correct?" and answered "I don't remember. The accountant always worked it out."
6. The way I understand that evidence, Mr Khodor possibly agreed with the figure that was put to him in relation to the year ended June 2021, but not any of the other figures. It is still necessary to take into account the answers he gave in relation to the other figures that were put to him, particularly his response to the question about the financial year ended 30 June 2022 that he did not remember and the accountant always worked it out. In circumstances where the tax returns were available and were not tendered in evidence, and there is no explanation as to why they were not tendered, I am not prepared to draw any inferences favourable to Mr Khodor about what his tax returns may have disclosed.
7. In the circumstances, the factual foundations for Mr Khodor's submissions are not made out.
8. I accept Mr Murphy's submission that Mr Khodor has not proved an entitlement to past economic loss.

Future economic loss

1. In his schedule of damages, counsel for Mr Khodor submitted that he should be allowed a buffer of \$10,000 for future economic loss.
2. Counsel for Mr Murphy submitted that no amount should be allowed for future economic loss based on the evidence of Dr Crocker.
3. I accept the defendant's submission.

Out of pocket expenses – past and future

1. Counsel for Mr Khodor submitted that Mr Khodor should be allowed \$5,000 for past out-of-pocket expenses and \$5,500 for future the pocket expenses.
2. Counsel submitted that the out-of-pocket expenses should be allowed because Mr Khodor gave evidence that he saw his general practitioner and the court could count the number of attendances that he saw the orthopaedic surgeon Mr Kahil. It was submitted that these attendances rarely cost less than \$200 each. Further it was submitted that he was seeing a psychologist every month since the date of the accident; every month of 5 years gave 60 attendances, likely to have cost him at the rate of \$160 per attendance, giving something approaching \$10,000. In addition it was submitted that he had an injection to his shoulder and has had physiotherapy. When I asked what was the evidence of the past out-of-pocket's, counsel submitted that the evidence was that Mr Khodor had said in his evidence that he was seeing a psychologist once once a month; together with the fact that there were 4 or 5 reports in evidence from Mr Kahil and there would have been on examination and he would have been charged for his attendance; together with at least one document from his GP saying that he had been treating him; together with a number of documents that refer to referrals to other specialists, including an eye specialist because he had been complaining of fuzzy vision in the right eye.
3. Counsel for Mr Murphy submitted that past out-of-pocket expenses are not proved by way of an estimate. There must be proof that the plaintiff is out-of-pocket.
4. Ordinarily out-of-pocket expenses are agreed on the basis of an exchange of documentary evidence between solicitors. If agreement cannot be reached, then the documentary evidence together with any other relevant evidence is placed before the court to determine whether particular items of past out-of-pocket expenses are recoverable.
5. I accept Mr Murphy's submission that Mr Khodor has not provided sufficient proof of his claimed past out-of-pocket expenses.
6. As for future out-of-pocket expenses, counsel for Mr Murphy submitted that there were multiple attempts to try introduce a claim for future surgery, but at the end of the day I do not need to resolve that question because it was not pleaded. Even if one were to allow Mr Khodor to pursue a claim for the cost of future surgery, it was submitted that there needs to

be some medical support for it. It was submitted that the only qualified medical evidence is that of Dr Crocker whose opinion is that Mr Khoder did not need surgery in the past and has no need for it in the future.

7. In all the circumstances I would have allowed a buffer a buffer of \$5,000 for future out-of-pocket expenses in relation to the treatment of his shoulder.

Conclusion

1. They were the only heads of damage addressed by the parties.

ORDERS

1. For those reasons I make the following orders:

177.1 Judgment for the defendant.

177.2 Plaintiff to pay the defendant's costs.

Amendments

26 August 2024 - 158 - corrected 'economic loss' to non economic loss

178 - corrected paragraph numbers

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Decision last updated: 27 August 2024

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Prepared on 26 October 2026 · Esheria