SUPREME COURT OF QUEENSLAND

CITATION:	*Ireland v B & M Outboard Repairs* [2015] QSC 84
PARTIES:	**COLIN LEO IRELAND** **(Plaintiff)** **v** **ROBERT JOHN HASLETT AND MARGARET ANN HASLETT AND CRAIG GEOFFREY HASLETT TRADING AS B&M OUTBOARD REPAIRS (ABN 21795 821 987** **(Defendants)**
FILE NO:	S235/2009
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Townsville
HEARING DATES:	31 March 2014, 1 to 4 April 2014, 12, 13 June 2014, 22 August 2014, last submissions received 1 September 2014
DELIVERED ON:	8 April 2015
DELIVERED AT: JUDGE:	Townsville North J
ORDERS:	**Judgement for the plaintiff against the defendants in the amount of $703,721.90.**
CATCHWORDS:	TORTS – NEGLIGENCE – BREACH OF IMPLIED TERM RELATING TO CONTRACT FOR PROVISION OF SERVICES – WHETHER CIVIL LIABILITY ACT 2003 HAS APPLICATION – DUTY OF CARE – BREACH OF DUTY OF CARE AND BREACH OF IMPLIED TERM – CAUSATION – SCOPE OF LIABILITY – PSYCHIATRIC ILLNESS – ASSESSMENT OF DAMAGES – VOLUNTARY ASSUMPTION OF RISK – OBVIOUS RISK – DUTY TO WARN – DANGEROUS RECREATIONAL ACTIVITY – CONTRIBUTORY NEGLIGENCE.

LEGISLATION:	*Civil Liability Act 2003*
	Civil Liability Act 2002 (NSW)
CASES:	*Astley v Austrust* Ltd (1999) 179 CLR 1 *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 180 CLR *Byrne v Australian Airlines Pty Ltd* (1995) 185 CLR 410 *Chand v Commonwealth Bank of Australia* [2014] NSWSC 708 *Cooper & Ors v Australian Electric Co* (1922) 25 WALR 66. *Hawkins v Clayton* (1988) 164 CLR 539 *Helicopter Sales (Australia) Pty Ltd v Rotor Work Pty Ltd* (1974) 132 CLR 1. *Hudson Investment Group Ltd v Atanaskovic* [2014] NSW CA 255 *Nair-Smith v Perisher Blue Pty Ltd* [2013] NSWSC 727 *Pennington v Norris* (1956) 96 CLR 10 *Rogers v Whittaker* (1992) 175 CLR 479 *Rosenberg v Percival* (2001) 205 CLR 434. *Wallace v Cam* (2013) 87 ALJR 648 *Zorba Structural Steel Company Pty Ltd v Watco Pty Ltd* (1993) 115 FLR 206
COUNSEL:	G F Crow QC with V Keegan for the Plaintiff M T O'Sullivan for the Defendants
SOLICITORS:	Macrossan and Amiet for the Plaintiff Sparke Helmore for the Defendants

Introduction

[1] Early in the morning of 10 April 2006 the plaintiff launched his Haines Hunter outboard boat at a boat ramp at Oyster Point at Port Hinchinbrook. He then engaged the ignition to start the outboard motor after which a fire broke out which severely damaged the boat. He claims that as a consequence of the fire he suffered personal injury including a debilitating psychiatric illness. The defendants were partners in a business that included the maintenance, repair and modification of outboard marine engines and ancillary parts who had, in September 2004, replaced the fuel lines of the boat and installed an electric fuel pump. The plaintiff claims that the fire on the boat and his consequential injury were caused by a breach of contract by the defendants and a breach of a duty of care owed by them to exercise reasonable skill and care in the performance of the work, including the advice given to install an electric fuel pump.

[2] The defendants dispute that they breached the contract with the plaintiff to perform the work or that they breached the duty of care owed, including that they failed to adequately advise the plaintiff of any risk associated with the installation of an electric fuel pump. There was also a dispute concerning the circumstances and cause of the fire and the nature and extent of any personal injury suffered by the plaintiff as a consequence of the fire. The assessment of damage is also contested.

The resolution of these issues involves a consideration of a number of provisions of the *Civil Liability Act 2003*.

[3] In order to address the many issues of law or of mixed fact and law raised by the parties it is necessary that I first consider the factual issues relating to the dealings between the plaintiff and the defendants, including the advice given and the work done, the circumstances of the event of the fire and the cause of the fire. These factual issues, so far as they were contested, involve a consideration of some expert evidence and also an assessment of the plaintiff and the reliability of his evidence. This latter matter also affects the resolution of the issues concerning the nature and extent of the injury, loss and damage suffered by the plaintiff.

[4] Because the reliability of the plaintiff's evidence affects so many issues, principally the resolution of what happened on 10 April 2006 and also the nature and extent of the injuries suffered by him as a consequence, it is pertinent to make some general observations concerning my assessment of the plaintiff now. He was subjected to a sustained and searching cross-examination by experienced counsel. There were aspects of the plaintiff's evidence that I found troubling, particularly concerning his dealings and entitlements with the church. But on a number of issues his evidence was corroborated by witnesses who I accept. This is particularly so in relation to the nature and extent of the effects of the event upon him. Further upon other issues his account appeared to me to be reasonable and not unlikely. Consequently on balance I am prepared to accept the plaintiff's evidence. I will in my reasons that follow attempt to explain why I have accepted the plaintiff's evidence on particular issues and correspondingly indicate when I have a reservation about his evidence.

The contract, the advice, what was said

[5] The plaintiff became interested and involved in boating in his mid-thirties. In approximately 2000 he purchased his first boat, a Haines Hunter 520 SLC, a half cabin approximately 5.2 metres long and is the boat that burnt in the fire on 10 April 2006[1]. Subsequent to the purchase of the Haines Hunter he fitted a 135 horsepower Mercury outboard engine to it. In 2002 or 2003 the plaintiff purchased a second boat, a Seafarer, it had a 150 horsepower Mercury outboard engine fitted to it[2]. In about January 2004 the plaintiff noticed problems with the 150 horsepower Mercury engine on the Seafarer. He took the boat and engine to the defendants who conducted some testing. The plaintiff said that he had a conversation subsequently with Mr Robert Haslett who advised him that part of the problem was that insufficient fuel was getting through to the motor causing damage to a cylinder piston. One of the options Mr Haslett offered to the plaintiff to remedy this situation was the installation of an electric fuel pump[3]. The plaintiff said that he authorised an alternative recommendation, to increase the size of the fuel lines in the fuel system between the tank and the motor only[4] but those repairs and works carried out in January 2004 did not end the plaintiff's troubles with the 150 horsepower engine on the Seafarer. In August 2004 he experienced engine

[1] Exhibit 13 is a series of photographs of a similar Haines Hunter of that model. The plaintiff's evidence was that his boat did not have a bait board which is depicted in one of the photographs comprising exhibit 13. Otherwise the layout of the boat and the positioning of the priming pump shown in the photograph was very similar to the position in his boat when purchased. T1-47 l 45 – 1-48 l 5 & see also T 1-49 l 17.
[2] T1-51 l 27.
[3] T1-53 l 40.
[4] See T 1-53 l 40 and exhibit 14.

problems when boating near Magnetic Island. The boat and engine were returned to the defendants where it was found out that a different cylinder piston had failed. The plaintiff authorised the repair of the engine[5].

[6] The plaintiff said that in August 2004 Robert Haslett again mentioned the installation of an electric fuel pump in an endeavour to rectify the problem of fuel starvation[6]. The second failure of the 150 horsepower Mercury was the catalyst for the plaintiff deciding to remove the 150 horsepower motor from the Seafarer and install it on the Haines Hunter. He said he had a conversation with Craig Haslett who recommended that either the fuel tank in the Haines Hunter be replaced or an electric fuel pump be installed in the Haines Hunter at that time[7]. The plaintiff's evidence was that as a result of the recommendations made by Mr Craig Haslett he authorised the defendants to swap the 150 horsepower engine onto the Haines Hunter and the 135 horsepower engine onto the Seafarer. Further he authorised work to be done on the Haines Hunter including the installation of new fuel lines, batteries and an electric fuel pump[8]. In evidence Mr Craig Haslett said he did not have a clear recollection of the conversations or dealings with the plaintiff other than confirming, by reference to the documentary exhibits, that the work evidenced by them was done. Mr Robert Haslett while saying that he provided the plaintiff with an option to install a fuel pump was also unable to give evidence of the content of his conversations with the plaintiff nor the work he did other than by reference to the documentary tax invoices which had been prepared in the handwriting of his wife[9].

[7] Neither Mr Robert Haslett nor Mr Craig Haslett suggested to the plaintiff that the installation of an electric fuel pump in a battery compartment[10] might increase the risk of explosion or fire. Neither suggested that accordingly it might be prudent for the plaintiff, in view of the risk, for him to have the defendants regularly check the fuel pump and attendant fuel lines and nearby battery. Neither suggested to the plaintiff that the presence of rust on the fuel pump or on clamps securing the fuel lines leading to or from the pump might indicate that he should have the defendants or others of equivalent competence to check the integrity of the fuel system in the battery compartment because of any attendant risk of leak with consequent fire and explosion.

What was done and what was not done

[8] The work done by the defendants on or about 16 September 2004 was against a background of damage to the engine twice apparently as a consequence of fuel starvation when it had been fitted to the Seafarer. It is admitted on the pleadings that the defendant advised the plaintiff to replace the fuel lines and to install an electric fuel pump to the Haines Hunter. That advice was given in the context of the 150 horsepower engine being moved onto the Haines Hunter.

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[5] See exhibit 16.
[6] T 1-55 l 35-40.
[7] T1-57 l 15.
[8] T1-57 – 1-59. Exhibit 17, the invoice from the defendants to the plaintiff of 16 September 2009 evidences that this work was done. In turn exhibit 18 evidences that the defendants performed work upon the Seafarer, including fitting the engine that had been on the Haines Hunter a few days later on or about 21 September 2009.
[9] T5-66 l 43 – 5-68 l 16.
[10] Nor for that matter a non-marine grade electric fuel pump.

[9] The defendants admit in their defence that they performed work upon the Haines Hunter on or about 16 September including the installation of the fuel pump and the installation of new fuel lines and that that work was done as a consequence of advice given by one of the defendants to the plaintiff.

[10] It is likely the work reflected by the invoice dated 16 September 2004 was done by Mr Craig Haslett assisted by his father Robert[11]. It is not in dispute that new fuel lines from the fuel tank to the engine were installed. The fuel lines were clamped using stainless steel clamps. A sample of similar hose or fuel line and clamps was tendered[12]. An electronic fuel pump was installed,[13] a fuel filter was fitted[14] and two batteries installed. The filter, the pump and one of the batteries were installed in a cavity at the rear of the Haines Hunter on the left of the engine-well if one were to stand in the boat and look backwards towards the engine mounted on the transom[15]. Stated as simply as I can the scheme or the arrangement is that a fuel pump draws fuel from the fuel tank situated below the deck of the boat. The fuel then passes through a filter before moving to the outboard engine. An example of a manual fuel pump can be seen from one of the photographs tendered as part of exhibit 13[16]. The plaintiff gave evidence[17] that before an outboard engine can be started the engine must be primed with fuel. The purpose of the pump therefore is to draw the fuel from the tank up to the engine and thus prime the engine so that it can be started. A manual pump (the bulb that can be seen in the photograph, exhibit 13) must be squeezed thus creating a vacuum that draws fuel from the fuel tank and priming the line. Correspondingly an electric pump, once turned on draws fuel up the fuel lines to the engine without the need for any manual or physical activity by the boat owner.

[11] Exhibit 28 is a photograph of a cardboard mock up prepared by the defendants intended to show how the filter and the fuel pump were arranged in relation to the other and where they were situated or fixed having regard to the positioning of the battery below[18]. Whether the arrangement shown in exhibit 28 is to scale or accurately positions the object compared to the fittings in the Haines Hunter may be doubted but it gives an idea of the arrangement.

[12] The fuel pump was not fixed in a position so that it could be easily seen from outside the battery compartment. The plaintiff said that it was difficult to see and that he had to get down low and look up within the compartment[19]. Mr Keech said that the fuel pump was directly above the battery and that it wasn't possible to see it

[11] T5-59 l 25-30.
[12] See exhibit 40. The clamps used were stainless steel, see further exhibits 35 & 42. More will be said about them and whether they were marine grade, resistant to rust and suitable for clamping fuel lines in boats.
[13] See a similar pump, exhibit 41.
[14] See for example exhibit 46.
[15] The cavities, one under the bait box on the starboard side and the other below the bait box on the port side can be seen in one of the photographs of the similar Haines Hunter, exhibit 13.
[16] The photograph numbered 3.
[17] T1-59 l 30.
[18] Exhibit 32 is a series of photographs of an arrangement or partial arrangement in a different boat. The photograph numbered 1 shows a clamp designed to hold the battery in place similar to that in the Haines Hunter. Photograph 2 shows a fuel filter in position. Other photographs in exhibit 32 depict a hand priming pump.
[19] T1-59 l 11-13.

because it was above the battery[20]. Mr Craig Haslett gave slightly different evidence. He agreed that the pump was installed vertically about four to five centimetres above the top of the battery but around about 10 to perhaps 15 centimetres to the side of the battery[21]. I do not consider that it is necessary for me to resolve the issue of whether the fuel pump was fixed directly above and somewhat to the side. For reasons that will emerge it is sufficient to act on the basis that the fuel pump was positioned and fixed in a relatively confined space above and adjacent to the battery which was fixed to the floor of the compartment. Openings in the battery compartment presumably permitted some air circulation and also exposure to salt water with the prospect of rust.

The event on 10 April 2006

[13] After the defendants performed the work upon the Haines Hunter in September 2004 the plaintiff used the Haines Hunter a few times but for the most part he favoured the Seafarer[22]. His intention was to sell the Haines Hunter but he didn't do anything about that until 2006. In March 2006 he received an enquiry from a prospective purchaser and they had discussions about price. He then set about putting the vessel in a seaworthy condition. The plaintiff had no difficulty with the operation of the Haines Hunter on any occasion when he used it between September 2004 and April 2006[23]. On the Saturday prior to the 10th April 2006 the plaintiff and his son Paul performed some work on the Haines Hunter. The plaintiff's intention was to ensure the boat was in a seaworthy condition hence the repairs. He planned to take the boat out after effecting the repairs. Some repair work was necessary to be done to the leg of the outboard motor. Mr Brian Keech, a long term friend of the plaintiff and a qualified mechanic, assisted with the fitting and repairing of the leg to the outboard motor. The work was done at the plaintiff's residence at Kelso.

[14] The plaintiff said that he helped Mr Keech with work on the fitting and repair of the engine leg and he generally cleaned up the boat on the outside while his son cleaned up on the inside. He estimated that they worked on the boat for between six and eight hours[24]. He observed his son take the batteries out of the compartments and refit them[25]. The plaintiff said that during the course of the work Mr Keech turned his attention to the battery compartments and after inspecting the compartments he said to the plaintiff, concerning the positioning of the electric fuel pump that it was dangerous[26] and that it shouldn't be in there[27]. The plaintiff acknowledged in evidence that he understood that loose battery connections could cause a spark and that because of the presence of fuel lines he knew that it was important not to have a spark in the compartment[28].

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[20] T4-15 l 10.
[21] T7-65 l 34-46.
[22] He estimated that he took the Haines Hunter out on two occasions soon after the work was done in September 2004 and then after between three and four times over the following approximately six months. T1-61 l 35.
[23] T1-61 l 40.
[24] T1-63 l 40.
[25] T1-64 l 5.
[26] T1-64 l 20.
[27] T2-24 l 20 & 2-24 l 34.
[28] T2-23 l 35–43.

[15] Mr Keech gave evidence of his observations of the boat on the day and of his inspection of the battery compartment[29]:

> "One of the batteries was out being on charge. I put it back in. Bolt it back up and then I went to prime it up to start the motor to check it, make sure the pump was working. And there was no hand pump. I looked around, when I discovered a fuel pump directly above the battery. I thought, well, you know, that's very unsafe there, but my part of the job was to make sure it was going. So I left the cover open so that any fumes or anything like that could escape and I could actually see. I checked me lines and that. I turned the key on. Wait until the pump finished pumping. Checked, make sure there was no fuel. Fired it up. Just checked, made sure the fuel pump – the water pump was working and then I shut it off and then Col turned up and I told Col that's a very dangerous place to have the fuel pump".

[16] Mr Keech said that he noted that the pump was rusty looking and that the clamps were rusty[30] but that the battery and battery connections appeared to be in good condition and order[31]. When cross-examined Mr Keech said that he told the plaintiff that the position of the fuel pump was dangerous because fuel and power "don't mix" and that in his opinion one should not put a fuel pump near a battery or electric gear[32].

[17] The plaintiff planned the seaworthy trial for the 10th April 2006. His intention was to take the boat around Hinchinbrook Island and with that in mind the boat was refuelled and a generous reserve of fuel was loaded on board. The plaintiff gave evidence that on the morning of the event he left Townsville at approximately 2.00 a.m. and he journeyed north to Port Hinchinbrook near Cardwell. He drove on the Bruce Highway averaging 80 kilometres an hour. He said that it was an uneventful trip. There were no problems with the road and he arrived at Oyster Point boat ramp at approximately 4.00 a.m.[33]. After he pulled into the car park he alighted from his car and set about readying the boat to be launched and then backed the boat into the water, took it off the trailer and pushed it around to a side of the jetty and tied the boat off. He then drove his car back to the car park and walked back down to the jetty and the boat. He gave evidence that he then remembered that he had left his esky up near the car but before returning for his esky he turned the ignition key onto the first point which started the pump and commenced the clicking sound which indicated the pump was pumping fuel[34]. He then walked up to his car, retrieved his esky and came back to the boat. He was standing on the jetty and he reached into the boat to turn on the ignition. He then described a "whoosh" and some flames which forced him to recoil backwards whereupon he fell into shallow water on the back of his neck[35]. After that he stood up in the water, looked at the boat and saw a relatively small flame but before he could do anything to retrieve a

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[29] T 4-14 l 3-12.
[30] T4-16 l 38.
[31] T4-17 l 20-22.
[32] T4-23 l 40-45. See also Mr Keech's statement, exhibit 36 where he said that he told the plaintiff it was dangerous to have a fuel pump in the same compartment as the battery when the battery did not have covers and the ignition wirings were attached to the batteries by wings.
[33] T1-67 l 14.
[34] T1-68 l 4.
[35] T1-68 l 15-20.

fire extinguisher the fire escalated and the boat burned and was gutted by a fire[36]. Thereafter he sought assistance and the authorities were notified.

[18] At the trial the defendants called evidence from a police officer, Sergeant Smith[37] who gave evidence that he could not recall the plaintiff being wet or his clothing being wet when he interviewed the plaintiff later that morning. The defendants relied upon Sergeant Smith's recollection as part of the defendants' case attempting to falsify the plaintiff's account and his creditworthiness. The incident occurred at about 4.00 a.m. but Sergeant Smith didn't interview the plaintiff until about 5.30 a.m.[38] and he did not touch the plaintiff[39]. The plaintiff was wearing a quick dry shirt and he landed in comparatively shallow water. I am not satisfied that Sergeant Smith's recollection so many years after the event of his observations at the time he interviewed the plaintiff are sufficiently reliable for me to reject the plaintiff's evidence on this point. I accept the evidence of the plaintiff.

[19] The defendant also drew attention to the report from a marine safety officer, Mr Peter Kirkby, whose report into the circumstances of the boat fire was tendered into evidence through him[40]. The report contains a record of some questions asked of the plaintiff and some answers given in response when Mr Kirkby interviewed the plaintiff on Wednesday 12 April, two days after the event. The interview records the plaintiff saying that he had retrieved the esky from his vehicle and placed it on the pontoon and then in the boat before he engaged the electronic switch to activate the pump and then entered the boat before turning on the ignition[41]. The defendant pressed that inconsistency together with a description of the sound made by the pump when it was turned on described as a "rattling sound" as pointing to an inconsistency and unreliability in the plaintiff's account.

[20] At the trial a deal of evidence was given as to the sounds made by the electric fuel pump when it was turned on. Mr Paul Ireland gave evidence that he had been in the boat on a number of occasions after the electric fuel pump had been fitted. He noticed that when the starter key was first engaged there would be a "click click click" noise for some seconds and then after that the noise would dissipate indicating that the lines were full of fuel and that the motor could then be started[42]. At trial it was put to the plaintiff and he agreed that when priming a "click click click" sound would be audible and that when the motor had been primed with fuel there would be no sound or any sound would be inaudible[43] but the plaintiff said that even after the fuel line was primed there would still be an audible but not intrusive sound which he described as something like a pulsing sound[44]. The plaintiff's evidence was that on the morning of the event so far as he was concerned the pump was operating normally until he operated the ignition switch[45] but the circumstance that he noted the clicking sound before he engaged the ignition upon

[36] T1-68 l 45.
[37] See T5-37 ff.
[38] T5-39 l 45.
[39] T5-46 l 38.
[40] Exhibit 1.
[41] See the record of interview at p 21 of the report, exhibit 1.
[42] T3-82 l 45.
[43] T2-34.
[44] See T2-34 l 30 and T3-62 l 7-15.
[45] T2-34 l 45.

his return with the esky suggests that he may not have paid particular attention to the sounds emitting from the pump or the fuel system[46].

[21] Returning to the defence submissions consequent upon the report by Mr Kirkby it should be borne in mind that the plaintiff was interviewed only two days after this event when he was suffering pain and beginning to suffer from symptoms associated with the severe illness diagnosed by Professor James[47]. The plaintiff's apparent answer at question 10 in response to the question when the fuel pump had been installed is erroneous[48]. The record of interview attributes to the plaintiff a description of the sound created by the activation of the pump as "a rattling sound"[49]. But in his report Mr Kirkby uses terms such as "rattling" and "knocking" to describe the noise[50] a circumstance which suggests that it is possible these descriptions were a product of Mr Kirkby's understanding rather than the plaintiff's description.

[22] When he gave evidence Mr Kirkby presented as a competent investigator with many years' experience. Nevertheless it is not clear to me that when the plaintiff was interviewed he understood that it was necessary for him when interviewed, to be precisely accurate as to the account of events or the circumstances on the day nor that his then health permitted him to be precisely accurate. As I have already noted at the trial the plaintiff gave evidence at length and he was subjected to a long, detailed and searching cross-examination. There were some occasions when he was unable to recall details[51] but generally he was responsive to questions, prepared to make appropriate concessions and to acknowledge that it was possible that at different times he had used different expressions or words to describe events. Nevertheless I was sufficiently impressed by the plaintiff as an honest and reliable witness and I accept his evidence of the circumstances of the event in question.

The factual cause of the explosion and fire

[23] Both parties called expert evidence in support of a contending hypothesis about the cause of the explosion and fire leading to the destruction of the boat. The plaintiff called evidence from an engineer, Mr Roger Kahler[52]. Mr Kahler's opinion was that the fire was caused in the circumstance of a discharge of fuel from a break in the fuel line on the discharge side of the pump leading to fuel being discharged into the battery compartment and to the boat rather than passing on to the motor with the consequence that when the plaintiff engaged the engine to turn the ignition on a spark from some source ignited the fuel.

[24] The defendant relied upon a Mr Peter Burge who provided a report[53] supplemented by some demonstration DVDs[54] who also gave evidence[55]. To a significant extent

[46] See T3-63 l 35.
[47] See further with respect to this my reasons below concerning the nature and extent of the personal injury suffered by the plaintiff.
[48] See p 22 of exhibit 1.
[49] See the answer to question 4 at p 21 of exhibit 1.
[50] See report at p 18 of exhibit 1.
[51] Notably concerning financial matters.
[52] See his report exhibit 2, his evidence at T6-16 l 15 ff and also the film of certain demonstrations or experiments conducted by Mr Kahler, exhibit 47.
[53] Exhibit 11.
[54] Exhibit 48.
[55] T6-62 l 25.

Mr Burge's opinion depended upon a supposition that the fuel leak and ignition was caused because either the battery had not been refitted properly two days before or because it had become dislodged as a result of a severe jolt sustained on the journey from Townsville to Port Hinchinbrook over very rough roads[56] or a combination of those. But the evidence does not support Mr Burge's hypothesis that the boat when it was towed north from Townsville passed over very rough roads and was severely jolted. In evidence the plaintiff acknowledged that at launch he did not check the batteries[57] but the evidence from Mr Keech and Mr Paul Ireland is they were reinstalled, secured into position and checked two days before. Mr Keech was able to operate the boat's engine quite satisfactorily two days before. He was sufficiently experienced in relation to the fitting of batteries and the checking of fuel lines to make an assessment two days before that the fuel system and motor appeared to be in safe working order. In these circumstances I conclude it is unlikely that any act or oversight of either Mr Keech or Mr Paul Ireland either left a battery unsecured or caused or contributed to any damage to any fuel line or the loosening of any of the clamps upon the fuel line. Thus Mr Burge's hypothesis that a loose battery may have damaged a fuel line is a speculation unsupported by the evidence relating to the journey.

[25] Mr Kahler's evidence and his demonstrations persuade me that somewhere on the discharge side of the pump fuel leaked into the boat. His evidence and demonstration[58] explains that when a pump initially primes after activation by turning on the power there is an audible repetitive clicking sound for a period while the pump primes and that if all is in order and the fuel is primed to the motor the sounds emitted are, if not inaudible, difficult to hear above normal operating noises or from some distance. However if the pump is cavitating, that is discharging fuel into the atmosphere on the discharge side a noise not dissimilar to the noise made when the pump primes will be heard[59].

[26] Accepting as I do the evidence of Mr Kahler in preference to that of Mr Burge I conclude that the most likely cause of the fuel leak was a failure in the fuel line on the discharge side of the pump most likely because of the failure of one or more clamps that had hitherto secured the fuel line leading from the pump to the motor. The plaintiff's evidence that the sound he heard of the pump apparently priming when he returned to the boat after retrieving the esky was similar to the sound made after the initial activation of the pump suggests that the noise described by Mr Kahler when the pump is cavitating was the noise the plaintiff actually heard. It is likely that on the occasion the plaintiff did not pay particular attention to the noise. The plaintiff was, it would seem, unaware of the potential significance of that noise as an indicator of a possible fuel leak until after the event. The source or cause of the ignition remains unknown. The evidence persuades me that the most likely source was a spark or arc of electricity emanating from the battery connections at the terminals[60].

Did a breach of the contract or of a duty of care cause harm – s 11(1)(a) *Civil Liability Act?*

[56] See for example T6-68 l 40-45.
[57] T2-23 l 45.
[58] Exhibit 47.
[59] See for example exhibit 47 and the discussion between myself and counsel after exhibit 47 was played at T6-30 l 30 – 6-31 l 7.
[60] See for example the evidence of Mr Burge, T6-68 l 10-17, and also the evidence of Mr Kahler.

[27] It is admitted on the pleadings that the defendants were obliged under an implied term of the agreement with the plaintiff to act with reasonable skill and care and diligence in the performance of its services under the agreement[61] and that the defendants owed the plaintiff a duty of care to act with reasonable skill, care and diligence in the performance of the services[62].

[28] In submissions at trial some confusion arose because of s 7(3) of the CLA and the reference to "express provision". It was submitted that the implied term admitted by the defendants was an "express provision" and one that operated so that a number of the provisions of the CLA did not apply to the plaintiff's claim in so far as he relied upon the breach of the implied term. But this submission ignores the distinction between an "express term" or "provision" on the one hand and an "implied" or "generic" term on the other[63]. The implied term relied upon by the plaintiff and admitted by the defendants arises by operation of law by reason of the profession or expert trade (in classical terms "art") engaged in by the defendants[64]. There was no express stipulation in writing nor in the words spoken between the plaintiff and the defendants when they agreed that the defendants would do the work and the plaintiff agreed to pay for it that the term implied by law was to apply between them. Section 7(3) of the CLA has no application in this case[65].

[29] Section 11(1)(a) is one of the enquiries stipulated by the CLA as part of the consideration of whether a breach of duty caused harm.

[30] The evidence of the experts and of others to which I will shortly refer is that the installation of an electric fuel pump in the battery compartment of the boat materially increased the risk of a fuel leak and upon the occasion of any ignition such as a spark from a source such as the electrical leads or the battery terminals of a fire or explosion.

[31] In addition to the evidence from Mr Kahler and Mr Burge that the parties respectively relied upon evidence was given by experienced marine engineers or those with experience in marine outboard fuel systems and engines.

[32] Mr Rhys Davies[66] gave evidence of many years' experience as a marine mechanic though by the time of trial he had been retired for many years. So his evidence

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[61] Paragraph 9.1 of the further amended statement of claim.

[62] Paragraph 9.2 of the further amended statement of claim. See further paragraphs 22 and 23 of the statement of claim which are admitted in the context of the defence including an obligation to exercise reasonable care in advising on the repair of the vessel.

[63] Compare for example *Seddon & Ellinghaus, "Cheshire and Fifoot's Law of Contract, 9th Australian ed, LexisNexis Butterworths at para 10.19 with para 10.50.*

[64] Consider *Astley v Austrust* Ltd (1999) 197 CLR 1 at [47]. See also *Zorba Structural Steel Company Pty Ltd v Watco Pty Ltd* (1993) 115 FLR 206 at 208-9 and *Cooper & Ors v Australian Electric Co* (1922) 25 WALR 66.

[65] Nor is the term, which is implied by law, that category of implied term discussed by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 and in the numerous decisions of a high authority confirming the principles. An implication from a presumed intention can be displaced by an "express term": consider for example *Byrne v Australian Airlines Pty Ltd* (1995) 185 CLR 410 at 422 & 441-2 (noting that the discussions by members of the High Court apparently endorsing some observations of Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 must be treated with some caution in light of the subsequent judgment of the High Court in *Astley v Austrust Ltd* (1999) 197 CLR 1 at 22-23). Nor is the term implied by law a term of "custom", there is no established "usage" in this context: see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 440-441.

[66] T5-48 ff.

lacked some force because he had been retired by the time of these events. He gave evidence that he often fitted fuel pumps inside battery compartments if the existing fuel system was "leaning out". His evidence was that the fuel pump would be fitted inside a compartment to keep it away from the hostile weather environment and salt water. Evidence was also given in the defence case by Mr Mark Green[67] who was an outboard mechanic of considerable experience. He had seen fuel pumps fitted to boats on average two to three times a year and seen them installed in places between the motor and the filter. His evidence was that he had fitted fuel pumps but high up in compartments in an attempt to keep them out of the way[68]. In evidence he acknowledged the risk of fire because of the installation near any batteries or electric systems.

[33] In the plaintiff's case Mr Wayne Riddle[69] (a marine mechanic with 29 years' experience working with marine pleasure craft) said that he would not install an electric fuel pump in a marine pleasure craft[70] because of the danger of the combination of the spark and vapour associated with such an installation[71]. Evidence was also given by Mr Roy Pietzner[72] who was an A grade motor mechanic who trains apprentices and had worked for some time in a boat dealership repairing outdoor marine engines. His evidence was that he would not fit an electric fuel pump inside a marine pleasure craft[73] for safety reasons[74]. Mr Pietzner said there was a risk of a leak on the outward or "pressure" side of an electric fuel pump because of the fuel being emitted from the pump because the fuel being emitted from the pump is under pressure[75]. He also gave evidence that there was an added risk if an electric fuel pump was used in combination with clamps that were not marine grade and were likely to rust.[76]

[34] The evidence of Mr Keech, which I accept, was that he observed rust on the fuel clamps securing the fuel lines to and from the pump. Evidence was given by Mr Pietzner that the clamps used by the defendants were not of marine grade.

[35] When the defendants advised the plaintiff and did the work under the contract I have described they did not warn the plaintiff that there was any risk associated with the installation of a fuel pump. Nor did they warn him that it would be wise to have the fuel system particularly that in the compartment near the pump and the battery, checked regularly to see that it was in good working condition and safe. The plaintiff was not warned that the clamps used might rust over time and if so might not secure the hose fittings[77].

[36] The evidence from both Mr Davies and Mr Green and inferentially that of the defendants is testimony that the installation of a fuel pump to an outboard marine pleasure craft even when positioned within a battery compartment or adjacent to a

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[67] T5-83 ff.
[68] T5-85 l 43.
[69] T5-2 ff.
[70] T5-41 l 15; T5-6 l 10.
[71] T5-8 l 45.
[72] T3-32 ff.
[73] T3-34 l 32.
[74] T3-36 l 5-10.
[75] T3-35 l 22.
[76] T3-54 l 35-40. See also T3-48 l 10-33.
[77] Refer para [7] above.

battery was not inconsistent with the standards of some experienced marine engineers before 2006 and perhaps at the time the defendants did the work.

[37] But the fuel pump was positioned within the battery compartment where it was difficult to observe and also where potential fuel leaks might be difficult to observe and where fuel vapours might not readily be dispersed. Moreover the battery and its leads and terminals were positioned nearby. There is also another consideration. The circumstance of the position of the battery compartment led to an inevitable exposure to seawater and the ever present risk of rust. The evidence of Mr Pietzner and Mr Riddle and that of Mr Kirkby[78] suggests that the practice spoken of by Messrs Davies and Green was not as common as their evidence might suggest and more dangerous than they thought. Consequently the evidence of Mr Pietzner and Mr Riddle persuades me that in 2006 a marine engineer acting responsibly would not recommend the installation[79]

[38] In the circumstances therefore I hold that the defendants in recommending and installing the non-marine grade electric pump where they did breached both the implied term and the duty of care owed to the plaintiff. But in deference to the issues raised and debated by the parties I should not let matters rest there. The defendants gave to the plaintiff no warnings concerning the risk. If, the defendants proposed to recommend the installation then the standard of reasonable care required that in the circumstances of the materially heightened risks associated with the proposal it was incumbent upon the defendants to give to the plaintiff a clear and explicit warning of the risks associated with a non-marine grade electric fuel pump should it corrode or malfunction and the undesirability of positioning it in a compartment adjacent to a battery[80]. Such an explicit and clear warning would be likely to result in either the plaintiff commissioning regular reviews or servicing by the defendants (as I consider likely upon my assessment of him)[81] or some express agreement or acknowledgment by the plaintiff of his understanding of the risk and his instruction to proceed[82]. There is, in this context a further consideration. The evidence persuades me that the clamps used by the defendants to secure the fuel lines leading to and from the pump were not of a marine grade and they were likely to suffer from the effects of rust. The installation of the pump in the particular circumstances materially heightened the risks I have spoken of. The response required of reasonable skill and care thereby required a heightened standard of care. In the particular instance it required the clamping of the fuel lines with marine grade clamps, not the clamps used by the defendants[83]. This failure of the defendants also constitutes a breach of duty of care and of the implied term[84].

[39] There is another consideration. The defendants did not recommend to the plaintiff that he have regular inspections of the fuel pump or the clamps or the fuel lines nor of the battery connections because of the heightened risk associated with the installation of the fuel pump its proximity to the battery and the ever present risk of

[78] See T7-5 l 35 – T7-6 l 45
[79] Recall para [30] above.
[80] Consider *Rogers v Whittaker* (1992) 175 CLR 479 as discussed and applied in *Rosenberg v Percival* (2001) 205 CLR 434.
[81] See s 11(3)(a) of the CLA.
[82] Perhaps it is this kind of circumstance that s 7(3) of the CLA contemplates.
[83] Which might have been adequate in other parts of the boat on fuel lines well away from an ignition source and the pump.
[84] See for example para 24.9 of the further amended statement of claim.

failure because of rust. The failure to recommend that to the plaintiff is in my view a breach of the implied term and duty of care[85] and the failure to provide such a warning was one of the likely circumstances that deprived the plaintiff of the knowledge of the risks and of his capacity to protect his interests accordingly.

[40] I hold that the defendants' breaches of the implied term and breach of the duty of care individually and collectively were a necessary condition (refer s 11(1)(a)) of the occurance of the plaintiff's consequential injury, loss and suffering.

Defendants "scope of liability".

[41] The preceding enquiry raised by s 11(1)(a) of the CLA is one of two required by s 11(1) of the CLA in deciding whether a breach of duty caused particular harm. The second enquiry is that stipulated in s 11(1)(b) of the CLA.

[42] In paragraph 18A(e) to (h) of the defendant's further further amended defence[86] the defendants contended that even assuming that a factual finding were made that a breach of duty had caused harm, it was not appropriate that the defendants' "scope of liability" should extend to the harm suffered by the plaintiff within the meaning of that term as used in s 11(2) and (4) of the CLA.

[43] In submissions before me it was suggested that s 11 might not apply to the consideration of a breach of contract and that it applied only to the breach of duty arising under a duty of care[87] but the submission seems, to me, to overlook the statutory definition of "duty"[88] (the term used in s 11 and other sections found in Schedule 2 of the Act) which provides that a duty can mean the duty of care in tort or a duty of care under contract that is concurrent and co-extensive with the duty of care in tort. I have already noted the admissions of paragraph 9 and 22 of the plaintiff's further amended statement of claim. It was admitted therefore that the defendants owed the plaintiff co-extensive duties, one a duty of care in tort and a duty of care implied under the terms of the agreement to exercise reasonable skill and care and diligence in the performance of services under the agreement. Thus, in the view I take, the provisions of s 11 of the CLA dealing with the issue of "scope of liability" apply to both causes of action in tort and contract. Even if I am wrong as to the construction of the Act for the reasons I will briefly explain I conclude that the scope of liability of the defendants should extend to their conduct in breach of both causes of action.

[44] It was the recommendation of the defendants to install the electronic fuel pump. The plaintiff was relatively inexperienced in boating matters compared to the defendants. The plaintiff's evidence under cross-examination demonstrated to me that he did not have a sophisticated knowledge of the mechanics or electrics of the

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[85] See for example para 24.14 of the further amended statement of claim. With respect to the failure to use marine grade clamps, while not expressly pleaded, it might be concluded that, in the context of the particular environment together with the close proximity of the electric fuel pump and the battery the implied term that goods or equipment be reasonably fit for intended use might require the use of marine grade clamps: consider *Helicopter Sales (Australia) Pty Ltd v Rotor Work Pty Ltd* (1974) 132 CLR 1.

[86] Filed 27 March 2014, document 52 court file.

[87] Consider s 5A(1) of the *Civil Liability Act 2002 (NSW)* which does not have a direct analogue in the Queensland Act. It is for this reason that I was referred to *Chand v Commonwealth Bank of Australia* [2014] NSW SC 708 at [258] where Robb J noted that there was an equivalence upon this issue between the general law relating to the liability in tort and to a breach of an absolute obligation in a contract.

[88] See the definition found in Schedule 2 of the CLA

boat[89]. I am satisfied that he had at the time limited practical knowledge or theoretical understanding as to how the fuel system and motor worked. He was not trained in engine mechanics, marine or terrestrial. There is no evidence that he, as a young man, sat at the foot of persons experienced in boats and marine engines. Whereas the defendants were experienced and had ostensible expertise in the field of the fitting and operation of outboard marine engines and associated fuel delivery systems. The recommendation, the work done and the associated installation was done by the defendants for reward as part of their business. The plaintiff was not told by them that anything that they were proposing was unusual or had associated with it any added or different risk. I have already dealt with the evidence of Mr Keech and its probable significance to the plaintiff in context. His comments and warning were not so detailed, authoritative or compelling to persuade me that it would be just to hold that the defendants should not be held to be causally liable for the damages suffered by the plaintiff.

[45] The resolution of the legal causation posed by s 11(1)(b) and (4) of the CLA requires an affirmative answer to a "normative question" – is it appropriate for the scope of the negligent defendants' liability to extend to the physical injuries sustained by the plaintiff[90]? The defendants recommended and installed a new system for the pumping of and delivery of fuel to the outboard engine and in a relatively confined space installed the electric pump close to potential ignition sources. A consequential fire and explosion was foreseeable and the risk of personal injury from such an event was foreseeable[91]. It is for these reasons that I conclude that the defendants should be held to be responsible for the harm suffered by the plaintiff. Further to adopt some of the terms or concepts used by courts in the past as touchstones or for consideration whether a duty of care was owed or causation should be upheld against a person in breach: the plaintiff was in a vulnerable position vis a vie the defendants by reason of his comparative lack of knowledge, experience and expertise; he was reliant upon the defendants who were doing the work for reward; there were proximate dealings between them and it would have been a relatively simple expedient to give the plaintiff an explicit and clear warning of the risks of the modification proposed.

Damage – was any personal injury caused by the event?

[46] The plaintiff gave evidence that after the event he recalled suffering from physical symptoms when he was driving back to Townsville. He recalled pins and needles coming into his hands and feet, he was stiff. He could recall being sore in his stomach and he had symptoms in almost every joint in his body but particularly up around his neck[92]. Other than some singeing to his hair he did not suffer from any burns. He didn't do anything about his injuries or symptoms for a few days but he recalled nightmares and he went to a medical centre[93]. His anxiety symptoms and problems with sleep continued. At different times he was prescribed medication including Valium, Temaze and Avanza. He described that every night for months he had recurring irrational dreams of being in the boat, trying to get out and to reach

[89] See for example T2-11 l 25 - T2-12 l 8.
[90] *Wallace v Cam* (2013) 87 ALJR 648 at [21]. See further *Hudson Investment Group Ltd v Atanaskovic* [2014] NSW CA 255 at [105] - [106] and [122] - [129].
[91] In my view plainly not "far-fetched or fanciful".
[92] T1-69 l 35.
[93] T1-70 l 1-5.

with the fire coming from behind. He gave evidence that he still suffered trouble with sleeping[94]. He said that he still had trouble sleeping even at the time of trial.

[47] The plaintiff said that before the accident he did not consume alcohol, he had not touched a drink since he was 18. He said that about 12 months after the accident he started drinking, it was the "only thing that would "switch me off at night time"[95]. His alcohol consumption increased. He kept this a secret from his wife for a long time but eventually she found bottles around the house. His drink is vodka and he consumes an average of a bottle a day[96]. The combination of the medication and the alcohol consumption had an effect upon him. Sometimes his wife would have to call in his son to calm him down, he has no recollection of some days, but sometimes his behaviour was so bad that his wife would lock herself in the bedroom[97]. At trial he described his condition as fragile, he had little confidence, was insecure and volatile.

[48] Physically he said that his neck pain was increasing with time and he was noticing more pain and less movement. He suffered from headaches and he exercised less than he did[98]. The neck pain mainly comes on in the afternoon and he suffers from headaches every day. He also complained of dizziness that would come on about once a fortnight which would cause him to have to sit down. Attacks of dizziness might last from between 15 and 30 minutes[99]. When cross-examined the plaintiff was taxed with the many inconsistencies with respect to his account of alcohol consumption. He acknowledged that on a number of occasions he had mislead doctors or had not been frank about his alcohol consumption. He also acknowledged when cross-examined that he had not complained of neck pain or neck related symptoms until approximately 17 months after the event when in September 2007 he reported that to an occupational therapist and to an osteopath[100].

[49] A number of witnesses gave evidence corroborative of the plaintiff's account of the effects the accident, and the resultant psychiatric or anxiety condition had upon his apparent behaviour and functionality**.** Mrs Ireland said that she and the plaintiff had been married almost 37 years by the time of the trial. She received her credentials as a pastor about 10 years ago. She estimated that prior to the accident both she and her husband were putting up to or in excess of 60 hours each per week into the church taking into account pastoral duties, services on Sundays, mentoring, leadership training and other duties. She described her husband before the accident as a fitness fanatic, he enjoyed hiking, fishing and sometimes he'd go to the gym. She recalled a fit man, fun loving who enjoyed a joke. She said that he was not a person good at detail, she handled administrative matters but he seemed to enjoy his pastoral duties. In the years prior to the accident neither she nor he drank alcohol. She noticed on the day of the incident when her husband returned home that he appeared shaken and she recalled that night that he woke up screaming suffering from an apparent nightmare. She gave evidence of regular nightmares and of him going to the bathroom at night vomiting and dry retching making complaints that his skin was on fire or melting away. As a result of the nightmares she moved into

[94] T1-73 l 34-41.
[95] See T1-47 l 15-28.
[96] T1-74 l 38.
[97] T1-75 l 5-10.
[98] T1-78 l 25-30.
[99] T1-78 l 45.
[100] See T2-81 l 31 - 2-82 l 12 and also exhibit 33.

another room to sleep at night. This arrangement continued at trial. She said there had been little or no intimacy in their marriage since the explosion and she noticed that over the years he had increasing difficulty sleeping and had been taking at times increasing doses of medication. She described him as an isolated person, not terribly friendly and not as fun loving as he had been. After the event his preaching duties diminished to the point where he doesn't preach anymore and she'd noticed that when he did preach he sometimes got facts or details muddled. She didn't notice for some time that the plaintiff had begun to consume alcohol some time after the event. However over time she became suspicious because his manner changed and then she started to find empty bottles in drawers and in suitcases in the house. She confirmed that the incident her husband did enjoy some boating outings but over time his boating activities diminished and ultimately came to an end.

[50] Mrs Murphy was the manager of the finance department for the Townsville Christian Life Centre Limited. She met the plaintiff some 25 years before trial and she had been employed by the church since about 1993. She said that prior to the accident the plaintiff was an amazing man, very confident, vibrant and a good communicator. In her scale after the accident he went from a 9.5 to a .2. She described that he "wasn't with it and that he wasn't with us" and he appeared to be in a "world of his own". Sometimes he couldn't function or was teary[101]. Mrs Murphy said that in the years before the event she worked with the plaintiff closely, she was his personal assistant and would see him a couple of times on average during a working day. She had noted that since the incident his memory capacity had diminished and he wasn't as good a communicator as he had been. Before the event he had been a good mentor and leader of the Bible College and he was very involved with the youth in the parish[102]. After the incident Mrs Murphy noticed that he became teary at times[103] and she had concerns with respect to his memory. By her assessment he couldn't put things together and he couldn't express himself as well as he had been able to[104].

[51] Paul Ireland, the plaintiff's son, said that he had noticed changes in his father subsequent to the event. He noted that his father had aged[105]. Whereas his father had been "the life of the party" always counselling, assuring people and visiting people he had become a hermit and he seemed disinclined to go out. The drinking had become an issue and on least two occasions he had to go to his parents' house at the request of his mother to help restrain his father who was suffering the effects of suspected mixed alcohol and medication consumption[106]. Before the event he and his father would see each other regularly, nearly every weekend and often do things together such as fishing. Whereas in recent times his father would say that he was sick or that he wanted to stay at home when he saw his father out and suggested doing something.

[52] Professor Basil James, a very experienced specialist psychiatrist with considerable experience in the forensic psychiatric context, provided a number of reports to the solicitors for the plaintiff at different times[107]. Those reports were the consequence

[101] See T4-76 l 27-39.
[102] T4-77 l 22.
[103] T5-14 l 3.
[104] T5-14 l 7.
[105] T3-89 l 33.
[106] T3-89 l 40.
[107] Report 25/6/2009, report 12/6/2010, report 23/8/2011 and a conference note dated 24/3/2014.

of a number of interviews and consultations with the plaintiff at different times between October 2007 and August 2011. Ultimately in the conference note of 24 March 2014 Professor James gave the following diagnosis and prognosis[108]:

> "Professor James notes that his diagnoses of severe and chronic post-traumatic stress disorder and a moderately severe substance (alcohol) dependence with a 17% PIRS is similar to Dr Karen Chau's opinions as set out in her report of 27 May 2010; Dr Chau has also a 17% PIRS.
>
> Professor James prognosis is extremely guarded. Professor James notes that although he has not examined Mr Ireland since 11 August 2011, he does not expect Mr Ireland to have improved and if anything expects a slight worsening of psychiatric symptoms. Professor James considers that the initial delay in obtaining a treatment, the severity of the psychiatric symptoms and the fact that they had remained severe for more than five years post-accident are all features which do not bode well for Mr Ireland's future. Professor James remains of the view that Mr Ireland should continue to consume antidepressants and seek assistance from a psychiatric and a psychologist and that such treatment is likely to be required for the foreseeable future."

[53] In evidence Dr James adhered to this opinion. When he gave evidence Professor James acknowledged that to a significant extent the opinions expressed by him depend upon the reliability of the plaintiff's self reporting. Dr James noted that the history of the symptoms given by the plaintiff were consistent with his observations and the information available to him from other medical sources and from Mrs Ireland. He acknowledged that early on after he first examined the plaintiff he offered the plaintiff some treatment options. Professor James made it clear in his evidence that he was conscious of the potential for a conflict to arise in circumstances where a treating psychiatrist might prepare reports in the forensic context. I accept Professor James' explanation that in this instance he was able to offer an independent expert opinion notwithstanding this circumstance[109]. In evidence Professor James was thoughtful and apparently open to consider on the merits propositions or suggestions put to him. For that reason he was impressive[110]. The evidence of his observations and findings in this forensic context is supported by the lay evidence that I find is reliable on this issue and by the history of the plaintiff's reporting to other doctors. I accept the evidence of Professor James.

[54] With respect to the plaintiff's claim for physical injuries evidence was given by Dr Tomlinson, a neurologist and Dr Wallace, an orthopaedic surgeon in the plaintiff's case and by Dr Eriksen, a surgeon and consultant in orthopaedic injuries in the defendant's case. Both Doctors Tomlinson and Wallace offered the opinion that the plaintiff had suffered a 7% whole body impairment as the result of an injury to his cervical spine sustained in the event. Dr Tomlinson also diagnosed a 6% impairment because of disequilibrium symptoms suffered by the plaintiff from time to time following the event[111].

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[108] Conference note dated 24/3/2014 forming part of Exhibit 6.

[109] I accept that Professor James offered the plaintiff treatment options in circumstances where he was gravely concerned for the plaintiff's health.

[110] One example is his explanation of the plaintiff's avoidance behaviour at T3-71 l 5.

[111] See Dr Tomlinson's reports of 29/3/2008, 5/4/2008., 7/10/2008 and 5/3/2014 contained in exhibit 9.

[55] Dr Eriksen however offered the opinion that the plaintiff had not sustained a permanent impairment to his cervical spine as a result of any injury that might have been sustained in the event. He reached this conclusion because, noting that the plaintiff's first recorded complaint of a symptom of cervical spine pain was in September 2007, he formed the conclusion that a causal connection between the event and the onset of symptoms 17 months later was doubtful[112]. Both Doctors Tomlinson and Wallace agreed that if the first suffering of symptoms in the cervical spine was as late as 17 months after the event then it was doubtful there was a causal connection[113]. I accept that proposition but what is also pertinent is when symptoms were suffered.

[56] The documentary evidence suggests that the first explicit complaint of cervical spine symptoms was made in or about September 2007 when the plaintiff apparently complained to an occupational therapist[114] and when he consulted the osteopath on or about 20 September 2007[115]. I have already referred to the plaintiff's evidence that he suffered from symptoms and that on the day he felt sore all over. In closing submissions the plaintiff's counsel directed me to a report from a Dr Claire Gifford of 30 May 2006[116] which contains a record of the plaintiff's early complaints at the hospital not long after the event. The emergency department clinical record notes complaints of radiating left shoulder pain and Dr Gifford's letter notes complaints of pins and needles in the hands and other symptoms including sleeping problems and nausea.

[57] I have already made reference in passing to the plaintiff's evidence of his suffering in the weeks and months and years subsequent to the event and to Professor James' evidence concerning the plaintiff's mental health and well-being. I have concluded, accepting the reliability of the plaintiff's evidence in this respect, that he was suffering from neck pains and headaches subsequent to the incident and in the weeks or months after it. It will be recalled the plaintiff complained of soreness generally and in the context of the problems he was having with his mental health and functionality it is likely that he did not focus upon the effects of any neck injury for some time. My preparedness to accept his evidence upon this issue is reinforced by the plaintiff's frank concession that the physical injuries alone would not have prevented him from continuing his duties as a pastor within his church[117] and my assessment that an incident of the nature described by him might well cause a whiplash type cervical spine injury.

[58] In the circumstance of my accepting the plaintiff's account that he suffered from symptoms from his neck and from headaches earlier than September 2007 and from soon after the event I conclude that I can accept the evidence of both Doctors Tomlinson and Wallace in preference to that of Dr Eriksen.

Assessment of damage

Physical and psychiatric harm

[112] See Dr Ericksen's supplementary report of 13 February 2014 forming part of exhibit 12.
[113] See for example T3-44 l 5 and T4-58 l 24.
[114] T2-81 l 31 - T2-82 l 12.
[115] Exhibit 33.
[116] Forming a part of the Townsville Hospital records in exhibit 5.
[117] T2-86 l 45.

[59] The plaintiff has suffered a serious and disabling psychiatric illness. On the evidence, which I accept, he continues to suffer from that condition and his prognosis is very guarded. Plainly the psychiatric illness should be regarded as the dominant illness when compared between it and the physical disabilities diagnosed by Doctors Tomlinson and Wallace. If it were to be assessed in isolation I would have assessed the psychiatric illness as having an ISV of the order of 30. In the context of the combination of the cervical spine injury and the sometimes troubling disequilibrium condition I assess the combined ISV at 35 with the consequence that I award general damages at $56,000[118].

Economic Loss

[60] A forensic accountant, Mr Thompson, was called. His report was tendered into evidence in the plaintiff's case[119]. His evidence however suggests that one should be guarded before relying upon the report because it is dated and because of certain assumptions and methodologies made or forced upon Mr Thompson because of the information given to him[120]. The first matter of caution is that the report, by the time of trial, was dated having been prepared some five years previously. Hence, even if the assumptions, information and methodology were reliable on its face it would not be a clear guide upon the consideration of damages for past and future loss of impairment of earning capacity. Further as will become apparent a substantial part of the plaintiff's notional income over the years was derived from fringe benefits available to him because of the generosity of his employer, the church. Mr Thompson did not have available to him the full detail of the nature or extent of these fringe benefits[121] but relied upon what was revealed in the tax returns that were then available to him at the time of his report[122]. It is plain that Mr Thompson had not seen the detailed evidence contained in the volumes marked as exhibit 4[123]. Moreover Mr Thompson had assumed that in and after 2007 the church had paid for a house cleaner and a gardener for the plaintiff as part of his fringe benefit package but the evidence revealed that the church had not employed a gardener for the plaintiff either at the time of the accident or in the years when he was renting a unit in North Ward[124] and the plaintiff's evidence was that he couldn't recall ever having a home cleaner employed by the church[125]. Mr Thompson frankly conceded that if those benefits had not been provided or paid for by the church then the value of them should be excluded from the calculations he made[126]. In the consequence I do not consider exhibit 31 can be relied upon with any confidence as proof with any precision of the nature and extent of any loss of earnings or how the plaintiff's impairment of earning capacity might be assessed or quantified in monetary terms. At best it is a general guide of what might be indicated by the taxation returns and information provided by the plaintiff.

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[118] See Civil Liability Regulation 2003 (Qld) s 3 and Appendix ii for injuries sustained during the relevant period.
[119] Report 11.9.2009, exhibit 31.
[120] His evidence can be found at T3-26 ff.
[121] T3-27 l 45.
[122] T3-27 l 40.
[123] T3-28 l 1.
[124] T3-9 l 45.
[125] T3-10 l 7.
[126] T3-31 l 40 – T3-32 l 5.

[61] The evidence of the plaintiff, of Mrs Murphy, of the plaintiff's wife and also the evidence of others who knew the plaintiff before and after the event on 10 April 2006 persuades me that the plaintiff is a very different man from the pastor who obviously held a leadership role in the church and congregation. That evidence together with the evidence from Professor James supports a conclusion therefore that the plaintiff sustained a significant permanent disability that affected not only his enjoyment of life but adversely affected his capacity to earn an income[127].

[62] The difficulty however in assessing how the impairment to the plaintiff's earning capacity could be reflected in an award of damages is compounded because of the nature of the evidence in this case. The plaintiff was an unimpressive witness when pressed upon the detail of the arrangements between himself and the church. He did not have command of the detail of the arrangements. The evidence before me demonstrates that the church originally was a congregation of worshippers led by the plaintiff and his wife. Quite how the congregation or the church was established was not demonstrated in evidence. The letter of 12 June 2006[128] demonstrates that the Townsville Christian Life Centre had an ABN in 2006. Mrs Murphy's evidence was that the plaintiff, Mrs Ireland and she conducted a ministry in accordance with the rules or dictates of the church then known as Assembly of God[129].

[63] At the time of the accident the evidence was that the church in Townsville had "three directors" the plaintiff, his wife and Mrs Murphy[130]. Mrs Murphy's evidence was that in 2008 the Townsville Christian Life Centre was incorporated as a not for profit company[131]. She said that this company had five directors the plaintiff, Mrs Ireland, herself, Mr Cliff McConnell and an assistant Deborah Beale[132].

[64] The plaintiff gave evidence in some detail of his substantially reduced duties over time[133] and through him a number of documents were put into evidence. Exhibit 22 is a letter dated 12 June 2006 which evidence is an apparent agreement with the church to continue paying his full salary package on the basis that when he received any compensation he was to reimburse the church for half his salary package paid since the accident. Exhibit 23 was a further document dated 11 January 2010 which records that the church had agreed to employ the plaintiff on a part time basis and that he was to commit to the duties specified in the letter. The letter went on to record an apparent agreement that the part time employment contract was to commence when the plaintiff received a settlement from this action from which he agreed to compensate the church by repaying 50% of the full time wage he had been receiving since the "boat explosion". Exhibit 24 was a document styled as a loan agreement dated 29 June 2011. It recorded an obligation by the plaintiff to repay some $300,000 to the church together with interest as specified on the terms mentioned. This debt was said to arise because of an "overpayment of wages between 10 April 2006 and 9 April 2011" and in the amount of some $60,000 a year

[127] The nature and extent of the later capacity will be discussed below.
[128] Exhibit 22.
[129] T4-75 l 15. See further T2-91 l 10.
[130] T3-21 l 45.
[131] Her evidence was this occurred in or about 11 March 2008.
[132] In evidence there was reference to the Certificate of Incorporation that was produced in court when Mrs Murphy gave evidence but ultimately not tendered into evidence. I note that the ABN for this new entity was different to the original entity. Compare exhibits 22 and 23.
[133] T1-84 – T1-86.

judging by the schedule on page 1 of the document[134]. Exhibit 25 is a copy of a mortgage, apparently registered over land jointly owned by the plaintiff and his wife. The mortgage is dated 29 June 2011 and appears to secure the monies covenanted to be repaid under the load agreement of 29 June 2011[135]. Further Exhibit 26 was tendered[136] which the plaintiff described as a schedulised work history/income for the years from 30 June 2003 until 30 June 2006 and after the accident the years 30 June 2007 until 5 June 2013.

[65] However as I have said the plaintiff's evidence was unsatisfactory. On a number of issues he was unable to explain detail or to offer any evidence in support of generalised propositions saying that Mrs Murphy could clear those issues up[137] but Mrs Murphy's evidence did not clear up much of the detail. When pressed she frankly confessed that no minutes of the church or directors of the church or of the members were kept before 2008, offering as an explanation that the church was not incorporated at that time[138]. But the only minutes of meetings of directors of the church following its incorporation in 2008 were two documents dated 19 June 2011 which apparently recorded meetings of directors when discussions were held concerning the apparent indebtedness of the plaintiff as recorded in the load agreement and the mortgage[139].

[66] When pressed in cross-examination the plaintiff was unable to explain why in the year after the accident, when apparently he was so disabled, his gross wages increased from some $10,400 gross in 2006 to $49,566 gross in 2007[140] nor was the plaintiff able to offer an explanation or justification why the fringe benefit component of his salary package for income comfortably exceeded 50% of his total salary package for many of the years in question before and after the event[141] which appears to be contrary to fringe benefits taxation guidelines applicable. Reasonably generous fringe benefits are anticipated and apparently allowed but that in general they should be no more than 50% of the total remuneration package and be related directly to duties to deal with the practice, study, teaching or propagation of the religious beliefs[142]. Nor could the plaintiff explain why he had not taken any steps to either sell the land secured by the mortgage or to repay the debt or the interest by the date specified in 2012 as agreed under the terms of the loan agreement Exhibit 24[143]. The plaintiff couldn't say whether there had been any meeting of the directors about this issue in recent times.

[67] When she gave evidence Mrs Murphy offered some explanations for some of the apparent financial dealings that have some seeming plausibility notwithstanding the absence of record keeping or documentation. She said that initially the plaintiff and his wife were paid a salary by the church that was quite modest and was largely dependent upon what the church could afford to pay[144] and was a salary in the years

[134] See exhibit 24, loan agreement 29 June 2011.
[135] Compare exhibits 24 and 25.
[136] See T1-83 l 25-30.
[137] See for example T3-11 l 30 & l 37 and T3-21 l 17.
[138] See T4-84 l 5.
[139] See the minutes, exhibit 38.
[140] See exhibit 26. See further T3-22 l 35 – T3-21 l 7.
[141] Consider the details in exhibit 26.
[142] Consider exhibit 34.
[143] See T3-23 l 35 – T3-24 l 10.
[144] T4-76 l 13.

before the accident determined by the three then "directors" being the plaintiff, Mrs Ireland and herself[145]. However after the sale of the Donut King business the plaintiff and his wife reported that their income would be reduced. By that time the church could apparently afford to pay a greater salary and it is for that reason that in the years subsequent to the sale of the Donut King business the remuneration package increased[146]. She added that in recent times the salary and remuneration package had been decreased substantially because the plaintiff was no longer performing[147]. Mrs Murphy's evidence was that she was the author of the letters or documents exhibit 22 and 23 and that her expectation and her understanding of the church's expectation was that the church would be repaid the monies owing under exhibits 24 and 25 by the sale of land or from the damages payout[148].

[68] Mrs Ireland was able to give some general evidence corroborating some of the evidence given by Mrs Murphy and she confirmed the arrangement whereby the board had agreed to continue paying the plaintiff his full time salary package for a number of years on the basis that 50% of it would be repaid if compensation was received.

[69] Notwithstanding the evidence of Mrs Murphy and Mrs Ireland the evidence of the financial dealings between the plaintiff and the church is unsatisfactory and the actual arrangement or explanation I regard as somewhat opaque. In particular I am not satisfied that the loan amounts recorded in the loan agreement, exhibit 24, necessarily reflect a calculation or measure of the plaintiff's loss of capacity to earn income or loss of income in the years specified. Nor am I persuaded that the church will, assuming the plaintiff's success in this litigation, necessarily enforce the mortgage securing the loan (exhibit 25) by insisting upon payment of the full amount apparently due and payable under exhibits 24 and 25. Further, while I am satisfied that in a general sense members of the church are concerned that the plaintiff was in the years subsequent to the event over compensated in his remuneration package[149] compared with the time, effort or attention to which the plaintiff was able to devote to his duties I am not persuaded that the other documentary evidence[150] nor the evidence of the witnesses demonstrates (or gives a precise guide as to) the nature or extent of the plaintiff's loss of earning capacity and how it might be assessed either as a percentage of his pre event earning capacity let alone in damages. Further while the schedule prepared of the plaintiff's work history and income for the years prior to the event and subsequent up until June 2013 (exhibit 26) provides an indication of the sources of income and the ebb and flow of the plaintiff's earnings I am not persuaded that it provides guidance for the precise calculation of damages that s 55 of the CLA speaks of.

[70] The plaintiff is entitled to compensation for any damage or destruction of his earning capacity as a consequence of the defendant's breach of contract or duty of care. Often in a given case an injured plaintiff's loss can be calculated by reference to a "defined weekly loss" more or less precisely calculated by reference to his or her wages or proven earnings. But the damage to or destruction of an earning

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[145] T4-76 l 15.
[146] T4-87 l 15.
[147] Consider the details schedulised in exhibit 26 for the years ended 30 June 2011, 30 June 2012 and 5 June 2013. See further T4-82 l 35.
[148] T4-81 l 40-45.
[149] Being a combination of wages and the value of fringe benefits.
[150] For examples, exhibit 2, 23 and 38.

capacity is compensable by an award of damages commensurate with the loss sustained. The assessment of that award poses difficulties in this case because of the nature of the evidence or its absence.

[71] In this State a court may only award damages if it is satisfied that the injured person has or will suffer loss having regard to the matter specified in s 55(2) of the CLA and "any other relevant matters". Moreover the court must state the assumptions on which the award is based and the methodology it used to arrive at the award (s 55(3)).

[72] I am satisfied that the plaintiff has suffered a significant and permanent partial destruction of his earning capacity as a consequence of the defendants' breach of contract and duty of care. The evidence that satisfies me of that is that of the plaintiff, Mrs Ireland, Mrs Murphy and importantly that of Professor James.

[73] The plaintiff's income or remuneration package was made up by a combination of wages, significant fringe benefits and also superannuation contributions. To the extent to which exhibit 26 is a guide the amounts varied in combination over the years. Plainly the church by the time of the event nine years ago was in a position to and was prepared to reasonably generously remunerate the plaintiff[151]. While for some years the plaintiff may have been in a general sense "over compensated" having regard to his performance my assessment of the extent to which his actual capacity was lost and destroyed when combining his capacity to earn wages[152], the value of the fringe benefits and the loss of proportionate superannuation payments upon the gross wages or salary component expressed as an average loss per week since 10th April 2006 is $750 net per week[153]. It is nine years approximately since the event. My assessment of the plaintiff's loss of earning capacity (including the value of fringe benefits and employer's superannuation contributions) for that nine years is $351,000. While the plaintiff appears to have been over paid by the church for a number of the nine years since the event and there is the prospect of his being compelled to repay money. Notwithstanding my uncertainty concerning the precise quantification of any repayment that the church might ultimately enforce and when that might occur I conclude that it is probable the church will require repayment of a substantial sum from the plaintiff. This consideration permits me to make the assessment of damages for economic loss since the event calculated in the way I have done. If my conclusion had been that the church would let the overpayment to the plaintiff stand and would not insist upon a substantial repayment my assessment would have been less for the reason that in those years the plaintiff's incapacity for work was not actually productive of the economic loss I have assessed[154].

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[151] The circumstance that the plaintiff, his wife and Mrs Murphy were responsible for the decisions at that time reinforces the likelihood of that situation.

[152] Net of taxation.

[153] This figure reflects an attempt made by myself to avoid a global assessment of loss that may appear to have little methodological or evidentiary support. Disentangling from the evidence the real value of net weekly wages, the fringe benefits assessed on a weekly basis and the proportionate loss of the superannuation benefits is difficult. In this case the evidence of the claimed overpayments and the arrangements made for the church to secure what has been styled as a loan complicates the picture. I have attempted to arrive at a figure expressed this way representing my assessment that the plaintiff suffered a permanent destruction of his earning capacity of the order of between 45% and 55%.

[154] Consider 55(2) of the CLA.

[74] Interest is recoverable calculated in accordance with s 60 of the CLA[155]. Notwithstanding its deficiencies exhibit 26 demonstrates that approximately four years ago the value of the remuneration package paid by the church to the plaintiff diminished significantly. I will award interest for a loss period of four years calculated in accordance with s. 60. This is $20,147.40.

[75] Turning to future economic loss for the reasons I have given I am persuaded that the plaintiff will continue to suffer a loss as a result of the damage to his earning capacity. He is now approximately 60.5 years of age. There is no mandated retirement age for pastors in a church. In all probability he would have continued to work until approximately age 70. Nevertheless I conclude that increasingly the extent of his input, had he not been injured, would have diminished and that commensurately the value of his remuneration package would have reduced. To take account of this and contingencies I assess his average net weekly loss until approximately age 70 at $600 net per week[156]. The calculation of this component, discounted as required by s 57 of the CLA at 5% for a notional 9.5 years[157] is $238,000[158].

Special damages

[76] Exhibit 10 schedulised special damages for pharmaceuticals and doctors' expenses paid by the plaintiff or on his behalf since the accident and up until trial at $9,178.50. I am persuaded that these expenses were referrable to treatment or relief of his symptoms as a result of the injuries sustained. Many of the expenses (primarily doctors' expenses) were paid for by Medicare or his medical insurer. They may be refundable but they should not attract an award of interest. I propose to award interest on past special damages of $1,500 which appear to be out of pocket expenses. Calculated in accordance with s 60 of the CLA interest recoverable is $193.75.

[77] At trial the plaintiff claimed future recurring and other medical expenses at $29,202.25. This was schedulised in Schedule B to the final submissions which reflected the plaintiff's further amended statement of claim filed on 25 March 2014. Some of the claims, for example for future psychological and psychiatric treatment were not precisely proven by the evidence but I am persuaded by the evidence of Professor James that future treatment by psychologists and psychiatrists is reasonable in the circumstances. The amounts claimed in the schedule appear to be reasonable and since most were calculated for a future loss period of 15 years whereas the plaintiff's future life expectancy is a little over 25 years the claim is, in my view, reasonable.

[78] In summary I assess damages as follows:

General damages	$56,000.00

[155] The current relevant treasury bond yield is 2.78%.

[156] This takes into account net weekly wages, employer contributions to superannuation on gross weekly wages which at trial were suggested at 11.25%, and the material value in fringe benefits.

[157] Multiplier 396.7

[158] I have determined not to further discount this figure for any vicissitudes or contingencies. A sufficient discount is, I consider, built into the figure of $600 net per week which is arrived at taking into account the increase in the percentage contribution of superannuation but allowing for a reduction in net weekly wages and fringe benefits. Further the limitation of the calculation to a retirement at age 70 also carries with it a reduction notwithstanding that the plaintiff might have worked beyond 70.

Economic loss	$351,000.00
Interest on past economic loss	$20,147.40
Future economic loss	$238,000.00
Past special damages	$9,178.50
Interest on special damages	$193.75
Future expenses	$29,202.25
Total	$703,721.90

Civil Liability Act issues

[79] The defendants raise a number of issues in their defence which were pressed at trial[159].

Section 14 – voluntary assumption of risk

[80] The defendants pleaded that the plaintiff voluntarily assumed an obvious risk of fire through a fuel link anywhere on the vessel including about the site of the fuel pump and battery which was an obvious risk and that he significantly increased the risk by loading his vessel with an excessive load of fuel[160].

[81] Section 14(1) of the CLA permits a defendant to raise a defence of voluntary assumption of risk and, if the risk is an obvious risk, a plaintiff is taken to have been aware of the risk and unless the plaintiff proves that he or she was not aware of the risk. The meaning of "obvious risk" within s 14(1) is found in s 13.

[82] I do not accept that the risk posed by the fitting of the electric pump in the circumstances I have described above and the associated risk of fire or explosion with consequent personal injury was obvious either to a reasonable person in the position of the plaintiff (see s 13(1)) or to the plaintiff on 10 April 2006. The risk that was raised by the defendants fitting the pump where and in the manner I have found of fire or explosion was plainly well known to marine motor mechanics, engineers and those with some detailed knowledge of engines and fuel systems. It is not a risk that was "patent or a matter of common knowledge" (s 13(2)). Even after Mr Keech's statement on the day the boat was cleaned and serviced I am not persuaded that the risk was obvious within the meaning of s 13 nor to the plaintiff. Mr Keech was a layman with some mechanical experience but he was not speaking with the authority of a person qualified or experienced in fitting or servicing marine or outboard fuel systems. The work done and consequent risk created was by the defendants who were experienced. The boat and engine had operated successfully and safely for some time. I reject the contention that in the circumstances of this case either sections 13 or 14 are engaged.

Section 15 – duty to warn of obvious risk

[159] See further further amended defence filed 27 March 2014, document 62 at paragraph 18A.
[160] See paragraphs 18A(j) (vii) A, B and C.

[83] The defendants pleaded in their defence that they owed the plaintiff no duty to warn him of the obvious risk of a risk of fire through a fuel link anywhere in the vessel including at or about the site of the fuel pump and battery[161]. Section 15(1) of the CLA provides that a person does not owe a duty to another to warn of an obvious risk. For the reasons I have given the risk was not an obvious risk within the meaning of the Act nor to the plaintiff. This defence fails.

Section 18 – dangerous recreational activity

[84] Section 18 is found in Division 4 of Part 1 of Chapter 2 of the CLA. The defendants pleaded that the plaintiff was engaged in an activity for enjoyment, relaxation or leisure that involved a significant degree of risk of physical harm[162]. Relying upon s 19 the defendants contended that they were not liable in negligence for harm suffered by the plaintiff as a result of the materialisation of the obvious risk posed in the circumstances in this dangerous recreational activity.

[85] In submissions the defendants acknowledged that boating using boats and outboard engines like the plaintiff's was not a dangerous recreational activity per se but it was submitted that in the context of the warning given by Mr Keech it constituted a dangerous recreational activity.

[86] The defence offered by s 19 arises only if the risk posed by the dangerous recreational activity is an obvious risk within the meaning of s 13 of the Act and the other sections found in Division 3 of Part 1 of Chapter 2. For the reasons I have given the risk of harm from fire or explosion was not an obvious risk, either to a reasonable person in the position of the plaintiff or to the plaintiff. For these reasons this defence should be rejected.

[87] In passing I note that there were submissions in this context upon the significance of the reference to "negligence" in s 17(1) which forms part of Division 4. Counsel for the defendants contended that the term negligence could include a breach of a term of a contract requiring the exercise of reasonable skill and care relying upon some observations of Beech-Jones J in *Nair-Smith v Perisher Blue Pty Ltd*[163] but this submission ignores the circumstance that the New South Wales Act to which his Honour was referring included a definition of negligence. The CLA does not define negligence. While s 4(1) expresses a general application of the Act to any civil claim for damages for harm a number of the sections that can be found in Part 1 of Chapter 2 of the Act draw a distinction between a liability for a "breach of duty" and a liability in "negligence for harm"[164].

[88] It is not necessary for me to dwell upon this issue but I incline to the view that because of the distinction maintained in the CLA, ss 17, 18 and 19 do not have an application in respect of a cause of action based on a breach of contract[165].

Section 24 - contributory negligence

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[161] See paragraph 18A(j)(vii)D of the further further amended statement of claim.
[162] See further further amended defence at paragraph 18A(j)(vii)E.
[163] [2013] NSWSC 727 at [82].
[164] Compare for example s 11, s 12, s 14, s 16 and s 17(1).
[165] See further the definition of "duty" in Schedule 2 and noting that the implied term upon which the plaintiff relies, which was concealed by the defendant in their defence was a term to be implied by law, not an "express provision" contemplated by s 7(3) of the Act.

[89] The defendants pleaded and alleged that the plaintiff was contributorily negligent and that he caused his resultant loss and damage to the extent of 100%[166]. It was not unreasonable for the plaintiff to go boating on the day he did, in the circumstances even allowing for the opinion expressed by Mr Keech. The fuel system had been installed by ostensibly qualified experts on their recommendation. The boat worked safely and satisfactorily for some time. He was not by reason of any particular knowledge or experience aware of the risk created by the defendants in fitting the fuel pump in the position and in the manner I have described[167]. The boat was otherwise apparently in good order and repair. Mr Keech gave evidence that after he had inspected the work done and after he had noted the position of the fuel filter he had fired the engine up and had run it for a period and that after that he was satisfied that the boat was well maintained and seaworthy[168]. Even allowing for Mr Keech's warning on the day of the potential danger created by the position of the electric fuel pump it was, in my view, reasonable for the plaintiff to take the boat out on the occasion he had planned without having the boat reassessed by the defendants or by another mechanic. The fuel pump had been installed by ostensibly competent experts, it had operated entirely satisfactorily and there was no reason from his perspective for him to be particularly concerned that the boat, which otherwise had been well maintained, was so dangerous that it would have been unreasonable for him to operate the boat in terms of his own safety[169]. I find that the plaintiff was not contributorily negligent.

Judgment and Orders

[90] For the reasons I have given there should be judgment for the plaintiff against the defendants in the amount of $703,721.90.

[91] I will hear submissions as to costs.

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[166] See s 24 of the CLA.

[167] Recall my assessment of the plaintiff that he did not have a sophisticated knowledge of the mechanics or electrics of the boat at para [43] above.

[168] T4-29 l 20.

[169] Consider *Pennington v Norris* (1956) 96 CLR 10 at 16.