DISTRICT COURT OF QUEENSLAND

CITATION:	*Bryant v Competitive Foods Australia Pty Ltd & Ors* [2018] QDC 258
PARTIES:	**DAVID GEORGE BRYANT** (Plaintiff) **v** **COMPETITIVE FOODS AUSTRALIA PTY LTD ACN 010 542 908 trading as HUNGRY JACK'S ANNERLEY** (First Defendant) **BRISBANE CITY COUNCIL ACN 002 765 795** (Second Defendant) **WAYNE BLOW & PARTNERS PTY LTD ACN 010 796 979** (Third Defendant)
FILE NO/s:	BD 1625/15
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	17 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20-24 August 2018; 27-30 August 2018; 21 September 2018
JUDGE:	Jarro DCJ
ORDERS:	**Judgment for the defendants**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – OCCUPIERS – where defendant admits it owes a duty of care to minimise risk of a foreseeable injury to entrants on the premises –where the plaintiff is the driver of a motor vehicle which causes death or injury to another person and suffers pure psychiatric harm – whether the scope of the duty of care extended of pure psychiatric harm TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – LOCAL AUTHORITIES – where the plaintiff alleges that a local authority owes a duty to the public when exercising statutory powers as assessment

manager of a development application – where a local authority approves a modification or re-configuration of a driveway access and pedestrian crossing – whether the local authority exercises control – whether the plaintiff is in a position of vulnerability and reliance in relation to the local authority – whether the scope of the duty of care extended of pure psychiatric harm

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – where a defendant to the proceeding is a firm of architects – whether the architects exercised reasonable care and skill in the provision of architectural services in respect of matters within the scope of its instructions – whether the scope of the duty of care extended of pure psychiatric harm

TORTS – NEGLIGENCE – ESSENTIALS FOR ACTION FOR NEGLIGENCE – STANDARD OF CARE – whether the occupier discharged its duty by retaining skilled contractors – where the occupier retained experts to design a safe system for movement of pedestrians and vehicles – whether the local authority breached its duty in approving site plans – whether the architects took reasonable steps to guard against foreseeable risks in relation to entrance to the property – whether the architects acted in a way widely accepted by peer professional opinion

TORTS – NEGLIGENCE – ESSENTIALS FOR ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – whether the design of a driveway and/or carpark, the presence of a hedge obstructing the view of pedestrians and drivers, and/or the absence of warnings signs were causative of the accident

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where the plaintiff had attended the premises five times prior to the accident – where the plaintiff was distracted by something causing them to look up and down as they drove the vehicle

DAMAGES – GENERAL PRINCIPLES – GENERAL AND SPECIAL DAMAGES – where plaintiff claims general damages for the psychiatric harm – where plaintiff suffers post-traumatic stress disorder or PTSD – where the plaintiff claim the costs of defending a related criminal proceeding as special damages

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR NEGLIGENCE – REMOTENESS AND CAUSATION – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY– where plaintiff suffers pure psychiatric injury – where the plaintiff alleges a diminished ability to contribute the gross income of the

business because of the psychiatric injury – where there is an insufficient causal link between defending a criminal proceeding and the psychiatric injury

Civil Liability Act 2003 ss 11, 22, 55

Becker v Sutherland Shire Council [2006] NSWCA 344

Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649

Chapman v Hearse (1961) 106 CLR 112

Chappel v Hart (1998) 195 CLR 232

Habib v Nominal Defendant (NSW) (1995) 22 MVR 454

Husher v Husher (1999) 197 CLR 138

Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361

Lee v Carlton Crest Hotel (Sydney) Pty Ltd [2014] NSWSC 1280

Leichardt Municipal Council v Montgomery (2007) 230 CLR 22

Mahony v Kruschich (Demolitions) Pty Ltd [1985] HCA 37

March v E & MH Stramare Pty Ltd (1991) 171 CLR 506

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254

Nominal Defendant v Gardikiotis (1996) 186 CLR 49

Palmer & Ors v State of Queensland [2015] QDC 63

Sullivan v Moody (2001) 207 CLR 562

Tame v New South Wales (2002) 211 CLR 317

Vairy v Wyong Shire Council (2005) 223 CLR 422

Voli v Inglewood Shire Council (1963) 110 CLR 74

Wallace v Kam (2013) 250 CLR 375

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

COUNSEL: R Myers for the Plaintiff

A P G Collins for the First Defendant

B F Charrington for the Second Defendant

J J Baartz for the Third Defendant

SOLICITORS: Shine Lawyers for the Plaintiff

Carter Newell for the First Defendant

Barry.Nilsson. Lawyers for the Second Defendant

Moray & Agnew Lawyers for the Third Defendant

[1] Tragedy occurred on 26 April 2012 at approximately 12:30 pm when a three-year old child was fatally injured within the Hungry Jack's Annerley carpark. The plaintiff, Mr David Bryant, was the driver and sole occupant of his 4WD Nissan Patrol utility when he approached in a southerly direction along Ipswich Road, Annerley, turned left into the Hungry Jack's Annerley driveway and proceeded through the carpark towards the entry to the drive through facility. Within the carpark there was a pedestrian crossing which provided access for pedestrians to the restaurant. As Mr Bryant entered the carpark, he drove through the pedestrian crossing. As he drove through the pedestrian crossing, Mr Bryant's utility struck the deceased child ("the accident").

[2] Mr Bryant developed a psychiatric injury following the accident and seeks to recover damages for personal injuries against three parties – Competitive Foods Australia Pty Ltd which trades under the name of "Hungry Jack's Annerley" ("Hungry Jack's"), the Brisbane City Council ("BCC") and Wayne Blow & Associates Pty Ltd ("the Architects").

[3] Liability and quantum are in dispute. The gravamen of Mr Bryant's complaint relates to the design (including approval) of the driveway and carpark. Hungry Jack's admits that it owed Mr Bryant a duty to take reasonable care for the safety of entrants upon its premises, but denies that it breached its duty, and contends that even if it did, the breach was not causative of Mr Bryant's psychiatric injury. BCC has denied that it owed Mr Bryant a duty of care, and even if it did, it did not breach its duty or cause Mr Bryant's psychiatric injury. Likewise the Architects deny that they owed Mr Bryant a duty of care, and say that if they did, they did not breach their duty of care and that any breach (which is denied) was not causative of Mr Bryant's psychiatric injury. Further, all defendants assert that Mr Bryant was contributorily negligent.

[4] For reasons to follow, I find:

(a) BCC and the Architects did not owe Mr Bryant a duty of care in the manner asserted by Mr Bryant.

(b) There was no breach of duty by any of the defendants.

(c) Mr Bryant has not established causation.

(d) Any assessment of Mr Bryant's damages is reduced by 90% because of contributory negligence.

(e) Save for the finding of contributory negligence, Mr Bryant's damages against Hungry Jack's is otherwise assessed at $219,368.00 or $264,593.00 against BCC and the Architects.

Agreed Facts

[5] Relevantly the following material facts[1] were agreed between the parties:

> ...
> *6. On or about 26 April 2012:*
>
> *(a) The first defendant occupied real property at 564 Ipswich Road, Annerley in the State of Queensland described as Lot I on RP 199412, County of Stanley, Parish of Yeerongpilly* ***("the premises")****;*
>
> *(b) The first defendant operated a Hungry Jack's fast food restaurant and drive through facility on the premises* ***("the restaurant")****.*
>
> *7. There was located at the premises a drive through facility whereby vehicles could enter the premises for the purposes of ordering and receiving food from the restaurant without leaving their vehicle* ***("the drive through facility")****.*
>
> *8. On or about 26 April 2012 at between approximately 12.30pm and 12.35pm:*
>
> *(a) The plaintiff was driving the vehicle in a southerly direction along Ipswich Road, Annerley in the State of Queensland;*
>
> *(b) The plaintiff turned left from Ipswich Road into the driveway; and*
>
> *(c) The plaintiff proceeded to drive the vehicle through the car park towards the entry to the drive through facility.*
>
> *9. There was located on the premises a pedestrian crossing which, inter alia, provided access to pedestrians to the restaurant.*
>
> *10. The plaintiff entered the premises and proceeded, inter alia, to drive through the pedestrian crossing.*
>
> *...*
>
> *13. When proceeding across the pedestrian crossing the plaintiff was unaware that the vehicle had struck the child.*
>
> *14. As the vehicle entered the premises there was located on the left-hand side parking spots for two vehicles.*
>
> *15. The design of the entry to the premises was that:*
>
> *(a) Motor vehicles could enter the premises from*

[1] Exhibit 1.

Ipswich Road via a 4.5 metre wide one-way entry driveway which was angled at approximately 60 degrees;

(b) *In the direction of travel from the entrance of the driveway into the car park there was situated a pedestrian crossing;*

(c) *The pedestrian crossing led from the northern side of the car park to the restaurant;*

(d) *Drivers entering the carpark from Ipswich Road intending to enter the drive through facility needed to travel over the pedestrian crossing.*

16. *The pedestrian crossing was in the region of a children's playground which was visible from outside the restaurant.*

17. *At all material times, Ipswich Road provided three lanes for traffic heading in a southerly direction.*

18. *On or about 20 September 1999, the third defendant, on behalf of Selden Pty Ltd submitted a development application to the second defendant for "extensions and alterations to existing fast food store" at 574 Ipswich Road Annerley* ***("the application")****.*

19. *The second defendant was the "assessment manager" for the application pursuant to section 3.1.7 of the IPA.*

20. *The application attached the third defendant's architectural plans 2020-5OA-TP1 and TP2 dated 31 August 1999* ***("the Architectural Plans")*** *and the Architectural Plans showed the retrofitting to the restaurant of:*

(a) *A covered outdoor play area;*

(b) *Additional outdoor dining area adjacent to the new outdoor play area and to the area recovered from the existing outdoor play area;*

(c) *A second drive through service window including a redesign of the associated service window modules; and*

(d) *An internal dedicated party room.*

21.

(a) *On 18 October 1999 the second defendant made an information request to Selden Pty Ltd under section 3.3.6 of IPA in relation to the application* ***("the Information Request")****;*

(b) *The Information Request stated inter alia:*

i. *"1. The applicant is requested to submit amended drawings which provide for safe and convenient movement of pedestrians from the existing car parking area along the eastern boundary of the site into the restaurant."; and*

ii. *"2. the applicant is requested to demonstrate compliance with section 19.10 of the Transitional Planning Scheme in respect of non-discriminatory access."*

22. *The third defendant responded to the Information Request by way of letter dated 26 October 1999 to the second defendant* ***("the Response")****. The response:*

(a) *Was written by the third defendant on behalf of the Applicant, Selden Pty Ltd.*

(b) *Attached eight (8) copies of the amended architectural plans 2020-50A-TP1A and 2020-50A-TP2A* ***("the Amended Architectural Plans")****.*

23. *On 11 January 2000 the second defendant approved the Application in accordance with s 3.5.15 of the IPA subject to conditions and in accordance with the Amended Architectural Plans.*

24. *On 21 March 2000, the second defendant sent a facsimile communication to the third defendant enclosing a document entitled "Section B Design Requirements* ***("the Design Requirements")****.*

25. *By the Design Requirements, the second defendant instructed the third defendant to document the design on the vehicle access to the Property from Ipswich Road in accordance with C1 driveway dimensions and the sketch documented in the Design Requirements.*

26. *The sketch documenting the Design Requirements referred to above was consistent with C1 driveway dimensions and depicted the driveway as:*

(a) One way entry only from Ipswich Road;

(b) A sixty degree angle; and

(c) 4.5 metres wide.

27. On 27 March 2000, the third defendant provided the second defendant with a sketch of the driveway in accordance with the Design Requirements.

28. On 28 March 2000, the third defendant spoke to Rory Kelly, Senior Town Planner of the second defendant ***("the Conversation")*** *wherein:*

(a) Mr Kelly advised the third defendant that he wanted to retain the alignment of the driveway and reduce the width of the driveway;

(b) The third defendant suggested that a traffic engineer be engaged to visit the site and make recommendations for submission to the second defendant; and

(c) Mr Kelly advised the third defendant that he was prepared to review an engineered solution.

29. After the Conversation, on or around 28 March 2000, the third defendant, on behalf of Selden Pty Ltd, engaged Beard Traffic Engineering Pty Ltd, a traffic engineer, to provide advice on the desirability, in traffic planning terms, of the driveway.

30. On 5 April 2000, Beard Traffic Engineering Pty Ltd provided advice ***("the Traffic Engineer's Advice")****.*

31. On 5 April 2000, the third defendant forwarded the Traffic Engineer's Advice to the second defendant.

32. On 8 May 2000, the second defendant sent a facsimile to the third defendant advising the third defendant that the second defendant approved the driveway as depicted on sketch 1 attached to that facsimile.

33. In accordance with the approval from the second defendant on 11 January 2000, as refined by the subsequent approval of the final plans on 8 May 2000, the development works were conducted in or about 2000.

Liability

The Accident

[6] Mr Bryant had been to Hungry Jack's about five times prior to the accident.[2] He was aware of the existence of a children's play area immediately adjacent to the restaurant.[3] He was aware of the existence and location of the pedestrian crossing.[4] He was also aware that children and adults may be in the vicinity of the pedestrian crossing and carpark.[5]

[7] On the day of the accident, Mr Bryant was driving in his 4WD Nissan Patrol utility. He was travelling along Ipswich Road, Annerley. He turned left onto the driveway and into the carpark. The following passage is extracted from Mr Bryant's evidence-in-chief:

> *Had you done that previously? Had you ever been there before?---Yes, yes.*
>
> *You knew the area well?---Yes.*
>
> *All right?---And then as I come through, there was a car coming out of the drive-through so I come through and stopped, like, pretty much came to a stop and hesitated because I wasn't sure if he was going to come out and we have a crash there, and then he sort of braked and then I braked and then he waved and I gave him - like, you sort of give your thumbs up, and then as you come around the corner, that's when I slowed down. I was in first gear. So to get my utility into first gear, you pretty much have to come to a stop. It's a 4-wheel drive. So I was just coastering through there.*
>
> *All right. And where were you – you were in a Nissan?---Yes.*
>
> *Nissan utility?---Yes.*
>
> *And where were you when, as you say, you've looked at this fellow and got the thumbs up from him to proceed?---Just past – like, just as you come in the driveway.*
>
> *So - - -?---So he's on the right-hand side there.*
>
> *Were you beyond the footpath, or - - -?---No, I was pretty - - -*
>
> *- - - were you still on the - - -?---My back end would have probably still been on the footpath.*
>
> *And, what, your front end on the Hungry Jack's - - -?---Yes.*
>
> *- - - driveway?---Yes.*

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2 T1-81, line 39.
3 T1-56, line 6 – 8 and T1-82, line 30.
4 T1-81, lines 42 – 46.
5 T1-82, lines 30 – 46.

All right. Did you – you obviously – to you see the fellow giving you the thumbs up, you've looked at him?---Yep

Were you concentrating on him, or looking around anywhere else?---No, not at all. I was full aware of my situation, or where I was.

All right. Well, what were you doing? Just tell his Honour where you were – just progress with your description, and tell his Honour where you were looking and what was going on, as you saw it, from time to time?---So as I came in, we hesitated, and then I sort of gave him the "Yep, it's all good," like, "I'm going." So then I rolled down the hill, and then, in the car park, when you're coming up to the pedestrian crossing on where it is, there's a car that – there was a car sitting on my left-hand side. Now, the building is very sharp on the right-hand side, so you can't see if somebody's walking out from the left or the right; you have to pretty much be upon it before you can see. So I come through there pretty slow. Like, I was – I would have – I was in first gear; I didn't have my foot off the clutch. Like, it was – like, I was going pretty slow. And then, as I come through the – through past the pedestrian crossing, I remember looking left, looking right, looking left; there was nobody there. On both sides, on the pedestrian crossing, that is. And then, as I come down the hill, that's when - - -

Okay. Just let me [indistinct] there – when you look to the left and look to the right and saw that there was no - - -?---Cars, nor a person.

- - - traffic that was going to impede you on the - - -?---Yes.

- - - pedestrian crossing, where would you put yourself with respect to the pedestrian crossing? Where was the utility?---Pretty much just in line. So my utility would have been coming up to the pedestrian crossing.

All right. Your – the bumper bar would have been encroaching - - -?---Yes.

- - - over the side, you would think?---Yes.

And do you recall looking to the left?---Yes.

And what did you see?---When I looked left, because of the way the sun was sitting that day, being midday, the sun was shining through my front quarter glass. So on the – my left-hand side site was the vouchers that my ex-wife had bought. And I remember seeing, when I looked left, the reflection shining. Like, you could – not – it's not a reflection, but it was highlighted, you could say.

The voucher on the front seat was - - -?---Yes.

- - - highlighted by the sun?---Yes.

All right. But did you look down? The – had you got to a stage to look down the pedestrian crossing, or were you still approaching - - -?---No, I would have - - -

- - - to get your left-hand look?---I would have been down the pedestrian crossing by that stage.

Right. And did you see any?---Nothing at all.

All right. Were you looking at all to your right, as you were proceeding over the crossing?---Yes, I looked right, yes. There was nobody there at that point in time. There was a person pushing a pram, down on the corner of the building.

And that was looking right to see if anyone was using the pedestrian crossing to come out of the - - -

MR BAARTZ: Your Honour, can I object - - -

WITNESS: Yes.

MR BAARTZ: - - - to leading by Mr – I just ask Mr Myers not to lead.

HIS HONOUR: Mr Myers.

MR MYERS: Yes, I will. What was the purpose of looking to your right?---To see if there was any traffic on the pedestrian crossing.

Well, just tell his Honour what happened next?---As I rolled down the hill, my front left-hand side started coming down. So I don't know if youse have been four-wheel driving, or anything like that, or if you get a flat tyre, especially in the front of a four wheel drive, it – the front of my car started creeping down – thing. So I was under the impression that – because I come off of a job site with Neil, and there's reo on – like, they used crushed concrete on the front of the driveways that you'll see on all of the construction sites, to get the mud off of your tyres before you go onto the road. And I thought there might have been some steel in my tyre, or something like that. So I was under the impression that I had a flat tyre. So as I come through the pedestrian crossing, and then I was – my – half of my utility was past it – my front started creeping down, and then that's when I thought, "Okay, I've got a flat tyre. I'll come down and pull in left." And that's why I drove down another six metres to pull into a car park on the left-hand side. And as that happened, I got down six metres, and a bloke ran out and started trying to lift the front of my car up. And hit – and I thought he was on drugs at the beginning

> *of it, because he's hitting my car and trying to lift the front of it. I wasn't quite sure what he was – what he was doing, at all.*
>
> *Did you get out of the car?---Not straightaway, no. I didn't know. So I – he started hitting my window, telling me to back the fuck up. And I'm thinking that he wants to fight me. So he keeps hitting the window, and he's going, "Back it up. Back it up." And I'm like, "Back what up, mate? Like, I don't understand what you're saying." So then I've wound down the window, and then, as I've wound down the window, he's like, "Reverse back." So that's when he ran back around to the front of the car, I put it in reverse. And then he went picture-white. I've never seen somebody go so white in my life. And that's where he just sat there, I suppose you could say, put his hands up over his head. He didn't know what to do. And that's when I got out of the car, and then walked to the front, and then – that's where [the child] was.*[6]

[8] Shortly prior to the accident, Ms Tse Lyn Yu, accompanied by her work colleague Mr Jason Skennar, was at the Hungry Jack's site planning to have lunch. She and Mr Skennar parked their car. As they were walking towards the entrance of the restaurant, she saw the child and his mother as they were walking up the walk way *"at the other side of the pedestrian crossing"* and *"behind the yellow"* bollard. She also observed Mr Bryant's utility driving into the carpark. She did not see the driver's face at that point. She next *"heard a thud", "a hitting sound"* and *"something crack"*. She kept the car under observation and saw the driver *"focussing on something else"* because *"his head was looking down"*. She said the car did not slow down or break until a number of people rushed closer to the utility asking the driver to back off. The driver then got out of his car. One of the first observations Ms Yu noticed about the driver as he got out of the car was that he was briefly holding a mobile phone on his right hand and then removed an ear piece. She said that he was *"not focussing on the road"* and was *"looking to and fro, down and up, down and up"*.[7] Ms Yu was extensively cross-examined, but her evidence particularly regarding Mr Bryant's conduct after the impact remained unwavering.

[9] Ms Yu's work colleague Mr Jason Skennar said that after parking his car with Ms Yu, they were walking towards the entrance of the restaurant. He saw a white utility entering the carpark from Ipswich Road. He also observed the child and his mother. He explained that *"the child was running ahead of the mother"*.[8] In his view, the driver *"seemed a bit distracted as he was driving in"* in that he was *"kind of looking up and down"*.[9] Mr Skennar said that as the child ran past the bollards, he was struck *"probably on the passenger front side"*.[10] When asked by Mr Collins of counsel who appeared for Hungry Jack's, Mr Skennar said:

> *…once everyone has realised what's happened, he's pushed the car – two gentlemen – two to three gentlemen have started pushing the*

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6 T1-56 – T1-59. Mr Bryant was interviewed by Police on the day of the accident (Exhibit 2, CD) which was largely consistent with his evidence at trial.

7 T5-38, line 35.

8 T7-39, line 45.

9 T7-40, lines 24 – 37.

10 T7-40, lines 39 – 40.

front of the car. The gentleman driving the car has stopped, handbrake, hopped out. That's when I observed he - - -

Where were you at this stage?---I was on the path in the vacant car park looking directly at the driver.

All right. You were about to say you observed something when he hopped out of the car?---I observed – as he's hopped out of the car, he's had something in his hand and he's had his earphones attached - - -

Yes?--- - - - which I assumed he's had his phone in his hand then.

Can I ask you there, before the impact had you been able to identify whether he had a phone at all?---No.

Right. Did you – were you able to identify whether or not he had headphones on?---No.

Okay?---No.

Anyway, he's got out of the car with the headphones on?---He's hopped out of the car with that on.

Yes?---Phone in the hand and he's yelled out, "What have I done?" At that point we've all yelled out, "You've hit a child. Move your car back."

Yes?---He's reversed off the child. He's walked away from – his words were, "I cannot" – "I can't look at that."[11]

[10] Ms Emily Downes was also at the scene of the accident with her mother, Ms Kathy Downes. They had just had their lunch and were returning to their parked car. As she exited the restaurant, she heard what she described as *"a bang and a screeching noise"*. [12] She described a *"lady on the other side of the crossing drop[ping] a handbag and running to the front of the vehicle"*.[13] Ms Downes proceeded to the front of the car and she saw Mr Bryant in the front seat of his car.[14] He had *"white earphones in his ear"*.[15] The vehicle reversed and she said Mr Bryant got out of his car and said words to the effect of *"I don't want to see that"*, *"I don't want to know what happened do I?"*.[16] Under cross-examination by Mr Charrington of counsel who appeared for the BCC, Ms Downes recalled seeing the driver as he exited the car with a phone or iPod in his right hand.[17]

[11] Ms Kathy Downes, a person of some 30 years first aid experience, assisted the injured child into the recovery position. She had no interaction at all with Mr Bryant.

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11 T7-41, lines 13 – 42.
12 T8-4, line 19.
13 T8-7, lines 25 – 31.
14 T8-6, line 11.
15 T8-6, line 27.
16 T8-6, lines 40 - 41.
17 T8-7, line 43 – 46.

[12] Senior Constable Mark Dent of the QPS Forensic Crash Unit arrived at the scene of the accident at approximately 2pm and performed a crash investigation which required, inter alia, the taking of measurements, creating a forensic plan, photographing the scene and gathering evidence from video footage and witnesses.[18] Under cross-examination by Mr Myers of counsel who appeared for Mr Bryant, Senior Constable Dent accepted that there were no traffic or other advisory signs within the carpark.[19] Senior Constable Dent was also cross-examined about a green plastic foliage on the hood of Mr Bryant's utility. The following exchange occurred between him and Mr Myers:

> *But for the purposes of this case, the plant has no role to play or is what you ultimately determined?---It was never explained to me why it was there, it was unlawful to have it there and it was just one more thing to take away the plaintiff's view of possible obstructions.*
>
> *You didn't think it played a role, did you?---Well, as I said, it's one of the factors. There was quite a few - - -*
>
> *Well, you investigate - - -?--- - - - and that was just one. I'm sorry?---Well, that was just one. I mean, you know, it was never explained to me why it was there. If someone wanted to say to me, "Look, this is why it was there", I'm perfectly happy to listen, but no one wanted to explain it, no one – it's just there. And if you sit in the vehicle in a certain position, you do find yourself having to look through it and it's just one of the many obstructions or factors involved.*
>
> *But it didn't obstruct vision at all?---Well, I wouldn't agree with that.*
>
> *Well, why did you say it in your statement?---Well, I said it doesn't obstruct the vision of someone of the driver's height looking forward, and I mean his eye height looking forward - - -*
>
> *Yes?--- - - - not looking down. That's a different story.*
>
> *Even less would it obstruct vision looking to the left. Even less so would it obstruct vision looking to the left?---It would depend on where the vehicle is and where the pedestrian is. They're the – you know, I'm sure it'll line up somewhere. I'm just saying it's one factor.*[20]

[13] Mr Timothy Woodcock is a QPS Senior Forensic Recording Analyst. Upon examining the CCTV images and applying a nine step methodology, Mr Woodcock ultimately concluded that the speed of Mr Bryant's utility at around the time of the accident was about 12.4km/hr. Allowing for margins of error, Mr Woodcock

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18 T6-62, line 36. See also Exhibit 2, Tab 3.

19 T6-68, line 30.

20 T6-72, line 46 – T6-73, line 27. Photographs of the green foliage was marked Exhibits 3 and 4.

assessed that Mr Bryant's utility was travelling somewhere between 11 – 14 km/hr.[21] Mr Woodcock did not conduct an analysis into the deceased child's movements; rather his focus related to the travelling speed of the utility at around the time of impact.[22]

[14] On multiple occasions throughout the course of the trial, the CCTV footage of the accident was played. The quality of the CCTV was not ideal but it assisted with the narrative of the tragic circumstances of the accident.[23] The CCTV assisted in identifying the path of travel of Mr Bryant's utility as well as the child. It showed the utility not swerving or changing its position of travel. It also showed the utility some distance from the bollards and the child progress out onto the pedestrian crossing before impact.

[15] At this juncture, in addition to the agreed facts,[24] I make the following factual findings:

(a) Hungry Jack's had car parking facilities which were located throughout the Hungry Jack's complex.[25]

(b) There was, among other things, a 'drive through' facility whereby vehicles could enter the premises and proceed on a designated path so as to order and receive food from the restaurant without leaving their vehicle ("the drive through facility").[26]

(c) The design of the entry to Hungry Jack's from Ipswich Road was such that:

(i) Motor vehicles could enter the premises from Ipswich Road via a 4.5 metre wide one-way entry driveway which was angled at approximately 60 degrees and described as a half C1 type driveway ("the driveway").[27]

(ii) In the direction of travel from the entrance of the driveway towards the eastern side of the carpark, there was situated a pedestrian crossing ("the pedestrian crossing").

(iii) The pedestrian crossing led from the northern side of the carpark to the restaurant.

(iv) Drivers entering the carpark from Ipswich Road intending to enter the 'drive through' facility needed to travel over the

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21 Exhibit 39, especially pages 14, 16 and 34.
22 T6-100, line 10 and T6-101, lines 7 – 14.
23 Exhibit 2, Tab 1.
24 Exhibit 1.
25 Exhibit 2 (Agreed Bundle) Photograph pages 19, 20, 21; Exhibit 17; There were car parking bays immediately on the left both before and after the pedestrian crossing. The carpark contained numerous other parking bays in various positions as a driver heads east into the carpark.
26 Agreed Fact 7; Exhibit 2 (Agreed Bundle) page 19.
27 See Agreed Fact 26 and later in these reasons - description of driveway as contained in report of Mr Pekol dated 12 June 2017 Exhibit 31 at page 16.

pedestrian crossing and then turn right into the drive though facility.[28]

(d) Depending on the precise position at which the measurement is taken, the distance from which a driver upon entry to the driveway could view the pedestrian crossing was approximately 15 metres.[29]

(e) On the day of the accident, the weather was relatively fine and the visibility was clear.[30]

(f) Mr Bryant intended to go through the drive through to purchase food.

(g) Mr Bryant had attended at the premises approximately five times prior to the accident.

(h) Mr Bryant was well aware of the existence of a children's play area immediately adjacent to the restaurant.

(i) Mr Bryant was well aware of the existence and location of the pedestrian crossing.

(j) Mr Bryant was aware children and adults may be in the vicinity of the pedestrian crossing and carpark.

(k) The pedestrian crossing was clearly marked with painted yellow stripes.[31]

(l) There were two bollards, also painted yellow, on the northern side of the pedestrian crossing through which pedestrians must pass in order to enter onto that part of the pedestrian crossing which traversed the driveway.[32]

(m) The stripes on the pedestrian crossing prior to the bollards are wider (1.94 metres) than that part which traversed the pedestrian crossing (1.70 metres).[33]

(n) That part on the pedestrian crossing in which the stripes are wider is positioned adjacent to a parking bay on the approach side from Ipswich Road.[34]

(o) There was a person in a vehicle in the drive through upon Mr Bryant's utility entering the premises.[35]

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28 Agreed Fact 15

29 Exhibit 2, Agreed Bundle, page 23.

30 The photographs all suggest the weather was clear and no witness indicated there were any weather related difficulties.

31 Exhibit 2, Agreed Bundle, page 8 and exhibits 19 and 21.

32 Exhibit 2, Agreed Bundle, pages 8 – 11 and exhibits 19 and 21.

33 Ibid.

34 Exhibit 2, Agreed Bundle, pages 10, 11 and 19 and exhibits 19 and 21.

35 Exhibit 2, Agreed Bundle, CCTV.

(p) There was a sedan which had been reversed into the parking bay at the time of the accident ("the parked car").[36]

(q) The parked car was parked such that the front of the parked car did not extend as far as the line of the bollards. Consequently there was a gap between the bollard closest to the carpark and the front of the parked car.[37]

(r) Mr Bryant's utility was of a higher driving height than the front of the parked car because it was a 4WD and the parked car was a sedan.

(s) The deceased child and his mother were approaching the restaurant on the pathway from the Ipswich Road end of the premises. The pathway proceeded in an easterly direction and was parallel to, but entirely separate from, the driveway.[38]

(t) At a point consistent with the pedestrian crossing, the pathway turned right at 90 degrees and proceeded in a southerly direction for about 2-3 metres before meeting the first part of the pedestrian crossing (in advance of the two bollards).[39]

(u) That part of the pedestrian crossing which traversed the driveway after the yellow bollards was 1.7 metres wide and consisted of six yellow stripes.[40]

(v) The distance from the bollards to the playground area across the pedestrian crossing was 6.74 metres.[41]

(w) The child had moved ahead of his mother along the pathway as they approached that area in advance of the commencement of the pedestrian crossing.[42]

(x) The child proceeded out between the two bollards on to the exposed part of the pedestrian crossing heading in the direction of the restaurant.[43]

(y) The child did so without stopping or checking for any vehicles.[44]

(z) The position of the parked car permitted Mr Bryant, if paying attention to the pedestrian crossing, to have a view of the deceased child as he approached the bollards and before entering that part of the pedestrian crossing which traversed the driveway.[45]

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36 Exhibit 2, Agreed Bundle, CCTV.
37 Ibid.
38 Exhibit 2, Agreed Bundle, pages 6 and 7 and CCTV.
39 Exhibit 2, Agreed Bundle, page 7.
40 Exhibit 2, Agreed Bundle, pages 8 and 10.
41 Exhibit 2, Agreed Bundle, page 23.
42 T7-39, lines 44 – 45.
43 T7-40, lines 39 – 40; T7-52, lines 33 – 40.
44 Exhibit 2, Agreed Bundle, CCTV; T7-40, lines 5 – 7, 39 – 40 and T7-52, lines 33-40.
45 Exhibit 2, Agreed Bundle, CCTV.

(aa) The speed of Mr Bryant's utility upon the entry to the premises was within the range of 10 km/hr (2.777m/s) to 14 km/hr (3.888 m/s).[46]

(bb) Mr Bryant's utility had braked and slowed down upon entry from Ipswich Road to the driveway.[47]

(cc) There was a slight decline in the driveway towards the pedestrian crossing.[48]

(dd) After entering the premises from the driveway access off Ipswich Road Mr Bryant's utility proceeded in one motion through the pedestrian crossing without making any attempt to brake.[49]

(ee) Mr Bryant's utility proceeded on a path where it was positioned in approximately the middle of the roadway as it passed through the pedestrian crossing.[50]

(ff) The child had proceeded approximately 1.5 to 2 metres out past the bollards onto the pedestrian crossing when he was struck by Mr Bryant's utility.[51]

(gg) The point of impact was approximately between the second and third yellow stripes from the northern side of the pedestrian crossing.[52]

(hh) The point of impact was on the left-hand front (passenger) side of Mr Bryant's utility.

(ii) Mr Bryant was distracted by something within his utility which, after entry, caused him to look up and down as he drove the utility towards the pedestrian crossing.[53]

(jj) Mr Bryant maintained a speed of approximately 10 to 12 km/hr as his utility proceeded through the pedestrian crossing.[54]

(kk) Mr Bryant continued to look up and down at something in the utility after proceeding through the pedestrian crossing.[55]

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46 Exhibit 39.
47 Exhibit 2, Agreed Bundle, CCTV; T1-56, lines 10 – 17 and T1-83, lines 7 – 20.
48 See for example T9-39, lines 15 – 30.
49 Exhibit 2, Agreed Bundle, CCTV; T7-40, lines 24 – 27, 41-42, T7-55, lines 1 – 20.
50 Exhibit 2, Agreed Bundle, CCTV and pages 12 and 19; T7-47, lines 37-43.
51 Exhibit 2, Agreed Bundle, CCTV and page 12; T7-40 and T7-44.
52 Exhibit 2, Agreed Bundle, page 12.
53 T7-40, lines 24 – 27.
54 Exhibit 39.
55 T5-8, lines 23 – 25; T5-35, lines 7-16 and 35-46; T5-38, lines 5 – 20 and 28 – 36.

(ll) There were other customers present in the carpark who stepped in front of the utility to cause it to be brought to a stop.[56]

(mm) The front of the utility came to a halt approximately 9 metres past the end of the pedestrian crossing.[57]

(nn) Mr Bryant did not comprehend why the utility was brought to a halt or what the concerns of the customers were.[58]

(oo) Mr Bryant then became aware that the concerns from the customers related to a child being located under his utility.[59]

(pp) Mr Bryant at the time of entry to the carpark had earphones in each ear which were connected to a mobile telephone.[60]

(qq) The earphones remained in Mr Bryant's ear and connected to his mobile telephone the entirety of the period he was driving the utility within the complex.[61]

(rr) Mr Bryant was told by persons in the carpark that he must reverse the utility.[62]

(ss) The persons were telling Mr Bryant to reverse prior to him alighting but he did not comprehend what was being said to him.[63]

(tt) Mr Bryant then caused his utility to reverse slightly.[64]

(uu) The child was then revealed, and was still alive, but eventually passed away at the scene.[65]

(vv) Mr Bryant did not hear any sound upon impacting the child.[66]

(ww) Other persons external to the utility, like Ms Yu, heard a loud noise on impact.[67]

(xx) Mr Bryant perceived there was some difficulty with his front left-hand tyre and that his gearbox may have failed.[68]

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56 T5-8, lines 23-25 and T7-41, lines 35-45.
57 Exhibit 2, Agreed Bundle, page 23.
58 T7-41, lines 35-45; T5-9, line 19.
59 T5-9, lines 19-20; T7-41, lines 22-45.
60 T1-86, lines 7-15.
61 Evidence of Mr Bryant and witnesses Mr Skennar and Ms Yu.
62 T5-9, line 24 and T7-41, lines 35-45.
63 Evidence of Mr Bryant with T5-9, lines 4-24; T7-41, lines 35-45
64 T5-9, line 24 and T7-41, lines 35-45.
65 T8-7, lines 5 – 10.
66 T1-105, lines 12 and 22-29.
67 T5-77, lines 26-44.
68 T1-58,lines 17-28 and Exhibit 2, Document 4.

(yy) There was a skid mark, which was caused by the utility's front left wheel, consequent upon the utility's impact with the child.[69]

(zz) Mr Bryant still had the earphones in his ears when he alighted from his utility.[70]

(aaa) For the duration of Mr Bryant's time in the Hungry Jack's carpark, there was green plastic foliage on his utility's hood/windscreen, towards its left centre.[71]

Planning Approval of the Driveway and Carpark

[16] Mr Jack Van De Ven is one of the Architects' current principals. He is a registered architect of some 30 years standing and commenced with the Architects in 1988. More relevantly in 1999, the Architects, under his direction and supervision, were retained by Hungry Jack's to provide architectural services for extensions and modifications to the existing Annerley store ("the 1999 retainer").[72] He personally carried out all of the relevant work or, at the very least, the work was done under his direction and supervision.[73]

[17] Prior to the 1999 retainer, Mr Van De Ven provided architectural services to other Hungry Jack's stores given his firm held a retainer since the mid-1980s.[74] He said:

> *In that time, we'd been doing all of their Queensland stores in that period, probably in excess of 50 carparks for fast food stores and a variety of carparks for retail and industrial developments.*[75]

[18] By 1999 he had designed *"well in excess of 100"* carparks. About half did not proceed beyond *"sketched plans"*. To his knowledge, the carparks that he designed (either as at 1999 or thereafter) had not had any workplace health and safety incidents.[76]

[19] Mr Van De Ven said that he received oral instructions with respect to the 1999 retainer requiring the following works to Hungry Jack's:

(a) a covered outdoor play area;

(b) an additional outdoor dining area adjacent to the new outdoor play area;

(c) a second drive though service window, including a redesign of the associated window modules; and,

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69 Exhibit 2, Agreed Bundle, pages 13, 14, 15 and 18 and given this was where the child was impacted and located.
70 T5-36, lines 1-7, T5-11, line 38 – T5-12, line 12 and T7-41, lines 22-25.
71 Exhibits 3 and 4.
72 See generally T9-27 – T9-28. See also T9-31, line 5.
73 See T9-31, line 5 and 9-36, lines 10-15.
74 T9-28, line 5.
75 T9-28, lines 5 - 8.
76 T9-28, lines 18 - 20.

(d) an internal dedicated party room.[77]

[20] An application for development approval was required given the works involved an extension to the existing building.[78] Mr Van De Ven was instructed to pursue the application to the BCC.[79]

[21] Consequently on or about 20 September 1999, the Architects submitted a development application to the BCC for *"extensions and alterations to existing fast food store"* at 574 Ipswich Road Annerley ("the application").[80] The application attached the Architects' architectural plans 2020-50A-TPl and TP2 dated 31 August 1999 ("the Architectural Plans") that showed the retrofitting to the restaurant of:

(a) a covered outdoor play area;

(b) an additional outdoor dining area adjacent to the new outdoor play area and to the area recovered from the existing outdoor play area;

(c) a second drive through service window including a redesign of the associated service window modules; and

(d) an internal dedicated party room.[81]

[22] In response to the application, on 18 October 1999, the BCC provided an information request ("the Information Request").[82] The Information Request stated inter alia:

(a) *"the applicant is requested to submit amended drawings which provide for safe and convenient movement of pedestrians from the existing car parking area along the eastern boundary of the site into the restaurant; and*

(b) *the applicant is requested to demonstrate compliance with section 19.10 of the Transitional Planning Scheme in respect of non-discriminatory access"*.

[23] The Architects responded to the Information Request by way of letter dated 26 October 1999 ("the Response").[83] Notably the response attached eight copies of the amended architectural plans 2020-50A-TP1A and 2020-50A-TP2A ("the Amended Architectural Plans"). Mr Van De Ven said that he amended the original drawings to embody the responses to the Information Request. He said the design principles which he applied in deciding upon the location of the pedestrian crossing complied with the non-discriminatory access in accordance with section 19.10 of the Transitional Planning Scheme and the relevant standards, namely AS2890.1 and

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77 See for instance T9-28, lines 40 to 47.
78 T9-30, lines 16 – 19.
79 T9-30, line 21. The BCC was the "assessment manager: for the application pursuant to section 3.1.7 of *IPA*: Exhibit 1, Agreed Fact 19.
80 Exhibit 1, Agreed Fact 18. See also Exhibit 61. See also T9-6, lines 5 – 18.
81 Exhibit 1, Agreed Fact 20. See also Exhibit 68 and T9-31, line 13. See further Exhibit 62 and T9-7, lines 3 – 29.
82 Exhibit 1, Agreed Fact 21(a) and (b). See also Exhibit 59.
83 Exhibit 1, Agreed Fact 22(b). See also Exhibit 53. See also generally at T9-36 – T9-39.

Council Planning Policy 18.06.[84] The following exchange occurred between Mr Van De Ven and Mr Baartz of counsel who appeared for the Architects:

> *In terms of the pedestrian crossing, Mr Van De Ven, which comes off the pathway from Ipswich Road, can you please identify, from a design perspective, the principles you took into account in placing the driveway in that location?---So we had to comply – we had to comply with disabled access, so that is both ambulance - - -*
>
> *Sorry. Could you say that again?---We had to comply with disabled access - - -*
>
> *Yes?--- - - - non-discriminatory access, so ambulance and wheelchair bound people, so we must comply with certain Australian standards for gradients, crossfalls, direction. And then we also had to address the design of a carpark in compliance with the council planning policy 18.06 and Australian standard for the design of carparks, take into consideration sight lines, pedestrian and vehicle movements, and work out – work through that design process.*
>
> *And applying those principles, did that indicate to you that this was the appropriate placement for the pedestrian crossing?---Working through the policy and the Australian standard, addressing sight lines, addressing vehicle movements, we thought that was the most appropriate location, yes.*
>
> *And as to the discriminatory access side of it, why – did you form the view that this also complied with the requirements under section 19.10?---We did.*[85]

[24] I formed the impression that Mr Van De Ven was a credible and reliable witness who was well versed in the processes which were undertaken in respect of the driveway, carpark and placement of the pedestrian crossing.

[25] Mr Rory Kelly, who was the BCC's senior town planner at the time of the application of the redesign of the carpark in September 1999, gave evidence.[86] He was ultimately the most senior person in charge of the approval process for the BCC, although he did not have the daily carriage of this redevelopment proposal as such.

[26] Mr Kelly reviewed the documents on the BCC's file pertaining to this development. A series of documents were tendered through him.[87]

[27] Mr Kelly detailed the process of applications of a similar nature (as at 1999 and 2000). He said once an application was received, it was usually dealt with by a multidisciplinary team consisting, if necessary, of a town planner, administration officer, engineer, architect, an ecologist, a landscape architect and an environmental pollution officer. Collectively members of the multidisciplinary team would assess

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84 See T9-38 - T9-39. See also Exhibit 69 for the wording of 19.10.

85 T9-38, line 40 – T9-39, line 14.

86 T8-18, line 18.

87 Exhibits 46 – 57 and 58 – 59.

the application.[88] Where specific engineering input was required, such input would be sought by the town planning approval team from relevant council engineering sections (including traffic engineers).

[28] Mr Kelly said that this redevelopment proposal involved an assessment manager, an architect, a landscape architect and a traffic engineer.[89] Mr Kelly said that initially BCC traffic engineer Mr Gordon Tong looked at the redevelopment proposal and did not consider any conditions were required from a traffic engineering perspective.[90] The assessment manager at the time, Mr Richard Hurl, sought an opinion from Mr Stephen Anderson, who was a general engineer.[91] Conditions were recommended by him in December 1999. Those conditions were then part of Mr Hurl's submission that went to Mr Shane Howard (who was Mr Kelly's delegate as Mr Kelly was on leave).

[29] On 11 January 2000, the BCC approved the Application in accordance with section 3.5.15 of the *Integrated Planning Act* 1997 subject to conditions and in accordance with the Amended Architectural Plans.[92] BCC's Mr Howard (who was acting as Mr Kelly's delegate) approved the Application with conditions in January 2000.[93] Mr Howard signed the decision and issued the approval conditions on 12 January 2000.[94] Not unsurprisingly, some 12 – 18 years after the approval process, Mr Howard had no independent recollection of his role in this approval process.[95] Nonetheless he gave the following evidence about the process of approvals at the relevant time:

> *….The process would be looking at the file, looking at the – the plans that were submitted originally, looking at the plans that are being proposed to be approved, looking at the proposed conditions and the recommendation from the assessment manager to – to the delegate, which was me at that particular time. So just comparing different plans, perhaps looking at the information request that was sent out to the applicant, and the response, and just making an assessment of if that approval was an appropriate thing to do and the conditions are appropriate, checking conditions, that kind of thing.*
>
> *I see. And the documents you just referred to there they would have been on some kind of file, would they, the - - -?---On the council file. Yes.*
>
> *And you – it would be that file that you would have regard to to check compliance for the purpose of making your decision?---Yes.*
>
> *I see. And that process, it may be similar to asking you how long a piece of string is, but was there a general timeframe engaged in that sort of process as a delegate?---Not a set timeframe, because it takes however long it takes. I mean, complex applications would take*

88 T8-20, lines 27 – 31.
89 T8-20, lines 35 – 39 and T8-23, line 15.
90 Exhibit 63.
91 T8-23, line 23. See also Exhibit 63.
92 Exhibit 1, Agreed Fact 23. See also Exhibit 70.
93 T9-4, lines 17 - 29.
94 Exhibit 64.
95 T9-4, line 35.

> *longer. This one might have taken, you know, half an hour tops. You know, it wouldn't have taken very long.*
>
> *And as the delegate did you have the carriage of any of the matters relating to the application before it arrived on your desk?---No. I wouldn't have seen it before it got to my desk, it's – especially as I was only acting.*
>
> *And you mentioned someone called an assessment manager. What role did they have in the carriage of the application before it arrived to you?---Yeah. Well, they would have been allocated the application to manage all the way through. So coordinating the different professionals on the team. They would have coordinated the engineer, the architect, landscape architect, etcetera, and assess the application in terms of the planning scheme all the way through. Dealt with the applicant, sent an affirmation request, got responses, drafted up conditions – all those things to prepare a submission to the delegate - - -*[96]

[30] Mr Van De Ven indicated that the approval was subject to certain conditions, including that further landscaping work be carried out.[97] He gave evidence that after having received BCC's decision, he then met with representatives of Hungry Jack's where the BCC approval was discussed. The representatives of Hungry Jack's who were present at that meeting raised their desire to revise vehicular access alignment from Ipswich Road (in other words, the crossover).[98] Consequently the Architects prepared a drawing depicting a new crossover into the Hungry Jack's carpark from Ipswich Road.[99]

[31] On 21 March 2000, the BCC sent a facsimile communication to the Architects enclosing a document entitled "Section B Design Requirements ("the Design Requirements").[100]

[32] By the Design Requirements, the BCC instructed the Architects to document the design on the vehicle access to the property from Ipswich Road in accordance with C1 driveway dimensions and the sketch documented in the Design Requirements.[101]

[33] The sketch documenting the Design Requirements referred to above was consistent with C1 driveway dimensions and depicted the driveway as:

(a) one way entry only from Ipswich Road;

(b) a sixty degree angle; and

(c) 4.5 metres wide.[102]

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96 T9-4, line 46 to T9-5, line 31.
97 T9-40.
98 See for example Exhibit 71 and T9-41.
99 T9-43, line 10 and exhibits 50 and 50.1.
100 Exhibit 1, Agreed Fact 24. See also Exhibit 49.
101 Exhibit 1, Agreed Fact 25.
102 Exhibit 1, Agreed Fact 26 See also Exhibit 74.

[34] On 27 March 2000, the Architects provided the BCC with a sketch of the driveway in accordance with the Design Requirements.[103]

[35] On 28 March 2000, the Architects spoke to Mr Kelly, BCC's Senior Town Planner ("the Conversation") wherein:

(a) Mr Kelly advised the Architects that he wanted to retain the alignment of the driveway and reduce the width of the driveway;

(b) The Architects suggested that a traffic engineer be engaged to visit the site and make recommendations for submission to the BCC; and

(c) Mr Kelly advised the Architects that he was prepared to review an engineered solution.[104]

[36] After the Conversation, on or around 28 March 2000, the Architects, on behalf of Selden Pty Ltd, engaged Beard Traffic Engineering Pty Ltd, a traffic engineering company, to provide advice on the desirability, in traffic planning terms, of the driveway.[105]

[37] On 5 April 2000, Beard Traffic Engineering Pty Ltd provided advice ("the Traffic Engineer's Advice").[106]

[38] On 5 April 2000, the Architects forwarded the Traffic Engineer's Advice to the BCC.[107]

[39] On 8 May 2000, the BCC sent a facsimile to the Architects advising that the BCC approved the driveway as depicted on sketch 1 attached to that facsimile.[108]

[40] In accordance with the approval from the BCC on 11 January 2000, as refined by the subsequent approval of the final plans on 8 May 2000, the development works were conducted in or about 2000.[109]

[41] Mr John Jukes was intended to be called by the BCC; but illness prevented him from giving evidence. Instead in an affidavit tendered before the Court, Mr Jukes stated that he had no independent recollection of the particular application. The affidavit addressed Mr Jukes' limited role in the process including the fact that he sought advice from traffic engineers, namely Mr Rod Mogg, in the course of his conduct of the approval file.[110]

[42] Expert evidence regarding liability was led from engineers Mr John Jamieson and Mr Adam Pekol and architect Mr Ross Carseldine. Such evidence will be referred to later in these reasons.

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103 Exhibit 1, Agreed Fact 27. See also Exhibit 75.
104 Exhibit 1, Agreed Fact 28. See also Exhibit 76.
105 Exhibit 1, Agreed Fact 29. See also Exhibits 76 and 77.
106 Exhibit 1, Agreed Fact 30. See also Exhibit 81. See further for example Exhibits 78, 79 and 80
107 Exhibit 1, Agreed Fact 31. See also Exhibit 82.
108 Exhibit 1, Agreed Fact 32. See also Exhibit 47.
109 Exhibit 1, Agreed Fact 33.
110 Exhibit 44, affidavit of Mr John William Jukes, sworn 28 August 2018. I note the BCC also took sufficient steps to attempt to contact other relevant witnesses: see Exhibit 45, affidavit of instructing solicitor Ngaire Elizabeth Wegner, sworn 29 August 2018.

Duty of Care

[43] Whilst Hungry Jack's conceded that it owed Mr Bryant a duty of care, BCC and the Architects contend that neither of them owed Mr Bryant a duty of care.

Duty of Care – Hungry Jack's

[44] Hungry Jack's admit that it owed a duty to take reasonable care for the safety of entrants upon its premises because it occupied and controlled the site where the accident occurred and was responsible for the day-to-day operations – not only regarding the restaurant, but of the carpark and pedestrian access within the property. It properly conceded that it had a duty to take care to minimise the risk of a foreseeable injury to persons who entered upon the property.[111] The issue though becomes whether the duty extends to cases of pure psychiatric injury in circumstances where the plaintiff himself is the driver of the motor vehicle which causes death or injury to another person and subsequently suffers psychiatric injury as a consequence of that accident. Hungry Jack's accepted that it was open to the court to find the duty of care extended to taking reasonable care to avoid the possibility of a patron on the premises suffering psychiatric injury from being involved in, or observing, a serious accident.[112] I shall proceed on that basis.

Duty of Care – BCC

[45] It was pleaded on Mr Bryant's behalf that the BCC, as the assessment manager for the development application at the time that the development was being planned and undertaken, owed a duty to the public, including Mr Bryant, to:

(a) exercise its statutory powers conferred by the *Integrated Planning Act* 1997 in respect to the application with reasonable care;

(b) avoid imposing on development applicants, obligations which gave rise to reasonably foreseeable risks to the general public, including the plaintiff;

(c) comply with relevant planning schemes and codes (collectively 'the Schemes');

(d) comply with the AS2890.1 – 1986 'Off Street Parking Facilities' Standard and/or the AS1742 – 1999 'Manual of Uniform Traffic Control Devices (Part 10: Pedestrian control and protection)' Standard (collectively 'the Standards').

[46] It was submitted on Mr Bryant's behalf that the duty imposed upon the BCC was akin to that considered by Beech-Jones J in *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280.[113] However that submission is misconceived because *Lee v*

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111 See for example *Brisbane Youth Centre Inc. v Bevan* [2017] QCA 211 at [186]. See also the Further Amended Defence of the First Defendant at [6], namely that Hungry Jack's pleaded that it owed a duty to entrants to take reasonable care for the safety of entrants upon its premises.

112 I was referred to *Tame v State of New South Wales* (2002) 211 CLR 317 at [49]-[52], [66]; *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60 at [25]-[26] and s 9(1) of the *Civil Liability Act* 2003.

113 Plaintiff's written submissions at [42] and [43].

Carlton Crest is authority for the proposition that a council in its planning guise does not owe a duty of care. His Honour stated at [352] and [355] as follows:

> *[352] I agree, although the first inquiry for this court at first instance is to ascertain whether there is any authority establishing the existence of such a duty in the relevant circumstances and, if so, its scope and content (Makawe Pty Ltd v Randwick City Council [2009] NSWCA 412; 171 LGERA 165 at [17] per Hodgson JA (Makawe). Surprisingly, none of the parties' searches was able to uncover any authority concerning whether a council owed a member of the public who suffered physical harm (such as Mr Lee) or mental harm (such as Ms Lee) a duty to exercise reasonable care in relation to the power to approve DAs, BAs, conduct inspections and issue classification certificates or license car parks. As that inquiry has not yielded any answer, I am bound to address the matter in the manner stated by Hodgson JA in Makawe at [17] as follows:*
>
> > *[17] In my opinion, the approach to be taken in determining whether a duty of care exists, in circumstances where there is no authority establishing the existence of a duty of care, and if so its scope or content, is usefully summarised by Allsop P in Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 at [102]–[105] [(Stavar)] as follows:*
> >
> > > *[102] This rejection of any particular formula or methodology or test the application of which will yield an answer to the question whether there exists in any given circumstance a duty of care, and if so, its scope or content, has been accompanied by the identification of an approach to be used to assist in drawing the conclusion whether in novel circumstances the law imputes a duty and, if so, in identifying its scope or content. If the circumstances fall within an accepted category of duty, little or no difficulty arises. If, however, the posited duty is a novel one, the proper approach is to undertake a close analysis of the facts bearing on the relationship between the plaintiff and the putative tortfeasor by references to the "salient features" or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury.*
> >
> > > *[103] These salient features include:*
> > > *(a) the foreseeability of harm;*
> > > *(b) the nature of the harm alleged;*
> > > *(c) the degree and nature of control able to be exercised by the defendant to avoid harm;*

(d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;

(e) the degree of reliance by the plaintiff upon the defendant;

(f) any assumption of responsibility by the defendant;

(g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;

(h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;

(i) the nature of the activity undertaken by the defendant;

(j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;

(k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;

(l) any potential indeterminacy of liability;

(m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;

(n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;

(o) the existence of conflicting duties arising from other principles of law or statute;

(p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and

(q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

[104] There is no suggestion in the cases that it is compulsory in any given case to make findings about all of these features. Nor should the list be seen as exhaustive. Rather, it provides a non-exhaustive universe of considerations of the kind relevant to the evaluative task of imputation of the duty and the identification of its scope and content.

> *[105] The task of imputation has been expressed as one not involving policy, but a search for principle: see especially Sullivan v Moody [2001] HCA 59; (2001) 207 CLR 562] at 579 [49]. The assessment of the facts in order to decide whether the law will impute a duty, and if so its extent, involves an evaluative judgment which includes normative considerations as to the appropriateness of the imputation of legal responsibility and the extent of thereof. Some of the salient features require an attendance to legal considerations within the evaluative judgment.*
>
> ...
>
> *[355] One discrete form of statutory power exercised in this case was the power to grant development approval. I have described the criteria involved in the exercise of that power above. It was not suggested that any aspect of the statutory scheme involves any consideration being given to the personal safety of users or occupants of buildings the subject of the proposed development. In my view it was not reasonably foreseeable that a failure to exercise reasonable care in granting development approval could result in physical or psychiatric injury to a user or occupant of any building constructed as a consequence. It follows that the Council did not owe either Mr Lee or Ms Lee or other potential users of the car park a duty to exercise reasonable care in granting development approval under s 91 of the EPA Act.*

[47] Further Beech-Jones J did not have the benefit of an earlier decision of *Becker v Sutherland Shire Council* [2006] NSWCA 344 where the New South Wales Court of Appeal reviewed existing authorities in Australian jurisdictions relating to actions in negligence against local governments arising out of council approval processes. The Court held that no duty of care was owed by the appellant council to the respondent property owner as a result of subdivision approval and the imposition of drainage and fill conditions, in circumstances where water inundation and land spillage eventually caused property damage to a neighbouring property.

[48] A duty of care is not owed by council in its guise of a planning approval council, as opposed to, for instance, a road authority.[114] The issue is compounded too given a legally recognised duty of care to avoid pure psychiatric injury is in a different class or category to a duty of care to avoid reasonably foreseeable physical injury.[115]

[49] In reliance upon Allsop P's "salient features" test in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at [102] – [105] (as identified above), it was submitted by the BCC that, in the present case the subject pedestrian crossing was on privately owned land, and in no way under the control of the BCC. After the subject approval under the then *Integrated Planning Act* 1997, BCC had no role in the

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114 See for instance, *Theden v Nominal Defendant* [2004] QSC 310.

115 See, for example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 262 [14] and *Tame v New South Wales* (2000) 211 CLR 317 at 328-329, 348 and 430.

construction of the pedestrian crossing, let alone its maintenance. Therefore no duty could apply. I respectfully agree.

[50] I also accept the submission advanced on behalf of the BCC that, in the circumstances, there is a complete absence of any control by the BCC over the subject works. This contradicts the existence of a duty of care of the BCC in relation to its planning approval.

[51] Matters of vulnerability and reliance (both general and specific) could not be said to have application in the present case because, in my view, the subject approval concerned modifications to the subject premises. Included in the approval process was a request for information relating to aspects of traffic and pedestrian access and egress and a response to that request, and these were addressed to provide conformity with relevant standards.[116] Mr Bryant, as a motorist using the subject premises, had no communications with, or exhibited, any reliance upon BCC's approval of the redesigned drive-through facility.

[52] Further in light of the authorities, I accept the submission advanced that a council approving the configuration of a driveway access to a private commercial carpark, and a pedestrian crossing on the circulation aisle of such a carpark, is entitled to expect that the drivers entering the carpark will watch where they are going and keep an appropriate lookout for pedestrians in the carpark.[117]

[53] Additionally, the case as pleaded against the BCC concerned allegations of breach of a duty relating to the BCC's approval processes mandated by the *Integrated Planning Act* 1997. The *Integrated Planning Act* 1997 does not identify the existence of an actionable duty of care of the statutory powers conferred by that enactment. No reference is made to payment of compensation, the bringing of proceedings (apart from reviewing approval decisions in the Planning and Environment Court) or the provision of resources for the payment of compensation to adversely effected parties.

[54] It is in those circumstances that I find the duty as advanced on behalf of Mr Bryant fails and that the BCC did not owe a duty to Mr Bryant in the exercise of its statutory approval powers (including the imposition of conditions) in relation to the redevelopment of the Hungry Jack's site at Annerley over the period September 1999 to May 2000.

Duty of Care – The Architects

[55] As was observed by French CJ and Gummow J in *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 371-372 (footnotes omitted):

> *[T]he formulated duty must neither be so broad as to be devoid of meaningful content, nor so narrow as to obscure the issues required for consideration. With respect to the latter, Gummow and Hayne JJ in Graham Barclay said:*

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116 Exhibit 1, Agreed Fact 21(a) and (b). See also Exhibit 59.

117 See *Sutherland Shire Council v Becker* [2006] NSWCA 344, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530, [23] and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at [80].

> *A duty of care that is formulated retrospectively as an obligation purely to avoid the particular act or omission said to have caused loss, or to avert the particular harm that in fact eventuated, is of its nature likely to obscure the proper inquiry as to breach.*
>
> *...But where the relationship falls outside of a recognised relationship giving rise to a duty of care, or the circumstances of the case are such that the alleged negligent act or omission has little to do with that aspect of a recognised relationship which gives rise to a duty of care, a duty formulated at too high a level of abstraction may leave unanswered the critical questions respecting the content of the term "reasonable" and hence the content of the duty of care. These are matters essential for the determination of this case, for without them the issue of breach cannot be decided. The appropriate level of specificity when formulating the scope and content of the duty will necessarily depend on the circumstances of the case.*

[56] Further in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 289 – 290, Hayne J stated (footnotes omitted):

> *Because the extent of a duty falls for decision in relation to "concrete facts arising from real life activities" it will not always be useful to begin by examining the extent of a defendant's duty of care separately from the facts which give rise to a claim. That may be possible and useful in a simple case (like motorist and injured road user) where the duty of care and its content are well established. In other cases, however, it may lead to an insufficiently precise formulation of the duty which obscures the issues that require consideration. That lack of precision may lie in formulating the duty too narrowly: for example, by asking did the defendant owe a duty of care to fence the part of the cliffs in its reserve from which the plaintiff fell? It may also, as in this case, lie in formulating the duty too broadly: for example, by asking did the defendant owe any duty of care to the plaintiff?*

[57] It was pleaded on behalf of Mr Bryant that at the time that the development was being planned and undertaken, the Architects owed a duty of care to the public at large, including Mr Bryant, to:

(a) take reasonable steps to ensure that the driveway and carpark for the development was designed safely and appropriately;

(b) take reasonable steps to ensure that the configuration of the carpark, including a drive-through food facility, was appropriately designed;

(c) take reasonable steps to ensure that the pedestrian access including the zebra crossing for the development was designed safely and appropriately;

(d) take reasonable care in undertaking the design and construction of the driveway and the carpark on the property;

(e) where necessary, to engage appropriate experts to advise on the appropriateness or otherwise of the development;

(f) comply with the Schemes;

(g) comply with the Standards.

[58] The Architects denied that a duty of care was owed in the manner alleged. Rather the Architects submitted that the duty of care owed by them to Mr Bryant was to exercise reasonable care and skill in the provision of the architectural services in respect of the matters within the scope of their instructions. The scope of the duty of care, however, did not extend to avoid causing pure psychiatric injury.

[59] The Architects were verbally engaged by Hungry Jack's to retrofit the following additions to the existing restaurant:

(a) a covered outdoor play area;

(b) an additional outdoor dining area adjacent to the new outdoor play area and to the area recovered from the existing outdoor play area;

(c) a second drive through service window including a redesign of the associated service window modules; and

(d) an internal dedicated party room.

[60] Architectural plans were prepared showing the additions.[118] After receiving the BCC's Information Request, the Architects added a pedestrian crossing to address the BCC's non-discriminatory access requirements which appeared in section 19.10 of the Transitional Planning Scheme. The new pedestrian crossing was added to the Amended Architectural Plans.[119] Following BCC approval, Hungry Jack's instructed the Architects to review the driveway into the premises from Ipswich Road. A C1 type driveway was prepared, following input, and subsequently approved.[120]

[61] Both Mr Bryant and the Architects rely upon the long-established High Court authority of *Voli v Inglewood Shire Council* (1963) 110 CLR 74. Windeyer J (with whom Dixon CJ and Owen J agreed) at 85 – 86 stated:

> *An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.*

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118 Exhibit 62.
119 Exhibit 65.
120 Exhibit 1, Agreed Facts 18 – 33.

> *In this case, however, the primary question does not arise from the duty that an architect has to his employer. It is whether the respondent architect had a duty to someone not his employer, a person with whom he had no contract at all, a person unknown to him personally whose only relationship with him was that he went into a building designed by him and built under his supervision. In the abstract the question, and it is an important question for architects, is can an architect be liable for negligence to a person who, after a building is finished and has been taken over by the building owner, lawfully enters it and, by reason of faults in its design and construction, comes to harm. Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in Donoghue v Stevenson, it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence.*
>
> *...*
>
> *...and what an architect must do to avoid liability for negligence cannot be more precisely defined than by saying that he must use reasonable care, skill and diligence in the performance of the work he undertakes.*
>
> *...*
>
> *First, neither the terms of the Architects' engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it.*

[62] It seems to me that the duty advanced on behalf of Mr Bryant would require an extension of the current authorities to include, within an architect's duty of care to the public, a duty to avoid causing pure psychiatric injury. Again a legally recognised duty of care to avoid pure psychiatric injury is in a different class or category to a duty of care to avoid reasonably foreseeable physical injury.[121]

[63] The High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 has articulated the scope of a designer's duty only in terms of avoiding

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[121] See, for example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 262 [14] and *Tame v New South Wales* (2000) 211 CLR 317 at 328-329, 348 and 430. See also *Sullivan v Moody* (2001) 207 CLR 562 at 567.

physical loss. Yet the case advanced on behalf of Mr Bryant seeks to extend the duty to avoid causing pure psychiatric loss.[122]

[64] In *Tame v New South Wales* (2002) 211 CLR 317, the High Court held that a duty of care to avoid pure psychiatric damage was inherently factual and that the threshold test was whether the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable.[123]

[65] Reasonable foreseeability has to be considered in the context of the facts of each case. And it should be understood and applied in the context of whether objectively it is reasonable for the defendant to add in contemplation the risk of injury that has occurred in the circumstances in which it has occurred.

[66] It was submitted by the Architects that the tragic accident was not reasonably foreseeable. In his closing, Mr Baartz for the Architects submitted:

> *The event was a confluence of extreme events, both of which were not reasonably predictable, but certainly the confluence of them certainly not so.*
>
> *Viewed objectively, in context, it was not reasonable for the [Architects] to have contemplated in 1999 and 2000 that the event which occurred 12 years later was the type of occurrence that a reasonable architect would have in their contemplation.*[124]

[67] I do not consider the risk of Mr Bryant sustaining a recognisable psychiatric illness was reasonably foreseeable because between 1999 and 2000 (when the Architects were engaged in the provision of the architectural services in respect of the matters within the scope of their instructions) the risk of a driver such as Mr Bryant tragically running over, fatally injuring a person and suffering a psychiatric injury, was a remote and far-fetched possibility.[125]

[68] Furthermore the reasonableness of imposing a duty of care in the circumstances of this matter must also be taken into account. This requires a consideration of the "salient features" of the case, as articulated by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at [102] – [105].[126] More relevantly the Architects properly, in my view, submitted the following "salient" features:

(a) Unlike claims of personal injuries against allegedly negligent architects arising from latent structural defects which were entirely within the architect's control, skill and expertise, the Architects lacked any real control over the circumstances giving rise to the accident.

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122 Per McHugh J at [56] and Kirby J at [132]. See also *Hill v Van Erp* (1997) 188 CLR 159 at 182-183 (Dawson J referring to a duty to not cause damage of a physical or economic kind).

123 See *Tame v New South Wales* at 331 (per Gleeson CJ), 384-385 (per Gummow and Kirby JJ), 401-402 (per Hayne J), 429 (per Callinan J). See also *Koelher v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

124 T10-16, lines 17 – 26.

125 See *Keohler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33]; *Sullivan v Moody* (2001) 207 CLR 562 at 576.

126 See earlier at [46] of these Reasons.

(b) The Architects had no control over and, cannot have assumed responsibility for:

(i) drivers in the carpark not using the carpark in a reasonable way, including by not driving with due care and attention and not keeping a look out whilst driving through the carpark, in particular on approach to, and whilst driving onto the pedestrian crossing in the carpark;

(ii) the fulfilment of a parent's duty with respect to their child or children; or,

(iii) pedestrians in the carpark not using the carpark in a reasonable way, including by using the pedestrian crossing without first checking it was safe to cross.

(c) Mr Bryant was not 'vulnerable' in his use of the carpark. He was not unable to protect himself from the alleged design defects in the driveway or carpark such as to cast upon the Architects responsibility for the consequences of the accident. He was alone in control of his utility, including its speed of travel, and was able to make an assessment as to how he ought proceed through the driveway and carpark and obviate any hazards.

(d) The user of any carpark is vulnerable to a person darting out between parked cars and thus Mr Bryant ought to have reasonably anticipated the presence of children in or around the carpark and have been in a state of heightened awareness, in particular as he approached the pedestrian crossing.

(e) The relationship between both Mr Bryant and the Architects, and Mr Bryant and the deceased child are both factors relevant as to whether a duty of care to avoid pure psychiatric injury was owed. A consideration of the relationships between the parties in the present matter militates against a duty being owed by the Architects.

(f) Moreover, a duty to avoid pure psychiatric harm has only been recognised in a limited number of "special" relationships between the plaintiff and the defendant, including relationships such as employer and employee, the operators of motor vehicles and cases involving medical negligence.[127]

(g) There was nothing "special" about the relationship between the Mr Bryant and the Architects. There was no connection between them save for Mr Bryant's allegations as to the Architects' negligent conduct alleged to have caused Mr Bryant's psychiatric illness.[128]

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127 See *Tame v New South Wales* at 340-341, [52], *Mount Isa Mine Ltd v Pusey* (1970) 125 CLR 383, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, *Hancock v Nominal Defendant* [2002] 1 Qd R 578 and *Kemp v Lyell McEwin Health Service* (2006) 96 SASR 192.

128 *Tame v New South Wales* at 413 [280].

(h) Any control the Architects had over the events on 26 April 2012 was too remote to give rise to actionable negligence for the harm alleged to have been suffered by Mr Bryant. To impose a burden on the Architects would be contrary to principle, such principle *"based upon considerations of practicality and fairness"*.[129]

[69] It is for those reasons that I find the duty as advanced on behalf of Mr Bryant must fail. Instead the Architects' duty to Mr Bryant was to exercise reasonable care and skill in the provision of the architectural services in respect of the matters within the scope of their instructions, which they did. The fact remains the scope of the duty did not extend to avoiding pure psychiatric injury.

Conclusions regarding Duty of Care

[70] In light of the above, I have concluded:

(a) Hungry Jack's owed Mr Bryant a duty to take reasonable care for the safety of entrants upon its premises to minimise the risk of a foreseeable injury (including psychiatric harm).

(b) The duty as advanced on behalf of Mr Bryant fails and the BCC did not owe a duty to Mr Bryant in the exercise of its statutory approval powers (including the imposition of conditions) in relation to the redevelopment of the Hungry Jack's site at Annerley over the period September 1999 to May 2000.

(c) The duty as advanced on behalf of Mr Bryant fails and the Architects owed a duty to exercise reasonable care and skill in the provision of the architectural services in respect of the matters within the scope of their instructions. The scope of the duty of care did not extend to avoid causing pure psychiatric injury.

Breach of Duty of Care

[71] Before dealing with any breaches, now is a convenient time to consider the relevant expert opinion, notably from Mr Adam Pekol, Mr Ross Carseldine and Mr John Jamieson.

Mr Adam Pekol, Engineer

[72] Mr Adam Pekol is a professional engineer with in excess of 30 years' experience. He has, among other things, designed or reviewed over 1,000 car parking layouts for both private and public sector clients.

[73] He prepared a report dated 12 June 2017.[130] Mr Pekol ultimately concluded:

(a) The design of the driveway reflected contemporary driveway design requirements for Brisbane, and as a result was successful in reducing the speed of Mr Bryant's vehicle as it entered the restaurant carpark from Ipswich Road to an acceptably low speed (i.e. 12.4 km/hr).

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129 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* at 268 [35].

130 Exhibit 31.

(b) The design of the carpark and the pedestrian crossing reflected contemporary driveway design requirements for Brisbane, and as such provided adequate levels of safety for both vehicular and pedestrian users of the facility.

(c) The large hedge located in the garden bed in the north-west corner of the site did not adversely affect the minimum sight distances from a vehicle entering the site to either the pedestrian crossing or other vehicles in the restaurant carpark.

(d) None of the relevant guidelines that were in force at the time the development was approved specifically required the installation of traffic signs to warn drivers of the pedestrian crossing and the likelihood of children running across it.

(e) The driveway and carpark design complied with the relevant schemes, codes and standards which applied at the time the development was approved.

[74] Regarding the latter, Mr Pekol outlined the role of the relevant standards and guidelines used in the design of off-street car parking areas in Brisbane. Notably Australian Standard AS2890.1 *"set out minimum requirements for the provision of off-street parking facilities"*. The Standard states:

(a) *This Standard cannot be taken as textbook for the design of parking stations.*

(b) *The services of a qualified person experienced in designing car parking facilities should be sought in the application of this document.*

(c) *Moreover, its use does not remove the need to comply with the regulatory requirements of local government.*

[75] Mr Pekol noted that section 3 of AS2890.1 deals with the design of access driveways, which is a function of:

(a) the class of the parking facility (eg short-term or long-term parking);

(b) the frontage road type (eg local road or arterial road);

(c) the number of parking spaces served by the access.

[76] He indicated that while AS2890.1 provided recommendations regarding the width of access driveways, it did not provide any further guidance with respect to the geometry of driveways, including the angle of approach to the external road and the size of driveway splays at the kerb.

[77] Mr Pekol stated that AS2890.1 did not provide any guidance as to what was considered to be the acceptable sight distance for pedestrians to circulating traffic. However, guidance was given in Austroads' Guides for Traffic Engineering Practice and the local planning scheme.

[78] Further AS2890.1 does not provide any guidance with respect to traffic signs and pavement markings required at pedestrian crossings in car parking areas. Given this, Mr Pekol indicated that regard must be had to the Manual of Uniform Traffic Control Devices.

[79] Mr Pekol noted that the 1987 Town Plan for the City of Brisbane was current as at the time the development application for the subject site was lodged. As such, the access, carpark and pedestrian crossing would have been assessed under the provisions of Planning Policy No. 18.06: Design Guidelines for On–site Car Parking and Service Vehicle Facilities.

[80] He noted that Planning Policy No. 18.06 typically set out high standards for key car parking design elements compared to AS2890.1. Relevantly section 5.2.1 of Planning Policy No. 18.06 described four mandatory design principles for off-street parking areas, which *"are intended to satisfy the primary objectives of traffic and user safety and shall be incorporated in all car parking areas"*. The four mandatory design principles were to:

(a) Restrict vehicles to low speeds in the vicinity at pedestrian activity. This should be achieved through the use of appropriate road geometry and physical devices designed to limit speed.

(b) Provide sight distances, appropriate for the likely operating speeds in all areas of potential pedestrian/vehicle and vehicle/vehicle conflict. In particular, sight distances of at least 2.5 seconds of travel time at the likely prevailing speed for conflicting movements shall be available. This will often require splayed corners on structures and careful treatment of landscaping and sign placement in areas of potential conflict.

(c) Ensure no reversing of vehicles, particularly service vehicles, shall occur in areas of high pedestrian activity.

(d) Ensure on-site traffic congestion does not impact on the external traffic system.

[81] Section 5.2.2 of Planning Policy No. 18.06 described 13 desirable design principles for off-street parking areas, which *"will produce safe car parking layouts which are convenient to use"*. The more relevant of these to the subject matter, according to Mr Pekol, were:

(a) Design for a progressive reduction in speed environment in moving between the road and a parking space.

(b) Provide a clearly defined pedestrian network which:

(i) closely follows demand lines;

(ii) ensures that pedestrian movements through car parking areas are along aisles rather than across them;

(iii) minimises the potential for vehicular/pedestrian conflict;

(iv) minimises likely vehicle operating speeds and congestion levels at the conflict points;

(v) provides for pedestrian and vehicular queues at conflict points.

[82] Regarding pedestrian facilities, Mr Pekol identified that section 5.5 of Planning Policy No. 18.06 detailed the sight distance requirements for pedestrians in car parking areas.[131]

[83] Mr Pekol noted that Planning Policy No. 18.06 did not provide any guidance with respect to traffic signs and pavement markings required at pedestrian crossing in car parking areas. He indicated that one must therefore refer to the Manual of Uniform Traffic Control Devices.

[84] Mr Pekol also considered the Austroads' Guides for Traffic Engineering Practice.[132]

[85] In his opinion, BCC approved driveway design complied with Planning Policy No. 18.06 taking into account the Department of Transport and Main Roads' limit for entry only movements from Ipswich Road. In his opinion:

(a) The driveway actually constructed was slightly wider than the 4.5m wide type C1 entry driveway approved by the BCC (i.e. about 4.9m at the property boundary).

(b) The layout of the driveway actually constructed was generally consistent with the layout recommended by Planning Policy No. 18.06 and therefore complied with the local planning scheme requirements.[133]

[86] Mr Pekol expressed the view that the speed of Mr Bryant's utility (of 12.4 km/hr):

(a) Fell within the low speed range. [134]

(b) Was considered to be a safe speed for vehicles to travel within car parking areas.

(c) Reinforced his earlier point that the difference between the approved (type C1) driveway in the driveway actually constructed was immaterial with respect to the matter at hand.

[87] Additionally Mr Pekol considered the actual layout of the car parking area incorporated the relevant design elements detailed in section 4.1 of AS2890.1, as follows:

(a) The only traffic entering the site would be destined to the restaurant and therefore there would be no through traffic on the subject site.

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131 Exhibit 31, Table 2.3 and Mr Pekol's opinions at [47] – [48].
132 Exhibit 31 at [50] – [62].
133 Exhibit 31, at [66] referring to Figure 3.4.
134 That is fell within the low range speed of relationship as plotted in figure 5.3: see [73] of Exhibit 31.

(b) A separate pedestrian path was provided into the site from Ipswich Road, running adjacent to the site's northern boundary and leading to the main pedestrian entry to the restaurant, via the pedestrian crossing.

(c) Pedestrians are not required to cross a "circulation roadway" and therefore a crossing with signs and line marking (as per AS1742.10) is not required.

[88] Similarly Mr Pekol was of the belief that the actual layout of the car parking area incorporated the relevant design elements detailed in s 4.1.3(b) of AS2890.1, as follows:

(a) The majority of parking aisles orientated in a manner that encouraged pedestrians to walk along the aisles rather than across them.

(b) A marked pedestrian crossing of the "circulation aisle" has been provided at a point that is remote from major concentrations of vehicular traffic (e.g. the point where traffic entering the site from Ipswich Road meets traffic exiting the drive-through).

[89] Therefore Mr Pekol indicated that the actual layout of the car parking area provided adequate levels of pedestrian safety because it incorporated the relevant design elements for pedestrians, as detailed in AS2890.1.

[90] Regarding Planning Policy No. 18.06, Mr Pekol believed that the actual layout incorporated the relevant design elements detailed in section 5.2.1 (i.e. the mandatory design principles) of Planning Policy No. 18.06, namely:

(a) Vehicles have been restricted to low speeds (e.g. speeds in the order of 10-15 km/hr in the vicinity of the marked pedestrian crossing).

(b) Adequate sight distance to the pedestrian crossing has been provided.

(c) There is no reversing of service vehicles adjacent to the pedestrian crossing.

[91] Additionally Mr Pekol was of the view that the actual layout incorporated the relevant design elements in section 5.2.2 (i.e. the desirable design principles) of Planning Policy No. 18.06, namely:

(a) The layout is designed for a progressive reduction in speed environment between the road and a parking space, by implementing the three level internal road hierarchy detailed in Figure 2.1 of the policy.

(b) A clearly defined pedestrian network has been provided which:

(i) closely follows demand lines which led to/from the main pedestrian entrance to the restaurant;

(ii) ensures the pedestrian movements through car parking area were along aisles rather than across them;

(iii) minimises the potential for vehicular/pedestrian conflict, by providing a single marked pedestrian crossing leading directly across the restaurant entrance;

(iv) minimises vehicle operating speeds;

(v) separates the pedestrian crossing from the vehicle conflict points;

(vi) provides adequate queuing space for pedestrians and vehicles at conflict points.

[92] In his view, the actual layout of the car parking area provided adequate levels of pedestrian safety because it incorporated the relevant design elements for pedestrians, as detailed in Planning Policy No. 18.06.

[93] Regarding stopping sight distance, Mr Pekol was of the view that the design of the pedestrian crossing provided adequate sight distance to vehicles approaching from the west because it complied with the requirements set out in section 3.3.4 of Austroads' Guide to Traffic Engineering Practice – Part 13.

[94] Furthermore, Mr Pekol was of the view that given the vehicle involved in the incident was travelling at a significantly lower speed than 20 km/hr, there would have been ample sight distance available to assimilate the presence of the pedestrian crossing.[135]

[95] Mr Pekol stated that it was also worth noting that the view of the pedestrian crossing was not obscured by the hedge in the garden bed located in the north-west corner of the site.[136]

[96] In his view, a parked vehicle did not constitute an obstruction to a pedestrian approaching traffic. Such a view, he stated, was reinforced by:

(a) The observation that the positioning of parking spaces on one or both sides of pedestrian crossings within off-street parking areas was common practice.

(b) The available sight distance for pedestrians[137] at point B on SK003 would be almost identical to that of a pedestrian walking out from between two parked cars at any other location in the carpark.

(c) Parked cars did not constitute an obstruction, as would a wall or fence, because parking spaces are not always occupied.

[97] He was therefore of the opinion that the design of the pedestrian crossing provided adequate sight distance for pedestrians because it complied with requirements detailed in section 5.5 of the Planning Policy No. 18.06.

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135 Exhibit 31, [88].
136 Exhibit 31, [89].
137 Exhibit 31, [94] at Point B on Drawing SK003.

[98] Mr Pekol's opinions were not greatly altered or sufficiently challenged in cross-examination so as to cause me to doubt the weight of his expert opinion.

Mr Ross Carseldine, Architect

[99] Mr Carseldine is a retired architect who highlighted an architect's *"imperative"* to work through a process and, if that meant engaging a traffic engineer, which in this case the Architects did, then that was required and reasonable in the circumstances.[138] In cross-examination by Mr Myers, Mr Carseldine said had he had a blank canvass with respect to the development of the site, he was not sure whether he would do anything significantly different.[139] He said a fast food restaurant carpark is *"full of distractions"*.[140]

[100] In his report of 6 November 2015,[141] Mr Carseldine expressed the opinion that, in the case of this accident, accepted carpark design practice could not be expected to prevent the possibility of an accident occurring when one of the parties involved acted in an unpredictable way. He noted that carparks are unsafe places by their nature, because of the expected interaction of people and vehicles. In his experience with the design of carparks, there has been an acceptance that:

(a) Pedestrians and vehicles will occupy the same space.

(b) Pedestrians will walk onto parking aisles (i.e. vehicle driveways) from between parked cars.

(c) Pedestrians will walk along parked aisles (i.e. vehicle driveways).

(d) Vehicles would drive in and out of parking spaces – a manoeuvre which usually involves some reversing of the vehicle.

(e) Vehicles will drive on parking aisles where pedestrians are walking.

[101] Mr Carseldine considered Australian Standard AS2890.1 and was of the view that the design satisfied the requirements and intent of the Australian Standard. He examined whether the Architects made changes to a previously designed carpark in accordance with the referenced documents that they could reasonably have been expected to use. In his view, the Architects did take into account the following referenced documents and that the design of the carpark was acceptable and subsequently approved by the BCC:

(a) The 1987 Town Plan for the City of Brisbane 1987 with amendments (in particular Planning Policy 18.06: Design Guidelines for On-site Car Parking and Service Vehicle Facilities).

(b) AS2890.1 – 1986 Part 1: Off-street Parking Facilities and its later updated version AS2890.1 – 1993 Parking Facilities – Off-street Car Parking.

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138 See for example T4-72, lines 29 to 41.
139 See T4-73, lines 32 to 45.
140 T4-80, line 17.
141 Exhibit 15.

[102] In his opinion, the addition of the pedestrian crossing was an accepted and appropriate design solution to manage the flow of pedestrians in the carpark. Mr Carseldine noted the solution would typically enhance safety, provided that drivers and pedestrians act appropriately. His opinion was that the input from the Architects into the overall carpark design was quite limited. Overall he considered the design of the carpark did not contribute to the accident occurring. Ultimately he formed the view that:

(a) After reviewing the design guidelines that he would have expected an architect to refer to when designing the carpark (that is the Brisbane City Council Town Plan and the relevant Australian Standard), he found that the carpark layout was entirely consistent with those guidelines.

(b) After reviewing various design features of the carpark and side entry in more detail, including the driveway entry from Ipswich Road, the landscaping, the drive through, the play area/pedestrian crossing and the general carpark layout, the Architects' involvement was consistent with what he would expect, and the design features did not contribute to the accident.

(c) He disagreed significantly with Mr Jamieson's analysis of how the physical surrounding affected the accident, and in particular the layout of the carpark and side entry. In his view, there was a lack of understanding of carpark design which was evident when Mr Jamieson used an Australian Standard which was written for roads to try and analyse sight lines at pedestrian crossings within a carpark.

(d) Whilst not denying that a horrifying accident occurred in the carpark, from his analysis and review of the incident, the Architects provided a level of service consistent with what he would expect of a professional consulting architect in the preparation of the design of the carpark and entry on the site.

[103] From his analysis of the carpark layout and the relevant design guidelines, the Architects produced a design which was in accordance with the relevant design guidelines and approvals. It was also consistent with carpark designs seen at numerous similar establishments throughout Brisbane.

[104] Mr Carseldine's opinions were not greatly altered or sufficiently challenged in cross-examination so as to cause me to doubt the weight of his expert opinion. Mr Carseldine was the sole expert architect who expressed views concerning architectural considerations and practice. His opinion remained unchallenged, notwithstanding Mr Myers' robust efforts in cross-examination.

Mr John Jamieson, Engineer

[105] Mr John Jamieson has been a crash investigator for 30 years. Four reports were commissioned.[142]

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[142] Exhibits 10 – 13. Initially five reports were prepared by Mr Jamieson but one report was excluded given its admissibility. There were other parts of Mr Jamieson's remaining reports where specific paragraphs, following many rulings, were excluded on the grounds of admissibility.

[106] The effect of Mr Jamieson's opinion may be broadly summarised as follows:

(a) Even if the driver had seen the approach of the child on his lower left prior to impact, he did not have time to respond to any image of the child.

(b) The appropriate Australian Standards in relation to parking and pedestrian design are AS2890.1 – 1986 "Off-street Parking Facilities", including the key referred standard, AS1742 – 1990 "Manual of Uniform Traffic Control Devices (Part 10: Pedestrian Control and Protection)".

(c) Australian Standard AS2890.1 (1986) when discussing entry of carparks only suggests normal 90 degree entry. However it can be seen that the concrete driveway entry to Hungry Jack's carpark is in fact an *"off-ramp"* styled angled entry, making an angle of 107 degrees for the left turning driver. That is, the ramp was some 17 degrees broader than a normal 90 degree left turn.

(d) The masked pedestrian zebra crossing is positioned 5.5 metres from the concrete "off-ramp" styled driveway. More importantly there are two parking spaces to the west of the pedestrian crossing that block the approach of children on the northern part of the crossing.

(e) The primary reason the crash occurred was due to the poor and sub-standard design of the entrance to the carpark, and the design of the carpark itself.

(f) The key fault with the driveway was that it provided parking immediately adjacent to the marked pedestrian crossing, which effectively reduced the pedestrian sighting distance to zero. All these design elements were either explicitly or implicitly in breach of Australian Standards AS1742.10 (1990) and AS2890.1 (1986) in relation to carpark design.

(g) These factors combined meant that the crash was not only unavoidable, but, from a design viewpoint, totally foreseeable and predictable.

(h) The Architects' traffic engineering consultants, Beard Traffic Engineering, in turn relied upon the ultimate review and approval process of BCC in relation to two specific matters. These were the faster driveway entry and the position of the internal pedestrian crossing.

(i) Despite the best endeavours of the Architects, they received inadequate technical advice and less than competent review and approval processes for their suggested renovations to this site.

[107] Mr Jamieson said that if it was accepted Mr Bryant's utility was *"rolling"*, then no crash would have occurred at all. He disagreed with the proposition that it was more likely or probably the case that distracting features, such as looking down and not

keeping a proper look out, caused the accident.[143] Mr Jamieson conceded the Hungry Jack's site was not a 'black spot' and also accepted that where there was a difference between the Manual of Uniform Traffic Control Devices and AS1742.1, the Manual takes precedence.[144]

[108] Mr Carseldine made the following pertinent comments in relation to some of Mr Jamieson's views:

(a) The entry to Hungry Jack's has been designed in accordance with the relevant requirements – independent traffic assessment carried out by Beard Traffic Engineering confirmed that the one way entry driveway is 4.5 metres wide type C1 with geometry as set out in Planning Policy 18.06.

(b) The drive-through is an easily identifiable potential danger and would cease to be a distraction once entering vehicles are still on the carpark entry.

(c) Having carparks adjacent to an area where pedestrians are moving is common and part of the BCC approved design.

(d) Pedestrian crossings are still a design tool as recognised by their inclusion in AS1742 and have a place in alerting both drivers and pedestrians to potential dangers.

(e) References to maximising sight distance are sourced from an outdated standard and are misleading. The references to sight lines refer to a vehicle leaving the sight line rather than to pedestrians moving within an off-street carpark.

(f) It is difficult to see how the designers of the built environment can be responsible for others acting in a manner *"not reasonable, responsible or predictable."*

[109] Mr Jamieson did not speak directly with Mr Bryant regarding his recollection of events because, in his experience, parties have different recollections of a crash over time.[145] Mr Jamieson said:

> *...For many years now I've discouraged that and walk away because my experience has been that often those chats result in information being given to me which is inconsistent with the statements I've been provided with and indeed caught out in forums such as this. So I've learnt that the - I rely on my client, in this instant Shine, to provide me with what they consider appropriate material to work with.*[146]

[110] Instead his preferred practice is to rely on his initial letter of instructions about the circumstances of an accident and other contemporaneous records. Whilst that may be a perfectly acceptable line of inquiry to follow in other forensic investigations, I

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143 T4-27, lines 9 – 24.
144 T4-29, line 16 and T4-30, line 41.
145 See generally T4-15 to T4-16.
146 T4-15, lines 27 – 31.

am, with respect, not persuaded this approach was the correct approach to adopt in this instance given a substantial part of this action involves sight lines and Mr Bryant's focus of attention prior to, during and after the accident. Indeed Mr Charrington in cross-examination highlighted my concern. The following passage occurred:

> *Well, if you need to read the three paragraphs in that box on page 4 to answer this, please do, and I'm happy to wait for you. But those instructions tell you what Mr Bryant didn't see in terms of the pedestrian - the deceased pedestrian?---Yes.*
>
> *But those instructions don't tell you where he was looking or what he was looking at, do they?---No.*
>
> *In providing an expert opinion based upon sight lines, would it not have been very important for you to establish where he was looking and what he was looking at?---Well, that sounds sensible, I agree, but I refer to my previous answer.*
>
> *...*
>
> *Therefore if you're providing an expert report into the investigation of the accident, isn't then the account of the people involved - especially the litigant that you're providing the report for - very important?---Of course.*
>
> *And yet you didn't seek any written responses to specific questions about Mr Bryant's views as he went through the car park, where he was looking, or what he was looking at?---No.*
>
> *...*
>
> *I see. Thank you. So am I correct in saying that you did not understand this incident to have occurred in circumstances in which Mr Bryant had nearly brought his vehicle to a stop twice in the car park before the collision occurred?---No, I base my analysis on the video.*
>
> *You did not understand this collision to have occurred after, on one of the occasions that Mr Bryant brought his vehicle nearly to a stop, that that occurred just prior to the pedestrian crossing and he looked to his left, then to his right and then to his left again?---Well, if the plaintiff nearly brought his vehicle to a stop, it wasn't immediately evident from the video.*
>
> *No?---In terms of looking to the left and right, no, I wasn't aware of that.*
>
> *And you did not understand, from the instructions that you were given, that this nearly stopping of the vehicle and looking left, right, left, had occurred after the vehicle had passed the hedges on the*

left-hand side?---Well, again, it's not particularly evident from the video.[147]

[111] Mr Jamieson accepted that a driver in a carpark needed to exercise great caution. The following exchange took place in cross-examination with Mr Charrington:

> *Now, would you agree with me that photograph 3 appears - I should say first, these photographs were taken on the day of this tragic incident?---Yes, thank you.*
>
> *Would you agree with me that photograph number 3 appears to be taken at or near the beginning of the driveway?---Yes.*
>
> *And photograph 4, over the page, appears to be taken approximately halfway through the driveway, or some way through the driveway itself?---Yes, I can see that.*
>
> *Yes. You would agree with me, Mr Jamieson, would you not, that the pedestrian crossing depicted in those photographs is readily visible?---Yes.*
>
> *And by either of those stages a driver entering this facility would, by noting the presence of that crossing, be immediately aware of the potential for pedestrians?---Yes.*
>
> *And if you then go back to the assumption that a driver entering this premises after having used it on five previous occasions, knowing the playground, and knowing all the things you say about it being a generator of children, such a driver would be acutely aware of the prospect of children being potentially present on the pedestrian crossing?---Yes.*
>
> *And any driver should therefore exercise great caution as they traverse that area, shouldn't they?---Yes.*[148]

[112] There were a number of compelling criticisms made about Mr Jamieson's opinion which, in addition to my primary concern about not seeking information from Mr Bryant (given a substantial part of this claim involves sight lines and Mr Bryant's focus of attention prior to, during and after the accident) cause me to doubt Mr Jamieson's views and instead prefer the collective weight of the evidence of Mr Pekol and Mr Carseldine. For example:

(a) Quite properly, Mr Jamieson conceded that he was not qualified to provide expert opinion on whether the Architects acted in a way that was widely accepted by peer professional opinion of a significant number of respected practitioners in the field of architecture, as competent professional practice of an architect.[149] Therefore, Mr

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147 T4-15, lines 33 to T4-16, line 46.
148 T4-32, lines 18 to 41.
149 T4-38, line 5.

Carseldine's views concerning architectural considerations and practice remained unchallenged.

(b) It was submitted that the basis of Mr Jamieson's assumption in relation to speed could not be gleaned from the instructions upon which he relied, namely the instructions from Mr Bryant's solicitors set out in his first report. Mr Jamieson made no effort to confer and obtain instructions directly from Mr Bryant. Further, the instructions furnished to Mr Jamieson from Mr Bryant's solicitors of travelling some 10km/hr, were different to the instructions provided directly by Mr Bryant to Psychiatrist Dr Dwyer which recorded that Mr Bryant nearly stopped his vehicle prior to the pedestrian crossing. It was therefore a contrary account.

(c) It was submitted that the opinions of Mr Jamieson were not founded on factual instructions, rather they contained assumptions designed to construct a case, albeit inconsistently with the actual evidence of Mr Bryant. Relevantly Mr Jamieson's evidence was that the design of the carpark with the drive through exit being situated adjacent to the driveway crossover rendered it necessary to stop, or nearly stop, on first entering the carpark.

(d) Furthermore Mr Bryant's version of *"nearly stopping"* shortly before the pedestrian crossing would, if given to Mr Jamieson, have rendered the speed of entry issue nugatory.

(e) The BCC submitted the reports of Mr Jamieson *"sought to explain the accident through hypothesis conjected in a contextual vacuum"*. It was submitted that the reports presumed that Mr Bryant, and any hypothetical motorist, would have been distracted visually from an adequate awareness of the approaching crossing and its surrounding features. The presumptions are rendered untenable in the context of Mr Bryant's evidence of having been to the subject carpark on five previous occasions and being well aware of the nature of the entrance, the positioning of the crossing and the approximate playground.

(f) It was submitted that Mr Jamieson was the *"sole protagonist"* of the re-design being problematic (in that there was an inherent promotion of a high speed of entry into the carpark resulting from a change from a ninety degree angle to a sixty degree angle). There was no evidence adduced to support the assumption made by Mr Jamieson as occurring as a question of fact, either generally in this carpark or in the particular instance of the present incident. The assumption by Mr Jamieson failed to take account of the obvious fact that drivers entering such a facility inherently must have known that they were entering a carpark in which children were likely to be present, and thus irrespective of possible entry speeds having regard to the angle of entry, the driver behaviour would be expected to reduce speed accordingly. Even on Mr Bryant's evidence, such was contrary to Mr Jamieson's unfounded assumption.

(g) Further the provision of the opinion postulating hypotheses based on assumptions about speed and sight lines, without attempting to garner instructions from Mr Bryant himself about his speed of entry and where he was looking, illustrated an intention to construct a case against the defendants on mere assumptions, as opposed to demonstrable and relevant facts.

(h) The assumptions made by Mr Jamieson were not founded on the evidence and lacked any evidentiary foundation.

(i) Further it was submitted that Mr Jamieson's reports *"were infected with adversarial bias and advocacy"*. For example it was highlighted the use of the term *"off ramp"* to describe the subject driveway crossover, in its technical definition of a half C1 type driveway was suggestive of that. Similarly, the attempted approach to describe the pedestrian crossing as something providing a *"false sense of security"* in relation to a three year old child was designed to *"paint an exaggerated picture of the relevant risk"*.

(j) Further there was a contest between Messrs Pekol, Carseldine and Van De Ven on the one hand and Mr Jamieson on the other, as to the drive through entrance and pedestrian crossing's compliance with the relevant Standard and the high standards imposed by Planning Policy 18.06.

(k) Unlike Messrs Pekol, Carseldine and Van De Ven, Mr Jamieson made no analysis of the appropriateness of the location of the pedestrian crossing due to primary pedestrian desire lines, and the need for best-practice non-discriminatory access. Mr Jamieson's opinions, it was submitted, were incompletely formed and gave no consideration to the primary reasons for the pedestrian crossing being where it was – which was pedestrian desire lines and non-discriminatory access.

(l) It was submitted there no attempt by Mr Jamieson to weigh these important considerations against the small risk that a dart-out misadventure by a child might occur in a confluence of circumstances with a motorist not keeping a lookout in a carpark expected to contain children.

(m) Despite the clear evidence of Messrs Carseldine, Pekol and Van De Ven that the pedestrian crossing met the primary pedestrian desire lines and the optimal point for non-discriminatory access for disabled people, there was no sensible alternative propounded by Mr Jamieson as to where a crossing ought to have been.

(n) Another issue was that Mr Jamieson's reports were infected by a misunderstanding of key aspects of the case, including the non-application of AS1742 because of the primary or primacy of the Manual of Uniform Traffic Control Devices in the application of a standard car and pedestrian height that Mr Jamieson did not address. Mr Jamieson's view about Australian Standard 1742 in its application

ought be excluded. In any event, AS1742 does not apply because the Manual of Uniform Traffic Control Devices takes precedence. Therefore that Standard has no application. Moreover that Standard relates to pedestrian crossings on a road, a very different scenario where the speeds are also different.

(o) Indeed it was submitted that the evidence of Mr Jamieson in his reports *"constitute[d] an evidentiary island in amongst a sea of considered opinions by the other experts: Mr Carseldine, Mr Pekol and Mr Van De Ven"*.

[113] With these matters in mind, I ultimately prefer the views of Mr Pekol and Mr Carseldine over Mr Jamieson. I found the opinions expressed by Mr Pekol and Mr Carseldine compelling. Their opinions were more aligned and were sufficiently corroborative regarding the relevant design requirements (including the driveway, carpark and the location of the pedestrian crossing). In many respects, they were consistent. Mr Jamieson made little, if any, convincing attempt to analyse the appropriateness of the location of the pedestrian crossing in light of primary pedestrian desire lines and the need for best practice for non-discriminatory access for disabled people. No sensible alternative was propounded by him.

[114] I shall now address the issue of breach of duty against each of the defendants.[150]

Breach of Duty – Hungry Jack's

[115] I note section 11 of the *Civil Liability Act* 2003 provides as follows:

> ***11 General principles***
>
> *(1) A decision that a breach of duty caused particular harm comprises the following elements—*
>
> *(a) the breach of duty was a necessary condition of the occurrence of the harm (**factual causation**);*
> *(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (**scope of liability**).*
>
> *(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1) (a)—should be accepted as satisfying subsection (1) (a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.*

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150 The authorities of *Wyong Shire Council v Shirt* (1979-80) 146 CLR 40 and *Derrick v Cheung* [2001] HCA 48 were relied upon by Mr Bryant.

> *(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—*
>
> *(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and*
> *(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.*
>
> *(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.*

[116] It was pleaded on behalf of Mr Bryant that Hungry Jack's breached its duty of care *"on the grounds that the first defendant did not take reasonable steps to ensure that the property was safe for the plaintiff"*.[151]

[117] However the case was formulated on the basis of the negligence relating to the design of the driveway and carpark. It was not directed to the day-to-day operation of the carpark.

[118] Hungry Jack's submitted that it retained a skilled contractor namely, the Architects, to design the driveway and carpark. It also adhered to and complied with the requirements of the BCC in constructing and developing the driveway and carpark.

[119] I accept Mr Collins' submission that in respect of any issue of design, Hungry Jack's had discharged its duty by the retention of skilled contractors.[152]

[120] Specifically, and referring only to the design and engineering aspects of the driveway and carpark (as opposed to day-to-day operations), I consider the duty to produce and implement a safe design was achieved by Hungry Jack's retaining experts to design a safe system for the movement of pedestrians, vehicles and parking having regard to the uncertain conduct of pedestrians and then to implement that system.

[121] To impose on a person a duty to prevent each specific act of negligence by a contractor would be to impose an impossible burden on that person and to do so where the contractor is likely to have specialised skills to undertake the relevant tasks that the person engaging the contractor does not have would be unreasonable.

[122] In *Leichardt Municipal Council v Montgomery* (2007) 230 CLR 22 at [23], Gleeson CJ stated:

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151 See [28] of the Further Amended Statement of Claim.

152 See for example, *Kondis v State Transport Authority* (1984) 154 CLR 672 at 679. See also *Transfield Services (Australia) v Hall; Hall v QBE Insurance (Australia)* [2008] NSWCA 294 at [54]-[57]. See also *Stringer v Westfield Shopping Centre Management Co (SA) Pty Ltd* (2017) SASR 476, *Indigo Mist Pty Ltd v Palmer* [2012] NSWCA 239 and *Gulic v Boral Transport Ltd* [2016] NSWCA 269.

> *This raises a more general question concerning non-delegable duties. A "special" responsibility or duty to "see" or "ensure" that reasonable care is taken by an independent contractor, and the contractor's employees, goes beyond a duty to act reasonably in exercising prudent oversight of what the contractor does. In many circumstances, it is a duty that could not be fulfilled. How can a hospital ensure that a surgeon is never careless? If the answer is that it cannot, what does the law mean when it speaks of a duty to ensure that care is taken? It may mean something different. It may mean that there should be an exception to the general rule that a defendant is not vicariously responsible for the negligence of an independent contractor. The present case illustrates the artificiality of attributing to the appellant a duty to ensure that care was taken. The failure to take care consisted in a workman, in the employment of Roan Constructions, placing a carpet over a telecommunications pit that had a defective cover, in circumstances where the workman should have noticed the defect. Thus a trap was created and the respondent fell into it. To speak of a local council having a duty to ensure that such an apparently low-level and singular act of carelessness does not occur is implausible. It is one thing to find fault on the part of council officers where there has been a failure to exercise reasonable care in supervising the work of a contractor, or in approving a contractor's plans and system of work. It is another thing to attribute to the council a legal duty of care which obliges the council to do the impossible: to ensure that no employee of the contractor behaves carelessly. The problem is even more acute if the source of this duty of care is said to be found in statute. One of the things that is special about this duty is that it is a duty to do the impossible. That is unlikely to have been intended by the legislature.*[153]

[123] I am satisfied the evidence demonstrated that Hungry Jack's reasonably retained the Architects to design the carpark initially and then to undertake the design of the alterations. Plans were then submitted to the BCC pursuant to the BCC's Information Request. Mr Van De Ven gave evidence that he took into account the applicable Australian Standards in section 19.10 of the Transitional Planning Scheme in relation to discriminatory parking. The expert evidence of Mr Pekol and Mr Carseldine has satisfied me that the design and development of the driveway and carpark were undertaken in accordance with applicable traffic design Standards and Scheme. Hungry Jack's engaged a skilled contractor who addressed Brisbane City Council Planning Policy 18.06.[154] The Architects addressed the Australian Standard for design of carparks.[155] The Architects took into account sight lines, pedestrian and vehicle movements.[156] The Architects avoided designs which would encourage rat-running. They addressed non-discriminatory access as required by section 19.10 of the Transitional Planning Scheme so that ambulance and wheelchair bound people had access.[157] The Architects addressed the Australian Standards for gradients, cross-

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153 See further the more recent observations of Ball J in *Bettergrow Pty Ltd v NSW Electricity Networks Operations Pty Ltd (No 2)* [2018] NSWCA 514 at [65] – [69].

154 T9-39, lines 3-6.

155 T9-39, lines 3-6.

156 T9-39, lines 3-11.

157 T9-38, lines 40-46, T9-39, lines 13-14.

falls and directions.[158] The Architects engaged with the BCC's engineers to produce compliant designs. They also engaged an independent traffic engineer to review its design for the crossover, which was itself based on the design recommended by the BCC.

[124] Hungry Jack's was criticised for *"prefer[ring] the 'well of the court' rather than giving evidence and explaining the considerations that were involved in seeking access whatsoever from Ipswich Road rather than Wateron Street and addressing the issue of the safety of the patrons within the facility having regard to the transition from a stand-alone restaurant to the drive-through facility giving rise to some increased conflict between pedestrian and vehicular traffic"* and *"a Jones v Dunkel inference be drawn such that findings of negligence be made against it"*.

[125] I do not accept this submission. It was unnecessary for Hungry Jack's to give direct evidence about these matters in light of the evidence of relevant lay witnesses (including Messrs Van De Ven, Kelly and Howard) and the expert opinions of Messrs Carseldine and Pekol. Mr Van De Ven was the actual person who was responsible for the designs. Mr Kelly and Mr Howard were directly involved in the approval process. Hungry Jack's engaged the Architects who were responsible for the design of the driveway and carpark. The Architects were also responsible for the design and placement of the pedestrian crossing within the carpark. The development involved dealings between the Architects, on behalf of Hungry Jack's, and the BCC and Main Roads. Hungry Jack's retained a skilled contractor to design the carpark, driveway and location of the pedestrian crossing. There was no requirement on Hungry Jack's to call a particular representative, nor should a *Jones v Dunkel* inference be made.

[126] It is for these reasons, and for reasons to follow when discussing issues of breach concerning the BCC and the Architects and causation, that I find Mr Bryant has not established a breach of a duty of care owed to him by Hungry Jack's.

Breach of Duty - BCC

[127] It was pleaded on behalf of Mr Bryant that the BCC breached its duty of care on the grounds that:[159]

(a) it failed to take reasonable steps to guard against reasonably foreseeable risks to entrants upon the property;

(b) the development should not have been approved under the *Integrated Planning Act* 1997 on the basis that it was unsafe and was not compliant with the Schemes and/or the Standards;

(c) the design of the carpark and driveway was negligently conducted;

(d) the BCC's insistence on the Architects adopting an angle driveway and/or landscaping led to a greater risk of an accident occurring;

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158 T9-39, line 2.

159 See [29] of the Further Amended Statement of Claim. I note there is an absence of particulars concerning the generic allegations made in subparagraphs 29(a) and 29(c) of the amended pleading. No request for particulars was sought.

(e) it failed to require an appropriate sight distance between the carpark entry and the location of the zebra crossing and an appropriate acclimatisation distance between those two points.

[128] It was submitted on behalf of Mr Bryant that the site gave rise to a number of distractions requiring an incoming driver to focus their attention across a wide spectrum, in the time available to them, as they entered the site. The effect of the submissions of Mr Myers was that by the adoption of a 60 degree angle of approach from Ipswich Road, the distractions caused by the drive-through exit onto the main circulation road of the carpark, the approval of the site plan incorporating two carparks on the western side of a pedestrian crossing, the allurement of the playground on the southern side of the crossing and the location of the pedestrian crossing (within 11 metres from the main entry to the facility) allowed little or no reaction time to incoming motorists, when the presence of a child behaving in the way that the deceased child was behaving in this instance was readily foreseeable, and the planting (directed by the BCC) which had the effect of further concealing the earlier approach of pedestrians from the northern boundary demonstrably breached the duty of care that was owed to invitees to the site. It was suggested that the two parking spaces, adjacent to the pedestrian crossing could and should have been eliminated to enable an adequate sight line.

[129] It was also broadly submitted that none of the defendants *"turned their minds to the dangers associated with the subject road configuration and the other features that made this site completely unsuitable as a drive-through/take away food facility"*.

[130] I reject these submissions based on the evidence of Messrs Pekol, Carseldine and Van De Ven, my reservations about the opinions of Mr Jamieson and for the reasons to follow.

[131] BCC highlight that this was private land, this was an approval process. It was not the case of council controlling, maintaining and devising a road for public use.[160] It was submitted by Mr Charrington that the case advanced on behalf of Mr Bryant impermissibly sought to examine the issue of breach of duty as against BCC through the prism of hindsight and an inordinately intricate level of obstruction.[161] The case, it was submitted, sought to posit a breach by reference to the accident that occurred between Mr Bryant's utility and the deceased child, having regard to the presence of a parked car which may or may not have been higher than the height of the child.[162] It was submitted that this approach obscured the proper enquiry into breach of duty, which would be the risk of pedestrian/vehicle collisions generally.

[132] It was correctly submitted that the proper enquiry was whether BCC's imposition of a pedestrian crossing at the optimal place for pedestrians and disabled patrons alike, was a reasonable response to the risk associated with dual access by pedestrians and vehicles in the carpark. Regarding the assertion advanced on behalf of Mr Bryant that BCC failed to take reasonable steps to guard against reasonably foreseeable risks to entrants upon the property, it was submitted that in relation to the existence of a duty of care on the part of a council exercising town planning powers, this broad assertion of negligence exceeded any recognised standard applicable to such cases.

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160 Cf *Theden v Nominal Defendant* [2004] QSC 310 – a case involving a country road and a deficient design relating to a crest in the road.

161 See for example *Rosenberg v Percival* (2001) 205 CLR 434 at 441-442.

162 There was no evidence adduced by Mr Bryant about this.

It was submitted the assertion advanced on behalf of Mr Bryant ought to be rejected. I agree for the reasons provided earlier when considering BCC's duty of care.

[133] Regarding the assertion that the development should not have been approved under the *Integrated Planning Act* 1997 on the basis that it was unsafe and was not compliant with the Schemes and/or the Standards, reference was made on behalf of the BCC to the weight of the evidence of Messrs Pekol, Carseldine, Kelly and Van De Ven as being manifestly against the assertion. The pleaded case concerned the redesign of the carpark associated with the development application of August 1999, as approved on 12 January 2000 and modified thereafter in terms of its conditions to final approval on 8 May 2000. The changes to the existing drive through carpark associated with that development and the approval process were restricted to the alternation of the driveway crossover to a C1 type driveway, and the installation of a pedestrian crossing to provide straight line access to the restaurant entrance.

[134] BCC properly, in my view, submitted that in relation to the driveway angle, the overwhelming evidence of Messrs Pekol, Carseldine, Kelly and Van De Ven was that the re-designed angle promoted the requirement of the Main Roads Department that the driveway provided only ingress means, not egress to Ipswich Road. This prevented the prospect of drivers easily ignoring "no exit" signs, thus improving traffic flow and road safety on Ipswich Road. A speed of 12.4 km/hr is a slow speed, typical of the entry speed of vehicles into carparks at the present and in no way an excessive speed brought about by the driveway angle, despite the criticism made by Mr Jamieson.

[135] Regarding sight lines and stopping distances, it was submitted, and I accept, that the subject driveway complied with a prescribed type for such carpark, especially from a major road, namely a C1 type entrance. On the evidence of Messrs Carseldine, Pekol and Van De Ven, the angle had a relevant and valid purpose in terms of vehicular safety and flow, namely the preclusion of vehicular exit from the subject carpark onto Ipswich Road. Such a design, within the approved entrance types, made sense in the context of the busy nature of Ipswich Road.

[136] Regarding the position of the pedestrian crossing, it was submitted, and I accept, that the evidence of Messrs Pekol, Carseldine and Van De Ven demonstrated that the subject driveway provided adequate sight line distance from the driveway crossover to the pedestrian crossing, in relation to pedestrians of "normal" height. Such a pedestrian would ordinarily be expected to be in the company of any small children below the height of the standard motor vehicle used for design purposes, and in a positon of control over such children. Further, as Mr Van De Ven and Mr Kelly made clear in their evidence, the subject crossing was installed to provide, as the legislation required, non-discriminatory access for patrons with disabilities (including those in wheel chairs) and was situated at the optimal placement for that important purpose, having regard to the gradient of the carpark and the location at the entry to the restaurant. Further, the placement was consistent with traffic design standards, because it was situated at the main pedestrian desire line for patrons attempting to access the restaurant entrance from Ipswich Road.

[137] Additionally the Beard Traffic Engineering report[163] was referred to BCC's Mr Mogg, who himself was a traffic engineer. When Mr Kelly gave his evidence, Mr

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163 Exhibit 48.

Kelly indicated that the notation of Mr Mogg's name on that communication indicated referral of the matter to him for his consideration.[164] I find these matters were reasonably considered by BCC and the Architects, including on behalf of Hungry Jack's, when the crossover was approved. The absence of a specific document from a traffic engineer on the BCC's engineering file is unremarkable.

[138] All in all I have reached a view that the Standards and Scheme were complied with. Parked vehicles did not amount to obstructions. The allurement of the playground was irrelevant. The location of the pedestrian crossing was optimal. In preferring the overwhelming evidence of Messrs Carseldine, Pekol and Van De Ven, Howard and Kelly, I accordingly find there was no breach of duty of care by BCC.

Breach of Duty – Architects

[139] It was pleaded on behalf of Mr Bryant that the Architects breached their duty of care on the grounds that:[165]

(a) they failed to take reasonable steps to guard against reasonably foreseeable risks to entrants upon the property;

(b) the development was unsafe and was not complaint with the scheme and/or the standards;

(c) the design of the carpark and driveway was negligently conducted;

(d) the pedestrian/zebra crossing was located at a point that was too close to the carpark entry point;

(e) they failed to seek any or any appropriate advice about the likely risks arising as a result of its design of the carpark and driveway.

[140] I refer to the effect of the submissions made by Mr Myers above in these Reasons at [128] and [129] referable also to the Architects. For the reasons expressed above, I reject those matters.

[141] The Architects submitted that there was no breach. They highlighted that there were only two architects who gave evidence in this case – firstly Mr Van De Ven who is the director of the Architects and Mr Carseldine who was the independent expert.

[142] Mr Van De Ven gave evidence that in about September 1999, Hungry Jack's instructed the Architects to extend and modify the existing store, more particularly by the inclusion of a new roof and secured outdoor play area, a new larger adjacent outdoor dining area for parents' supervision, conversion of an old outdoor area into a new dining area on the western side of the building and an introduction of a second drive-through service window.[166] As a consequence the Architects prepared architectural plans 2020-50A-TP1 and TP2 dated 31 August 1999[167] ("the architectural plans"). After receiving an information request from the BCC dated 18

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164 See T8-32, lines 7-16.
165 See [30] of the Further Amended Statement of Claim.
166 T9-28 lines 37-47.
167 Exhibit 68.

October 1999,[168] in so far as relevant to the proceeding, the Architects added a pedestrian crossing to address the BCC's non-discriminatory access requirements which appeared in s 19.10 of the Transitional Planning Scheme.[169] The new pedestrian crossing was shown on amended architectural plans 2020-50A-TP1A and 2020-50A-TP2A ("the amended architectural plans").[170]

[143] The amended architectural plans were received and approved, upon review, by the BCC's traffic engineers and architect.[171] As part of the BCC's assessment process, the application for the extensions to the restaurant were approved by the BCC on 11 January 2000.

[144] In 2000, the Architects were instructed by Hungry Jack's to review the driveway because Hungry Jack's wished to maintain the "entry only" from Ipswich Road, make access easier from Ipswich Road and prevent cars from exiting onto Ipswich Road from the drive-through.[172]

[145] On 21 March 2000, Mr Johns Jukes of the BCC's engineering department sent a facsimile to the Architects attaching its recommendation for the design of the new driveway.[173] This was the design the BCC *"wanted"* the crossover to look like as it complied with the BCC's current standard designs.[174] The BCC's recommendation was to construct the entry *"half of a C1 type driveway"* in the dimensions indicated.

[146] The Architects duly prepared a design for the new driveway (2020-50A-TB1B and 2020-50A-TP2B)[175] which represented the Architects' interpretation of the C1 type driveway sketched in Mr Jukes' facsimile. Those documents were submitted to Mr Jukes on 22 March 2000 under cover of facsimile which read, in part, *"Please call me to discuss how we can get this crossover amendment through."*[176]

[147] The *"interpretation"* by the Architects in the sketch provided by Mr Jukes of a C1 type driveway was required because Ipswich Road is not perpendicular to the driveway and the C1 driveway is a standard design for a square block of land, so modifications were necessary to give safe access.[177]

[148] On 22 March 2000, the BCC issued a construction permit for the new driveway but construction could not proceed until the BCC approved the layout of the driveway.[178]

[149] After discussions with Mr Jukes and, subsequently, Mr Kelly (a planning officer employed by the BCC) on 28 March 2000, the Architects briefed an independent traffic engineering company, Beard Traffic Engineering, to review an extract of 2020-50A-TP1B showing the new driveway and other features of the north-west quadrant of the site including the drive-through exit and pedestrian crossing.[179]

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168 Exhibit 59.
169 Exhibit 69.
170 Exhibit 65.
171 T8-20, 8-81, 8-31, 8-32, 8-38, T9-5, 9-12, 9-15, 9-16, 9-20 and Exhibits 51, 52, 59, 63 and 64.
172 T9-41 – T9-43.
173 Exhibit 49.
174 T8-28, lines 45-46.
175 Exhibit 74.
176 Exhibit 74.
177 T9-47, lines 13-25.
178 See Exhibit 73 and T9-45.
179 Exhibit 77.

[150] Beard Traffic Engineering provided three reports to the Architects.[180] The third and last report addressed the matters which the Architects requested Beard Traffic Engineering incorporate in its report, in its facsimile dated 4 April 2000.[181] Each report issued by Beard Traffic Engineering confirmed that subject to the changes to the Architects' layout depicted in Beard Traffic Engineering's amended drawing, the Architects' design showed a C1 type driveway and the final report confirmed the new driveway was satisfactory from a traffic planning perspective.

[151] The Architects sent Beard Traffic Engineering's report dated 5 April 2000 to BCC's Mr Kelly with the attached amended drawing of the crossover on 5 April 2000 and requested Mr Kelly to contact the Architects to discuss his comments.[182] The report and drawing were re-sent to Mr Jukes of the BCC on 8 May 2000 with an additional drawing of the Waterton Street driveway and requested approval of both drawings.[183]

[152] BCC approved the alterations to both the Ipswich Road entry and Waterton Street driveway in accordance with the drawings provided on 8 May 2000.[184]

[153] I find the Architects took reasonable steps to guard against foreseeable risks to entrance to the property. More particularly the Architects addressed Brisbane City Council Planning Policy 18.06.[185] The Architects addressed the Australian Standard for design of carparks.[186] The Architects took into account sight lines, pedestrian and vehicle movements.[187] The Architects avoided designs which would encourage rat running. They addressed non-discriminatory access as required by section 19.10 of the Transitional Planning Scheme so that ambulance and wheelchair bound people had access.[188] The Architects addressed the Australian Standards for gradients, cross-falls and directions.[189] The Architects engaged with the BCC's engineers to produce compliant designs. They also engaged an independent traffic engineer to review its design for the crossover, which was itself based on the design recommended by BCC.

[154] In the course of argument, I was referred to section 22 of the *Civil Liability Act* 2003. This section does not apply to the Architects. Relevantly section 22 of the *Civil Liability Act* only applies in relation to breaches of duty happening on or after 2 December 2002. Whilst the accident occurred on 26 April 2012, the alleged breach (albeit one that I have not found) would have occurred in 1999 and/or 2000 as the case pleaded against the Architects. Rather the determination of the issue regarding breach must be determined at common law.[190]

[155] There being no contradictory expert evidence in the relevant field of architecture, creates a situation where there is no evidence upon which I could find that Mr Carseldine's opinion is incorrect. In any event I have found his opinion persuasive in finding no breach of duty arising on part of the Architects. The expert opinion

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180 Exhibits 78, 79 and 81.
181 Exhibit 80.
182 Exhibit 82.
183 Exhibit 58.
184 Exhibit 87.
185 T9-39, lines 3-6.
186 T9-39, lines 3-6.
187 T9-39, lines 3-11.
188 T9-38, lines 40-46, T9-39, lines 13-14.
189 T9-39, line 2.
190 Similar considerations apply to the BCC.

supports a finding of no breach on part of the Architects.[191] Further Mr Jamieson conceded that he was not qualified to provide expert opinion on whether the Architects acted at the relevant time in a way that was widely accepted by a significant number of respected practitioners in the field of architecture.[192]

[156] I am satisfied based on the opinion of Mr Carseldine that the Architects adhered to the requirements of the governing standards and in so doing, acted in a way widely accepted by a significant number of respected practitioners in the field as competent professional practice.

[157] The Architects' defence is also assisted by the expert opinion of Mr Pekol. Mr Pekol's view, essentially, insofar as it relates to the Architects' designs, complied in every respect with the Brisbane City Council design guidelines 18.06, AS2890.1, the Manual of Uniform Traffic Control Devices and Austroads Guide to Traffic Engineering Practice.

[158] I find no breach has been proven.

Causation

[159] Should I be wrong on my views regarding an absence of any breach of duty owed to Mr Bryant, I express my views regarding causation.

[160] Four matters were advanced on behalf of Mr Bryant as causative of the accident, namely: the design of the driveway; the design of the carpark; the presence of a large hedge obscuring the view of pedestrians and drivers; and the absence of warning signs. More fulsomely it was pleaded that the accident was caused by:

(a) The design of the driveway which resulted in Mr Bryant's car entering the carpark at a speed greater than that which it would have been able to safely enter the carpark with a normal 90 degree carpark entry.

(b) The design of the carpark resulting in:

(i) Limited time for Mr Bryant to react to an entrant upon the zebra crossing within 5.5 metres from the entry of the carpark;

(ii) A zebra crossing leading across the carpark to a children's playground when it was reasonably foreseeable that children might run across the crossing without looking;

(iii) A vehicle or vehicles parked in the three car spaces between the entry to the carpark and the zebra crossing, which obscured Mr Bryant's vision of the child;

(iv) Drivers entering the carpark to be looking towards their right to guard against vehicles exiting from the drive through when pedestrians were entering the carpark from the left-hand side.

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191 See generally *Rogers v Whitaker* (1992) 175 CLR 479 at 483; *Rosenberg v Percival* (2001) 205 CLR 434 at 439; *Piwonski v Knight* (2002) 83 SASR 400 at [68].

192 See T4-37, lines 36-46 and T4-38, lines 1-5.

(c) Having in place a large hedge some six feet in height which obscured the view of pedestrians and drivers.

(d) Failing to install any or any adequate signs warning Mr Bryant of the proximity of the pedestrian/zebra crossing and the likelihood of children running across it.

[161] One only needs to consider the evidence given by Mr Bryant to become circumspect about the matters suggestive of being causative of the accident. As Mr Bryant entered the driveway, there was a car coming out of the drive through and Mr Bryant and the other driver both *"pretty much came to a stop"*[193] eventually causing Mr Bryant's utility to be placed in first gear which is *"pretty much have to come to a stop"*.[194] Mr Bryant was just *"coasting through"* and rolled down the hill of the carpark. In evidence-in-chief, Mr Bryant described this event in the following way:

> *So as I came in, [the other driver and I] hesitated, and then I sort of gave him the "Yep, it's all good," like, "I'm going." So then I rolled down the hill, and then, in the carpark, when you're coming up to the pedestrian crossing on where it is, there's a car that – there was a car sitting on my left-hand side. Now, the building is very sharp on the right-hand side, so you can't see if somebody's walking out from the left or the right; you have to pretty much be upon it before you can see. So I come through there pretty slow. Like, I was – I would have – I was in first gear; I didn't have my foot off the clutch. Like, it was – like, I was going pretty slow. And then, as I come through the – through past the pedestrian crossing, I remember looking left, looking right, looking left; there was nobody there. On both sides, on the pedestrian crossing, that is. And then, as I come down the hill, that's when - - -*
>
> *Okay. Just let me [indistinct] there – when you look to the left and look to the right and saw that there was no - - -?---Cars, nor a person.*
>
> *- - - traffic that was going to impede you on the - - -?---Yes.*
>
> *- - - pedestrian crossing, where would you put yourself with respect to the pedestrian crossing? Where was the ute?---Pretty much just in line. So my ute would have been coming up to the pedestrian crossing.*
>
> *All right. Your – the bumper bar would have been encroaching - - -?---Yes.*
>
> *- - - over the side, you would think?---Yes.*
>
> *And do you recall looking to the left?---Yes.*[195]

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193 T1-56.
194 Ibid.
195 T1-56, line 45 to T1-57, line 24.

[162] If Mr Bryant's version of the accident is accepted, then there would have been no impediment which should have prevented him from seeing the child.

[163] I consider the specific matters promulgated on behalf of Mr Bryant indicative of causation to lack merit because:

(a) The angle of the driveway entrance played no part whatsoever because even on Mr Bryant's version he nearly stopped his utility when coming across the drive-through exit. In this regard the competing versions of Mr Skennar and Ms Yu and Mr Bryant on the one hand and Mr Bryant on the other, unify, allowing me to find the angle of the driveway played no part in the accident.

(b) Sight lines leading up to the pedestrian crossing were rendered irrelevant and that is because, on Mr Bryant's version, he had reached the crossing and then looked left, right and left again. So the sight lines beforehand are irrelevant.

(c) The stopping distance was irrelevant because Mr Bryant said he nearly stopped. He said he nearly stopped twice and particularly when he got to the pedestrian crossing itself, with his front bumper on the beginning of the crossing. Therefore, the stopping distance was rendered irrelevant.

(d) The placement of the pedestrian crossing and its proximity to the entrance was rendered irrelevant due to Mr Bryant's evidence that he was very familiar with the carpark; he had been there five times. He knew the crossing was there. He knew that there was a children's playground. He knew that there were children going into the restaurant, potentially. He knew that it was a place inhabited by children. All of that therefore rendered the placement of the pedestrian crossing utterly irrelevant.

(e) The presence of the large hedge is irrelevant because, on Mr Bryant's version, he had arrived at the pedestrian crossing and then looked left, right and left again.

(f) The presence of warning signs is irrelevant because, on Mr Bryant's version, he had reached the crossing and then looked left, right and left again. Again, Mr Bryant was very familiar with the carpark; he had been there five times. He knew the crossing was there. He knew that there was a children's playground. He knew that there were children going into the restaurant, potentially. He knew that it was a place inhabited by children.

[164] The following observation of McHugh J in *Chappel v Hart* (1998) 195 CLR 232 at 246 is apposite:

> *Human nature being what it is, most plaintiffs will genuinely believe that, if he or she had been given an option that would or might have avoided the injury, the option would have been taken. In determining the reliability of the plaintiff's evidence in jurisdictions*

> *where the subjective test operates, therefore, demeanour can play little part in accepting the plaintiff's evidence. It may be a ground for rejecting the plaintiff's evidence. But given that most plaintiffs will genuinely believe that they would have taken another option, if presented to them, the reliability of their evidence can only be determined by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred.*

[165] In a similar vein, Callinan and Heydon JJ in *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [226] stated:

> *In Rosenberg v Percival, Callinan J referred to the very limited utility, indeed practical uselessness, of reliance by a court upon an answer by a plaintiff denying that he or she would have run a particular risk had he or she known about it. Her Honour here did not rely simply upon such a denial. Quite properly, she looked to supporting objective factors such as an innate cautiousness on the part of the appellant, and his awareness of a serious accident in water in which a relative had suffered injury. We are not convinced that these factors provide a complete answer to the essential anterior question, whether the appellant would have actually seen or read the contents of the sign or signs on the day, however many there were and wherever they were located.*

[166] To me, the objective factors further rejecting the submissions advanced on behalf of Mr Bryant regarding causation are as follows:

(a) Insofar as the design of the driveway:

(i) Speed of entry, whether permitted by the new driveway or not, was not causative of the accident. Mr Pekol's view, which I prefer over Mr Jamieson, was that given the vehicle involved in the incident was travelling at a significant lower speed than 20 km/hr, there would have been ample sight distance available to assimilate the presence of the pedestrian crossing.

(ii) Mr Pekol's view was that the design of the driveway reflected contemporary driveway design requirements for Brisbane and as a result was successful in reducing the speed of Mr Bryant's vehicle as it entered the restaurant carpark from Ipswich Road to an acceptably low speed (i.e. 12.4 km/hr).

(iii) The evidence of Mr Pekol, in conjunction with Messrs Carseldine, Kelly and Van De Ven, was that a speed of 12.4 km/hr is a slow speed, typical of the entry speed of vehicles into carparks and in no way an excessive speed brought about by the driveway angle.

(iv) The weight of the evidence of Messrs Pekol, Carseldine, Kelly and Van De Ven was that the re-designed angle promoted the requirement of the Main Roads Department that the driveway

provided only ingress means, not egress to Ipswich Road. This prevented the prospect of drivers easily ignoring "no exit" signs, thus improving traffic flow and road safety on Ipswich Road.

(v) The evidence of Messrs Pekol, Carseldine, and Van De Ven was that the driveway angle had a relevant and valid purpose in terms of vehicular safety and flow, namely the preclusion of vehicular exit from the subject carpark onto Ipswich Road. Such a design, within the approved entrance types, was legitimate in the context of busy Ipswich Road.

(b) Regarding the design of the carpark:

(i) The pedestrian crossing is not 5.5 metres from the entrance of the driveway of the carpark, but rather 15 metres. Irrespective, Mr Bryant had been to Hungry Jack's on at least five occasions prior to the accident and was aware of the existence of the pedestrian crossing and carpark.

(ii) The evidence of Messrs Pekol, Carseldine and Van De Ven was that the subject driveway provided adequate sight line distance from the driveway crossover to the pedestrian crossing, in relation to pedestrians of "normal" height. Such a pedestrian would be expected to be in the company of any small children below the height of the standard motor vehicle used for design purposes, and in a positon of control over such children.

(iii) Mr Pekol opined that the actual layout of the carparking area provided adequate levels of pedestrian safety because it incorporated the relevant design elements for pedestrians, as detailed in AS2890.1 – Part 6: Off-Street Car Parking and Brisbane Planning Scheme Policy No. 18.06.

(iv) A parked vehicle did not constitute an "obstruction" to a pedestrian approaching traffic. Further I note and accept Mr Pekol's view that the presence of parked vehicles to the west of the pedestrian crossing would not constitute an obstruction to the crossing sight distance for pedestrians and that the design of the pedestrian crossing provided adequate sight distance to vehicles approaching from the west because it complied with the requirements set out in section 3.3.4 of Austroads' Guide to Traffic Engineering Practice – Part 13.

(v) The design of the pedestrian crossing provided adequate sight distance for pedestrians because it complied with requirements detailed in section 5.5 of Brisbane Planning Policy Scheme No. 18.06.

(vi) Mr Carseldine maintained the view that the crossing was an accepted and appropriate design solution to manage the flow of pedestrians in the carpark and the design of the carpark did not contribute to the accident.

(vii) The existence of both the carpark and the pedestrian crossing were clearly visible to Mr Bryant.

(viii) According to Mr Pekol, given the utility was traveling at a significant lower speed than 20 km/hr, there would have been ample sight distance available to assimilate the presence of the pedestrian crossing.[196]

(c) Regarding the presence of the hedge:

(i) Mr Pekol's view, which I prefer, was that the large hedge located in the garden bed in the north-west corner of the site did not adversely affect the minimum sight distances from vehicles entering the site to either the pedestrian crossing or other vehicles in the carpark. His view was that the view of the pedestrian crossing was not obscured by the hedge.

(ii) The hedge did not hide the presence of either the carpark or the crossing.

(iii) No witnesses gave evidence of any concern as to any obstruction by the hedge.[197]

(iv) The photographs clearly show that by the time a driver enters past the driveway, they have driven past the hedge and have an unimpeded view.

(v) I am satisfied the presence of the hedge did not in any way impede Mr Bryant's view of the pedestrian crossing upon entry into the premises.[198]

(d) Regarding the issue of warning signs:

(i) Mr Pekol's view, which I accept, was that none of the relevant guidelines required the installation of traffic signs to warn drivers of the proximity of the pedestrian crossing and the likelihood of children running across it.

(ii) There was no necessity for a sign to warn Mr Bryant of the existence of a pedestrian crossing as he knew it was, or ought to have known it was obvious and he was aware of the

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196 Exhibit 31, [88]. The same applies to the presence of the hedge.

197 There is merely a general assertion by Mr Bryant, under cross-examination by Mr Charrington, at T2-25, lines 5 -15.

198 Exhibit 2, photographs 3, 4 and 9. Further there was no evidence from Mr Bryant that any hedge impeded his view at any time.

existence of the pedestrian crossing and pedestrians (including children) in any event from his previous visits to the Hungry Jack's restaurant.

(iii) The absence of signage is of no consequence and would not have added any greater level of safety or imparted any greater knowledge to Mr Bryant given he was aware of the existence of the pedestrian crossing and pedestrians (including children) within the carpark.

[167] It seemed common ground between Mr Pekol and Mr Jamieson that the accident was an *"inevitable accident"*.

[168] The CCTV footage shows the child running through and past the bollards and beyond the front of the carpark in the space adjacent to the crossing on the Ipswich Road side.[199] This is consistent with the photographic evidence showing the trajectory of the vehicle compared to the concrete join in the bitumen surface of the carpark, leading to, as it was submitted by BCC, the *"irresistible inference"* that the child was located between the second and third yellow stripes (from the bollards on the northern side of the crossing). I accept that the child could not have been struck in this position on the crossing without being visible to a driver travelling at 12.4km/hr or less unless the driver was not looking ahead. The logical inference to draw from the position of the deceased child (between the second and third yellow stripes (from the bollards)) was that he could not have simply materialised from nowhere. The child must have been visible from the time it took him to take several steps along the crossing after clearing the bollard, ensuring his visibility for that period of time to any motorist looking ahead.

[169] Furthermore, I prefer the compelling evidence of the three independent witnesses: Ms Yu, Mr Skennar and Ms Downes. The effect of their evidence was that both before and after the accident, Mr Bryant was driving his utility whilst looking down (and up intermittently), that he had headphones in his ears, and when the utility door was opened, Mr Bryant was seen to be holding a mobile phone in his right hand, which was connected to the earphones. Consequently the driveway angle of entry and the sight lines were rendered irrelevant by Mr Bryant not looking where he was driving. And for reasons to be expanded further below, I find the accident was caused by a combination of:

(a) The child suddenly darting from the northern side of the property and into the path of Mr Bryant's utility.

(b) Mr Bryant failing to observe the sudden emergence of the child into the path of his utility.

[170] Therefore in all of the circumstances I am not satisfied that any asserted deficiencies, such as the angle of the driveway, sight lines or stopping distance between the driveway entrance and the pedestrian crossing materially contributed to the accident.

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199 Exhibit 2.

Contributory Negligence

[171] In the event I am wrong regarding liability, given the defendants have all pleaded contributory negligence, I make the following findings regarding this issue.

[172] Hungry Jack's submitted the incident occurred as a consequence of the conduct of Mr Bryant, more particularly that he caused or contributed to his own negligence by:

(a) Using or otherwise looking at his mobile as the vehicle approached and passed through the pedestrian crossing.

(b) Failing to ensure that neither his hearing nor his vision was impeded as the vehicle approached and passed through the pedestrian crossing.

(c) Failing to ensure that he had clear visibility through the front windscreen of the vehicle;

(d) Failing to ensure that the brakes of the motor vehicle were properly maintained and functioning at full capacity.

(e) Failing to keep a proper look out including permitting himself to be distracted by a mobile telephone and a discount voucher in his possession.

(f) Failing to drive at a speed which was safe in all of the circumstances.

(g) Failing to apply the brakes of the motor vehicle so as to avoid a collision with the infant.

(h) Failing to have proper regard to the fact that the premises (being the carpark at a retail fast food outlet) was one where young children may be present and may act in an erratic manner.

(i) Proceeding directly through the pedestrian crossing without any attempt to slow down in the event there was a pedestrian (including, in particular, children) in proximity to the pedestrian crossing.

[173] Hungry Jack's submitted that given the fatal matrix, the prime determination was the cause of the collision. There were important factual issues, the determination of which will necessarily impact upon the ultimate issue of liability. These included:

(a) The speed of the utility upon entry.

(b) The level of vigilance undertaken by Mr Bryant upon entry to the premises (in particular the issue relating to whether he was looking at his mobile phone or any document).

(c) The extent, if any, to which Mr Bryant's view was obscured (and why).

(d) The point at which Mr Bryant may first have been able to observe the child had he been paying attention.

(e) Whether Mr Bryant could have braked or taken any action at any time prior to the impact.

(f) The fact that the child, to some extent, was unsupervised.

(g) The fact there appeared to be some type of plant inserted near the windscreen of the utility (in close proximity to the windshield wipers) which may have impacted upon Mr Bryant's visibility and concentration.

[174] It was submitted that there was one other feature of the case which was pertinent to Mr Bryant's claim. It is not in dispute that Mr Bryant's utility not only impacted the child on the pedestrian crossing but then dragged the child for some nine metres whilst the child was pinned under the car. When the car first stopped, it then had to be reversed a short distance to reveal the child, who was then still alive. Mr Bryant's case, it was submitted, must necessarily be that whatever aspects led to the impact, Mr Bryant, acting prudently, would not have seen the child and would have continued to drive. Mr Bryant must argue that the events which occurred were reasonably foreseeable. The obvious corollary, it was submitted, is that it must be accepted that if Mr Bryant had seen the child, he would have braked prior to impact or immediately thereof. Instead he carried the child forward.

[175] BCC pleaded that at the time Mr Bryant both exited Ipswich Road and commenced to enter the Hungry Jack's restaurant, he knew that he was about to enter a carpark and/or a drive through restaurant and, as a consequence knew or ought to have known that:

(a) Other vehicles might be entering or leaving the fast food restaurant.

(b) Persons (including families and children) might be:

(i) in or about the fast food restaurant;

(ii) entering or leaving the restaurant.

[176] Further, BCC pleaded that a covered children's playground was clearly visible to drivers of vehicles (including Mr Bryant) as they drove upon the concrete driveway to the property and immediately before they entered the carpark of such. As such it was incumbent upon any driver entering the property (including Mr Bryant) to:

(a) Exercise appropriate caution when driving through the carpark.

(b) Travel at an appropriate speed whilst entering the carpark.

(c) Keep an appropriate look out for any persons who might be in or about the carpark, and in particular for those who might be about to use the pedestrian crossing.

[177] I accept the force of these submissions. As indicated, I have preferred the evidence of the three independent witnesses, Ms Yu, Mr Skennar and Ms Downes. The effect of their evidence was that both before and after the impact, Mr Bryant was driving

his vehicle whilst looking down (and up intermittently), that he had headphones in his ears, and when the vehicle door was opened he was holding a mobile phone in his right hand, which was connected to the earphones. Whilst the speed of the utility was suitable for a carpark environment, I am satisfied Mr Bryant was simply not looking where he was driving.

[178] In addition to the matters expressed above, I am satisfied the evidence clearly establishes Mr Bryant's contribution to the accident. His culpability is evidenced as follows:

(a) Mr Bryant had attended the premises approximately five times prior to the incident.

(b) He was aware of the existence of a children's play area immediately adjacent to the restaurant.[200]

(c) He was aware of the existence and location of the pedestrian crossing.[201]

(d) He was also aware children and adults may be in the vicinity of the pedestrian crossing and carpark.[202]

(e) The pedestrian crossing was marked with painted yellow stripes.[203]

(f) There were two bollards, also painted yellow, on the northern side of the pedestrian crossing through which pedestrians must pass in order to enter onto that part of the pedestrian crossing which traversed the driveway.[204]

(g) There was a vehicle that was parked such that the front of the parked vehicle faced the driveway. The front of the parked vehicle did not extend as far as the line of the bollards and there was a gap between the bollard closest to the carpark and the front of the parked vehicle.[205]

(h) Mr Bryant had with him in his utility a Hungry Jack's discount voucher which he intended to use when purchasing food from the restaurant.[206]

(i) Under cross-examination by Mr Collins, the following exchanged occurred:

> *Now, Mr Myers asked you about any distractions. Firstly, you had earphones in both ears?---Yes.*
>
> *Why?---Because I'm not allowed to talk on the phone.*

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200 T1-56, line 6 – 8 and T1-82, line 30.
201 T1-81, lines 42 – 46.
202 T1-82, lines 30 – 46.
203 Exhibit 2, photograph 8 and exhibits 19 and 21.
204 Ibid.
205 Exhibit 2, CCTV.
206 Exhibit 5 and T1-94, lines 40 – 45.

Right. So were you talking on the phone?---No.

So is it the case that you drive along with your phone, what, in a holster or in a lap or what? In your lap or what?---Sits in the centre console.

So is that where it was on the day?---Yes.

So you had both earphones in your ear?---Yes.

With it in the centre console?---Yes.

Now, what you didn't tell us in evidence-in-chief is there was some kind of plant or fern sitting on your windscreen?---Yes.

What was that?---Just a shrub that was jammed in – a stick.

You've got a shrub sitting on your windscreen?---Not a shrub. It's a stick.

Well, we will see it in the photos?---Yes.

I suggest it's like a fern?---Yeah.

What is it doing sitting on your windscreen?---Because there's about six different employees who drive the utility, so they would always do silly things to everyone. That's all.

So you kept driving with this fern in your windscreen?---Well, you can't see it. It's down underneath the win – it's not even above the windscreen wipers.

But it's in your windscreen?---Yeah.

Right. It was there on the day, wasn't it?---Yes. Yes.[207]

(j) Mr Bryant was distracted by something in his utility which, after entry, caused him to look up and down as he drove the utility towards the pedestrian crossing.[208]

(k) Mr Bryant did not see the child prior to impact.[209]

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207 T1-86.

208 T7-40, lines 24-27.

209 Exhibit 1, Agreed Fact 13 and T1-58 and T1-85.

(l) Mr Bryant did not realise he had impacted with the child.[210]

(m) He continued to maintain a speed of approximately 10 to 12 km/hr as he proceeded through the pedestrian crossing.[211]

(n) He continued to look up and down at something in the utility after proceeding through the pedestrian crossing.[212]

(o) He did not comprehend why the utility was brought to a halt or what the concerns of customers were who stepped in front of the utility to cause it to be brought to a stop.[213]

(p) He was brought to a stop some nine metres after impact.

(q) Mr Bryant was told by persons in the carpark that he must reverse the utility.[214]

(r) Mr Bryant still had earphones in his ears when he alighted from the utility.[215]

[179] I do not accept that Mr Bryant's assertion that he *"was paying full attention"* is meritorious.[216] Further there is simply no possible way that I accept Mr Bryant's evidence that he *"rolled"* or *"coasted"* his utility forward at or around the time of the drive through exit, or that he looked left or right before the pedestrian crossing.

[180] I accept and prefer the independent evidence of the lay witnesses Ms Yu and Mr Skennar, together with Ms Downes. Mr Bryant's conduct amounted to more than mere inadvertence, momentary inattention or misjudgement. His actions were careless. He was in a confined space where children were about. It was not an open road. Notwithstanding his knowledge of the environment in which he was travelling, Mr Bryant did not remain vigilant as to the existence of pedestrians. Had the deceased child not been in front of his mother who was pushing a stroller a few metres behind and darted out onto the pedestrian crossing, I would have made a finding of 100 per cent for contributory negligence. Instead I find Mr Bryant's actions extend to 90 per cent, and damages would otherwise be reduced accordingly.[217]

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210 Exhibit 1, Agreed Fact 13 and T1-105, line 1.

211 Exhibit 39.

212 T5-8, line 23 – 25; T5-35, lines 7 – 16 and 35 – 46; T5-38, lines 5 – 20 and 28 – 36.

213 T5-8, lines 23-25 and T7-41, lines 35-45.

214 T7-41, line 35-45 and T5-9, line 24.

215 T7-41, line 22-25; T5-36, lines 1-7; T5-11 – T5-12, line 12.

216 T1-87, line 42.

217 See generally s 10 of the Law Reform Act 1995; s 24 of the *Civil Liability Act* 2003; *Green v Hanson Construction Materials Pty Ltd* (2007) Aust Torts Rep 81-907 at [29]-[32]; and *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 529 at 532-533. See also *Derrick v Cheung* (2001) 33 MVR 393, *Stocks v Baldwin* (1996) 24 MVR 416 and *Marien v Gardiner* [2013] NSWCA 396 concerning duty of a driver of a motor vehicle.

Quantum

[181] Notwithstanding my conclusion reached on liability, it is appropriate to assess quantum.[218]

[182] Mr Bryant was born on 18 June 1985. He is 33 years of age and was 27 at the time of the accident. There can be no doubt the accident has had, and continues to have, a profound impact upon both him and his family. A number of lay witnesses gave evidence of their observations and dealings with Mr Bryant (pre and post-accident).

[183] Mr Bryant's uncle, Mr Robert Anderson, was one of them. Mr Anderson and Mr Bryant's late father were cousins. I considered Mr Anderson was an honest and credible witness. He explained that after Mr Bryant left school, he would do anything; however he seemed to have *"picked up scaffolding"* and *"worked on towers"*. Although Mr Anderson did not work directly with Mr Bryant in a professional sense, Mr Anderson said that his nephew would help him with his real estate portfolio. Mr Anderson said Mr Bryant was always *"very generous with his time"*. After the accident, Mr Anderson observed a couple of things. For example about six months after the accident, he said that he was working at his rental house at Belmont and he asked Mr Bryant for assistance to braise some tap fittings. A few days went by and Mr Anderson telephoned his nephew a number of times to remind him. Eventually Mr Bryant turned up one evening at about 8pm. According to Mr Anderson, Mr Bryant seemed *"sad"* and *"melancholy"*. *"Something was not right"*. Mr Bryant went to his car to retrieve some equipment in order to braise the taps, however after some time did not return. Because of that, Mr Anderson had to go outside to speak to his nephew. It was on this occasion that Mr Anderson strongly encouraged Mr Bryant to seek medical treatment. Also since the accident, Mr Anderson has noticed that Mr Bryant has been *"paranoid about safety"*. Mr Anderson explained that on his observation, Mr Bryant's *"sadness"* happened more as a consequence of the accident as opposed to the breakdown of Ms Bryant's marriage some years later. To him, his nephew was *"already struggling"* prior to the divorce.

[184] Mr Paul Moreland, a plumber since 1969, first met Mr Bryant in the middle of 2010. He engaged Mr Bryant to erect scaffolding so that he could work on a 14 storey building in the CBD. Mr Moreland described Mr Bryant as a reliable and good worker however he observed those favourable attributes change following the accident in 2012. Mr Moreland described that his working relationship with Mr Bryant started to slow down after the accident due to a number of factors including what he described as *"the emotional side"*, as well as Mr Bryant's need to attend various appointments with solicitors and a psychiatrist. Mr Bryant began missing work because of appointments with solicitors and his psychiatrist. This prevented him from turning up for jobs. He described Mr Bryant's personality following the accident as *"a little more serious"*, although Mr Moreland considered Mr Bryant as having the same level of skill and application.

[185] Mr Tony Rainbow has been a builder and sole trader for many years. He has known Mr Bryant for approximately 15 – 18 years. He has engaged Mr Bryant in the past to install scaffolding for construction of residential properties. According to Mr Rainbow, the quality of the work Mr Bryant performed prior to the accident was *"never a problem"*. Mr Bryant was required to install individual scaffolding tailored

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218 I have assessed Mr Bryant's damages on the basis of liability having been established, without contributory negligence.

to the particular location, job site or project. Mr Rainbow said there was nothing generic in respect to the work. After the accident, Mr Rainbow noticed Mr Bryant's enthusiasm, confidence and nous *"diminish"*. Mr Rainbow tried to engage Mr Bryant for work following the accident, however had to *"pull away"* because Mr Bryant lacked motivation and was unresponsive to requests from Mr Rainbow to perform work. Mr Rainbow would have still continued to engage him without hesitation, had Mr Bryant's attitude and demeanour not changed following the accident. Mr Rainbow engaged Mr Bryant recently for a smaller job. Mr Rainbow observed Mr Bryant's confidence was *"lost"*. He described him as *"not David"*, *"he was really there for the wage and his heart and soul was no longer in the work"*.

[186] Mr Jason Wade is a production manager/site manager in the entertainment industry. He met Mr Bryant in about 2011 prior to the accident. He engaged Mr Bryant for several shows as a rigger. Mr Wade heard about the accident and following the accident noticed that Mr Bryant was not focussed on work as much as he was previously. Previously Mr Bryant was *"a pretty solid worker"*. Post-accident Mr Wade noticed Mr Bryant's personality changed. Mr Wade stopped engaging Mr Bryant for the bigger jobs because Mr Bryant was having family troubles and *"didn't have his head in the game"*. He also observed Mr Bryant not working as fast as what he did prior to the accident. From about July 2012, Mr Wade has not had much involvement with Mr Bryant.

[187] Mr Niel Luu first met Mr Bryant when Mr Luu was engaged in building three town houses at Browns Plains in 2011. Mr Bryant started doing scaffolding for Mr Luu for approximately six months. He described Mr Bryant as *"very able"*. Mr Bryant *"brought a lot of hands-on skills"*. Prior to the accident Mr Bryant was *"very proactive"*, *"he had got the job done"* and was *"goal orientated"*. Following the accident, Mr Bryant's work ethic progressively declined and Mr Luu observed that Mr Bryant's tolerance had dropped *"a bit"* and *"his thinking was not clear"*. The professional relationship between the two ceased a few months later. Had it not been for the accident, Mr Luu said he would have continued to work with Mr Bryant.

[188] Two expert psychiatrists were called. The first was Consultant Psychiatrist Dr Michael Dwyer who assessed Mr Bryant on two occasions – the first being on 16 March 2015 and then on 13 June 2016. Dr Dwyer said that prior to the accident, it appeared Mr Bryant was managing his company, employing people and doing quite well. He agreed that Mr Bryant's involvement in the legal proceedings was an exacerbating factor to Mr Bryant's current psychiatric symptomatology. This also extended to dealing with lawyers and preparing for and going to court. Dr Dwyer could not say for certain whether the resolution of these court proceedings would lead to an improvement in Mr Bryant's level of functioning. He also accepted that Mr Bryant's custody and financial settlement in the Family Court were potentially exacerbating features to his condition. He said that Mr Bryant would potentially improve with significant treatment. The diagnosis was one of Post Traumatic Stress Disorder.

[189] Professor Whiteford spoke to his report of 5 July 2017. Professor Whiteford has not seen Mr Bryant since July 2017. Mr Myers took Professor Whiteford to the ongoing effects of the accident upon Mr Bryant and Professor Whiteford accepted that it seemed apparent that Mr Bryant had not improved since he last examined him. Professor Whiteford considered Mr Bryant's ability to manage stressors was significantly reduced. He considered that once the court proceedings finalised, Mr

Bryant's symptoms would improve. However given the chronic nature of the Mr Bryant's condition and treatment rendered to date, Professor Whiteford did not expect to see a significant improvement in Mr Bryant's condition.

General Damages

[190] Mr Bryant's damages fall to be assessed against Hungry Jack's under the *Civil Liability Act* 2003 given the date of the subject event. The assessment of damages as against BCC and the Architects fall to be assessed under common law given the pleaded breaches related to matters predating the commencement of the *Civil Liability Act* 2003.

[191] Mr Bryant suffers from Post-Traumatic Stress Disorder. Dr Dwyer has assessed a psychiatric impairment rating scale of 13 per cent. Professor Whiteford assessed a likely impairment of five per cent. Both experts contend that irrespective of further treatment, it is likely Mr Bryant will remain with a residual impairment (including the conclusion of the present litigation). I accept the accident has had a traumatic, ongoing impact upon Mr Bryant and will likely continue into the future.

[192] Adopting a midrange approach between the two experts, I assess Mr Bryant's psychiatric injury under Item 12 (moderate mental disorder) of schedule 4 of the *Civil Liability Regulation* at 10 ISV points. Accordingly, pursuant to schedule 7, table 3, the resulting amount for general damages against Hungry Jack's is $13,350.00.

[193] BCC and the Architects have submitted that the assessment of damages under the common law is rendered problematic by the paucity of common law assessments since the introduction of the *Civil Liability Act* 2003 and the *Workers' Compensation Rehabilitation Act* 2003. I was referred to the decision of McGill SC DCJ in *Palmer & Ors v State of Queensland* [2015] QDC 63 where his Honour awarded between $52,000.00 and $70,000.00 to four plaintiffs for workplace actions arising in 2008, and assessed in 2015.

[194] I consider it appropriate to assess general damages as against BCC and the Architects at $55,000.00, reflecting the seriousness of Mr Bryant's condition and its continued impact upon his functioning. Interest of two per cent per annum, on half, produces $3,575.00.

Past Economic Loss

[195] At the time of the trial of this action, Mr Bryant sought an award of approximately $156,000.00 for past economic loss based on the opinion expressed by expert Forensic Accountant Mr Michael Lee. The defendants submitted a global award between $20,000.00 and $40,000.00.

[196] At the time of the accident, Mr Bryant was self-employed as a scaffolder and rigger trading under the name DGB Industries Pty Ltd which was the trustee for the DGB Trust ("the Trust"). Mr Bryant was the sole director and shareholder. He commenced self-employment in about 2003 working predominantly within the entertainment industry, working for production companies and concert events initially around the Brisbane area.

[197] The structure of the Trust was that it had no other employees other than Mr Bryant and his then wife. Mr Bryant provided all labour (except for contractors). The Trust

was the entity which contracted with clients to provide scaffolding and rigging services. The Trust paid a salary to Mr and Mrs Bryant. From 2012, the Trust also conducted a small coffee shop (out of a shipping container) which was initially attended to by Mr Bryant's then wife.

[198] The Trust would invoice customers and subsequently receive payment for the services. In 2012, the Trust changed from the cash accounting method to the accrual method. The Trust paid the expenses associated with the business. Each year the Trust paid a salary to Mr and Mrs Bryant, and in some years, made distributions to them as well as their children.

[199] I note the two expert Forensic Accounts called at trial (Mr Lee and Mr Stuart Benjamin (who was relied upon by the defendants)) agreed that the amounts contained in Mr Bryant's personal income tax returns were not necessarily reflective of his earning capacity.[219] Each of them provided guidance as to the extent of Mr Bryant's loss.[220]

[200] Following the accident, Mr Bryant took one month off work.[221] He stated that he entered into a process of supplying labour to some jobs as opposed to managing them.[222] His ability to contribute to the gross income of the business then diminished substantially as he was unable to physically participate in the business in a full time capacity.[223] This failure to attend the business then led to a drop off in the quantum of the contracts to be fulfilled or the work that was capable of being performed or obtained. Mr Bryant said that he would not work on some days such that the amount of days per week reduced.[224] He indicated that the contractual obligations were only able to be maintained by reason of Mr Bryant's then wife whom he relied on to coordinate the contracts in order to sustain the work for the business.[225] Some contracts were *"set and forget"* and were occurring such that they could be performed entirely by subcontractors.[226]

[201] The Trust's gross income was as follows:[227]

(a)	2008	$208,845.00;
(b)	2009	$221,310.00;
(c)	2010	$71,167.00;
(d)	2011	$206,257.00;
(e)	2012	$272,257.00;
(f)	2013	$276,900.00 (1.71 per cent on 2012);
(g)	2014	$284,701.00 (4.57 per cent on 2012);
(h)	2015	$246,960.00 (-9.29 per cent on 2012)[228];
(i)	2016	$157,307.00 (-42.22 per cent on 2012);
(j)	2017	$114,393.00 (-57.98 per cent on 2012).

219 T5-78, lines 8 – 10 and T7-12, line 7.
220 Exhibits 23 – 26 and 40 – 42.
221 There was approximately 10 weeks left in the 2012 financial year.
222 T1-61, line 35.
223 T1-61 – T1-62.
224 T1-61, lines 40-50.
225 T1-75.
226 T1-75, line 20.
227 See Exhibit 40, p 27 and Exhibit 25, p 23.
228 In January 2015, there was an acrimonious separation between Mr Bryant and his then wife.

[202] Mr Lee gave evidence to the effect that it was important not to focus on the gross sales but rather what he described as *"return on labour"*.[229] In that respect he said that one needs to look at the labour component (as opposed to simply looking at Mr Bryant's gross income) to accurately assess the value of Mr Bryant's contribution in the business.[230] Based on his methodology, Mr Lee ultimately concluded that between 1 July 2012 and 30 April 2018, Mr Bryant's past economic loss for that period was $154,958.00.[231]

[203] Conversely and after applying his methodology in light of what he considered to be limited information, Mr Benjamin was of the view that the level of work undertaken by Mr Bryant's business had actually increased following the incident. His view was that, on the information available to him, Mr Bryant's submission that he had to decline work as a result of the incident or hire additional staff or contractors to undertake work could not be substantiated.

[204] The Trust's expenditure on contractors was as follows:

(a)	2008	$83,808.21;
(b)	2009	$65,381.27;
(c)	2010	$2,899.50;
(d)	2011	$39,085.39;
(e)	2012	$10,534.58
(f)	2013	$17,585.24;
(g)	2014	$31,857.00;
(h)	2015	$35,238.00;
(i)	2016	$5,411.00;
(j)	2017	$18,209.00.

[205] It is difficult to reconcile the two approaches made by the expert evidence. Whilst I am guided by their detailed opinions, I am not convinced or persuaded by either. However it does seem clear to me that Mr Bryant's economic loss falls within the ranges promulgated by the experts. My brief reasons for not being persuaded by either methodology are because:

(a) Insofar as Mr Lee's opinion is concerned, I remained unconvinced about his methodology concerning *"return on labour"*. This is so when Mr Bryant's mark-up on the work performed by the business varied on both labour and materials at all material times. Mr Bryant said that his mark-up on labour and materials would vary. Neither was there sufficient evidence of the percentage mark-up in any materials, nor was there a way to safely discern how much of the gross income of the business was referrable to materials and how much represented the business' actual profit. In addition, the Trust recorded significant increases in costs which could not seem to be adequately verified.

(b) Mr Benjamin sought further material from Mr Bryant's solicitors in order to substantiate his opinion. Whilst some documents were

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229 Exhibit 25, Schedule A.

230 T5-54, lines 14 – 17. This explains why Mr Lee's assessment of gross profits differs significantly from the other expert Mr Stuart Benjamin: see Exhibit 25, page 24 and Exhibit 40, page 27 respectively.

231 Exhibit 25, p 26.

> forthcoming, not all documents were, such that Mr Benjamin's opinion remained qualified.

[206] Doing the best I can in the circumstances, I accept Mr Bryant has suffered an injury which has affected his ability to derive an income. I am unable, however, to come to a precise mathematical calculation as to the extent and will assess Mr Bryant's economic loss on a global basis.

[207] It seems to me that following the accident, Mr Bryant was required to take some time off immediately in the aftermath of the accident. For a not insignificant period of time, Mr Bryant was unable to perform some additional, albeit unquantified, work which prevented a greater loss restriction to the overall gross income and monies available for the Trust to ultimately distribute wages to him or make distributions. I note the Trust's gross income has fluctuated not only in the period prior to the accident, but also in the period after the accident. In addition, the medical evidence demonstrates that Mr Bryant's PTSD has had quite a significant impact on his ability to work.[232] In early 2015, Mr and Mrs Bryant were involved in an acrimonious separation and family law court proceedings commenced. It being almost 7 years since the accident, I assess Mr Bryant's past economic loss globally at $70,000.00.[233]

[208] Interest on that amount at the rate of 1.3 per cent per annum from 26 April 2012, say 6.6 years, produces an extra $6,006.00. I make no allowance for past loss of superannuation entitlements.

Future Economic Loss

[209] Mr Bryant sought an award of $457,248.00 for future economic loss based on Mr Lee's opinion of a resulting net loss of $528.00 per week for the next 34 years on the 5% tables. No reduction for contingencies was made. Conversely the defendants submitted a global award between $50,000.00 and $100,000.00 was appropriate.

[210] The High Court in *Husher v Husher* (1999) 197 CLR 138 at 148 stated:

> *Deciding what value is to be ascribed to the loss of future earning capacity of an injured plaintiff requires close attention to the facts of each case. The task is not one to be undertaken by seeking to classify cases as concerning "sole traders" or "partnerships" or "wage-earners" or "trading trusts", and then attempting to deduce some rule of general application to all cases falling within the classification thus devised. Rather the inquiry is about what could the plaintiff have done in the workforce but for the accident and what sum of money would the plaintiff have had at his or her disposal. Only when those inquiries are pursued can a judgment be made about what capital sum to allow as damages for the impairment of the plaintiff's earning capacity. In doing so, regard must be had, of course, to all those contingencies of life that might reasonably be expected to affect the course of events in the future.*

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232 There is no suggestion by the medical opinion that there was a delayed onset of Mr Bryant's psychiatric conditions.

233 The award for this head of damage is cognisant of section 55 of the *Civil Liability Act* 2003 as it pertains to Hungry Jack's.

[211] In Mr Bryant's case, as in all cases, an assessment of the loss of earning capacity involves an evaluation of the probabilities and possibilities that hypothetical events will occur.[234] This is not an exact science. Additionally, in my view, the hypothetical exercise looking to the future requires discounting.

[212] Mr Bryant is 33 years of age. He has a substantial working life ahead of him prior to normal statutory retirement. The medical evidence demonstrates that Mr Bryant is left with a psychiatric injury which will be ongoing and may impact upon his ability, into the future to derive an income at the same level as that prior to the injury. It is apparent that he has a residual work capacity which will improve so long as his condition improves. The expert psychiatrists agree that the cessation of any effects of this litigation should improve Mr Bryant's symptomology and functioning. In light of these matters, and given Mr Bryant's education, work experience and solid employment history, I make a global assessment of $120,000.00 for future economic loss.

Special Damages

[213] Special damages are agreed at $5,368.00[235] This figure is exclusive of an amount of $55,865.00 sought by way of special damages on behalf of Mr Bryant for *"the costs incurred…in defending a criminal prosecution in respect to the accident, for which he was found not guilty"*.

[214] Following the accident, Mr Bryant was charged with dangerous operation causing death. He was prosecuted. He defended the charge and was subsequently acquitted following a jury trial in the District Court.

[215] Mr Purcell of Potts Lawyers, who represented Mr Bryant in the criminal matter, gave evidence that the total legal costs arising from the criminal prosecution amounted to $56,165.00.[236] Mr Purcell provided a general overview as to how matters proceed in the criminal jurisdiction. He said that Mr Bryant was initially charged by police and was issued with a notice to appear. Mr Bryant then appeared in the Magistrates Court where he was released on bail. A full hand up committal was made in the Magistrates Court where a magistrate made a determination as to whether Mr Bryant should be committed for trial. Mr Purcell said that was then up to the Director of Public Prosecutions as to whether an indictment was presented to the District Court. Consequently determinations were made separately and independently by the Commissioner of Police, a magistrate and the Director of Public Prosecutions. Mr Purcell said that submissions were made on Mr Bryant's behalf to the Director of Public Prosecutions for the charge not to proceed to trial. Despite this, the Director of Public Prosecutions elected to proceed and the matter proceeded to a criminal trial. Mr Bryant elected not to call evidence. He was subsequently acquitted of the charge.

[216] The defendants have applied to strike out the claim for Mr Bryant's legal costs in light of rules 149, 150, 155 and 157 of the *UCPR*. The principle ground being that the defence costs associated with the criminal proceeding (brought by an independent third party solely at that third party's election) cannot be said to be a "loss" or "damage" consequent upon any personal injuries being suffered.

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234 *Malec v JC Hutton* (1990) 169 CLR 638 at 642.
235 Exhibit 60.
236 See T2-80 and Exhibit 8.

[217] References were made to the High Court authorities of *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49[237], *Mahony v Kruschich (Demolitions) Pty Ltd* [1985] HCA 37, *Wallace v Kam* (2013) 250 CLR 375[238] and *Chapman v Hearse* (1961) 106 CLR 112[239]. These cases, it was submitted, highlighted matters regarding causation, novus actus interveniens and remoteness, the effect of which precluded Mr Bryant's legal defence costs.

[218] Mr Bryant relied on *Habib v Nominal Defendant (NSW)* (1995) 22 MVR 454 in support of an entitlement to recover his legal costs in defending criminal proceedings. In that decision, the plaintiff was charged with fraud in respect of the prosecution of his claim for damages for personal injuries arising from the alleged negligence of the driver of an unidentified vehicle. At 463, Kirby P stated:

> *It is well settled that damages suffered as a result of proceedings between the plaintiff and third parties may be recovered from the defendant. McGregor on Damages, 14 ed at 439 notes:*
>
> > *"Where the costs that the plaintiff now claims as damages from the defendant have been incurred in previous proceedings between the now plaintiff and some third party, whether the third party be a civil litigant or the crown as prosecutor…since the leading case of Hammond & Co v Bussey costs in such actions have been held recoverable as damages subject to the rules of remoteness of damage." [Emphasis added].*
>
> *...Instead, it was to be decided by reference to the possibility that criminal proceedings might be launched in respect of a claim made by a plaintiff for damages arising out of the activity of the driver of the unidentified motor vehicle.*
>
> *The test to be applied to resolve such cases has been set out in Wyong Shire Council v Shirt (1980) 146 CLR 40 at 47 where Mason J said:*
>
> > *"A risk of injury which is quite unlikely to occur…may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful."*
>
> *As such the test is generally referred to as an "undemanding" one, in the sense that it is enough to affix liability to a defendant even when the damage is judged to have been a remote possibility. An illustration of this situation was the unlikely chain of events involved in Chapman v Hearse…*

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237 At paragraphs [4] – [8].
238 At paragraphs [11] and [14] – [16].
239 At 122.

[219] It was also identified on behalf of Mr Bryant the comments made by Powell JA in *Habib* at 471 (who was dissenting) namely:

> *I accept that the test of foreseeability to be derived from such cases as Chapman v Hearse (1961) 106 CLR 112 and Mt Isa Mines Ltd v Pusey (1970) 125 CLR 383 is not a particularly demanding one, and does not require that a tortfeasor needs to foresee the precise and particular nature of the damage which is said to have been sustained, but requires only that he foresee injury of a class into which the damage which has been sustained falls. It was on this basis that, during the course of the argument on the appeal, I indicated that if, as seen at one stage, was likely to occur, the appellant had been charged with negligent driving, the cost of his defending himself in respect of that charge might well be regarded as reasonably foreseeable.*

[220] It was submitted on behalf of Mr Bryant that all three defendants well knew of the dangers and risks associated with the use of the premises and in light of the authorities and foreseeability being the relevant criterion, the risk was not far-fetched or fanciful. For that reason, it was submitted the claim for legal defence costs was properly justiciable.

[221] Mr Bryant's claim is for a psychiatric injury described as "post-traumatic stress disorder." The claim is solely for a psychiatric injury. Special damages in a personal injuries claim are monetary relief awarded for the out of pocket expenses incurred due to the negligent actions of a defendant.

[222] It was submitted by the defendants that the case of *Habib* can be distinguished from the facts of Mr Bryant's case and the legislation under consideration should be carefully considered in contrast to the circumstances of Mr Bryant's claim. In *Habib,* the plaintiff's claim related to a claim under the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW) for "damages…in respect of…death or bodily injury". Kirby P considered the words "a claim for damages…in respect of …death or bodily injury" of a person were extremely wide in their connotation. His Honour did not consider the claim for legal costs fell outside the statute. Powell JA noted the artificiality of the charge (it not being one related to the plaintiff's driving but rather faking a motor vehicle accident and attempting to obtain statutory damages by fraud). Priestly JA was prepared to agree with Kirby P and considered that the authorities on foreseeability require only that the general kind of consequence should be foreseeable, not its particular manifestation. His Honour considered those damages came within the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW).

[223] The defendants submitted the High Court authorities emphasised the need for the particular expense to be causally connected to the defendant's negligence. If so the defendants ought to have reasonably foreseen that an expense of that kind might be incurred.[240] In this regard, McHugh J stated in *Gardikiotis* at 55 that:

> *Under the common law theory of common sense causation, a free, informed and voluntary act of the plaintiff or a third party, which builds on a situation resulting from the defendant's tort and causes loss or damage to the plaintiff, negatives any causal connection*

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240 See *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49.

> *between that tort and the loss or damage. That is so even though the act of the plaintiff or third party would not have occurred but for the defendant's tort. Consequently, unless a defendant's wrong has caused a disability that requires the plaintiff to obtain assistance in managing his or her verdict moneys, the cost of such assistance is not caused by the defendant's negligence and is not recoverable as damages from the defendant.*

[224] Earlier in *Gardikiotis,* the joint judgment of the majority made the following observations at [2]:

> *…True it is that, but for the accident, the respondent would not have a verdict to invest and, thus, would not need assistance in its management. But it is contrary to common sense to speak of the accident causing a need for assistance in managing the fund constituted by her verdict moneys in circumstances where her intellectual abilities are not in any way impaired.*

[225] Regarding causation, in *Mahony v Kruschich (Demolitions) Pty Ltd* [1985] HCA 37, the High Court stated:

> *…In negligence, "damage" is what the plaintiff suffers as the foreseeable consequence of the tortfeasor's act or omission. Where a tortfeasor's negligent act or omission causes personal injury, "damage" includes both the injury itself and other foreseeable consequences suffered by the plaintiff. The distinction between "damage" and "damages" is significant. Damages are awarded as compensation for each item or aspect of the damage suffered by a plaintiff, so that a single sum is awarded in respect of all the foreseeable consequences of the defendant's tortious act or omission…*

[226] The Court went onto state:

> *…A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a novus actus interveniens. But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone. Whether such a line can and should be drawn is very much a matter of fact and degree…*

[227] In light of the foregoing and my views regarding liability, I am not persuaded there is a sufficient causal link between the alleged negligent actions of the defendants and the need for Mr Bryant to, on his own volition, engage legal representation in order to defend a criminal trial which was ultimately pursued by the Director of Public Prosecutions (on his own assessment of the evidence after an earlier assessment made by the investigating police, on behalf of the Commissioner of Police, to initiate a notice to appear in the Magistrates Court, and following a Magistrate's committal). Further I accept the submission made by the defendants that the causal connection is

negatived if the factors required for the production of the harm include, in addition to the wrongful act:

(a) The free deliberate and informed act or omission of a human being, intended to exploit the situation created by the defendant (voluntary human action); and,

(b) An abnormal conjunction of events.

[228] It follows that that the kind of damage cannot be recovered in the present instance.

[229] Therefore special damages are assessed at $5,368.00.

Future Expenses

[230] Both psychiatric experts consider Mr Bryant suitable for future psychiatric treatment. Professor Whiteford is of the view that another 15 sessions of cognitive therapy from a clinical psychologist over the next 12 months is appropriate. Professor Whiteford is also of the view that Mr Bryant would benefit from pharmacotherapy, such as a serotonin reuptake inhibitor, which would cost about $35 per month and would need to be taken for at least 12 months.

[231] Dr Dwyer's view is Mr Bryant will require at least 20 sessions on a weekly or fortnightly basis. In his view, if Mr Bryant does not progress with cognitive behaviour therapy, then a referral to a psychiatrist would be warranted with a view to commencing anti-depressant medication despite Mr Bryant's continued reluctance to do so.

[232] Based on the figures provided by Professor Whiteford[241], and, allowing say 15 treatments with a psychologist, Mr Bryant's expenses for all the costs of such consultations to be $1,644.00. In addition I will allow $3,000.00 for future out of pockets which includes medication, any necessary GP attendances and travel. Total future expenses is therefore $4,644.00.

[233] Absent a finding of contributory negligence, I otherwise assess Mr Bryant's damages against Hungry Jack's at $219,368.00 or $264,593.00 against the BCC and the Architects.

Orders

[234] There will be judgment for the defendants.

[235] I will hear the parties as to costs.

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241 See p 11 of his report.