SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Randall & Anor* [2016] QSC 191
PARTIES:	**JOSHUA SMITH** (plaintiff) **v** **PAUL MICHAEL RANDALL** (first defendant) and **AAI LIMITED** (second defendant) **PAUL MICHAEL RANDALL** (plaintiff) **v** **JOSHUA JOHN SMITH and AAI LIMITED ACN 005 297 807)** (defendants)
FILE NOS:	SC No. 2725 of 2015 SC No. 2 of 2015
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	26 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27, 28, 29 July 2016
JUDGE:	Applegarth J
ORDER:	**Direct the parties in each proceeding to confer and bring in draft minutes of judgment.**
CATCHWORDS:	TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – APPORTIONMENT IN PARTICULAR SITATUATIONS AND CASES – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO LOOK-OUT – FAILURE TO GIVE WARNINGS OR SIGNALS – where the driver of a delivery truck is travelling behind the driver of a utility on a one-lane highway before dawn – where the utility slows and moves towards the centre line of the road as it approaches a private driveway on its right – where the utility driver does not indicate an intention to turn right into the driveway – where the truck attempts to overtake the

utility on its right, in the lane for oncoming traffic – where the utility commences to turn right into the private driveway and into the path of the overtaking truck – where the vehicles collide – where the driver of the utility is affected by alcohol – whether each driver breached the standard of care required of a driver in his position – where each driver's breach caused the collision – assessment of the comparative culpability of each driver

Civil Liability Act 2003 (Qld), s 9(1), s 9(2), s 11, s 23, s 23(2), s 47
Transport Operations (Road Use Management) Act 1995 (Qld), s 80, s 80(16F), s 80(16FA)

Allen v Chadwick [2015] HCA 47, cited
Freeleagus v Nominal Defendant [2007] QCA 116, cited
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529, cited
Rains v Frost Enterprises Pty Ltd [1975] Qd R 287, cited
T & X Company Pty Ltd v Chivas [2014] NSWCA 235, cited
Thurgar v Gollschewski [2002] QCA 430, cited
Vos v Hawkswell [2010] QCA 92, cited

COUNSEL: A G Munt for the plaintiff/defendant (Smith)
S Cleary for the first defendant/plaintiff (Randall)
K S Howe for the second defendant

SOLICITORS: Slater & Gordon for the plaintiff/defendant (Smith)
Shine Lawyers for the first defendant/plaintiff (Randall)
Moray & Agnew for the second defendant

[1] At around 5.00am on 21 January 2013 Mr Paul Randall, a jockey, was driving his utility west along the Gore Highway, outside of Toowoomba. He was on his way to perform trackwork at the Barham Stud track, which is located on the northern side of the highway.

[2] At the same time, Mr Joshua Smith was driving a milk truck in the same westerly direction. It was after first light, but still fairly dark. Mr Smith's truck had its headlights on. After passing through roadworks which were being undertaken near the township of Westbrook, Mr Smith could see the utility's tail lights a long way ahead. He accelerated from 40 kilometres an hour to about 80 kilometres an hour with the intention of accelerating to the speed limit, which was 100 kilometres per hour along the highway.

[3] Mr Randall's utility had reached a speed of about 70 kilometres an hour after it has passed through the same roadworks. As he approached his destination he slowed, and may have braked, to exit the highway on his right and enter a driveway to the horse training facility. On his left, at about the same point along the Gore Highway, the Westbrook Wyreema Road joined the Gore Highway at a T junction on its southern side.

[4] The parties are agreed that the utility slowed to about 10 kilometres per hour in the westerly lane for travel. It was positioned on the far right hand side of that lane which has a broken centre dividing line.

[5] Mr Smith did not see any indicator. He says that he did not realise how slow the utility was travelling until he was about 100 metres away from it, when his headlights lit up the rear of the utility. He thought the utility was either broken down, travelling slowly or completely stopped. He moved his truck into the lane for easterly travel in order to overtake the utility. Mr Smith says that when he was only about 10 metres behind the vehicle he tooted his horn. Around this time the utility made a right turn into the path of his truck. Mr Smith braked heavily, but his truck, which was loaded with milk crates for small deliveries, hit the utility. The utility rolled. Each driver was injured. However, they were able to speak to police and others at the scene of the accident.

[6] Mr Smith and Mr Randall each claim that the accident was caused by the other's negligence. Each brings a claim against the other for damages on account of injuries caused by the accident. The second defendant in both actions, AAI Limited (trading as Suncorp Insurance), was the compulsory third party insurer of both vehicles. The trial of each action was heard consecutively, with Mr Smith's proceeding first. The quantum of Mr Smith's claim was settled on the first day of the trial. The quantum of Mr Randall's claim was only settled after he had given substantial evidence. In the event, liability remains in issue, and I am required to apportion liability on the basis of the contributory negligence of the plaintiff in each action. The issues of negligence and contributory negligence in each action mirror the other.

[7] The essential issues of negligence and contributory negligence raised against Mr Randall are:

(a) failing to display any indicator to signal an intention to turn;

(b) failing to drive with due care and attention and failing to keep a proper lookout;

(c) making a right hand turn when it was not safe to do so; and

(d) driving whilst intoxicated.

[8] The essential issues of negligence and contributory negligence raised against Mr Smith are:

(a) failing to keep a proper lookout;

(b) failing to slow behind the utility and give way to it;

(c) driving at an excessive speed in the circumstances; and

(d) failing to steer or brake to avoid the utility.

Credibility and reliability

[9] Neither plaintiff was a credible or reliable witness. Mr Randall was a particularly unimpressive witness, both in his purported recollection of the accident and in his exaggerated claims about its consequences.

Mr Smith's evidence about the accident

[10] The part of the Gore Highway upon which Mr Smith's truck followed Mr Randall's utility is straight in the relevant vicinity. Mr Smith could see the utility ahead of him. A handwritten statement dated 22 January 2013 which he provided to his employer about the circumstances of the accident recounts that he noticed the utility about one kilometre ahead of him. After that Mr Smith began to accelerate. His statement continues:

> "When I was approx 400-500 metres away from the ute I notice [sic] he was drifting further towards the centre line. I began to apply the brakes and notice [sic] Westbrook-Wyreema Road on the left hand side of the road and a gravel driveway on the right. Within a couple of seconds the ute was directly in front of me. He was stationary or travelling very slow in the middle of the road. He had no indicator on. As I was about 30 metres away I placed my right indicator on as I couldn't stop in time. I was going about 80 km/h. I assumed he had slowed down to turn left and 'apex' the corner. As I began to overtake he turned right directly in front of the truck. I slammed on the brakes and the horn. We impacted."

[11] Neither this statement nor Mr Smith's evidence was precise about when he first realised that his truck was gaining rapidly on the utility.

[12] When recounting the accident in his evidence-in-chief Mr Smith mentioned that he thought the vehicle was either broken down, travelling slowly or completely stopped. He did not refer specifically at that point of his evidence to any belief that the utility was going to turn left into the Westbrook-Wyreema Road. It may be that he omitted to do so because he was anxious in giving his evidence. I find his later evidence that he thought that the utility was going to turn left and "apex the corner" unconvincing. It is unconvincing because the utility had slowed to 10 kilometres an hour. It was not a long vehicle which was required to stay in the centre of the road in order to make a left turn. It was not a fast moving vehicle whose driver would have decided to "apex" the corner (an expression used in motor racing) so as to travel around the corner at a high speed.

[13] Even if it be assumed in Mr Smith's favour that the thought occurred to him at the time that the utility had slowed down to turn left into the Westbrook Wyreema Road, it is hard to see why this possibility would have been rated any higher than the possibility of it turning right into the facility. Mr Smith was aware of the existence of the facility and had seen cars parked there. The position which the utility took on the road of moving so that its far right hand side was close to the broken centre dividing line is more consistent with the driver intending to turn right than to turn left.

[14] Mr Smith knew of a large complex with a number of buildings on the right hand side of the highway at the point the vehicle ahead of him was either stopped or travelling slowly. His amended reply admitted that he was aware of the existence of the driveway on the right hand side of Mr Randall's vehicle, but pleaded that he "rarely encountered traffic turning right into the driveway prior to the accident" and denied having "ever seen a vehicle turning into the driveway early in the morning." In his evidence Mr Smith attempted to resile from the admission that he was aware of the existence of the driveway and said that his pleading that he had "rarely encountered traffic turning right

into the driveway" was a mistake of wording. His evidence was that he has never seen a car drive into the driveway, and had only seen parked cars on the right hand side.

[15] Mr Smith's statement to his employer dated 22 January 2013, from which I have earlier quoted, supports the conclusion that he knew about the driveway on the right side of the road and noticed it just before the accident. Mr Smith was unconvincing in his evidence in which he attempted to explain this statement as incorporating knowledge of the driveway acquired after the accident. His evidence in Court was that he did not notice the gravel driveway at the time of the incident. This evidence is inconsistent with his pleaded admission and inconsistent with the statement he gave to his employer. It is also inconsistent with the account he gave to Dr Lockwood. The version of the accident recorded in Dr Lockwood's report refers to events after Mr Smith left the roadworks area and went around the bend into a straight where he could see the tail lights in front of him. The statement continues:

> "He said that he kept his eye on the lights. Approximately one to two kilometres along, he noticed that he was catching up to with (sic) the tail lights quite quickly, and when he was 100 – 200 metres away, the taillights were suddenly in front of him. There was no indication of indicators being on in the other vehicle but he said that as the tail lights were not moving, he realised that the vehicle was not moving. He said he was still catching up when he noticed a street on the left and a gravel driveway on the right and thought the tail lights were perhaps from a truck taking a right turn, and as the vehicle seemed to be just over (towards) the median strip, he thought it might have broken down. He said that he indicated right with the intention of driving around the stationary vehicle and, 10 – 20 metres from the back of what he found out to be a utility, hit his horn as a warning. When he was approximately five metres away, he saw the wheels of the other vehicle suddenly turn to the right. He realised that he was likely to hit this vehicle so he hit his brakes …"

This account tends to confirm that Mr Smith both knew of the driveway entrance to the complex on the right of the highway and noticed it.

[16] Mr Smith gave evidence of other road users on country roads, who he described as "country-type people", not using indicators. As noted, his evidence was that he "thought the vehicle was either broken down, travelling slowly or completely stopped."

[17] If the utility was travelling slowly or practically stopped, then it was just as likely to be turning right without indicating than turning left without indicating. Mr Smith did not explain in his evidence why he excluded this possibility, knowing as he did that people on those roads often do not indicate. It was not reasonable for Mr Smith to assume (if he in fact did so) that the vehicle had slowed down to turn left and apex the corner.

[18] From the various accounts which Mr Smith gave of the accident, two things are apparent. First, at some point he realised that he was catching up to the vehicle in front quite quickly. Second, he realised at some point that something was wrong because the vehicle in front was either stationary or moving very slowly. Mr Smith's oral evidence was unhelpful and somewhat evasive as to when he realised each of these things. His oral evidence tended to suggest that he only realised these things when he was about 100 metres away from the vehicle in front of him. However, other evidence suggests

that he realised that something was wrong when he was about 400 or 500 metres away from the utility.

[19] A record of a telephone conversation between Mr Smith and an employee of WorkCover on 11 February 2013 recounted that when Mr Smith was travelling along a long straight he noticed two red lights to the centre of the road, and that he was 500 metres away[1] "before he noticed something was wrong, someone was stopped in the middle of the highway with no indicators, just two red tail lights getting closer …".

[20] In his evidence Mr Smith accepted that he could see the tail lights from several hundred metres away. He even went so far as to say that he could see them "kilometres off". He acknowledged that he could see the tail lights of the utility when it was 400 or 500 metres away, but said that he could not see the utility until his lights illuminated it. Although in other places he said that he kept the vehicle under constant observation, he sought to resile from this by referring to "a lot of ups and downs on the road". However, there is no independent evidence of such undulations. Although in his evidence Mr Smith claimed that he had "no depth perception", he had enough depth perception to estimate in his statement to his employer on 22 January 2013 that he was approximately 400 to 500 metres away from the utility when he noticed it was drifting further towards the centre line.

[21] Immediately after the accident and at the scene of the accident, Mr Smith told police that he saw the car ahead of him and that his "lights hit it about 500 metres ahead and it was in the middle of both lanes and didn't have an indicator on". Yet in his evidence he disputed the accuracy of this statement and said that his lights only hit the utility when he was near a road sign which was about 150 metres away from the utility. In his re-examination he sought to explain the 500 metres figure in the records of what he told police on the basis that he thought that the sign was 500 metres from the accident scene (when it is in fact 150 metres away). This evidence was completely unconvincing since Mr Smith says he knows what 500 metres or half a kilometre is. He suggested that when asked by police he pointed to the sign and that the policeman wrote down 500 metres. However, police officers would be expected to know the difference between 150 metres and 500 metres. I reject Mr Smith's evidence in this regard and think it likely that he told police that the distance was about 500 metres. His attempt to attribute error to the police does him no credit at all.

[22] More reliable guides to when and where Mr Smith was when he realised that he was quickly gaining on the vehicle in front and that the vehicle was travelling slowly and "drifting further towards the centre line" are his statements to the police immediately after the accident and his statement to his employer dated 22 January 2013.

[23] I conclude that Mr Smith had the tail lights of the vehicle in front under observation for a distance of more than a kilometre as he drove along the flat straight road. When the utility was about 400 to 500 metres in front of him, Mr Smith noticed that it was moving towards the broken centre line and slowing. At this stage Mr Smith was closing fast on the vehicle in front. He was probably at least 300 metres away from the utility when he realised that he was closing rapidly on a slow moving vehicle which was in the centre of the road, not indicating. Mr Smith may have been as far as 500 metres away when he realised something was wrong. However, even if it was not until he was 100 to

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[1] The file note has an obvious typographical error in referring to 500k instead of 500m.

200 metres away before he realised how quickly he was gaining on the vehicle ahead, and that the vehicle was travelling very slowly or was stationary, Mr Smith was still far enough away to brake heavily and to slow rapidly over a distance of 100 or 200 metres.

[24] Mr Smith's statement to his employer suggests that he could not stop in time, but this seems to be in the context of when he was much closer to the vehicle. There is no evidence to suggest that he could not have decelerated from 80 kilometres per hour to 10 kilometres per hour over a distance of more than 100 metres. Further, under cross-examination and on the assumption that he only noticed something was wrong when his headlights lit up the vehicle from about 100 metres away, Mr Smith did not say that he could not have stopped in time. His evidence was that he may have been able to stop but that it would have been an emergency stop which would have shifted his load and damaged the milk. He explained why he did not perform such an emergency stop:

> "There was no oncoming traffic. There was no reason why, I thought, I wouldn't be able to overtake. The car was either going straight, in – in my mind, or turning left … or it was broken down."

[25] Contrary to the statement which he gave to his employer which suggested he could not have stopped in time, even if he wanted to, under cross-examination Mr Smith stated:

> "Like I said, I probably could've stopped in time if I had to, but there – there was no reason to. If there was an oncoming car, I would have been able to stop … and avoid the collision."

This admission is central to the case. Mr Smith did not slow down to the speed of the vehicle in front of him because he did not think it was going to turn right. However, his belief that it was going to either go straight on or turn left was unreasonable in the circumstances given:

1. the utility's position on the road, close to the centre line, being the position which it had moved to and the position which would be taken by a vehicle intending to turn right into the driveway;

2. Mr Smith's knowledge of the driveway's existence; and

3. his knowledge that drivers do not always indicate their intention to turn.

[26] Something should be said about the sounding of the horn. Mr Smith's evidence is that he did not sound the horn until he was about five to ten metres behind the utility. He did not sound his horn when he first realised that something was wrong. He explained in his evidence why he did not sound the horn until he was only several metres behind the utility:

> "I sounded the horn, like I said, because I was surprised the vehicle was still there. And it crossed my mind that the car might be broken down, as it was still stationary in the middle of the road, no hazard lights, nothing, and I thought someone may walk out from in front of the car or underneath it …"

Mr Randall's evidence about the accident

[27] Mr Randall was completely unconvincing in his evidence about contentious issues in relation to liability. In his evidence to this Court he professed to recall seeing his indicator on. He attributed this to having a "very phenomenal" memory. However, his memory on other matters was shown to be not phenomenal at all. For example, he could not recall how many times he checked his mirrors before turning. He denied making statements to the police which are recorded in police records. Those records are more reliable than Mr Randall's evidence to this Court.

Did Mr Randall activate the indicator?

[28] On the important question of whether he activated his indicator before turning, his confident recollection in Court of having done so and of having seen the indicator on his dashboard contrasts with his recollection shortly after the time of the accident when he spoke to police. Mr Smith had told the police at the accident scene that Mr Randall had not turned on his indicators, and Mr Randall did not deny this when given the opportunity to do so by the police. In fact, he told the police that he could not recall if his indicator had been on. It is surprising, if he turned his indicator on and had a recollection of doing so, that he did not raise this at the time when he spoke to police and others at the scene of the accident. If Mr Randall had activated the indicator and had a recollection of doing so, then he would have told the police when he was still at the scene and probably would have accused Mr Smith of having ignored his signal. He did not do so.

[29] Given the adverse view which I take of Mr Randall's credibility and reliability, I do not accept his evidence that he turned on the indicator. Like much of his evidence, it was self-serving. Mr Randall was prepared to say just about anything to suit his case.

[30] There is nothing to suggest that, if the indicator mechanism had been activated, the indicator lights failed to work due to some malfunction. The utility was fairly new and there is no evidence of its indicator lights not working prior to the incident.

[31] Mr Smith was driving along a fairly straight road and was well-positioned to be able to observe any indicator operating on Mr Randall's truck. Although it was fairly dark, the weather conditions were clear and Mr Smith was able to keep the utility under observation for several hundred metres in front of him. I accept Mr Smith's evidence to the extent that he says he did not observe any indicator on Mr Randall's vehicle.

[32] Importantly, if the indicator had been activated so as to signal Mr Randall's intention to turn right, then it is highly improbable that Mr Smith would have chosen to overtake the utility on its right side. If, having failed to slow to an appropriate speed, he was not able to stop behind the utility or slow to its speed, the option existed for him to pass it on its left.

[33] Each lane was approximately 3.5 metres wide, with bitumened shoulders of 2.4 metres on the southern side and 2.25 metres on the northern side. The utility was 1.75 metres wide and the truck was 2.17 metres wide. So the combined width of the vehicles was just under four metres, and there was a bitumined surface width of almost six metres to the southern side of the centre line.

[34] If Mr Randall had indicated, then Mr Smith would have slowed and travelled behind the utility or passed on its left. Instead, he tried to pass on its right, just as the utility began to turn into his path.

Did Mr Randall drive without due care and attention?

[35] If Mr Randall had looked in his rear view mirror or side view mirror during the time the utility travelled over the several hundred metres to the point where he intended to turn right, then he would have seen the truck's headlights. If he had kept a regular view in his rear view mirror, he would have noticed that the truck was gaining on him.

[36] Given my adverse view about Mr Randall's credibility and reliability, I have no confidence that he checked his mirrors and saw the truck. In his evidence-in-chief Mr Randall said that he had been aware of the truck just prior to making the turn and saw it "just prior to the turn", just as he started to make the turn and "it's come out of nowhere". He also gave evidence that he recalled checking his mirrors and seeing the truck, but by the time he "looked back again, it was just too late, and [he] had already started turning." I think it more likely that Mr Randall did not check his mirrors at all since if he had done so and observed the truck behind him, he would have activated the indicator and not steered his vehicle, as he did, into the path of an overtaking truck.

[37] It is possible that Mr Randall did observe the truck in his mirror just as he committed to the turn, particularly if, as Mr Smith says, he sounded the truck's horn when he was a very short distance behind the truck and in the process of overtaking it.

[38] If, as Mr Randall says, the truck seemed to "come out of nowhere" then it is because Mr Randall did not bother to look into his rear view mirror when approaching the point at which he intended to turn right. If he saw the truck at all then it was probably after he had committed to making the turn and as Mr Smith was effecting the overtaking manoeuvre. By then it was probably too late to avoid the collision. However, he only came to be in that position because he failed to indicate, failed to drive with due care and attention and failed to keep a proper lookout before making the turn. In the result, he made a right hand turn when it was not safe to do so.

Intoxication

[39] Mr Smith has pleaded that Mr Randall was intoxicated at the time of the collision. He alleges that Mr Randall was:

> "Driving whilst intoxicated, with a blood alcohol content of 0.058% and having consumed Oxycodone, such that his ability to operate a motor vehicle with proper care and skill was significantly impaired."

Mr Randall submits that the allegation is without evidentiary foundation.

[40] As to the Oxycodone, Mr Randall denied having taken any such drug the previous day. However, the records of what he told police contradict this. He told a police officer that he took an Oxycodone tablet at about 10.00 am the previous day. At the trial Mr Randall said he could not recall the conversation with the police officer and that his memory of events at the scene of the accident was blurry. Why he would tell a police officer that he had taken an Oxycodone tablet when he had not done so was unexplained.

[41] Mr Randall had been prescribed a prescription drug, Oxynorm, in late 2012. The records from his general practitioner indicate that he received a prescription on 7 September 2012. An entry in the general practitioner's records on 9 November 2012 indicates that these tablets "ceased". There is no evidence that Mr Randall obtained a prescription for these drugs from another doctor or obtained Oxynorm tablets illicitly. However, the distinct possibility exists that he had some unused tablets and used one of them on Sunday, 20 January 2013 when he was recovering from having ridden in a race on Saturday.

[42] A blood sample was taken from Mr Randall and the certificate of analysis shows that whilst the drug Sertraline was present in his system (which he had disclosed to Queensland Racing), there was no trace of Oxycodone detected. If he had taken an Oxycodone tablet on the morning of Sunday, 20 January 2013 then, given its half-life, there may have been no trace of it left in his system so as to be detected upon analysis. In the light of the certificate of analysis, I decline to find that Mr Randall was affected by Oxycodone at the time of the accident, or that the drug was present and interacted with the alcohol which was in his system at the time of the accident.

[43] As for his alcohol consumption, Mr Randall gave evidence that he had between four and six standard nips of Canadian Club whisky between about midday and 9.00 pm the day before the accident. I do not regard Mr Randall as a reliable historian as to how many drinks he had the previous day or when he stopped drinking. He gave evidence that he did not believe the alcohol had affected him at all. However, I do not accept his evidence.

[44] After police arrived they detected alcohol on his breath. A roadside breath test was administered at about 5.24 am and it produced a reading of 0.058 per cent blood alcohol concentration. A subsequent blood sample was taken for testing at about 6.58 am which revealed a blood alcohol concentration of 0.022 per cent.

[45] Mr Randall's submissions note that by operation of s 80 of the *Transport Operations (Road Use Management) Act* 1995 (Qld), the matters stated in the certificate of analysis are evidence of those matters and until the contrary is established is conclusive evidence. By operation of ss 80(16F) and (16FA) his blood alcohol content at a material time – here the time of accident – is taken to be that recorded in the certificate if the test was done less than three hours after the material time, which it was. Accordingly, for the purposes of that Act Mr Randall's blood alcohol content is taken to have been 0.022 at the time of the accident, well below the limit of 0.05. Mr Randall did not argue that the matters stated in a certificate of analysis contemplated by this section were conclusive evidence in a proceeding of the current kind. His final submissions accepted that in their context the provisions are about proof in criminal proceedings.

[46] Whilst the roadside breath test may not be sufficient evidence for the purpose of a criminal proceeding for driving under the influence, it still is a relevant piece of evidence for the purpose of this civil proceeding. It is not inconsistent with Mr Randall's blood alcohol content of 0.022 per cent about one and a half hours after the breath test was taken.

[47] There is no evidence about whether Mr Randall converted or used the alcohol in his system at a rate of 0.01, 0.015, 0.02 or some other figure each hour. Therefore, using

the blood test as a base, one cannot do a "countback" to say for sure that his blood alcohol content at 5.24 am was more or less or about the same as the 0.058 per cent reading on the roadside breath test, and one cannot say for sure that his blood alcohol level at the time of the accident at about 5.00 am was more or less than 0.058 per cent. However, the roadside breath test is some evidence which, in conjunction with the blood sample analysis, supports the conclusion that Mr Randall's blood alcohol level was in the vicinity of 0.06 at the time of the accident.

[48] Police records of the interview at the scene state that Mr Randall told them that he had been "a bit sleepy". When his attention was directed to this record under cross-examination, Mr Randall said: "I wasn't sleepy. I was drowsy." He later resiled from that and said that he was not drowsy before the accident. I conclude on the basis of the police records that he told the police that he was a bit sleepy at the time of the accident and this was true.

[49] I find that he was affected by alcohol, having drunk to excess on the night before the accident. As noted, I find that his blood alcohol level at the time of the accident was in the vicinity of 0.06 per cent.

[50] Mr Randall gave evidence that he was in the habit of activating the indicator when turning into the property. I treat that evidence with some reservation. However, if it be the case that he was in the habit of indicating then the influence of alcohol and his drowsy condition explains why he did not activate the indicator on the morning of 21 January 2013. The influence of alcohol and his resultant drowsy state also explain why he did not keep a proper lookout in his mirrors before executing the right turn.

[51] In defence of Mr Randall's claim, Mr Smith relies upon s 47 of the *Civil Liability Act* 2003 (Qld) which relevantly provides:

> "**47 Presumption of contributory negligence if person who suffers harm is intoxicated**
>
> (1) This section applies if a person who suffered harm was intoxicated at the time of the breach of duty giving rise to a claim for damages and contributory negligence is alleged by the defendant.
>
> (2) Contributory negligence will, subject to this section, be presumed.
>
> (3) The person may only rebut the presumption by establishing on the balance of probabilities—
>
> (a) that the intoxication did not contribute to the breach of duty; or
>
> (b) that the intoxication was not self-induced.
>
> (4) Unless the person rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced, on account of

> contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
>
> …"

Section 47(5) deals with a case in which the concentration of alcohol in the driver's blood was 0.15 or more, or the driver was so much under the influence of alcohol or a drug as to be "incapable of exercising effective control of the vehicle". In such a case the minimum reduction prescribed by subsection 47(4) is increased to 50 per cent. This is not such a case.

[52] The *Civil Liability Act* defines the term "intoxicated" to mean when "the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired."[2]

[53] Notably, the definition does not use the term "substantially impaired". The Act does not presume or deem a person's capacity to exercise proper care and skill to be impaired in circumstances in which the person has, for example, a blood alcohol level of 0.05 per cent or more.

[54] Whether or not a person is under the influence of alcohol "to the extent that the person's capacity to exercise proper care and skill is impaired" depends upon all the circumstances of the case, not simply on a blood alcohol level. For example, it is possible to imagine a case in which a sleep-deprived driver, who has taken no stimulants such as caffeine, has a relatively low blood alcohol level but the effect of the alcohol is to slow his or her reactions to a state in which the driver is not able to react fast enough and cannot exercise proper care and skill. By contrast, another driver with the same blood alcohol level, but who is well-rested and stimulated by coffee, may have a slowed reaction speed due to the presence of alcohol but still be able to react quickly enough to exercise proper care and skill.

[55] In such a case, the person may be under the influence of alcohol but not to the extent that his or her capacity to exercise proper care and skill is "impaired". The presence and influence of alcohol is not enough, on its own, to render that capacity "impaired". Were it otherwise, any driver with a small amount of alcohol in their system would be taken to be "intoxicated". That should not be assumed to be the legislative intention in the absence of clear words to that effect. Instead, the concentration of alcohol is an important factor in determining the influence of the alcohol upon the driver in question. The extent of the influence depends on all the circumstances, including whether the driver is alert or tired due to other factors.

[56] This is not a case in which a driver arose after a good night's sleep, sober and drank a few glasses of wine at lunch, followed by a few coffees by way of stimulation. Mr Randall was under the influence of alcohol as a result of drinking too much the night before. He was still under the influence of alcohol at 5.00 am. The police notebook records him saying that he had been drinking until 9.30 – 10.00 pm. My adverse view about his credibility and reliability lead me to reject his evidence that he drank between four and six standard nips of whisky on the Sunday at a barbeque that went between noon and about 8.00 or 9.00 pm. There is no explanation or evidence as to how his

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[2] Sch 2.

blood alcohol level, evidenced by the roadside breath test and the blood sample the next morning, would be at those levels if he had consumed only that number of drinks the previous evening. Incidentally, he told police at the accident scene that he could not remember exactly how many Canadian Clubs he had at the barbeque the night before. Mr Randall's unreliable recollection of events does not permit me to make any confident finding about when he stopped drinking and when he went to sleep on the Sunday night. He told the police that he got up at 3.50 am. The police were able to smell alcohol on his breath.

[57] This is not a case in which an alert driver recorded a roadside breath test reading of 0.058 a short time after drinking. Mr Randall was hungover. The police notebook seems to record him saying that he was maybe a "bit sleepy". Whilst he denied saying this to police, in his evidence he said instead that he was "drowsy". He did not say to police that he was a bit sleepy or drowsy because he had only had a few hours sleep. I conclude that Mr Randall was "drowsy" (to use the expression he used before seeking to retreat from it) because he had drunk to excess the night before. At the time of the accident he was recovering from the previous night's drinking and was still under the influence of alcohol. He was tired. He was under the influence of alcohol to an extent that impaired his capacity to exercise proper care and skill.

[58] The influence of alcohol contributed to the accident. It was causative in the sense that it contributed to his failure to indicate an intention to turn right and his failure to drive with due care and attention, including a failure to look in a rear view mirror when he was close to his destination and intending to turn.

[59] If Mr Randall looked in his rear view mirrors at all, then it was probably only at the last second, just as he began to effect the turn, perhaps alerted by the horn which Mr Smith sounded as he was overtaking. If Mr Randall had looked in his mirrors earlier, then he would have seen a truck approaching and closing on him. This probably would have prompted him to activate his indicator. If he falsely assumed for some reason that the indicator was already on it would have prompted him to check whether the indicator had earlier been activated. He also might have activated his brake lights quickly a few times to signal to the driver that he was both slowing and intending to turn right.

[60] Because Mr Randall suffered harm and was "intoxicated" within the meaning of the *Civil Liability Act* at the time of Mr Smith's alleged breach of duty giving rise to Mr Randall's claim for damages, and contributory negligence is alleged against Mr Randall, contributory negligence is presumed, subject to s 47(3). Mr Randall has not rebutted the presumption of contributory negligence by establishing on the balance of probabilities that his intoxication did not contribute to the alleged breaches of duty. Instead, I find that his intoxication did. His intoxication contributed to his failure to indicate an intention to turn right and his failure to drive with due care and attention and to keep a proper lookout. These breaches, in turn, led Mr Smith to attempt to overtake the utility instead of slowing behind it and permitting it to effect the signalled turn.

Breaches of duty

[61] Mr Randall and Mr Smith owed duties to each other to take reasonable care in the control of their respective vehicles so as to prevent harm to the other. The risk of harm was foreseeable, not insignificant and, in the circumstances, a reasonable person in the

position of the driver would have taken precautions.[3] If precautions were not taken, then there was a possibility that serious harm to another road user would be caused. The precautions required to avoid harm were not burdensome.[4]

Mr Smith's claim

[62] Mr Randall was familiar with the road and travelled that route. He knew that "a lot of heavy vehicles" used the road and he gave this as the reason why he turned his indicators on.

[63] A reasonable person who knew that a lot of heavy vehicles used the road, and indeed any road user, intending to turn right from the Gore Highway into the driveway entrance would have taken the precaution of indicating an intention to turn right into the driveway, and also driven with due care and attention, including by keeping a proper lookout for following vehicles.

[64] I find that Mr Randall breached the duty which he owed to take precautions to prevent harm to other road users in that he:

(a) failed to display any indicator to signal an intention to turn; and

(b) failed to drive with due care and attention and to keep a proper lookout.

[65] As previously noted, the influence of alcohol and his drowsy state contributed to these failures. Because he failed to indicate and failed to keep a proper lookout, he made a right hand turn when it was not safe to do so. Mr Smith has established that Mr Randall breached his duty of care.

Mr Randall's claim

[66] If, as Mr Smith suggested in some of his evidence and contrary his statements after the accident, he only realised that there was something wrong when he was between 100 and 200 metres away from a vehicle which appeared to be either stationary or moving very slowly, then his failure to realise the hazard any earlier was because he was failing to keep a proper lookout. As I have found, Mr Smith probably realised that he was catching up with the vehicle in front of him, and that the vehicle was moving towards the centre line, when the vehicles were 400 to 500 metres apart.

[67] I do not suggest that Mr Smith should have immediately commenced an emergency braking manoeuvre when the utility was still some 400 to 500 metres in front of him. Instead, he should have kept the utility under careful observation and been attentive to its movements. If he had done so, he would have realised he was closing in on the vehicle quite quickly when he was a few hundred metres from it.

[68] In his submissions, Mr Smith concedes that the evidence leads to a conclusion that he should have observed Mr Randall's vehicle at an earlier time and reacted accordingly. He also concedes that a reasonable driver in his position would have slowed his speed from 80 kilometres per hour to perhaps 40 kilometres per hour. He submits, however, that it would be unreasonable to have expected him to come to a complete stop or to

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3 *Civil Liability Act* 2003 (Qld), s 9(1).
4 *Civil Liability Act* 2003 (Qld), s 9(2).

reduce his speed to the same speed that Mr Randall was travelling, namely 10 kilometres per hour. This is said to be so particularly in the light of the fact that the truck was loaded and the effect which aggressive braking may have had upon the load restraint system.

[69] I do not accept this submission. It was possible and reasonable for Mr Smith to slow his vehicle from a speed of 80 kilometres to a much slower speed whilst travelling over a distance of 100 metres or more. There is no satisfactory evidence that he could not have done so, or that doing so would have caused his load to shift in a manner which created a danger. This matter was not canvassed in cross-examination of the expert witness who gave evidence in the case. Mr Smith accepted that he probably could have stopped in time. I find that it was unreasonable for him not to have reduced his speed once he noticed that the utility was moving towards the centre line and that the distance between the two vehicles was closing. He might have slowed to 20 or 30 kilometres per hour from his original speed of 80 kilometres per hour, and done so safely.

[70] If he had slowed behind the utility then he would have been in a better position to assess the other driver's intentions and, if necessary, alert the other driver to his presence by sounding his horn or flashing his lights. If he had slowed and done these things, then Mr Randall might have activated his indicator or, if he had not done so, committed to the turn before Mr Smith attempted to overtake the utility on its right. If Mr Smith had slowed the truck and continued to travel behind the utility then Mr Smith would have had more time to judge the situation and would not have assumed that the utility was going to turn left, rather than right. He would have better appreciated that it was travelling at a slow speed and was positioned beside the centre line in preparation for turning right. This would have allowed Mr Smith to either remain behind the utility or to pass it on its left side when it was safe to do so. Instead of doing these things he made a decision to overtake it on its right side without taking into account the distinct possibility that the utility was turning right without its driver having activated its indicator. This was unreasonable in circumstances in which Mr Smith was aware that drivers on such roads often fail to indicate their intentions to turn.

[71] In summary, Mr Smith failed to take appropriate precautions. He should have rapidly decelerated when he realised that the utility was moving to the centre line of the road and that he was gaining on it. Even if he was about 100 metres away from the utility when he realised there was a problem, he had sufficient time to slow his truck by braking without undertaking a dangerous braking procedure. There was sufficient time to slow. Instead, without having a reasonable basis to conclude that the utility was turning left (given the lack of any indication, the vehicle's slow speed and its position on the road) and in circumstances in which there was a substantial risk that the utility might turn right without indicating, Mr Smith overtook it on its right side at a reasonably high speed. In failing to observe the speed and direction of travel of the utility at an earlier time and to have reacted accordingly, Mr Smith breached his duty of care. He also breached his duty of care, once he realised there was a problem, in failing to slow behind the utility and in attempting to overtake it in circumstances where it was not safe to do so.

Causation

[72] The breaches of duty which I have found caused the vehicles to collide and for each driver to suffer harm. The breaches of duty which I have found were a necessary

condition of the occurrence of the harm.[5] For example, if Mr Randall had indicated or had kept a proper lookout, or had done both of these things, then Mr Smith would not have attempted to overtake the utility on its right side. Instead he would have slowed and travelled behind the utility and passed it on its left side when it was safe to do so. If Mr Smith had not breached his duty and, instead, had slowed and travelled behind the utility, then the utility would have made the turn and the collision would have been avoided.

[73] Each of the plaintiffs has established factual causation and it is appropriate for the scope of the liability of the defendant to extend to the harm so caused.[6]

Apportionment

[74] Apportionment between the parties involves a comparison both of culpability, that is the degree of departure from the standard of care required of the driver, and "of the relative importance of the acts of the parties in causing the damage".[7] The whole conduct of each negligent party in relation to the circumstances of the accident must be subjected to comparative examination.[8]

[75] The driver of the following vehicle is in a better position than the leader to observe certain matters.[9] However, one must not over-emphasise the responsibility of the following driver or the importance of that driver's opportunity to avoid the risk created by the carelessness of another.[10] The driver of a following car is not inevitably liable should his or her vehicle collide with the vehicle in front.[11] Liability and comparative culpability must be determined by reference to the particular facts of the case.

[76] According to s 23 of the *Civil Liability Act*, the principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the person who suffered harm has been guilty of contributory negligence in failing to take precautions against the risk of that harm. For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person; and

(b) the matter is to be decided on the basis of what that person knew or ought reasonably to have known at that time.[12]

It is unnecessary to dwell on the application of this or similar provisions in other contexts, such as the position as between a pedestrian and the driver of a vehicle.[13] In the circumstances of this case Mr Randall was vulnerable to injury caused by a

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5 *Civil Liability Act* 2003 (Qld), s 11(1)(a).
6 *Civil Liability Act* 2003 (Qld), s 11(1)(b).
7 *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 at 532-533.
8 Ibid.
9 *Rains v Frost Enterprises Pty Ltd* [1975] Qd R 287 at 294.
10 *Freeleagus v Nominal Defendant* [2007] QCA 116 at [23].
11 *Vos v Hawkswell* [2010] QCA 92 at [31].
12 *Civil Liability Act* 2003 (Qld), s 23(2).
13 As to which see *T & X Company Pty Ltd v Chivas* [2014] NSWCA 235 at [54] – [57]. See also *Allen v Chadwick* [2015] HCA 47 at [22] in the context of contributory negligence in failing to wear a seatbelt.

following vehicle which did not slow or which overtook him as he attempted to turn right. He knew of heavy trucks on the road and ought reasonably to have known of the risk of harm to himself if he failed to indicate his intention to turn right and failed to keep a proper lookout. Mr Smith was at risk of being injured if he collided with a vehicle which turned across his path as he attempted to overtake it. He knew that drivers on country roads do not always signal their intention to turn right and ought reasonably to have known of the risks which arose if he effected an overtaking manoeuvre in the circumstances in which he did.

[77] In acting in the negligent way in which he did, each driver was guilty of contributory negligence in failing to take precautions against the risk of harm to himself.

[78] I was referred by counsel for Mr Smith to other cases involving vehicles in which an indicator had been used incorrectly or not at all. These cases were of some assistance but turn on their own facts. For example, this is not a case in which Mr Smith gave a reasonable explanation for the utility's slow speed or stationary presence on the road so that in the circumstances his overtaking manoeuvre was one taken with all reasonable care for his own safety.[14]

[79] In accordance with s 47 of the *Civil Liability Act*, the damages to which Mr Randall would be entitled in the absence of contributory negligence should be reduced on account of contributory negligence by 25 per cent "or a greater percentage decided by the Court to be appropriate in the circumstances of the case". I have earlier noted the respects in which the influence of alcohol contributed to his breaches of duty. A sober driver who neglected to indicate and keep a proper lookout in the circumstances in which Mr Randall placed himself would be substantially departing from the standard of care required of a driver in his position. The fact that Mr Randall was under the influence of alcohol and that this contributed to those failures increases the extent of his departure from the required standard of care. He should not have driven whilst still under the influence of alcohol and tired. His contributory negligence justifies a greater than 25% reduction.

[80] For the reasons which I have earlier given, Mr Smith also departed to a substantial degree from the standard of care required of a reasonable driver in the circumstances. I do not consider that there is any real difference between their culpability.

[81] Each driver's breaches of duty had a similar causative potency. Their respective breaches contributed fairly equally in causing the collision and the injuries which resulted from it.

[82] Having regard to the whole of the conduct of each negligent party and all of the circumstances, I consider that liability should be apportioned equally between the two drivers. Expressed differently, the damages to which Mr Smith would be entitled in the absence of contributory negligence should be reduced by 50 per cent on account of his contributory negligence; and the damages to which Mr Randall would be entitled in the absence of contributory negligence should be reduced by 50 per cent on account of his contributory negligence.

Conclusion and orders

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[14] c.f. *Thurgar v Gollschewski* [2002] QCA 430 at [12].

[83] Each driver was negligent. Each driver was guilty of contributory negligence. Each driver's contributory negligence is assessed at 50 per cent. The quantum of each claim having been agreed, the only order which I will make is to direct the parties in each proceeding to confer and bring in draft minutes of judgment. I will hear the parties, if required, as to the form of orders, including any issue as to costs.