

# DISTRICT COURT OF QUEENSLAND

CITATION: *O'Connor v Brisbane City Council* [2013] QDC 137

PARTIES: **EDWARD JAMES O'CONNOR**  
(plaintiff)  
v  
**BRISBANE CITY COUNCIL**  
(defendant)

FILE NO/S: BD1224/2010

DIVISION:

PROCEEDING: Trial

ORIGINATING COURT: District Court, Brisbane

DELIVERED ON: 24 June 2013

DELIVERED AT: Brisbane

HEARING DATES: 29, 30 April and 3, 14 May 2013

JUDGE: Samios DCJ

ORDER: **Judgment for the plaintiff against the defendant for the sum of \$56,011.04**

CATCHWORDS: HIGHWAYS AND BRIDGES – public authorities – negligence – road repairs partly completed by local authority – bicyclist riding in a group on road – bicyclist falls from bicycle – bicyclist claims cause of fall was hazard created by local authority during the repairs – bicyclist claims no warning of presence of hazard given by local authority – misfeasance – duty of care – breach of duty – volenti non fit injuria – whether road authority liable despite sections 19, 35, 36 and 37 *Civil Liability Act* 2003 – whether obvious risk – whether dangerous recreational activity – contributory negligence – whether bicyclist breached s 151 or s 247 *Transport Operations (Road Use Management – Road Rules) Regulation* 1999 (Queensland) – injury to shoulder – assessment of damages  
  
*Civil Liability Act* 2003 ss13, 18, 19, 35, 36, 37 and 55  
  
*Civil Liability Regulations* 2003 item 97  
  
*Transport Operations (Road Use Management – Road Rules) Regulation* 1999 regulations 151 and 247

*Brodie v Singleton Shire Council: Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512, 581 [163] followed

*Buckle v Bayswater Road Board* (1936) 57 CLR 259, 283 per Dixon J followed

*Chappel v Hart* (1998) 195 CLR 232 followed

*Desmond v Mount Isa City Council* [1991] 2 Qd R 482, 485

*Fallas v Mourlas* [2006] NSWCA 32 followed

*Kenny and Anor v Eyears and Anor* [2003] QSC 439 followed

*Leichhardt Municipal Council v Montgomery* [2007] HCA 6 followed

*Leonardi v Payne and Anor* [2009] QSC 382 considered

*March v E and MH Stramare Pty Ltd* (1991) 171 CLR 506, 509 followed

*Micronis v Adams* (2004) IDCLR (NSW) 369

*Neindorf v Junkovic* [2005] HCA 75 followed

*Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 611 followed

*O'Shea v Permanent Trustee Co of New South Wales Ltd* [1971] Qd R 1 followed

*Perfect v MacDonald and Anor* [2012] QSC 11 followed

COUNSEL: Ms A Marks for the plaintiff

Mr A Musgrave for the defendant

SOLICITORS: Gabriel Ruddy and Garrett for the plaintiff

King & Co for the defendant

[1] At about 7.00 am on 3 November 2007 Mr O'Connor was riding his bicycle along Sinbad Street towards Shorncliffe Parade at Shorncliffe in Brisbane. Prior to that date the Brisbane City Council undertook repairs to the road surface of Sinbad Street. Mr O'Connor rode his bicycle over the repairs. Mr O'Connor lost control of his bicycle whereupon he was thrown to the roadway and injured.

[2] Mr O'Connor claims against the Council damages for negligence.

- [3] It is not in dispute that the incident occurred on a curved stretch of road on Sinbad Street located on the southern side of the Sandgate Golf Course. The Council had undertaken the repairs to the northbound lane of Sinbad Street. The repairs to the road consisted of an area of the roadway that measured 25.2 metres in length and 3.5 metres in width and the repairs took up the entire northbound lane of Sinbad Street. According to the Council's records, the repairs were commenced on 30 October 2007 and were not completed until 13 November 2007. Beside the northbound lane of Sinbad Street there was a bicycle lane which measured 1.1 metres in width. The repairs did not extend into the bicycle lane.
- [4] Mr O'Connor claims that the repairs at the date of the incident were such that the road surface was scoured, resulting in grooves in the bitumen of around 2.5 to 5 centimetres in depth and a general uneven road surface over the entire area of road work which was uneven, broken and dangerous. In addition he claims the existence and condition of the repairs was not known to him, was not apparent to him, was obscured from his view due to the curve of the road and was not signed as uneven surface or roadworks.
- [5] The Council in its defence says on 30 October 2007 repairs were conducted by the Council. The repairs involved scraping the surface of the road in anticipation of new asphalt being applied to the road. A base layer of asphalt was then applied by the Council to the road surface leaving a height differential of approximately 25 millimetres between the surface of the repair works and the surrounding bitumen surface and entry and exit ramps to assist with vehicle movement over the repair works whilst the asphalt settled. Further, the Council says adjacent to the vehicle carriageway was a designated bicycle lane and the repair works did not extend over or into the designated bicycle lane.

- [6] In addition, the Council denies the road surface was scoured resulting in grooves in the bitumen of around 2.5-5 centimetres in depth and says the scoured surface of the repair works had been covered by a base layer of asphalt and the repair works did not result in the road surface being left with any grooves in the bitumen surface. Further, the Council says the road surface of the adjacent bicycle lane was smooth and outside the boundaries of the repair works.
- [7] In addition, the Council says the repair works were obvious to persons such as Mr O'Connor travelling on the road keeping a proper lookout as to where he was travelling. The repair works were visible from a considerable distance away for users of the road. The bend in the road did not obscure the presence of the repair works to users of the road. Further, the Council had in place signage warning of the condition of the road surface with the words "rough surface" which was erected some 30 metres away from and on the approach to the repair works. Further, the Council says Mr O'Connor was not keeping a proper lookout as to where he was riding his bicycle. Further, the Council says Mr O'Connor's view of the repair works and the road surface generally was obscured by the presence of the cyclists to the front of him.
- [8] Evidence from employees of the Council was to the effect that repairs to a road such as Sinbad Street are carried out in stages. The first stage is to excavate the area to be repaired. Mr Bayne, the senior supervisor for recurrent maintenance, said normally the excavation is to a depth of approximately 150 to 200 millimetres, Mr Williams who is a team leader in an asphalt gang and did the work at the site, said the road surface was removed down 100 millimetres. Nevertheless both he and Mr Bayne agreed that once the excavated material is removed, then a base layer of asphalt is laid leaving a depth

of 25 millimetres from the road surface to the top of the base layer of asphalt. After that base layer of asphalt is allowed to cool, a paving top is applied.

- [9] On 9 November 2007 Bruce Edge was following his normal track on a bicycle around Shorncliffe. When he gave evidence he said he just piled into a hole that he did not see coming because it was on a corner. He broke his back wheel and crashed off onto the grass next to the hole. Mr Edge damaged his tyre and broke his rear wheel in the repairs in Sinbad Street where Mr O'Connor fell six days earlier. Mr Edge said when he got home he rang the Council because he felt strongly that somebody else would pile into this hole.
- [10] Mr Norgrove, an employee of the Council was given Mr Edges' complaint to action. He went out to the site and made observations on 9 November 2007. He took six photographs of the repairs and other areas on that date. These photographs are the closest in time to the incident on 3 November 2007. Other photographs have been taken by a loss adjuster showing the approach to the repairs at various distances. These were taken on 4 April 2008.
- [11] Unfortunately, in my opinion, there was no close up photograph of the repairs.
- [12] At the end of the evidence Mr O'Connor submitted that the state of the road as encountered by him and his fellow cyclists on 3 November 2007 was consistent with a road that had been excavated and either not filled with base layer asphalt or only partially filled with base layer asphalt.
- [13] The Council submitted the evidence established that the base layer asphalt had been laid in the excavated area and the repairs were safe to be used by drivers of motor

vehicles and cyclists. Further, there was a height differential of approximately 25 millimetres between the surface of the repair works and the surrounding bitumen surface. Further, that a warning sign had been placed on the approach to the repairs. The sign carried the words “rough surface”.

- [14] When Mr O'Connor gave evidence he said at the time of the incident he was cycling with friends who rode from sometime together. These friends were Denise Hawgood, Trevor Hawgood, Louise Lambrianides and Sharon Grayson. As the evidence shows, Mr O'Connor and his friends at the time of the incident were in their late 40's or early 50's. On the day of the incident, the purpose of the ride was a recreational ride. They did it two or three times a week. He said Trevor Hawgood was probably the strongest and best rider so he would take the front and he was very good being the ears and eyes for the group and he would yell out if there was a pothole, glass, obstacle of some sort. He said normally they would travel two abreast unless it was dangerous, then someone like Trevor would yell out single up and they would get into a single lane. He said heavy traffic, narrow road and obstacles that they knew about would necessitate single file riding. On this particular day, he said Mr Hawgood was on the front right and Mr O'Connor was in the second row nearest the gutter and he trailed Denise Hawgood who was in front of him. He said Louise Lambrianides was beside him and behind him was Sharon Grayson. He said there was very little traffic around and the weather was clear and good. He said the rider who was the eyes and ears for the group would yell out if there was an obstacle. He said the rider at the rear would yell out if there was a car coming so that people would be aware that there was a car there because sometimes it gave a rider a bit of a shock if they came a bit closer. Mr O'Connor said he was wearing a helmet.

[15] Regarding the incident, he said they were travelling along their normal route along Sinbad Street at normal speed and the next thing he knew he dropped into something. He said he was travelling at 25 to 27 kilometres per hour. He said all of a sudden he dropped into something. He said there was a dug out area. He said he dropped down and from there on it was all a blur. Later on when he came to, he got up and had a look around and he noticed it was like a scarified area. He said they had cut grooves into this area. He said he couldn't understand what happened. He assumed his front wheel obviously went into one of those grooves and caught and he was catapulted. He said the area of scarification was 20 odd metres long. He said however, this was not the real problem. He thought it was just the grooves that were cut into this thing where the wheels went into and locked and that's what caused all the damage. He said it was a substantial drop. He said the drop was about three inches. He said there were no ramps. He also saw no signs on his approach to this area. With reference to the photographs he said before he dropped down he was riding on the carriageway and not in the bike lane. However, he said he would not call it a bike lane. He said it was very narrow at that point. He also said at a distance earlier to where the incident occurred, there was a lot of rubbish and there is normally glass and there is a lot of weed and stuff and one would rarely ride in the bike lane unless there was a truck coming along or something like that.

[16] When cross-examined, Mr O'Connor accepted he had not mentioned that Ms Grayson was present at the time of the incident in his claim form he signed on 22 May 2008. He said to the best of his knowledge at that time he did not know she was there. He said Mr Hawgood did not call out anything before the incident occurred. Regarding the grooves in the road he accepted that he had said in further and better particulars they were 75 millimetres apart. He said these grooves themselves were 25 metres

long. He said the grooves ran roughly parallel along the length of this section of road works. He said the grooves were approximately 75 millimetres or three inches apart. He said the depth was between two to three inches. He then agreed that the depth of the grooves was 25 millimetres to 50 millimetres. He said his tyre became wedged in a groove and he was propelled forward out of his bicycle over the handle bars. He said he was riding a metre from Mrs Hawgood's back tyre. He agreed he should ride in the bike lane if that were practical. Regarding whether he kept a proper look out he agreed they did not see the roadworks. He said we didn't see it on the day. I took him to mean the drop in the repairs. He said if the team leader calls single file they would get into single file. He said that was just commonsense.

- [17] Regarding the photograph PN-1 in exhibit 12 taken by Mr Norgrove on 9 November, it was suggested to Mr O'Connor that the photograph showed the condition of the road as it existed when he travelled over it on 3 November 2007. Mr O'Connor disagreed and said it looked a lot lighter and it had grooves in it. He agreed there was a distinct colour difference between what is shown in the photograph as being the roadworks and the other road which is present there, the existing carriage way. It was suggested to him that the photograph does not show a two to three inch drop down at the point where the existing carriageway meets the roadworks. Mr O'Connor said it appeared to and he said it did show a three inch drop down. He was also asked whether he agreed the photograph depicted that there was a ramping or profiling downward. He did agree with that. He agreed the photograph did not show any of the grooves that he referred to in his evidence. When he was shown photograph PN-2 from exhibit 12 he said the roadworks were in a different condition when he rode over it on 3 November 2007. He said what he remembered after the accident was it looked like a white surface not that surface at all and it had grooves in it. Later in his cross-examination, Mr O'Connor



suggested that if the Council dug up like they did they should put a barrier up saying go around it and have traffic controllers at either end of the section. He agreed before the incident he did not put on his brakes because he did not have time. He agreed that if he had perceived any danger in the roadworks, he should have taken steps to avoid riding into the roadworks. He agreed he made no complaint to the Council, however, he said in hindsight he should have made a complaint.

[18] Mrs Hawgood gave evidence. She was riding in the front with her husband and Mr O'Connor and Mrs Lambrianides behind them. She did not recall who was directly behind Mr O'Connor and Mrs Lambrianides. However, regarding what happened she said they came across some roadworks. Very suddenly. There was a bike lane, and there was quite a drop off to where the traffic would have gone. Because they were riding two abreast, they were somewhat over on the white line to where the traffic drops off. She and her husband got through it but there was no warning, it was just bang. We were there. And by the time they'd sort of ridden and corrected themselves, they didn't have time to warn the others that it was there. They heard a yell, turned around and Mr O'Connor had come off his bike, and Mrs Lambrianides had been calling to them to stop. She said the drop was maybe 3-4 centimetres. She said regarding the road, the tar had all been pulled up and it was just rough bitumen. She said it was like they'd pulled all the tar off it to re-seal it, basically, so it was just very rough. Very unstable. But it was the drop that was the most dangerous rather than the actual bitumen itself. She said the drop was when you became unstable and could easily fall. Regarding whether she saw any grooves or corrugation in the relevant area, she said it was like when they rip tar up, they have those huge machines that come through and rip the roads up, and they like, shred, she supposed, for want of a better term, the tar. That's what it was like. They were about to reseal it, obviously, and they

had prepared, and it was just corrugated, if that's what you want to say. She said it was definitely uneven and unsurfaced. It wasn't dirt, per se, but it was still bitumen, but it was all torn up. She said there was no sign of warning. She did not see any entry ramps into the area. When cross-examined Mrs Hawgood agreed the roadworks were quite plain to see and should have been seen and there was plenty of time to take evasive action. However, in her next answer she said if they had seen it they would have called it. When shown the photograph PN-1, she did not agree the photograph showed the condition of the roadworks when she rode through on 3 November. She said she did not believe that it was what it looked like when they rode through. She said it did not show the drop off. She said the photograph showed quite smooth bitumen. She said it wasn't like that when they rode through it. She said it looks like it has been repaired in that photo. She said it was definitely not the state that it was in when they rode through. She said there was no sign at about the point shown in photograph PN-4 on Sinbad Street. Later in her evidence she said the drop off that she was referring to was on the edge of the bike lane.

- [19] Mr Hawgood gave evidence. He said he rode at the front as a courtesy to call out if there were any obstacles or obstructions or things on the road. Regarding this particular day, with reference to the location of these repairs, he said they were riding along opposite the boat ramp at the end of the golf course. He said they came across a bit of road work. He said he believed it was unsigned. He saw no signs for it. He said where they had excavated the width of the road lane, and obviously put a temporary surface in, and it was about an inch drop down into that from the white line in the centre of the road to the edge of the bike lane. He referred to the outside edge of the lane. I took him to say Mr O'Connor dropped down into that. He said it went for about 30 metres. He said he did drop down into the repair surface himself. He said

when he dropped down into that area he did not see any entry ramps or exit ramps into the excavated area. Describing the surface of that area from what he observed he said “it was a temporary asphalt surface. Bitumen.” Regarding whether he saw any grooves or any changes in the surface in that area, he said it was probably uneven, had some bits of gravel in it. He said he did not see any signs as he approached the area. He agreed with photographs showing a distance of 20 metres to the roadworks, and from the position of the photographer a rider could see the full width of the road and that there were any excavations of rough surfaces that could be identified. He agreed if one were a cyclist, one could take steps, for instance, to move into the bike lane and slow their speed. He agreed on the day in question there were no roadworks on the bike lane portion of the road. He said if one saw the roadworks, even at 25 to 30 kilometres per hour speed, one could move into the bike lane. However, his answer seemed to be qualified by saying that account had to be taken that there was something that was an inch deep that was black the same colour as the bitumen. Regarding the photograph PN-1, he agreed the photograph showed the condition of the roadworks that he came across when he saw them on 3 November. Regarding the drop down he said his recollection was that you drop down off the bit that runs across the road as well as along the surface of the repair. He said this included the line of the bike path that can be seen in the photo. He said by reference to the photograph and the lamp post in the photograph, you can see the drop. He said there was a similar sort of drop off the road surface into the repaired area. He was questioned about the presence of ramp down from the existing road surface into the area where the roadworks were being undertaken, however, he did not seem to me to be able to answer whether those ramp downs existed. Regarding the presence of grooves by reference to the photograph his recollection was there were no grooves, 1-2 inches deep, running in the direction of travel on that road surface where the roadworks were. As to that he said “no, I think

the issue was the inch - you can see it in this photo, PN-1, is the edge along the bike path.” He said one can see that edge there in the photograph. He said “that, I believe, was probably what Ed hit, that caused the accident”. He said that would be consistent with where they were riding in terms of their position on the road. He said certainly the surface within the repair area was rough and uneven. He said it was not grooved. He said “it was the edge”.

[20] Mrs Lambrianides also gave evidence. She said they came around the bend opposite the sailing club, and without any warning, no notification, they ended out in a road that had been dug out. She said it was corrugated and there was loose gravel. She said the drop-down was enormous. She said speaking for herself she got a fright. She looked to her left and Mr O’Connor was in the air. She said the drop was three inches. She said it was definitely three inches. She said usually if the road is dug out, they put a little tarred ramp area for bikes to be able to go into those areas fairly safely. She said there was no in-ramp, there was no out-ramp. She said the area was hugely corrugated. She said it was just a mess. She said there were no warnings at any time. She said the speed they were riding as they came into the bend was 26, 27, 28 kilometres per hour. She said if there had been any warning, if somebody in the group had seen the sign or would have called out roadworks ahead, everybody would have slowed their speed down considerably probably to about 15,18 kilometres per hour, so if they needed to stop quickly, they were able to take evasive action. They would have increased the distance between the bikes. She said Mr Hawgood was in front and he is the most observant rider of all and he did not call it. Mrs Lambrianides disagreed the roadworks looked like the road works in the photograph PN-1 when she passed over it on 3 November 2007. She also said there was no “rough surface” sign as suggested by a statement made on photograph PN-4 of the possibility that a sign was in that position.

She said it definitely was not there. Mrs Lambrianides was asked to compare what was shown in the photograph PN-1 which was not present when she was there on 3 November 2007. She said looking at the photo it looks like the road has had some sort of sealant added to it. She said “it’s smooth”. She said the drop-down does not appear on the exit area. She said there is certainly no area where you’d need to ride up and just on the entry part apart from the far left hand corner it seems to be filled in. She said it is quite different to what they experienced on the day. She said with regard to the proposition that what was in the photo is how it looked like on 3 November 2007, she said “totally disagree”. She said all she could tell us is, on the day, this is not how the road looked. It was completely corrugated. It was rough. There was loose gravel.

[21] When Ms Grayson gave evidence, she said she remembered they were cycling along through Shorncliffe, headed towards the yacht club, with the intent of going up the hill. She said when they turned the bend, they fell into a hole. She remembered trying to navigate through the hole. She remembers hearing a noise. When she finished going through she stopped and looked over and Ed was lying on the ground. Later in her evidence she said she remembered a jolt. She got quite winded because it was such a sudden fall. She wasn’t expecting it. And then, looking down, and realising that she was in some type of a scoured-out area and trying to hold on very tightly. She said her goal was to get through the ruts that had been made and get to the other side without falling off. She said it was like a scoured-out – it had been worked on. Like roadworks. And had been dug out. There was a little bit of rubble in it and she remembered the jolt of the drop into it. And just really trying to hold on as tightly as she could to get herself through it and to the other side. She said she went over the edge. She did not see any entry ramps in that area. By further explanation of what she

meant by rubble she said it seemed to be the same colour as the road. It was like bits of the bitumen was still lying in it. She said it was very similarly coloured. She did not see any warning signs.

[22] When cross-examined, Ms Grayson said regarding her recollection that certain aspects of it may be impaired. She said the first time she gave anyone a statement about this is when she spoke to solicitors acting for Mr O'Connor a couple of weeks ago. She agreed one could move out of the road of the storm water drain and then back into the bike lane without any problems before you got to the road works. She agreed you get a good view of the full width of the road from 20 metres away. She agreed if you were a cyclist and there were some obstacle up there 20 metres ahead, you have plenty of time to pull into the cycle lane. She agreed even with the arrangement of the cyclists on the day, one would have enough time for all the cyclists to have got into a single file and moved into the bike lane to go around the road works if they perceived the danger. She agreed if you perceive the danger there was still plenty of time to react to it. When Ms Grayson was shown exhibit PN-1 she did not agree it showed the roadworks as they looked like on 3 November 2007. Although, her next answer suggests she was agreeing the roadworks were repaired like those shown in the photograph, I recollect her answer was a question. Later, her answers show she did not agree with the photograph PN-1. She agreed the photograph does not show loose rubble or ruts. However, she said it was a scoured-out area. She also said she did not see a sign in the position suggested by the photograph PN-4.

[23] Mr Edge gave evidence that on 9 November 2007 he was just following his normal track around Shorncliffe and just piled into a hole that he didn't see coming, because it was on a corner. He broke his back wheel and crashed off onto the grass next to the

hole. He identified where this happened. It coincided with where Mr O'Connor and the other riders in his group said they entered the repairs. He said regarding when he first saw what he fell into that he did not think he saw it until he hit it. He did not realise there was anything happening until he was crashing. Regarding the drop he said he thought it was probably an inch and a half. If not a bit more. And the edge was really jagged which is what he was driving right on the edge and the jagged edge is what broke his tyre. He said he did not see any ramps into this area at all. He said there were not any signs that he observed on the way. He said there were no warnings at all. When it was suggested to him he was not travelling in the bike lane on that day he said that was not true. He said he was on the white line and the edge of the hole was also on the white line and that's what he hit. He said so he was on the white line and that's probably more or less the bike lane. When he was asked about approaching the scene of the accident from 32.5 metres away and whether you could start to see the road surface at the point where the road works were, he said what he could say what he saw was he didn't see anything. Regarding 20 metres ahead from where the road works were, he did not agree you can see the road ahead where the road works were. He said that he didn't see it and that was why he fell in it. He said if he had seen it, he wouldn't have fell in it. Again 10 metres ahead and what he might have seen he said he did not think it is relevant because he didn't see it. He said he did not deliberately fall in the "god damn hole". He said regarding seeing the road works 10 metres ahead, he said from the photo it appears that you should be able to see. He agreed with the dimensions of the repairs and the dimensions of the bicycle lane. He agreed the road works extended to the white line. When shown the photographs taken by Mr Norgrove, he agreed there is a darker area of asphalt which is distinct in colour when compared to the existing surface. However, he did not agree that the roadworks were filled with gravel and relatively smooth and flat at the time of his fall. His reason

for that was that the road works were deep enough for him to destroy his rear tyre, deflated immediately, and break his rear wheel. He seemed to agree that there were ramps into and out of the road works shown in the photograph. However, I consider he was going to qualify his answer. Unfortunately, I asked at an inappropriate time for a copy of the relevant exhibit. He said he crashed off just past the power pole seen in the photographs. He agreed there were no road works in the bike lane itself. He agreed if he had travelled further into the bike lane he would have been able to pass the works, like a cyclist can be seen off in the distance in the photograph PN-1. He agreed that the photograph showed the condition of the road works on 9 November, however, qualified that by saying apart from the fact that it looks to be smooth in the photo but it wasn't as smooth as it appeared. Later he said what happened was he fell in a hole. He got a puncture. Therefore the hole caused the puncture. He said he complained to the Council. Part of his complaint apparently said "does not have any witches hats or anything to indicate spots. Caller fell off his bike and ruined his back tyre".

[24] Mr Edge was not known to Mr O'Connor.

[25] The Council called Mr Bayne. He has been a senior supervisor for recurrent maintenance with the Council for the last 18 months. In his position, he oversees a team of field supervisors and a team of five operational crews where they conduct the maintenance on roads for what they call the recurring maintenance for large repairs. During his evidence he was shown the photographs taken by Mr Norgrove on 9 November and exhibit 16 which contained records of the Council relevant to the repairs and adjacent streets where repairs were carried out. He described the process of doing road works seen in the photograph PN-1. He said the process involves inspecting and marking out the roadway and then on the day one of the crew attends.



They use a profiling machine which excavates the ground. Normally, it would excavate to a depth of approximately 150 to 200 millimetres. He said the patch of road which requires work is conducted by a field team. They allocate the work then either himself or a field supervisor inspects the road to determine the resources required for the timing and circumstances, whether the road permits, whether there is additional traffic control employees required and they then schedule the work with their field crews. He said a profiler is a large excavating machine with a broom on it which will dig out the road mechanically and the tailings are automatically sent to an adjoining truck for removal to the tip. He said it has got a range of refinements on it so that it maintains the common depth across the actual profiled area. He said most of the roads are excavated either to 150 millimetres or 200 millimetres depending upon the nature of the damage and the type of traffic that goes on that road. He said they excavate all the damaged roadway then they refill it with hot asphalt and then the asphalt is sprayed with a bobcat using a designated spreader and it's then compacted in different layers to achieve the compaction required by the quality team. He said the profiler scraped away the failed area of asphalt and there is laid what is called a base level. He said exhibit 16 page A showed for this particular job on the same day the Council applied the AC overlay which was a smaller area for some reason. He said that was 26 metres at a depth of 25 millimetres. He said that made him wonder if that's a second job which was in the catchment area of that overall work. By way of clarification, Mr Bayne said with the process, there is excavation first then that is refilled with asphalt and he called that the base course of asphalt and then that is let to cool and the next stage after that a paving is applied. He called it a paving top. He said it leaves a smoother finish. Regarding the cooling down that could take anywhere between 24 hours up to three weeks. He said there was never a delay between the profiling and the base layer. He said if there was such a delay that would mean the road would have to

be closed because it would be completely unsafe. He said they would have to have permanent traffic control for that duration. Regarding the placement of a sign such as a “rough surface” sign, he said the crews and the supervisors carry these rough surface or loose surfaces signs as appropriate in the vehicles. He said they are affixed to either fixed structures such as poles or in a majority of cases they use a small sledge hammer and they have a wooden stake and they’re placed in the roadway ahead of the area to alert road users to the fact that there is some roughness in the surface. He said the team leader who places the sign is intending to make sure that it’s as visible as possible for approaching users. He said they may put multiple signs up if there is some restricted visibility. A relevant consideration to the placement of the sign was the approach speed. He said there are recommended standards. He said a sign should not be placed too far ahead as the road user could forget about it. He said they have relatively low incidents of signs being removed. He said Council staff have in the back of their ute a supply of signs. If they saw anything that was incorrect they could stop and actually set it up themselves. He said if there was a deep hole in the repairs there would be required barriers or traffic redirection signs. Regarding photograph PN-1 he said he disagreed with the suggestion that road surface was unsafe. With respect to the suggestion there should be a barrier to prevent anyone driving onto or near what is shown in photograph PN-1 he said the road from the photographs that he was looking at has been what he would call ramped down. He said it has a 25 millimetre – 1 inch depression in the road and at either end there is a ramp of asphalt so that there is a smooth run down into it. He said it’s not a great variation in depth whatsoever. He said if there were to be barriers placed around it to prevent traffic travelling through it, he said you would need to have physical barriers at either end of it and down the side to stop traffic going on it if it was an actual traffic hazard. He said you would need to have some form of traffic management scheme whether its traffic controllers to soft

stop your traffic or portable traffic lights. He said as to the photograph PN-1, that is the condition of the road after the completion of stage one, that is the base layer. He said according to the standards that they have been operating to, this is regarded as a safe road. He said the road in photograph PN-1 has a 25 millimetre reduction from the existing road. He said stage two would involve a paving machine to put a thin layer of top-grade asphalt on top of it. He said the road had been ramped down by asphalt.

[26] When cross-examined Mr Bayne agreed when marking out and inspecting the repairs consideration would be given to any hazards that might be created by the works and consideration would be given to road users which would include cyclists. Mr Bayne said that the Council would never dig a road open and not fill it. He agreed the Council's records do not show that the job had been left safe nor signed. He agreed employees of the Council would in practice check whether signs that had been erected were still there. He agreed that more than one sign could be placed at this particular location to warn of the repair area ahead if it had been deemed necessary. Mr Bayne did not agree that a sign could have been affixed to the metal post shown in the photographs instead of using a wooden stake driven into the ground. He explained there was a preference for using a wooden stake with a sign on it rather than affixing the sign to another post using tags or wire tags. In his opinion, the one sign that was apparently placed in the position shown in photograph PN-5 was sufficient. In his opinion, more signs were not required as the road was perfectly safe. When re-examined he said what he meant by the road was left in a safe state was that it was regarded as being safe for all traffic.

[27] Mr Bayne said provided the records of the Council were accurate the records showed the base layer was laid on 30 October 2007 and the paving was laid on 13 November 2007.

[28] Mr Williams gave evidence. He is a team leader in an asphalt gang. He has been employed by the Council for 15 years. He has been the team leader of an asphalt gang probably for eight to nine years. By reference to the project site return form A in Exhibit 16, he said he did that work described in that form on 30 October 2007. He described the process involved in the work. He said the profiler is used to remove the road surface down to 100mil. He said the base layer was then laid and he said the depth you need to leave the site after you finish laying the base layer was 25mil. As to how he could be satisfied that the works were left at 25 millimetres, he said he had been doing it for a number of years and you get a bit of an eye for it and just looking at the photo PN-1 you can see that's close to 25mil. He said "I mean a couple of areas it might be 28 or something you know." He said "I suppose on an average you're looking at 25mil." He also said both ends of the road works were a little scalloped. He said that was a little scalloped ramp down to 25mil. He said that can be seen in the photograph PN-1. By reference to photograph PN-4 on which someone has suggested the possible placement of a warning sign of "rough surface" he said he did leave a sign in that area which is the same as is shown in photograph PN-6. He said if he hadn't seen a sign he would have stopped and bashed another one in. He said if it had been knocked over he would have belted it in with a sledge hammer. He agreed he was in the vicinity not too far away from the repairs for three days. He said if he'd seen gravel in the repairs or the sign missing he would have swept it up after he had finished Allpass Parade, rang his supervisor and asked for a suction broom to come around while he was busy in Allpass Parade. However, regarding the repairs, he said he has

been doing it for a number of years and it is trafficable. He said it's safe for traffic and it's safe for supposed bike riders.

[29] When cross-examined, Mr Williams said he did recall putting the rough surface sign up. He said it covered the job onto Sinbad Street and it covers the exit of the car park on the right. He said the reason for the sign being put up was because it was an open patch. That was to make people aware, to make drivers and cyclists aware there's a rough surface ahead and there's a hazard ahead. He agreed the sign was to warn motorists and cyclists. He agreed if the area was left with a significant drop, say two or three inches from the old surface down to the new surface, that would create a hazard for road users. Further, in cross-examination he agreed that the sign he said he put up was probably about 17 metres away from the repairs. He said he considered that the circumstances required one rough surface sign. He agreed that if a cyclist drove into a 100mil deep hole that was of course dangerous to the cyclist. Mr Williams said regarding the repairs he left it clean and tidy. He left it safe.

[30] Mr Williams was asked a number of questions about the records. One question was about a no box that had been whited out. He could not recall why he did that. His answer suggested the records may refer to more than one job. He did not agree the records could indicate the base layer was not completed.

[31] Katie McGlade gave evidence. Although not currently employed by the Council, in November of 2007 she was a recurrent maintenance supervisor with the Council. She said she would get a job brief from local asset services. It was her role to go out and mark up the work that was designed on the brief and plan and organise to have crews come in and perform the work. In her work she would schedule the work for a

profiling gang to come in, dig down, removed the failed road base asphalt and replace with the base course of new asphalt that come in, which they call deep lift or bottoms, and then it was up to her to schedule a paving crew to come in behind them and bring up to the top surface. With reference to the Council records in exhibit 16 page A, she said the tick to the box saying job completed on the line showing paver finish required, although she did not recall, was likely to be confusion between the team leader not realising that that job completed refers to the failure work being done, not to the actual whole job scope being completed. When asked where is the whole job scope being completed recorded on the form she said that was on the last box on the bottom line where it is referring to the AC overlay. She said there, there is a yes and no ticked. She said that reference to "job completed" referred to the entire project. That was as opposed to what she was calling the profiling work.

- [32] Ms McGlade's evidence was no different to Mr Bayne or Mr Williams regarding the process to be followed in effecting repairs to a road such as Sinbad Street. Like Mr Williams she said that if she had seen a sign was down or missing she would have put a sign up absolutely. She did not see any signs down during the period she was in this area between 30 October 2007 and 1 November 2007. She like Mr Williams said when the road works are backfilled up with the bottom coat that leaves a depth of 25mil. So anyone driving in after the base asphalt had been put in and compacted they would be driving down into this road work 25 millimetres. Ms McGlade said regarding the photograph PN-1, that was the condition of the road that she saw when she inspected it on 30 October 2007. She said the features in the photograph are the darker black area is the new asphalt, the bottom course that they laid into the patch. She said generally, there is a ramp down and a ramp up and she referred to the side joints and the roller drum going up and pinching them hard to create the edge for the

asphalt to bite into. Her evidence was that one needs to have that pinched edge on the sides for the adhesion of the asphalt. I took the reference to the asphalt on this occasion to be the top coat.

[33] When cross-examined, Ms McGlade agreed the Council records do not indicate what temporary awareness signage might have been in place. Ms McGlade later said she thought that if the depth left after filling in the excavation was over 40mil they then would have to ramp it with asphalt. Ms McGlade said the placement of a sign was a discretionary matter for the team leader. It was determined by where it was deemed safest. She said suburban roads were very different from major arterial roads and highways. She agreed signs do go missing. Regarding there being quite a drop into the repairs she did not agree that a combination of signs would be appropriate. She said it would be more about getting a crew out there to make it safe and trafficable assuming there is a drop that's dangerous to traffic. At one stage she agreed there were occasions where the profiling is done and then left and then the base asphalt is applied either on another day or at a later time. Later she said that she had made a mistake and said as the profiling in this case was 100mil, the base asphalt goes straight back in on the same day. She said there is a time lapse between the final surface of 25mil of the top coat which is put on at a later date. To her, exhibit 16 page A the reference paver finish required "yes" indicated that the road needs the final overlay to be applied. However, the tick directly to the right "job completed" "yes" suggested that the base layer had been put down.

[34] Finally I asked Ms McGlade with reference to the left hand corner of the excavation in the photograph PN-1 whether the vertical cut put into the excavation is to tie into the final layer. She said it was not a cut. She said it was "for the roller – the drum to – he

puts his – the edge of the drum up against the edge of the existing road to punch the – the new asphalt to – to push that down to give an edge, yes, for the new asphalt to bite into as – so that when the new asphalt is – it marries up to that existing edge. “

[35] Mr Norgrove who is employed by the Council as a technical officer gave evidence. He inspected the repairs and took photos on 9 November 2007. Mr Norgrove wrote notes about his inspection. He noted the repair was clear of the bike lane. Further, the resurfacing was to be completed next week. He said the repair is highly visible and well ramped on both ends. He said the rough surface sign was missing and that the Council will reinstate the sign. With regard to the ramping of the repairs he said there were not sudden sharp edges on it at all. He said in his experience the rough surface sign is always put up and he photographed another sign that was put up in Allpass Parade. With regard to the photograph PN-3 he said that was immediately behind the curve and that is normally where Council put the road signs. He said he looked for the sign but did not find it. He said he phoned up Ms McGlade and requested that one of her guys go out and put a sign in.

[36] When cross-examined Mr Norgrove said the repair area was depressed but the surface was not rough inside of it. He said it had been compacted smooth. He said when he inspected it had already been rolled, it was compacted and smooth and it was just as good as the road surface either side, the final finish on it. He said it still had to be topped though with the final wearing course.

[37] As far as liability is concerned the critical issue is the state of the repairs when Mr O'Connor rode onto the repairs.



- [38] Although by some questions the Council hinted that Ms Grayson may not have been present, I am satisfied she was and although she gave a statement to Mr O'Connor's solicitors recently I am satisfied she gave relevant evidence.
- [39] I am satisfied Mr O'Connor's evidence that he dropped down a substantial drop of about three inches is supported by the evidence of the other riders in his group. Although Mrs Hawgood said the drop was three to four centimetres she described it as dangerous. Further, although Mr Hawgood said the drop was an inch, he still described what happened as a drop down into the repair surface. Mrs Lambrianides said the drop down was enormous and was probably three inches. Ms Grayson said they fell into a hole.
- [40] Mr O'Connor's evidence that there was no entry ramp was supported by the other riders in his group. Those that were asked about it from Mr O'Connor's group said there were no exit ramps.
- [41] Further, Mr O'Connor's evidence that there was no warning sign was also supported by the other riders in his group and Mr Edge.
- [42] However, Mr O'Connor said his wheel went into a groove and locked. When cross-examined he said these grooves ran in the direction of travel of the road and were therefore 25 metres long and were about 75 millimetres apart and were between 25 millimetres and 50 millimetres in depth. The other riders in his group did not say they saw grooves as described by Mr O'Connor.
- [43] However, I consider there was support for Mr O'Connor's evidence on this point. That is, Mrs Hawgood said the tar had all been pulled up and it was just rough bitumen.

Mr Hawgood did say the surface was uneven. Mrs Lambrianides said the surface was hugely corrugated and it was just a mess. Ms Grayson said her goal was to get through the “ruts” and get to the other side without falling off. She said by “ruts” she meant “It was like scoured-out it had been worked on. Like road works. And had been dug out”.

[44] Regarding the photograph PN-1 except for Mr Hawgood, none of the riders in Mr O’Connor’s group including Mr O’Connor accepted the photograph showed how the repairs were on 3 November 2007. On this point Mr Hawgood said with respect to the repairs that obviously the Council had put a temporary surface in and he said “it was a temporary asphalt surface. Bitumen”

[45] The evidence of Mr Bayne, Mr Williams and Ms McGlade was not challenged as to how in the normal course repairs like these repairs are carried out. However, Mr Bayne did not physically do any of the work. Mr Bayne’s evidence assumed the records were accurate. Mr Bayne said the records which were for 30 October 2007 show the excavated area had been filled in with 22.86 tonnes of an asphalt mix classified as B771. Further, Mr Bayne said by reference to photograph PN-1 the road was ramped down and it had a 25 millimetre or 1 inch depression in the road and there was a smooth run down into it. He said it did not have a great variation in depth whatsoever. He said referring to photograph PN-1, the road is regarded as a safe road. Mr Williams also said he did the work on 30 October 2007. He said the works would be left with a 25 millimetre drop as shown in photograph PN-1. He also said he remembered putting up the rough surface sign. He said he left the site safe. However, he agreed from the records it was not possible to reach the conclusion the job was left safe and left signed. Ms McGlade said the photograph PN-1 showed the condition of

the road when she inspected it on 30 October 2007. The Council's witnesses including Mr Norgrove said there were ramps in the repairs.

[46] However, when Mr Williams gave evidence he was asked if he remembered this road and he said "vaguely". He said he averages 10 patches per week and over six years he has probably done between two and three thousand jobs ago. With the records he said about one entry "I might've stuffed up there". That was an entry about whether the job had been completed. His answers suggested he should have ticked "No". He also said "I can't think that far back". When asked to confirm by reference to photograph PN-4 which had on it marked the words "possible location of sign" the place where he put the sign, he said "Well, that's a big possibility".

[47] With respect to Ms McGlade's evidence she said regarding her recollection of the state of the works on 30 October she did not recall a hundred per cent. She said that twice. She agreed she did not have an independent recollection of this particular job. She also agreed that the records did not show what signs might have been in place. She did say in her evidence the base asphalt goes straight back in on the same day. That was also Mr Bayne's evidence. Although Mr Bayne said if it did not go back in the same day the Council would have to take some steps to make it safe. Ms McGlade also said if there was quite a drop she would have to get a crew out there to make it safe and trafficable.

[48] Mr Norgrove's evidence contradicts the evidence of Mr O'Connor and his group if the repairs Mr Norgrove saw were the same as those of 3 November. That is Mr Norgrove said when he inspected the repairs they were ramped and there were no sudden, sharp

edges on it at all. He did say the rough surface sign was missing. Further, the repairs were depressed. However he said it had been compacted smooth.

[49] Finally Mr Edge's evidence supports there was a "hole" in the repairs he rode into on 9 November 2007. However, Mr Edge said the photograph PN-1 showed the repairs as they were on 9 November 2007.

[50] I consider the Council's records are confusing. The records do not make express reference to the base layer or the date the base layer was laid. The Council's witnesses seem to me to infer from the entries in the "failure area" section that a base layer was laid on 30 October 2007 leaving the requisite depth of 25mm with ramps and broomed clean and smooth. I do not accept that inference can be drawn from these entries.

[51] In the record for 30 October 2007 the failure area is recorded as 118m<sup>2</sup> which is not consistent with an excavation for the repairs into which Mr O'Connor rode onto on 3 November. That is, it is agreed the area of the repairs was 25.2 metres by 3.5 metres. That is an area of 88.2m<sup>2</sup>. Although 118m<sup>2</sup> is larger than 88.2m<sup>2</sup> the entry to me appears to relate to something beyond these repairs.

[52] In addition, Mr Bayne and Mr Williams agreed the record for 30 October 2007 has an entry for AC overlay of 26m<sup>2</sup> which they thought related to something else in the catchment area (Mr Bayne) or somewhere else in Sinbad Street (Mr Williams). Their evidence on this point suggested to me they saw the record was inaccurate or at least confusing. Although this entry does not relate to the laying of the base layer, the entry nevertheless reduces the confidence one can have in the records.

- [53] In addition the whiting out at some stage of the entry “no” for job completed causes me to lose confidence in the record for 30 October 2007. The entry that was whitened out may have been accidental. However, to my mind if the entry “job completed” was recorded as “no” that could suggest whoever made that entry thought the base layer work had not been completed.
- [54] If I am wrong about the records I consider the records do not show the repairs were left safe before Mr O’Connor fell. By safe I mean the repairs had a 25mm drop, ramps and a smooth surface.
- [55] However, I accept a “rough surface sign” was erected about 17 metres on the approach to the repairs before 3 November 2007. That is because I accept the hole in the ground shown in photograph PN-3 is support for there having been a sign hammered in at that point. Further, the other signs erected in Allpass Parade are support that when these repairs were carried out at that time a “rough surface sign” is likely to have been erected in Sinbad Street.
- [56] There are differences in the evidence given by Mr O’Connor and the other riders in his group. However, despite the differences I accept Mr O’Connor’s evidence. I accept Mr O’Connor was truthful and reliable in his evidence on the issue of liability. As to the other riders in Mr O’Connor’s group I accept they gave truthful evidence. However, on some issues I consider some of the other riders in his group were mistaken.
- [57] I accept Mr Edge was truthful and reliable in the evidence he gave.

[58] On the other hand Mr Bayne did not work on the repairs. I consider while he was an honest witness his evidence assumed the records showed all the work done in relation to the repairs and the photographs, in particular PN-1 showed the repairs as at 3 November when Mr O'Connor rode onto the repairs.

[59] Further, I consider Mr Williams and Ms McGlade do not have an independent recollection of the work that the Council did in relation to these repairs despite Mr Williams claiming at one stage he did. As with Mr Bayne, the evidence Mr Williams and Ms McGlade gave I consider is based on the records that I consider are confusing and do not show the repairs were left safe before Mr O'Connor fell and they gave evidence of what they expected would take place in practice rather than what in fact took place. I do not accept Ms McGlade's claim the photograph PN-1 showed the repairs as they were on 30 October 2007. I do not accept she could make that claim as she had no independent recollection of the work the Council did in relation to these repairs.

[60] I accept the evidence of Mr O'Connor and the other riders in his group that something untoward happened when they entered the repairs. I consider if the repairs had been left in a safe condition as claimed by the Council's witnesses I consider the repairs would not have been as Mr O'Connor and the riders in his group found the repairs and Mr O'Connor would not have fallen from his bicycle.

[61] Therefore, I do not accept Mr Baynes', Ms Williams and Ms McGlade's evidence that the repairs before Mr O'Connor rode onto them had a drop of 25mm, had ramps and a smooth surface. I do not accept their evidence that the repairs were "safe" when Mr O'Connor rode onto the repairs.

[62] I do not accept the photographs show how the repairs were on 3 November because I consider Mr O'Connor's evidence and that of the riders in his group is inconsistent with the repairs being in the condition shown in the photographs. Although Mr Hawgood said he noticed a temporary asphalt surface I consider this is not inconsistent with what was observed by Mr O'Connor, Mrs Hawgood, Mrs Lambrianides and Ms Grayson. However, Mr Hawgood's evidence on this point leads me to conclude a partial base layer was laid in the repairs on 30 October 2007. However, I find when this partial base layer was laid the repairs did not have a drop of 25mm and the repairs were not ramped. Further, the repairs had grooves in the base and were not smooth. Therefore, I find the Council carried out further work to these repairs after Mr O'Connor fell. I do not accept the records exclude a partial base layer being laid and further work being done at a later date after Mr O'Connor fell and before 9 November when the photographs were taken.

[63] I find after Mr O'Connor's fall the Council, not in response to his fall, laid more asphalt on the repairs and reduced the drop and put in ramps and brushed the repairs clean. I find the repairs were in that condition then when Mr Edge rode into the repairs and Mr Norgrove photographed the repairs on 9 November 2007. I find the reason Mr Edge came to grief on the repairs on 9 November 2007 was because there was still a "hole" in the repairs.

[64] Although Mr Hawgood said the drop was one inch and Mrs Hawgood said the drop was between three to four centimetres, that does not persuade me to reject Mr O'Connor's evidence. That is because I consider Mr Hawgood and Mrs Hawgood are mistaken on that point. I accept Mrs Lambrianides' evidence that the drop was 3 inches. I accept Ms Grayson's evidence who said they fell into a hole. The reason I

accept Mr O'Connor's, Mrs Lambrianides' and Ms Grayson's evidence on the extent of the drop is because a drop of about an inch according to Mr and Mrs Hawgood I do not accept would cause Mr O'Connor to fall as that drop would not be unsafe and would not have left exposed a groove in the base of the repairs.

[65] Although the witnesses called by Mr O'Connor did not say grooves extended throughout the repairs, I consider there was evidence from some of the witnesses that the surface was not safe. I accept the evidence of Mrs Hawgood and Mrs Lambrianides who described it as corrugated and Ms Grayson referred to "ruts" in the surface. Although Mr Hawgood did not accept there were grooves he seemed to me to be fixed on the one inch edge next to the bike path. I prefer the evidence of Mr O'Connor and Mrs Hawgood, Mrs Lambrianides and Ms Grayson to Mr Hawgood on this point. I am satisfied grooves were left in the base from the excavation stage and these grooves were not covered by the partial base layer.

[66] Mr Edge's evidence to my mind does not detract from Mr O'Connor's case. I am satisfied just because he came to grief on the repairs it does not mean therefore the repairs were in the same condition on 3 November 2007 and on 9 November 2007. I am satisfied the Council left a "hole" in the repairs after doing further work after Mr O'Connor's fall. Looking at the photograph PN-1 I consider there is a drop next to the bike lane that I consider could have damaged Mr Edge's bicycle.

[67] I find although a rough surface sign was erected about 17 metres from the repairs before 3 November 2007 the sign was removed by a person unknown before 3 November 2007.



[68] Therefore, I accept Mr O'Connor's evidence there was a substantial drop of about three inches in the repairs. Further, that the wheel of his bicycle became caught in a groove in the repairs which caused his wheel to lock and caused him to fall.

[69] I find the drop of about 3 inches and the groove in the repairs was a hazard to bicycle riders. I find this hazard was created by the Council when it laid the partial base layer on 30 October 2007.

[70] I accept the evidence of the witnesses for the Council that creating a hazard was to be avoided. However, I find the hazard exposed Mr O'Connor to a risk of injury. The Council owed a duty of care to Mr O'Connor. The Council was required to exercise reasonable care and skill to avoid a danger created by the Council (*Buckle v Bayswater Road Board* (1936) 57 CLR 259, 283 per Dixon J).

[71] I find the Council was aware before 3 November 2007 that signs do go missing. Therefore, I find the Council was aware it was possible there would be no sign "rough surface" to act as a warning to bicyclists as they approached the repairs. Therefore, I find the Council did not discharge its duty of care to Mr O'Connor by removing or minimising the risk of injury that it created (*Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512, 581 [163]). I find the hazard was in the repairs between 30 October 2007 and up to when Mr O'Connor fell on 3 November 2007. I find the Council should have sent a crew to remove the hazard. I accept Ms McGlades' evidence that if there was quite a drop the response would be to send a crew to make it safe. Alternatively, the Council should have erected signs so that users of the road would go around the repairs or have some traffic control in place. I accept Mr Bayne's evidence this would be the response to repairs that were not safe.

[72] I find the expense to do so would have been extremely modest as the Council could have easily done the work as it was doing similar work in neighbouring streets over the days between 30 October and 1 November 2007 (*Desmond v Mount Isa City Council* [1991] 2 Qd R 482, 485).

[73] I do not accept the hazard was obvious to a bicyclist. Where the repairs were carried out may have appeared a different colour to the surrounding road. However, I find that change of colour would not reveal the hazard to a bicyclist approaching at, say, 25 kilometres per hour on a bend with no warning sign to lead the bicyclist to slow down. I accept that Mr Hawgood was considered the ears and eyes of the group. I also accept that he was careful to fulfil the trust reposed in him by the other riders. I find he did not see the hazard in the repairs. I am satisfied he was riding carefully and had he noticed any danger ahead and had there been a warning sign Mr Hawgood would have warned the other riders including Mr O'Connor to take care. I further find that what happened to Mr O'Connor and his group and what happened to Mr Edge at the later date is evidence that the hazard could not be seen by the exercise of reasonable care. I find the Council would have reasonably expected bicyclists to use the road and to travel in groups as Mr O'Connor and his group did on 3 November. I accept Mr O'Connor's evidence that as he rode he was constantly monitoring for something untoward.

[74] The Council submits that Mr O'Connor was in breach of regulation 151(1) of the *Transport Operations (Road Use Management – Road Rules) Regulations 1999* and regulation 247 of the Regulations. Regulation 151(1) provides:-

“The rider of a motorbike or bicycle must not ride on a road that is not a multi-lane road alongside more than one other rider, unless subsection (3) applies to the rider.”

[75] Subsection (3) provides:-

“The rider of a motorbike or bicycle may ride alongside more than one other rider if the rider is overtaking the other riders.”

[76] Regulation 247(1) provides:-

“(1) The rider of a bicycle riding on a length of road with a bicycle lane designed for bicycles travelling in the same direction as the rider must ride in the bicycle lane unless it is impracticable to do so.”

[77] There is no dispute Mr O’Connor was riding alongside Mrs Lambrianides. Further, neither Mr O’Connor nor Mrs Lambrianides was overtaking the other. However, I consider regulation 151(1) prohibits another rider over and above Mr O’Connor and Mrs Lambrianides riding on the road. That is, I construe the words “alongside more than one other rider” in the regulation as prohibiting three people riding side by side on the road.

[78] As far as regulation 247 is concerned, I accept Mr O’Connor’s evidence that it was impracticable to ride in the bicycle lane because of the size of the lane and that he found in practice that there was glass and other debris within the bike lane which itself presented a hazard. There was also a drain about 20 metres from the repairs that may have pushed him out. Therefore, I accept it was impracticable for Mr O’Connor to ride in the bicycle lane on this occasion.

[79] If I were wrong with respect to either regulation 151 or regulation 247, I do not accept a breach of either of those regulations in this case absolves the Council from the duty of care owed to Mr O’Connor nor the breach of that duty of care by the Council. Further, even if Mr O’Connor breached either of those regulations, I am satisfied neither breach caused Mr O’Connor’s injury (*March v E and M H Stramare Pty Ltd*

(1991) 171 CLR 506, 509; *Chappel v Hart* (1998) 195 CLR 232). I am satisfied the cause of Mr O'Connor's injury was the negligence of the Council.

[80] However, although the Council claimed in its defence that the repair works were carried out in accordance with accepted engineering practice, I do not accept the evidence called by the Council amounts to evidence of accepted engineering practice. The evidence called by the Council, I consider, amounted to evidence of what in the normal course of events is done. The evidence called by the Council does not alter my conclusion that the Council created a hazard in the repairs.

[81] Further, the Council relies on s 19 of the *Civil Liability Act* 2003. That section provides:-

**“19 No liability for personal injury suffered from obvious risks of dangerous recreational activities**

- (1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the person suffering harm.
- (2) This section applies whether or not the person suffering harm was aware of the risk.”

[82] Section 13 of the Act provides as follows:-

**“13 Meaning of obvious risk**

- (1) For this division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
- (5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk.

*Examples for subsection (5)–*

- 1 *A motorised go-cart that appears to be in good condition may create a risk to a user of the go-cart that is not an obvious risk if its frame has been damaged or cracked in a way that is not obvious.*
- 2 *A bungee cord that appears to be in good condition may create a risk to a user of the bungee cord that is not an obvious risk if it is used after the time the manufacturer of the bungee cord recommends its replacement or it is used in circumstances contrary to the manufacturer's recommendation.”*

[83] Section 18 of the Act defines “dangerous recreational activity” as follows:-

“... means an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.”

[84] Ms Marks for Mr O’Connor referred me to *Micronis v Adams* [2004] 1 DCLR(NSW) 369 where Dodd DCJ held that trail riding on a horse was not a dangerous recreational activity. In his judgment his Honour asked a question, “Is it a significant risk?” His Honour answered the question that it was not. In reaching that conclusion his Honour noted that if the participant and organisers of the activity were asked whether in plain language they thought the activity involved a significant risk of physical harm, the answer universally would be “no”.

[85] Ms Marks also referred me to *Fallas v Mourlas* [2006] NSWCA 32 which was a case involving night shooting for kangaroos by spotlight. Ipp JA considered the activity in

question, namely entering and leaving a vehicle with a loaded gun, did carry a significant risk and was therefore dangerous within the meaning of the New South Wales *Civil Liability Act*.

[86] Asking the question posed by Dodd DCJ “Is it a significant risk?”, I consider the activity of road cycling as in the present case did not involve a significant degree of risk of physical harm to Mr O’Connor. Further, the risk was not an obvious risk. I consider the risk would not have been obvious to a reasonable person in the position of Mr O’Connor. As the witnesses who gave evidence about it said, if they had perceived there was a danger, they would not have ridden into it. Therefore, I find s 19 of the Act does not absolve the Council from liability in this matter.

[87] The Council also relies upon ss 35, 36 and 37 of the Act. Those sections provide as follows:-

**“35 Principles concerning resources, responsibilities etc. of public or other authorities**

The following principles apply to a proceeding in deciding whether a public or other authority has a duty or has breached a duty—

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising the functions;
- (b) the general allocation of financial or other resources by the authority is not open to challenge;
- (c) the functions required to be exercised by the authority are to be decided by reference to the broad range of its activities (and not merely by reference to the matter to which the proceeding relates);

- (d) the authority may rely on evidence of its compliance with its general procedures and any applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.

**36 Proceedings against public or other authorities based on breach of statutory duty**

- (1) This section applies to a proceeding that is based on an alleged wrongful exercise of or failure to exercise a function of a public or other authority.
- (2) For the purposes of the proceeding, an act or omission of the authority does not constitute a wrongful exercise or failure unless the act or omission was in the circumstances so unreasonable that no public or other authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

**37 Restriction on liability of public or other authorities with functions of road authorities**

- (1) A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority—
  - (a) to repair a road or to keep a road in repair; or
  - (b) to inspect a road for the purpose of deciding the need to repair the road or to keep the road in repair.
- (2) Subsection (1) does not apply if at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

- (3) In this section—

*road* see the *Transport Operations (Road Use Management) Act 1995*, schedule 4.

*road authority* means the entity responsible for carrying out any road work.”

[88] Accepting the Council is a public authority and a road authority for the purposes of ss 35 and 36, no evidence was led by the Council as to its resources or funding limits nor was any evidence led as to its policies in terms of funding of works and the like. The evidence which I accept is that the Council was working in this area. According to Ms McGlade the response to a hazard would have been to send a crew to remove the hazard or, according to Mr Bayne, to erect signs so that users of the road would go around the repairs or have some traffic control in place. I do not accept those would have been expensive measures. I consider in the circumstances it would have been reasonable to expect the Council to take those steps I have just mentioned to remove the hazard or remove the risk of the hazard.

[89] As far as s 37 is concerned, I consider this section only absolves the Council for nonfeasance, whereas what has occurred in the present matter is a case of misfeasance. That is because s 37, I consider, does not absolve the Council from creating a hazard when it undertook these works. I consider s 37 is intended to deal with situations where wear and tear to a road causes a hazard (*Neindorf v Junkovic* [2005] HCA 75; *Leichhardt Municipal Council v Montgomery* [2007] HCA 6).

[90] The Council also claims Mr O'Connor should fail in these proceedings because he voluntarily assumed the risk of injury in the circumstances. However, I am satisfied Mr O'Connor did not fully comprehend the extent of the risk involved (*O'Shea v Permanent Trustee Co of New South Wales Ltd* [1971] Qd R 1). Therefore, Mr O'Connor's claim against the Council does not fail on this ground.

[91] Finally, the Council submits Mr O'Connor caused or contributed to his injury by his negligence. I find that riding in a group it was reasonable for Mr O'Connor to ride in



the position he did and to rely on Mr Hawgood at the front of the group to be the ears and eyes of the group. I further find that the speed at which the cyclists were travelling was not excessive, having regard to the speed limit in the area. Further, I find the Council expected cyclists to use the road and not just the bicycle lane. The Council's witnesses said the ramp was provided for motorists and cyclists. I am satisfied there was no breach by Mr O'Connor of the Regulations. I accept Mr O'Connor was constantly monitoring for anything untoward. I accept Mr Hawgood as the ears and eyes of the group was doing the same. In all the circumstances, I am satisfied Mr O'Connor took reasonable care for his own safety (*Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 611). Therefore, I find Mr O'Connor did not cause or contribute to his injury.

[92] Therefore, I find the Council guilty of negligence which caused Mr O'Connor's injury.

[93] Mr O'Connor, who was born on 21 March 1955, is now 58 years of age.

[94] Following his fall, he was unconscious for a short time. He came to. He rode home. When he got home, he iced his shoulder. He was off work for two days. He thought his shoulder would come good. However, a doctor ordered an ultrasound. The ultrasound shows he suffered a large, irregular, full thickness tear of the supraspinatus tendon. He underwent surgery in December 2007. He was off work following the surgery for two weeks. He was in a sling for a long time. He underwent physiotherapy. He suffered pain. He then started swimming, as he was told he could, and to try and get the movement back into the shoulder. He also underwent acupuncture and got himself a personal trainer and started doing light weights and push-ups.

[95] At the time he suffered injury Mr O'Connor was working with Storm Financial. He finished work there in 2008 when receivers took over. His injuries did not cause him to cease work with Storm Financial. He then obtained work as a real estate salesperson. He worked there for 12 months. He had problems carrying signs, sales paraphernalia, belting in star pickets and open day signs, getting in and out of cars, and driving. Again, when he ceased work in real estate it was not because of his injury. He did not particularly like the work. He then obtained work with Village Motors as a fleet manager. He said he suffered difficulties doing the tasks required in that role because of his shoulder. He said he cannot open up bonnets with one arm and has difficulty climbing on vehicles to ensure that preservative material is removed from the top of a vehicle, and he has to climb all over vehicles to ensure they are clean and in a deliverable condition. He also has trouble carrying flags and paraphernalia for the car yards including the bollards. He said driving can make his shoulder extremely sore as well as climbing up and down on vehicles all day, it is sore.

[96] When Mr O'Connor gave evidence he said that he has been involved in running, cycling and swimming for many years. He has also done marathons, half-marathons and ultras. The day before the trial, he did a 160 kilometre ride in Noosa. In April or May of 2008, he had a knee operation. Further, in March 2012, he had to have a stent inserted for a heart problem. Notwithstanding his injury in November 2007, the knee operation in April or May 2008 and the stent in about March of 2012, his times before November 2007 and then in March 2009 he agreed were comparable. Mr O'Connor said the reason those times were comparable were because "I did put in a lot of work". However, when it was suggested to him his ability to perform his work since November 2007 was roughly the same as it was before November 2007, he disagreed. He said he was handicapped to a degree. He said he was handicapped when he swims

as well. He said he swims to one side because one side is weaker than the other. He said, "I just work on it". He said at work instead of taking one trip to go do something, he might take three. He said he also suffers pain as a consequence of his having to perform tasks associated with new car sales work. He said he also takes time off work since November 2007.

[97] Dr Gillett, an orthopaedic surgeon, examined Mr O'Connor on 14 July 2009. At that time Dr Gillett was of the view that further treatment involved exercise and strengthening as Mr O'Connor is doing. He thought in general terms his shoulder at that length of time from surgery and injury would remain as it is in the long-term. Although Dr Gillett was of the view further costs were not required, he says in general terms, in relation to rehabilitation, use of a personal trainer to strengthen the musculature is appropriate. However, in general terms, now in relation to rehabilitation, continuing with exercises himself is appropriate in the long-term. Dr Gillett was of the view that Mr O'Connor would not require a personal trainer for the shoulder at that time. He also thought that chiropractic treatment for the left shoulder was appropriate. For a period of time to regain range of motion but no ongoing treatment is required. Further gymnasium strengthening was appropriate, and that was part of the rehabilitation. However, ongoing management of the shoulder condition was that he does need to continue with ongoing exercise and strengthening regime of the rotator cuff musculature in the long-term. He thought if he required to do this in the gymnasium, then that was more appropriate and was reasonable in the long-term. He thought the condition will remain as it is. He thought he would be restricted in triathlon goals of swimming because of the lack of power and will swim off-course and have pain and discomfort associated with the activity. Dr Gillett

concluded that, related to loss of motion and loss of power, there was a 7% impairment of upper extremity function or 4% loss of whole person function.

[98] In an updated report dated 18 May 2012 Dr Gillett states Mr O'Connor will have intermittent symptoms in the shoulder and at times may take time off work. He thought if Mr O'Connor was doing more physical activities, then intermittently Mr O'Connor will have time off work.

[99] Dr Theile, a plastic and reconstructive surgeon, has stated that Mr O'Connor has scarring related to his surgery which is visible. In his opinion Mr O'Connor has a whole person impairment attributable to his left shoulder scarring of 1%.

[100] When Dr Gillett gave evidence he confirmed that in his first report the reference to Mr O'Connor having a general toothache in his shoulder was a description of the quality of the pain. Dr Gillett said Mr O'Connor had described to him the pain or ache in his shoulder is like a toothache.

[101] When cross-examined Dr Gillett said this pain is a constant discomfort or pain or something burning. Regarding the comparisons between triathlons in 2005 to 2009 Dr Gillett agreed the times recorded were comparable. However, he said many factors affect the time. Dr Gillett said Mr O'Connor has compensated in some way to achieve the goals in these triathlons. In his opinion Mr O'Connor has rehabilitated well. He agreed Mr O'Connor has had a good outcome from the operative procedure. However, regarding his daily activities including his work and recreational activities, Dr Gillett said Mr O'Connor will have persistent problems using his arm, shoulder or body above shoulder height on a repetitious basis. He said, "So in a functional range which is really most people don't use their arms above shoulder height he does very, very well."

Regarding whether Mr O'Connor as a recreational athlete will be impacted in the future other than from some mild disadvantage in overhead work, Dr Gillett said in part to that question that if Mr O'Connor said to him that he had persistent pain and discomfort doing his recreational athletics, Dr Gillett would accept that.

[102] When re-examined Dr Gillett said that in the long-term of Mr O'Connor's rotator cuff he will deteriorate as he ages, which is just part of the human being ageing. He said there is some debate about whether your healing response that you get from a rotator cuff repair predisposes you to an earlier failure than just due to the ageing process. Dr Gillett said, "In essence, you are not normal." He said, when you tear your cuff and have it repaired, it is not normal, so it is attached to the bone as scar tissue and one only gets a good outcome predominantly from rotator cuff repairs by your muscle rehabilitation. Regarding driving, Dr Gillett also said he would accept that Mr O'Connor may get some ache in his shoulder.

[103] I accept that Mr O'Connor's injury to his shoulder is to be determined under item 97 of the *Civil Liability Regulations 2003*, which provides for moderate shoulder injury. Examples in item 97 include "traumatic adhesive capsulitis with limitation of movement and discomfort and symptoms persisting or expected to persist for about two years, permanent long-term soft tissue disruption, for example, from tendon tears or ligament tears, a fracture from which the injured person has made a reasonable recovery, requiring open reduction and internal fixation, nerve palsies from which the injured person has made a good recovery." Item 97 provides an ISV range of between 6 to 15. Relevant considerations I consider are that Mr O'Connor has suffered a full thickness tear to his supraspinatus tendon, he has undergone surgical repair and he has

experienced and will continue to experience pain and discomfort as a consequence of the injury sustained and has been left with a permanent disability.

[104] In assessing the injury scale value, I have had regard to *Leonardi v Payne* and Anor [2009] QSC 382 where the plaintiff suffered a partial thickness tear to the rotator cuff tendon and a soft tissue injury to the cervical spine. Cullinane J assessed general damages by treating the shoulder injury as a dominant injury and by reference to item 97. His Honour assessed general damages based on an ISV of 10 in relation to the shoulder injury. His Honour applied an uplift of 25% to take account of the plaintiff's cervical spine injury. However, the plaintiff in *Leonardi* had not undergone surgical repair.

[105] In these circumstances I come to the view that Mr O'Connor's shoulder injury should be assessed as attracting an ISV at the high end of the range provided by item 97, namely 15. That would also include the injury by way of scarring such that no further consideration need be given to the appropriate ISV.

[106] Therefore, I allow Mr O'Connor for general damages \$18,000.

[107] Regarding Mr O'Connor's claim for special damages it seemed to me that Dr Gillett did not support the cost of a personal trainer after two months. Otherwise the way he was questioned did not seem to me to lead Dr Gillett to reject as reasonable Mr O'Connor's claim for gym membership and physiotherapy in the past. I consider Dr Gillett supported Mr O'Connor's use of chiropractic treatment so far.

[108] The evidence satisfies me that Mr O'Connor should be allowed for special damages the following:-

(a)	Dr Fleming	\$2,484.35
(b)	Dr Landy	\$96.90
(c)	Dr Musgrave (ultrasound)	\$182.75
(d)	Dr Fleming	\$471.90
(e)	Dr Luckin (anaesthetist)	<u>\$864.00</u>
	<i>Subtotal</i>	<i>\$4,099.90</i>
(f)	Caboolture Private Hospital	\$3,577.11
(g)	Physiotherapy expenses	\$1,055.00 (20 attendances at \$50 per attendance and one initial consultation cost of \$55)
(h)	Strathpine Health Care Clinic	\$550.00
(i)	Personal training costs	\$150.00
(j)	Gym membership	\$464.00
(k)	Travel expenses	<u>\$845.50 (50c/km for 1,691 km)</u>
	<i>Grand total</i>	<i>\$10,741.51</i>

[109] Mr O'Connor's refunds are \$1,364.55 to Medicare and \$4,547.26 to Defence Health.

[110] I allow interest on Mr O'Connor's out of pocket expenses on the sum of \$4,829.70 at the agreed rate of 3.84% for 5.64 years, which is the sum of \$1,045.99.

[111] Regarding Mr O'Connor's past economic loss, I found the evidence on this point to be unsatisfactory. In his evidence-in-chief it was led that he had two days off work immediately following his injury, then after the surgery in December 2007 he had two weeks off work. It was in cross-examination that he claimed that he had been taking time off work as a consequence of the pain he suffered from his shoulder since his accident in 2007 "once, twice a month, maybe?". When it was sought to clarify how

many days that might be off work since the accident in 2007, Mr O'Connor said, "I would say 10 days to 12 days, I would imagine. Something like that." That was to represent the position by reference to a year. There were no records produced from Storm Financial, and I might expect that to be the case. However there were no records produced from the real estate agency, and the records produced from Village Motors summarised in a schedule to Exhibit 21 showed in 2010 Mr O'Connor took eight days' sick leave and three days as rostered days off. In 2011 he took no sick days and in 2011 he had six days off as rostered days off. In 2012 he had 15 days' sick leave and 10 days' rostered days off. However he accepted that 15 days' sick leave in 2012 was because of his heart problem. Because of that problem he was unfit for work from 26 March 2012 to 15 April 2012. I also considered there was confusion about the rostered days off. At one stage I thought it was being suggested they represented days Mr O'Connor was ill because of his shoulder injury. However it seems it was more an arrangement with the employer that allowed Mr O'Connor to have a day off if he in fact worked on a Saturday. That is, a day off during the week.

[112] Consequently, I am not persuaded that Mr O'Connor has had to have 10 to 12 days a year off work because of his shoulder injury since November 2007. I am also not persuaded that the two days he had off immediately after the accident in November 2007 caused him to lose pay. In the end I accept he lost two weeks off work after the surgery, for which he is to be compensated at \$650 per week, which is a sum of \$1,300 for past economic loss. That is notwithstanding he took the two weeks off during his holiday period. I accept he was deprived of the benefit of his holiday leave and should be compensated accordingly (*Kenny & Anor v Eyears & Anor* [2003] QSC 439).



- [113] I allow Mr O'Connor interest on his past economic loss at the agreed rate of 3.84% for 5.64 years, which is a sum of \$281.54.
- [114] I also allow Mr O'Connor lost past superannuation at 9%, which is a sum of \$117.
- [115] Regarding future economic loss, the evidence does not bear out that Mr O'Connor has been taking 10 to 12 days off work because of his shoulder injury since November 2007. However it does seem that Mr O'Connor was trying to say that he has not taken days off, although he should have been taking those days off because of his shoulder injury. Though the question did not appear to be accurate when Mr O'Connor was asked about the 2011 employment records showing that he only took three days off, he said, "I – not necessarily – I don't like taking days off, so ...".
- [116] I consider the best that can be said is that Dr Gillett is of the opinion that Mr O'Connor will have intermittent symptoms in the shoulder and at times may take time off work. As Dr Gillett says it really comes down to what he has had to do at work on the day. Regarding the physical activities which are set out in the letter of instruction from the solicitors for Mr O'Connor to Dr Gillett, Dr Gillett states if he is doing more physical activities as described in that point, then Dr Gillett thinks intermittently Mr O'Connor will have time off work. However, there is no way to predict any pattern of that.
- [117] In addition, Dr Gillett said when cross-examined regarding work activities that Mr O'Connor will have persisting problems using his arm or his body above shoulder height on a repetitious basis. Although Dr Gillett accepted that driving as a real estate agent Mr O'Connor would get an ache in his shoulder, the evidence persuades me that even in his current occupation Mr O'Connor is required to do driving and therefore could get an ache in his shoulder.

[118] I accept Mr O'Connor's evidence about the effects of his injuries upon him and I accept Dr Gillett's evidence. I also accept that Mr O'Connor intended to work until the age of 70 prior to November 2007.

[119] I also accept Mr Pettigrove's evidence that Mr O'Connor's position and therefore I take it to be the security of his position is results driven. Therefore I accept that if Mr O'Connor is able to produce the results and is loyal, then he should remain in his employment. However, Mr Pettigrove's evidence persuades me Mr O'Connor will in the future be at a disadvantage having to compete with younger people who may not have an impairment as does Mr O'Connor. I take it that an employer who is results driven would not be partial to an employee who is taking time off because of a shoulder problem.

[120] However, I accept, because of Mr O'Connor's evidence and Dr Gillett's evidence, Mr O'Connor's future loss of earnings are unable to be precisely calculated by reference to a defined weekly loss (s 55 *Civil Liability Act 2003*).

[121] In *Perfect v MacDonald and Anor* [2012] QSC 11 McMeekin J, when assessing future economic loss for a plaintiff who had not suffered past economic loss, noted that s 55 did not operate to take away "well-established common law rights". At paragraph 48 of his judgment his Honour said:-

"Damages were awarded at common law for loss of or diminution in earning capacity only where it was established, on the balance of probabilities, that any demonstrated impairment 'is or may be productive of financial loss': *Graham v Baker* (1961) 106 CLR 340 at 347 per Dixon CJ, Kitto and Taylor JJ (emphasis added). How one approached that question of 'may be' was discussed in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638. The reasoning of all the judges in *Malec* would require an assessment of damages for economic loss at common law where the chance of loss of earnings post accident was more than negligible but significantly less than

50%. That is the approach of the common law and remains the approach under the CLA.”

[122] I accept Mr Pettigrove’s evidence. In particular I accept that he has seen other employees at Mr O’Connor’s present employment doing things that Mr O’Connor cannot do. I accept he has seen Mr O’Connor have difficulties carrying out his work because of his shoulder. He gave evidence of the erecting of big flags that can be hard for Mr O’Connor to do that he gets other sales people to do, and in addition there is the removal of the bollards that are put in and out which can weigh 20 kilos, and they are quite heavy to lift, and Mr O’Connor cannot get them out, so other people lift them out. Mr Pettigrove also gave evidence of Mr O’Connor taking other days off. However this is where I found the confusion with the rostered day off situation. It seemed to me that Mr O’Connor has a benevolent employer who is prepared to use some arrangement of trading days off work for a day off without the loss of pay.

[123] In the end I am satisfied that there is a realistic chance that Mr O’Connor will lose earnings each year because of his impairment. I accept there is 12 years of working life to be considered. Mr O’Connor’s net income for the 2012 financial year was \$45,077. Over the 12 years of working life ahead of him I accept that a six month period of loss of work, whether from his current work or if he were to lose that work in other work is the measure of the chance that he will lose income. Therefore I accept six months’ lost income should be allowed. That is a sum of \$22,500 for future economic loss.

[124] I also allow Mr O’Connor lost future superannuation at 9%, which is a sum of \$2,025.

[125] Although I accept Dr Gillett said that Mr O’Connor would benefit from ongoing exercise aimed at maintaining strength in his left shoulder, I do not accept it is

reasonable to provide that extra cost. That is because I am satisfied Mr O'Connor has made a good recovery from his injury and he maintains exercise with the activities he is engaged in. I consider while Dr Gillett was prepared to support some of Mr O'Connor's expenses to date he did not support these expenses on an ongoing basis. Mr O'Connor claims future expenses of \$23,821. I do not accept that is justified on the evidence before me.

[126] Therefore, in summary, the damages allowed are as follows:

• General damages	\$18,000
• Special damages	\$10,741.51
• Past economic loss	\$1,300
• Interest on past economic loss	\$281.54
• Past superannuation	\$117
• Future economic loss	\$22,500
• Future superannuation	\$2,025
• Interest on special damages	\$1,045.99
TOTAL	\$56,011.04

[127] Therefore, I give judgment for Mr O'Connor against the Brisbane City Council for the sum of \$56,011.04.

[128] I will hear the parties on the question of costs.