SUPREME COURT OF QUEENSLAND

CITATION:	*Brown v Daniels & Anor* [2018] QSC 209
PARTIES:	**SHAYNE MAXWELL BROWN** (plaintiff) **v** **JAY LESLIE DANIELS** (first defendant) **RACQ INSURANCE LTD ABN 50 009 704 152** (second defendant)
FILE NO:	Rock No 826 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	14 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27, 28 and 29 August 2018
JUDGE:	Davis J
ORDER:	**1. Judgment for the plaintiff in the sum of $2,098,590.23.** **2. I will hear the parties on costs.**
CATCHWORDS:	EVIDENCE – ADMISSIBILITY – OPINION EVIDENCE – EXPERT OPINION – BASIS OF OPINION – where the plaintiff tendered a report of an engineer as the report of an expert – where the defendant objected – where a number of the objections were conceded – whether the expert's conclusions were as an expert or factual conclusions better made by the Court TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – INTERSECTIONS AND JUNCTIONS – where the defendant was travelling down a road that terminated at a T-intersection with a road the plaintiff was travelling down – where the plaintiff struck the defendant's vehicle and was injured – whether the defendant was responsible for the plaintiff's injury – whether the plaintiff was contributorily responsible *Civil Liability Act* 2003 (Qld) s 9, s 12 *Uniform Civil Procedure Rules* 1999 (Qld) r 5, r 423, r 429 *Anikin v Sierra* (2004) ALJR 452, considered *Allianz Australia Insurance Ltd v Mashaghati* [2018] 1 Qd R 429, considered *Brown v Holzberger* [2017] 2 Qd R 639, considered

Fox v Percy (2003) 214 CLR 118, considered
McQuitty v Midgley & Anor (2016) 74 MVR 374; [2016] QSC 36, cited
R v Bjordal (2005) 93 SASR 237, cited
R v Faulkner [1987] 2 Qd R 263, cited
Read v Nominal Defendant [2007] QSC 297, cited
Sibley v Kais (1966) 118 CLR 424, considered
Seymour v Australian Broadcasting Commission (1977) 19 NSWLR 219, cited
Trompp v Liddle (1941) 41 SR (NSW) 108, considered
Vairy v Wyong Shire Council (2005) 223 CLR 442, cited
Wallace v Kam (2013) 250 CLR 375, cited

COUNSEL: A R Philp QC with S Deaves for the plaintiff
M Grant-Taylor QC with C K George for the defendant

SOLICITORS: VAJ Byrne & Co for the plaintiff
Quinlan Miller & Treston for the defendant

[1] The plaintiff Mr Brown sues for damages for personal injuries suffered on 12 February 2013 when the motorcycle he was riding collided with a Ford utility (the utility) which was driven by the first defendant and which was towing a horse float. The second defendant is the compulsory third party insurer of the utility. In these reasons, I generally refer to the second defendant only as "the defendant".

[2] In the course of the trial Mr Philp QC, who led Mr Deaves for the plaintiff, sought to tender a report of an engineer Dr Kahler who Mr Philp QC intended to call to give expert evidence relating to the cause of the collision. Mr Grant-Taylor QC, who led Mr George of counsel for RACQ Insurance Ltd,[1] objected to Dr Kahler's evidence on grounds and in circumstances which I will later describe. I made rulings on the admissibility of that evidence but reserved my reasons. These reasons for judgment deal both with Dr Kahler's evidence and the claim generally.

Uncontentious background

[3] On 12 February 2013 at about 4.30 pm, Mr Brown was riding his vintage 1970 Harley-Davidson motorcycle in a northerly direction on the Gladstone-Monto Road. He was heading towards Ubobo, where he lives.

[4] About 1.2 kilometres south of the accident site, the Gladstone-Monto Road winds through a series of bends before crossing a one-lane bridge over Ridler Creek. From the bridge, the road takes a straight, fairly gentle incline for a short distance and then leads into a sweeping right hand bend followed by a relatively short straight stretch of road which leads up to the intersection with Collingwood Lane.

[1] There was no separate appearance for the first defendant.

[5] From the bridge travelling north, the road bears double continuous white centre lines. Once through the right-hand bend, the line on the western side becomes broken and the line on the eastern side remains unbroken.[2]

[6] Collingwood Lane is a dirt road which runs east-west and intersects with the Gladstone-Monto Road from the east forming a T-intersection. To a motorist who is on the Gladstone-Monto Road south of the intersection and travelling north, the intersection will appear on the right. To a motorist facing the intersection on Collingwood Lane, Mr Brown was approaching from the left.

[7] The two roads do not intersect at a right angle. There is an angle of 55 degrees between the two roads on the southern side of the intersection.[3]

[8] There are trees and scrub on both sides of Collingwood Lane. However, near the intersection there is only low grass so that the view from a vehicle in the lane and at the intersection is clear, looking both north and south.

[9] To a driver of a vehicle in Collingwood Lane positioned at the intersection with the Gladstone-Monto Road, there is a line of sight south onto the exit of the right-hand bend.[4]

[10] The intersection is only a couple of kilometres from Mr Brown's home at Ubobo.[5]

[11] The utility was owned by Dominique Facer. There were three occupants of the utility at the time of the collision. They were all seated together. The first defendant Mr Daniels was driving. Sheldon McPartland was sitting next to him (obviously to Mr Daniels' left) and Ms Facer was sitting to the left of Mr McPartland and therefore was the closest to the passenger side door. Messrs Daniels and McPartland and Ms Facer had been working on rural properties in the area. They were part of a larger group of workers who had been engaged in weed and vegetation control. This activity involved camping on the properties overnight.

[12] The utility was towing a horse float which was not being used for its designed purpose. It was fitted out with a shower and sink and contained a washing machine and clothes dryer.

[13] Mr Brown gave evidence that a new engine and gearbox had been recently installed in his motorcycle.[6] This was confirmed in some respects by the evidence of Mr Andrew Newbury. While there was cross-examination as to the relevance of this to the collision, it was not challenged that the engine and gearbox were new or that the engine was being run-in. The significance of this is considered later.

[14] The collision occurred at about 4.30 pm and Mr Brown was severely injured. The circumstances of the collision are contentious and I shall analyse the evidence later. The injuries that Mr Brown sustained are not in dispute but the impact of them upon his life is. Again, that will be analysed later.

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2 Drive-through footage, exhibit 16.
3 Report of Dr Roger Kahler of InterSafe, ex 22 at 3.
4 Drive-through footage, ex 16.
5 Transcript at 1-99 ll 1–5.
6 At 1-29 l 45 to 1-30 l 2.

[15] Mr Brown's motorcycle was extensively damaged, but of more significance to the determination of liability for the accident is the damage to the utility and trailer. Photographs show:

(i) no damage to the rear of the horse float;[7]

(ii) no scuffing or other evidence of impact of the motorcycle or Mr Brown with the rear of the horse float;[8]

(iii) a scuff mark on the tandem left side forward tyre of the horse float;[9]

(iv) damage to the left rear corner of the tray of the utility;[10]

(v) damage to the left rear mudflap of the utility.[11]

[16] There is no doubt that the damage to the tray of the utility was caused in the collision.[12]

Dr Kahler's evidence

[17] As previously observed, Mr Philp QC attempted to tender a report of Dr Kahler and Mr Grant-Taylor QC objected.

[18] Upon receipt of Dr Kahler's report, about 16 months ago, the defendant's solicitors commissioned a report from Dr Carnavas, another engineer. Drs Kahler and Carnavas conferred and a joint report was prepared.

[19] Mr Grant-Taylor QC's position was that all reports were inadmissible, including those authored or partly authored by his witness, Dr Carnavas. Dr Carnavas had been retained, of course, to meet Dr Kahler's evidence if the opinions of Dr Kahler were found to be admissible.

[20] Mr Grant-Taylor QC took objection to Dr Kahler's evidence on two bases:

(i) a breach of the requirements of r 429 of the *Uniform Civil Procedure Rules* (UCPR); and

(ii) that the evidence (or at least part of it) was not admissible expert opinion evidence.

[21] The parties were content for all three reports to be received for identification so I could consider the admissibility issues.[13] I read the reports over lunch on the first day of the trial and then expressed some preliminary views on the admissibility on some of the matters stated in the reports.[14] Mr Grant-Taylor QC and Mr George produced an outline of submissions on the objections and I directed an outline to be prepared by the plaintiff. That occurred. Some concessions were made. I dismissed the objection based on r 429 and upheld some of the objections which were not conceded by the plaintiff. A copy of the report, redacted consistently with the rulings, came into evidence as Exhibit 22.

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7 Bundle of photographs, ex 15, photograph 1347.
8 Exhibit 15, photograph 1347.
9 Exhibit 15, photographs 1347, 1352 and 1353.
10 Exhibit 15, photographs 1258, 1260, 1261, 1262, 1263, 1374 and 1380.
11 Exhibit 15, photograph 1381.
12 Transcript at 2-44 ll 6–9, 2-53 to 2-54 l 16.
13 The reports became exhibits for identification A, B and C.
14 Transcript at 1-58 to 1-60.

[22] Rule 429 of the UCPR provides as follows:

> "**429 Disclosure of report**
>
> A party intending to rely on a report must, unless the court otherwise orders, disclose the report—
>
> (a) if the party is a plaintiff—within 90 days after the close of pleading; or
>
> (b) if the party is a defendant—within 120 days after the close of pleading; or
>
> (c) if the party is not a plaintiff or defendant—within 90 days after the close of pleading for the party."

[23] There is no doubt that the rule has been broken. The pleadings in the case closed on 10 February 2017 upon the service of the plaintiff's reply.[15] Dr Kahler's report was therefore required to be disclosed by 11 May 2017 but was not disclosed until almost a month later. The defendant's report is also late but of course that cannot fairly be said to be through the fault of the defendant, given that the plaintiff had breached the rule with the late delivery of Dr Kahler's report.

[24] Dr Carnavas' report is dated 21 May 2018, roughly a year after Dr Kahler's report was prepared and delivered. The joint report is dated 29 June 2018.

[25] Rule 429 is contained within Part 5 of Chapter 11 of the UCPR. Chapter 11 is entitled "Evidence" and Part 5 is entitled "Expert evidence". Rule 423 identifies "the main purposes" of Part 5. Rule 423 is as follows:

> "**423 Purposes of pt 5**
>
> The main purposes of this part are to—
>
> (a) declare the duty of an expert witness in relation to the court and the parties; and
>
> (b) ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and
>
> (c) avoid unnecessary costs associated with the parties retaining different experts; and
>
> (d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding."

[26] Division 2 of Part 5, within which r 429 is contained, then regulates how expert evidence is to be given. For instance, by r 427 expert evidence must be reduced to a report, r 428 prescribes the requirements for the report and importantly r 429B provides that the court may direct experts to meet and confer. It is obvious, consistently with r 423, that the rules

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[15] UCPR r 169(a).

are designed to ensure that expert evidence is disclosed and dealt with efficiently. This is consistent with r 5 of the UCPR which is as follows:

> "**5 Philosophy—overriding obligations of parties and court**
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> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.
>
> *Example—*
>
> The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

[27] As to the relevant considerations for the exercise of discretion to allow expert evidence to be led notwithstanding a failure to comply with r 429, Sofronoff P said recently in *Allianz Australia Insurance Ltd v Mashaghati*:[16]

> "[54] It can be seen that these rules, in combination, are directed towards early and full disclosure of expert evidence in order to assist in achieving either an early settlement of the claim that is the subject of the proceedings or, if that cannot be done, then an efficient trial in which the parties and the Court can concentrate upon the essential issues only.
>
> [55] Tactical surprise is thus avoided. On the other hand, relevant expert evidence which has not been dealt with in accordance with the rules may still be admitted in evidence if the interests of justice in ensuring a fair trial require it. The power of the Court to grant leave to a party to tender a non-compliant report or to permit oral evidence to be given by an expert is unfettered by any express provision of the rules. However, the discretion is informed by the purpose of the rules set out in r 5, namely to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. The discretion is also informed by r 5(2) which obliges the Court to apply the rules with the objective of avoiding undue delay, expense and technicality.
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> [56] Of course, these express provisions which guide the Court in the exercise of discretion are subject to the overarching obligation of the Court to ensure that a trial is fair."

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[16] [2018] 1 Qd R 429.

[28] Here, there is no suggestion:

(i) that the defendant could not meet the evidence of Dr Kahler; Dr Carnavas's report was prepared and delivered;

(ii) that the experts could not be properly prepared to give evidence; they have conferred and have prepared a joint report; or

(iii) that the trial would be delayed by the delivery of Dr Kahler's report.

[29] In those circumstances, I ruled that non-compliance with r 429 ought to be excused.

[30] Expert opinion evidence is admissible if:

(i) there is a recognised field of study;

(ii) the witness is an expert in that field;

(iii) the opinion is based on the witness's experience and expertise in the field; and

(iv) the opinion evidence is probative of a fact in issue.[17]

[31] Where the factual issue for determination is within common knowledge and experience, then opinion evidence on that issue is, by definition, not expert. The issue is one for the tribunal of fact, not for the expression of an opinion by a witness.[18]

[32] Experts often give evidence not just of their opinions but also of observations. Here, for instance Dr Kahler viewed the scene, took photographs and performed various measurements. Rightly, no challenge was taken to those parts of his report. What was challenged was his opinion on matters said to be relevant to the causes of the accident.

[33] In *R v Faulkner*,[19] the Court of Criminal Appeal rejected the submission that traffic accident reconstruction was a recognised field of science. Courts in other jurisdictions have since taken a different view.[20] While there might be no such field of science recognised in Queensland, engineering is certainly a recognised field and Dr Kahler is a qualified and experienced engineer. Consequently, if his report contains opinions which are founded in the science of engineering, then those parts of his evidence would be admissible, subject of course to relevance.

[34] Opinion evidence is not admissible where the opinion expressed is not properly based on a field of science. This problem often arises when there are unknown variables or assumptions so that the opinion cannot be said to be properly founded in the field. *R v Bjordal*[21] and *Read v Nominal Defendant*[22] are examples of such cases.

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[17] *Clark v Ryan* (1960) 103 CLR 486 at 491–2; on the necessity for the opinion evidence to be probative, see *Smith v The Queen* (2001) CLR 650.
[18] *R v Faulkner* [1987] 2 Qd R 263; *Smith v The Queen* (2001) 206 CLR 650.
[19] [1987] 2 Qd R 263.
[20] *R v Bjordal* (2005) 93 SASR 237, for example.
[21] (2005) 93 SASR 237.
[22] [2007] QSC 297.

[35] Judicial observations on the limitations of expert evidence in traffic accident cases are common. In *Fox v Percy*,[23] Callinan J observed:

> "I return to the facts of this case. Here Mr Tindall was described by counsel for the appellant as an 'accident reconstruction expert'. That is an ambitious claim. Three things may be said about the evidence in this case and running down cases generally. Rarely in my opinion will such evidence have very much, or any, utility. Usually it will be based upon accounts, often subjective and partisan accounts, of events occurring very rapidly and involving estimates of time, space, speed and distance made by people unused to the making of such estimates. Minor, and even unintended but inevitable discrepancies in relation to any of these are capable of distorting the opinions of the experts who depend on them. It is also open to question whether variables in relation to surfaces, weather, and the tyres, weight and mechanical capacities of the vehicles involved can ever be suitably accounted for so as to provide any sound basis for the expression of an opinion of any value to a court. The engagement of experts in running down cases, other than in exceptional circumstances, is not a practice to be encouraged."[24]

[36] Gleeson CJ, Gummow, Kirby and Hayne JJ in *Anikin v Sierra*[25] said:

> "Different minds might respond in different ways to the evidence given at the trial. Much time was consumed there by the evidence of experts. Sometimes such evidence may be helpful in describing technical developments of motor vehicle design (such as the evolution and capacity of modern motor vehicle headlamps) or in applying to uncontested facts commonly accepted tables governing the distance travelled by motor vehicles at different speeds and stopping time allowing for differing driver reaction times. Not all judges are mechanically minded or interested. Expert evidence, grounded in the proved testimony, can therefore occasionally be useful. But in the end, such evidence has weight only in respect of matters within the relevant field of expertise and is only as helpful as the evidence and assumptions on which it is based. Such evidence may not usurp the ultimate decisions which remain for the trial judge. In the present case, the expert reports had (and were treated as having) relatively little significance. In the end, the evaluation of the case depended substantially on the acceptance or rejection of the evidence of the bus driver and Mr Fatches and the application to the facts, as then found, of largely undisputed evidence concerning the illumination in front of the bus and the likelihood that it would have revealed the presence of the appellant in time to permit the avoidance of impact."[26]

[37] As already observed, Mr Philp QC and Mr Deaves prepared a written response to the defendant's objections, and many of the objections were properly conceded. I heard argument and ruled on those which remained in contention.

[38] Dr Kahler, in his report, reproduced a number of photographs of that part of Gladstone-Monto Road leading up to the accident site. Mr Grant-Taylor QC submitted that the

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[23] (2003) 214 CLR 118.
[24] At [149], followed by White J, as her Honour then was, in *Read v Nominal Defendant* [2007] QSC 297 at [6].
[25] (2004) 79 ALJR 452.
[26] At [28].

photographs were irrelevant because they depicted sections of the road well before the section where the accident occurred.

[39] Mr Brown, who could not recall the accident, gave evidence that he was running-in the new engine on his motorcycle and therefore would not have ridden above 100 kilometres per hour. Mr Grant-Taylor QC cross-examined Mr Brown suggesting to him that when running in a new motor the important thing was not to have the motorcycle running at a constant speed.[27] Mr Brown agreed.[28] Mr Grant-Taylor QC also suggested that to run-in the engine it was necessary to take the motorcycle up to fast speeds. Mr Brown agreed but said that he would not exceed 100 kilometres per hour.[29]

[40] Mr Grant-Taylor QC's cross-examination was quite proper and clearly relevant. It laid a foundation for him to submit that I would not conclude that Mr Brown was not speeding even if I accepted Mr Brown's evidence that he was being careful to run the new engine in properly. However, the cross-examination made relevant the features of the road leading up to the accident site. Given the twists and turns and the single lane bridge, Mr Brown would have been travelling very slowly as he approached the incline leading to the right hand bend onto the accident site. That is relevant as to how likely it would be that a person with knowledge of engines like Mr Brown would load the new engine with heavy acceleration up a hill to a high speed above 100 kilometres per hour. The evidence of the photographs is relevant and the objection was overruled.

[41] Objection was taken to a series of photographs of Collingwood Lane well east of the intersection.[30] Again, the objection was that the evidence was irrelevant. It was submitted that the first photograph[31] was taken at a point on Collingwood Lane where the intersection was not even visible. That photograph[32] is irrelevant and the objection was allowed. The other photographs show a view approaching the intersection. They demonstrate that the view both north and south is impeded by vegetation until a driver is close to the intersection. The photographs are of some, if only perhaps marginal, relevance and the objection was overruled.

[42] Objection was taken to the following:

> "The damage to the Ford F250's mud flap and mudguard suggests that the motorcycle has impacted the F250 before its alignment was parallel to the Gladstone-Monto Road and that the F250 was part way through the turn. The damage also suggests that the motorcycle's speed would be reduced to the speed of the F250 in the impact phase and that the motorcyclist separated from the F250 at the speed of the vehicle. The incident does not involve a glancing contact by the motorcycle."

[43] These opinions are, with respect, not truly based on any science. They are simply conclusions which are drawn from physical evidence. No science or expertise is identified as the basis upon which the conclusions are drawn. The Court is in as good a position as Dr Kahler to consider the evidence and draw conclusions as to the movement

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27 Transcript at 1-53 l 33 to 1-54 l 28.
28 At 1-54 ll 21–28.
29 At 1-53 ll 11–16.
30 Figures 18 to 23 in Dr Kahler's report, ex 22.
31 Figure 18.
32 Figure 18.

of the two vehicles and of Mr Brown in the accident. The objection was properly taken and the evidence was excluded.

[44] Dr Kahler reproduced a document entitled "A Guide to Road Design Part 3: Geometric Design", published by Austroads Incorporated. The document became attachment 3 to his report. The document concerns the reaction time of drivers. It may be that studies have been conducted into drivers' reaction times. The difficulty though is that any opinion based on any science behind drivers' reaction times is significantly undermined by the variables in any particular case. In the document itself, this appears:

> "Reaction time is the time for a driver to perceive and react to a particular stimulus and take appropriate action. This time depends on:
>
> - alertness of the driver
> - recognition of the hazard
> - the complexity of the decision or task involved."

[45] In a sense, Mr Brown obviously did not react quickly enough to avoid the accident. However, a number of questions then arise. When did the hazard arise? Did the utility and horse float shoot out suddenly in front of him? Was he keeping a proper lookout himself? Was it possible to react quickly enough to avoid the collision? These are issues for the Court and evidence of reaction time adds nothing. The evidence was excluded.

[46] Dr Kahler drew a number of final conclusions:

> "This report discusses an incident in which a collision has occurred between a motorcycle and a Ford F250 towing a horse float.
>
> Based on the assumption that the Ford F250 stopped, the study of this incident shows that the driver of the Ford F250 was not likely to see the motorcyclist unless a head shift was completed in order to be able to observe up the road. The motorcyclist would have been within the field of view of the person in the left front passenger seat.
>
> The Ford F250 was within the field of view of the motorcyclist, but the incident is consistent with the motorcyclist's expectations being defeated in that the Ford F250 pulled out: hence, the motorcyclist's Reaction Time was increased.
>
> The measurements taken at the intersection, the calculations completed, and the trials conducted, show that the motorcyclist would have been in the Ford F250's driver's field of view when stopped at the intersection of Colinwood Lane and the Gladstone-Monto Road, but only if the driver had shifted his head so as to see past the visual obstructions presented by the vehicle's passengers and the B-pillar.
>
> The intersection is of a design where it is at the limits of design and accident rates are known to increase.
>
> The incident is not consistent with the motorcyclist travelling at very high speed and being out of the Ford F250 driver's field of view when stopped at the intersection. The incident is also less consistent with a scenario wherein

> the Ford F250 did not stop but rolled into the intersection when the motorcyclist would have been quite close to the impact point."

[47] Many of the conclusions are based on parts of the report that have been excluded either by concession or by ruling. The other conclusions are not based in the science of engineering but are assumptions drawn on the physical evidence available where the Court is in as good as position as Dr Kahler to assess the evidence. All the conclusions were excluded.

[48] Dr Kahler's report was marked for identification as Exhibit A. A redacted report reflecting the concessions made by Mr Philp QC and the rulings that I made in the course of the trial was then received as Exhibit 22. Mr Grant-Taylor QC did not seek to tender Dr Carnavas's report and no party pressed the tender of the joint report. Therefore, neither came into evidence. Mr Grant-Taylor QC did not require Dr Kahler for cross-examination.

Evidence as to the collision

Mr Brown's evidence

[49] As already observed Mr Brown does not recall the accident.

[50] Further, as already observed, a new engine and gearbox had been installed in Mr Brown's motorcycle[33] and the engine was being run-in. Mr Brown's technique in running-in the new engine and gearbox was to take the motorcycle for short runs of no more than 80 kilometres and not exceed a speed of 100 kilometres per hour.[34]

[51] Mr Brown thought that the motorcycle would be travelling at about 100 kilometres per hour when the engine was making between 4,200 and 4,500 revolutions per minute. The engine's maximum speed was about 5,500 revolutions per minute.[35] Mr Brown opined that the motorcycle was probably capable of a top speed of about 135 kilometres per hour when run-in.[36]

[52] Mr Brown explained the features of the Gladstone-Monto Road in the vicinity of the accident site. In particular:

(i) The road winds and bends south of the Ridler Creek Bridge;

(ii) The Ridler Creek Bridge is a single lane wooden bridge;

(iii) The distance from the Ridler Creek Bridge to the intersection with Collingwood Lane is about 600 metres; and

(iv) The road sweeps to the right after the bridge and the intersection is visible from a distance of about 170 to 180 metres.[37]

[53] Mr Brown's evidence as to the layout of the area is consistent with a video prepared by Dr Kahler showing a drive through of the relevant area.[38] His evidence is also consistent

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[33] Transcript at 1-29 to 1-30.
[34] At 1-30 to 1-31.
[35] At 1-30.
[36] At 1-52.
[37] At 1-32 to 1-33.
[38] Exhibit 16.

with the photographs in Dr Kahler's redacted report.[39] Later in these reasons, I analyse the evidence as to the distance from the intersection to the point at which a vehicle travelling out of the bend would come into view.

[54] Mr Brown had done work for the local council on the Ridler Creek Bridge and obviously knew it well.[40] There was debris on the bridge because of flooding so it had to be taken slowly by Mr Brown, in first gear.[41]

[55] Mr Brown conceded that when running-in a new engine the proper technique was to vary the speed of the motorcycle. He also conceded that from effectively a standing start at the Ridler Creek Bridge the motorcycle, by design, could reach a speed of 120 kilometres per hour, but thought that was not possible with a new engine that was not properly run-in.[42]

[56] Mr Grant-Taylor QC cross-examined on the capabilities of the motorcycle and, at times he and Mr Brown may have been at cross-purposes. The relevant cross-examination is:

> "You would have plenty of time to get to a speed of 80 K by the time you got to Collingwood Lane, wouldn't you?---You would get to 80 kilometres an hour quite easily, yes.
>
> You would have plenty of time to get to a speed of 100 K by the time you got to Collingwood Lane, wouldn't you?---Which is the speed limit, yes.
>
> You would have plenty of time to get to a speed of 120 K before you got to - - -?---I believe I – well - - -
>
> - - - Collingwood Lane?---Yes, you could, but I believe I wouldn't have been doing that speed.
>
> Well, no, no, just answer the question, please?---I'm just answering your question.
>
> With a bike of your capacity, you would have plenty of time, having crossed over the bridge, 500 to 600 metres south of Collingwood Lane, to reach a speed of 120 kilometres per hour before you reach Collingwood Lane, wouldn't you?---You could, yes.
>
> You would have plenty of time to reach a speed exceeding 120 kilometres an hour, wouldn't you?---No, I wouldn't have.
>
> Well, what do you say would be the maximum speed that you could reach having crossed over the bridge before you reach Collingwood Lane?---I would have been on 100 kilometres an hour.
>
> No, no, no, I'm not asking you what you were on. I'm asking you what the bike was capable of reaching?---At that stage, it would not have been capable because the road would have been too tight – it was too tight to get up to that rev – rev – revs in the motor because the rings were still seating into the bore

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39 Figures 1 and 4 through 17.
40 Transcript at 1-33 and 1-53.
41 At 1-52.
42 At 1-53.

– into the casing of your bore, and if you do that it would have damaged the motor.

Yeah, but the bike was still capable of - - -?---Not at that stage - - -

- - - reaching that speed, wasn't it?--- - - - no, because it was too tight - - -

One hundred and 20 - - -?--- - - - the motor – the motor would have seized.

One hundred and 20, and I put to you in excess of 120, it was perfectly capable of reaching those sort of speeds?---Not at that stage, no.

You see, whether you're running in the engine of a bike, or running in the engine of a car, the principle is the same, is it not? It's not so matter – so much a matter of not going at a fast speed, it's a matter of going at a variable speed, so that - - -?---That is dead right.

- - - the wear is not concentrated on a particular part or component of the engine?---That's correct.

Is that correct?---That is very correct.

So you would agree - - -?---But over-revving your machine at – a new motor that's very tight will cause damage to (1) your – your rings, you end up snapping your rings very easily.

HIS HONOUR: Are you asking him a question about his – the speed of the bike or are you asking a question about the speed of the engine, because it's two different issues.

MR GRANT-TAYLOR: That's true. At the moment, I'm asking him about the speed of the bike.

HIS HONOUR: All right. You understand that?---Well - - -

So you're being asked a question about what - - -?---Of the bike – if – just a normal bike running.

Just hang on?---Yes.

You're being asked a question that when you're running in an engine - - -?---Yes.

- - - it's necessary to have the bike going at different speeds?---Yes, variables, yes.

Thank you.

MR GRANT-TAYLOR: And I think you've agreed with that. Is that correct?---Yes, between 80 to 100 kilometres I was – is [indistinct] running, I would vary it between that, yes.

And just to repeat the proposition I put to you a little earlier, it's not a matter of avoiding a fast speed or avoiding a slow speed. It's a matter of avoiding riding your bike at a constant speed. Isn't that right?---Yeah, or labouring the motor.

Yeah?---Yes, that's correct.

> So there would be nothing wrong with riding your bike at 120, putting the speed limit to one side for a moment, provided you didn't do it so long and provided, if you were running in the bike efficiently and conscientiously after a time, you reduced your speed to whatever, 60, 70?---That is – that is dead correct.
>
> And the bike - - -?---As long as your motor wasn't too tight.
>
> And provided you didn't stay at 60 or 70 too long and varied it up to 90 - - -?---That's - - -
>
> - - - went back up - - -?--- - - - correct.
>
> - - - to 120, back down to 70, that's the way - - -?---Or back to 100, yes, that's correct.
>
> That's the way we run in a machine, isn't it, like - - -?---That's the way you can run in a machine, yes.
>
> So there would be nothing wrong, if you were running in the machine, in taking your bike to speeds in excess of 100, and I put to you up to 120 or in excess of 120. That would not be inconsistent with the principles of running in a new engine?---That would be if the motor is too tight.
>
> All right?---If the motor is too tight in it – in it, and you feel it when your bike is too tight, when you bring it up those revs because then it will be coming back up past four and a-half to five and a-half thousand revs on me motor and that would be doing damage." [43]

[57] Mr Brown's evidence has to be understood in light of the fact that he does not actually remember the accident. He is therefore hypothesising how he would have been operating the motorcycle rather than how he remembers that he did operate it. At one point he said "I would have been on 100 kilometres an hour".[44] That is an answer to a question as to the maximum speed that could have been achieved over the stretch of road from the bridge. It is not evidence that he was, or would have been, travelling at that speed immediately before the intersection with Collingwood Lane.

[58] Mr Brown's evidence as to the likely speed of the motorcycle amounts to this:

(i) The motorcycle was being generally run at a top speed of about 80 kilometres per hour.

(ii) He would, though, vary the speed up to 100 kilometres per hour.

(iii) When run-in, the motorcycle could have accelerated from the bridge and reached a speed of 120 kilometres per hour at the intersection, but it was not run-in.

[59] Mr Grant-Taylor QC cross-examined Mr Brown on his traffic history. Mr Brown admitted that he had been convicted of dangerous driving and numerous offences of speeding over a period of a number of years.[45]

Ms Schulze

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[43] At 1-52 l 38 to 1-55 l 10.
[44] At 1-53 ll 14–15.
[45] At 2-7 to 2-9.

[60] Frances Tonia Schulze is not a resident of Ubobo. She lives at Nagoorin. She was one of various witnesses who were present at the scene of the accident at a time which must have been shortly after the collision.

[61] Mr Schulze saw Mr Brown by the side of the road and saw a person she knew as "Peter". Other evidence identifies that person as Peter Ellis.

[62] Ms Schulze noticed that the back of the horse float was very dirty and there was no sign of damage to the horse float.[46]

Mr McPartland

[63] Mr McPartland was called by Mr Grant-Taylor QC but interposed by consent in Mr Brown's case.[47]

[64] Mr McPartland was a passenger in the utility. He was seated between Ms Facer to his left and the driver, the first defendant to his right. He gave evidence that he recalled the utility driving to the T-intersection up Collingwood Lane. He said that he looked to the left and to the right and saw no traffic. The utility (with the horse float attached) was then driven across the road turning right (north). Mr McPartland said that he heard an impact when "we were all the way onto the other side of the road".[48]

[65] Under cross-examination, Mr McPartland gave evidence that he thought that Collingwood Lane intersected with the Gladstone-Monto Road at a right angle.[49]

[66] Again in cross-examination, he said this:

> "MR PHILP: And, is there an estimation now, of how far into the turn the truck had gone before you heard – you felt a bang or you heard a bang?---Felt. Felt.
>
> You felt a bang?---Yeah.
>
> Did you hear something, as well?---I think so. I can't be too sure.
>
> All right. But you actually felt it through your seat, the bang?---Yes. Yes.
>
> And could it be that the F250 was still in the process of turning, not having completed its turn? Is that possible?---I believe it was – if any, I would say we were 95 per cent completed that turn.
>
> And you say that the – because of that, that the horse float was virtually directly behind the vehicle - - -?---Correct.
>
> - - - when you heard the bang?---Yes."[50]

[67] At the scene, Mr McPartland noticed that the damage was to the back of the utility, not the trailer, and he discussed that with Ms Facer.[51] In cross-examination he was asked if

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[46] 1-69.
[47] At 1-88.
[48] At 1-90
[49] At 1-91.
[50] At 1-93 ll 25–40.
[51] At 1-96.

he had noticed at the scene whether Mr Brown smelt of alcohol. No evidence on this topic was led in chief. Mr McPartland said that he did, and that he had discussed that at the scene with Ms Facer.[52] These questions in cross-examination were not designed to elicit evidence from which Mr Philp QC intended to submit that Mr Brown had consumed alcohol. Mr Philp QC obviously knew that Mr McPartland and Ms Facer had previously alleged that Mr Brown had smelt of alcohol at the scene and the question was asked to lay a foundation upon which to attack the credit of those two witnesses.

[68] At the time of the accident Mr McPartland was not in a romantic relationship with the owner of the utility, Ms Facer. A relationship did develop later.

Peter Ellis

[69] Mr Ellis lived in Ubobo with Mr Brown and Mr Brown's then partner Nicole Raine. Mr Ellis was at the scene shortly after the accident. He saw Mr Brown off to the shoulder of the Gladstone-Monto Road[53] and saw the motorcycle only a couple of metres from the intersection[54] near the first road marker north of the intersection.[55]

[70] Mr Ellis smelt no alcohol on Mr Brown[56] and saw no damage to the horse float. He saw damage to the left rear of the utility.[57]

Mr Hodson-Gilmore

[71] John Hodson-Gilmore is an Advanced Care Paramedic who attended the accident scene. Mr Hodson-Gilmore is authorised to administer various drugs including morphine and methoxyflurane to trauma patients. These drugs can react badly with alcohol. As part of his practice as a paramedic Mr Hodson-Gilmore must be on the lookout for signs of a patient having consumed alcohol so as to avoid administering drugs which might be inappropriate.[58] He did not detect any smell of alcohol on Mr Brown and did not observe any other indicia that Mr Brown may have consumed alcohol before the accident.[59]

Andrew Peter Newbury

[72] Mr Newbury purchased Mr Brown's motorcycle after the accident and installed the motor into his own motorcycle.[60] He gave evidence without objection that he could tell that the engine from Mr Brown's motorcycle was new because it was running hot when under load.[61] As to the proper practice when running-in a new engine, Mr Newbury said:

> "And what do you have to do when you're running in an engine?---Vary your speeds, 80 Ks, maybe up to 100, slowly accelerating and decelerating, and in time, it will – it runs cooler, like to a normal operating temperature."[62]

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52 At 1-95 to 1-96.
53 At 1-99.
54 At 1-99.
55 At 1-101.
56 At 1-100.
57 At 1-100.
58 At 2-29 l 40 to 2-30 l 10.
59 At 2-29 l 35.
60 At 2-34.
61 At 2-34 to 2-35.
62 At 2-35 ll 20–25.

Dominique Facer

[73] Ms Facer was a passenger in the utility. She said that she was sitting on the passenger side with Mr McPartland to her right and the driver, the first defendant, to the right of him. Her evidence-in-chief as to the movements of the utility was:

> "As you approached the Gladstone-Monto Road, what happened to the vehicle?---Jay brought the vehicle to a complete stop. We - - -
>
> And when that – sorry?---Yep, sorry.
>
> When that happened, what did you do?---When the vehicle had come to a complete stop, I then leant forward in my seat and looked to my left to make sure that I couldn't hear or see any oncoming traffic. We'd all been looking. Jay was - - -
>
> Well, just take it one step at a time?---Yeah.
>
> What did you see when you looked to your left?---A clear road.
>
> What did - - -
>
> HIS HONOUR: How far could you see?---A couple of hundred metres, from – to the best of my knowledge, from what I can remember.
>
> All right.
>
> MR GRANT-TAYLOR: And what did you do then?---I had turned back to Jay, as Jay was looking to my right, and he asked me if it was clear to go. And I had looked again, leant forward and looked again to the left, and it was clear, and I had signalled him to go. He put the vehicle in first, and he pulled on to the Gladstone-Monto Road. I remained looking left, and then as soon as he started turning, I then looked forward.
>
> And did you see any other vehicle - - - ?---No.
>
> - - - till the time that you turned back to your right – until your vision was taken away from the left, did you see any other vehicle?---No.
>
> What's the next thing that happened?---The next thing that happened, we were starting – I think he'd just started – he put it in second, and we started going, and I heard a big bang at the back of the truck.
>
> And did you know what that was? Did you have any belief about what that bang was?---No, we all - - -
>
> Well, just – just talk about - - ?--- - - - went forward in our seat.
>
> Just talk about your story. Talk about yourself, yes?---I went forward – it pushed me out into the – I nearly hit the dash, and I looked at Jay and I went, 'What happened?' And then I looked in my mirror, and I seen a man on a bike." [63]

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[63] At 2-48 ll 1–44.

[74] In cross-examination it became apparent that Ms Facer made a written statement about a year after the accident. In her statement she:

(i) did not say that after looking left then right she then looked left again;

(ii) did not say that she signalled to the first defendant that the road was clear;

(iii) did not say that the motorcycle hit the back of the truck, but said that it hit the trailer;

(iv) said that Mr Brown "smelt strongly of grog", obviously a reference to alcohol;[64]

(v) said that "there was plenty of room behind our car on the right and left sides for the motorcycle to pass us if he had needed to instead of crashing into the back of our trailer".[65]

[75] In cross-examination she asserted that the utility and trailer were nearly straight in the northbound lane at the time of the accident. She said:

> "Correct?---Yes. When the bike hit, we weren't sure if it hit the trailer first or if it hit the back of the truck, so – but to the best of my knowledge, as I can recall to you, he may have hit the trailer first and then hit the truck after, because the truck was straight and the float was coming around. So the float was nearly straight.
>
> There's no - - ?---We were well and truly on the road and straight. The vehicle and the float were straight."[66]

[76] Extraordinarily, she said in her written statement that "I'm pretty sure that the sun was behind us".[67] The utility was travelling in a westerly direction at 4.30 pm in the afternoon.[68] The utility would have been travelling directly into the sun. The sun was not behind her as she sat in the utility. The sun does not set in the east.

Other evidence

[77] Photographs were taken by police.[69] As already observed, they show damage to the left hand corner of the utility's tray and a scuff mark on the left hand forward tyre of the horse float.

[78] Dr Kahler performed various measurements from the intersection south to the bend in the road. These show that the motorcycle was probably first in the view of a person at the intersection when the motorcycle was about 200 metres away. The drive-through[70] along Gladstone-Monto Road shows the intersection coming into view (and therefore the vehicle would be coming into the view of a person at the intersection) as the vehicle passes the road between the fourth and fifth of the chevron signs positioned in the bend.[71] The drive-through down Collingwood Lane shows the vehicle stopped at the intersection

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64 At 2-49 to 2-50.
65 At 2-51 l 40; the statement is ex 21.
66 At 2-51 ll 1–10.
67 At 2-56 ll 1–10.
68 At 2-55 l 35.
69 Exhibit 15.
70 Exhibit 16.
71 Counting from the north.

with the fourth chevron sign in sight.[72] The fourth chevron sign is 205 metres from the intersection.[73]

[79] The driver of the utility, the first defendant, was not called to give evidence; neither were the two police officers who attended the scene. However, by consent, pages of Constable Hamilton's[74] notebook were admitted.[75] Constable Hamilton interviewed the first defendant. The notebook reads relevantly:

> "Driving out on dirt road on Collingwood Lane.
>
> I turned right on Gladstone-Monto Road.
>
> Check both ways and drove onto the road.
>
> As I was turning I heard a big bang underneath the tray of the ute on the left hand side."[76]

The law and the pleadings

[80] There is of course no doubt that users of the road owe each other a duty of care. In *Vairy v Wyong Shire Council*,[77] the duty was described as "the duty to take all reasonable care for the safety of other users of the highway having regard to all the circumstances of the case."[78]

[81] Against that, s 9 of the *Civil Liability Act* 2003 (Qld) provides as follows:

> "**9 General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;

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72 Exhibit 16; and see Dr Kahler's report, ex 3, figures 17, 25 and 31.
73 Dr Kahler's report, ex 3, figures 30 and 31.
74 One of the officers who attended the scene.
75 Exhibit 14.
76 Notebook reproduced faithfully, with grammatical errors.
77 (2005) 223 CLR 442.
78 At [26].

(d) the social utility of the activity that creates the risk of harm."

[82] Section 12 provides:

"**12 Onus of proof**

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

[83] Of the New South Wales equivalent to s 12 of the *Civil Liability Act*,[79] the High Court in *Wallace v Kam*[80] said as follows:

"The determination of factual causation in accordance with s 5D(1)(a) involves nothing more or less than the application of a 'but for' test of causation. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence."[81]

[84] Contributory negligence is raised on the pleadings. Sections 23 and 24 of the *Civil Liability Act* provide as follows:

"**23 Standard of care in relation to contributory negligence**

(1) The principles that are applicable in deciding whether a person has breached a duty also apply in deciding whether the person who suffered harm has been guilty of contributory negligence in failing to take precautions against the risk of that harm.

(2) For that purpose—

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

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

24 Contributory negligence can defeat claim

In deciding the extent of a reduction in damages by reason of contributory negligence, a court may decide a reduction of 100% if the court considers it just and equitable to do so, with the result that the claim for damages is defeated."

[85] While the plaintiff bears the onus of proving the existence of the duty, the breach of the duty and causation of damage, the defendant bears the onus of proof of any contributory negligence.

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79 Section 5D of the *Civil Liability Act* 2002 (NSW).
80 (2013) 250 CLR 375.
81 At [16].

[86] The particulars of negligence alleged in the second amended statement of claim are pleaded as:

> "5. The incident was caused by the negligence of the First Defendant.
>
> PARTICULARS
>
> 6. The First Defendant:-
>
> (a) Failed to keep any or any proper lookout;
>
> (b) Drove without due care and attention;
>
> (c) Failed to control the said vehicle in the manner of a reasonable driver;
>
> (d) Failed to exercise due care, skill and prudence in all of the circumstances;
>
> (e) Allowed the said vehicle to collide with the motorcycle;
>
> (f) Failed to stop, slow down or steer clear of the motorcycle; and
>
> (g) Failed to give way to the motorcycle."

[87] The second defendant in its second further amended defence pleads, in answer to those paragraphs, as follows:

> "5. As to paragraph 5 of the Second Amended Statement of Claim, the second defendant:
>
> (a) Denies that the collision was caused by the negligence of the first defendant on the grounds that it is untrue;
>
> (b) States that the collision was caused or contributed to by the negligence of the plaintiff, particulars of which are as follows:
>
> i. Failing to keep any or any proper lookout;
>
> ii. Driving without due care and attention;
>
> iii. Failing to slow down, stop or steer clear of the first defendant's vehicle;
>
> iv. Failing to exercise due care and skill in all of the circumstances;
>
> v. Colliding with the rear of the first defendant's vehicle in circumstances in which a reasonable driver would have avoided and/or taken steps to avoid the collision;
>
> vi. Travelling at a speed which was excessive in the circumstances.
>
> (c) States that the plaintiff:
>
> i. Had an uninterrupted view of the intersection;

ii. Collided with the rear of the trailer."[82]

[88] Here, Mr Brown had the benefit of right of way at the intersection as the first defendant was entering a T-intersection from the terminating road.[83] Mr Brown's submissions relied quite heavily on a number of authorities where a party not giving way in accordance with the road rules had been held responsible for the accident.[84]

[89] The reliance by the plaintiff on the road rule requiring the first defendant to give way prompted Mr Grant-Taylor QC to say this in submissions:

> "Your Honour, reading paragraph 22 of the plaintiff's submission would lead the uninitiated to believe that all that the plaintiff needed to establish a causal breach of duty is to show that the intersection gave rise to a situation in which the first defendant was obliged to give way to the plaintiff's motorcycle - that is no doubt correct - and that a collision at such an intersection necessarily behoves the conclusion that the necessary giving way did not occur and it seems that that's all that need to be established for the plaintiff to succeed."[85]

[90] Mr Grant-Taylor QC referred to *Brown v Holzberger*:[86] That was also a case involving a plaintiff riding a motorcycle and being involved in a collision at a T-intersection in which he had right of way. Notwithstanding the defendant's obligation to give right of way to the plaintiff, the defendant was held not to have caused the collision in breach of his duty of care. The plaintiff was held to have approached the intersection at high speed and therefore came into view after the defendant had looked down the road and before he attempted his turn. The plaintiff's case was dismissed.

[91] Mr Grant-Taylor QC's submission is of course correct as a matter of law. In *Sibley v Kais*,[87] the High Court considered how traffic regulations defined the duties of road users and how breaches of the regulations could evidence breaches of the duty. In the joint unanimous judgment, this was said:

> "These regulations in nominating the vehicle which has another vehicle on its right as the give way vehicle are undoubtedly salutary and their breach is deservedly marked with criminal penalties. But they are not definitive of the respective duties of the drivers of such vehicles to each other or in respect of themselves: nor is the breach of such regulations conclusive as to the performance of the duty owed to one another or in respect of themselves. The common-law duty to act reasonably in all the circumstances is paramount. The failure to take reasonable care in given circumstances is not necessarily answered by reliance upon the expected performance by the driver of the give way vehicle of his obligations under the regulations; for there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties, whether derived from statutory

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82 Underlining showing amendments omitted.
83 Transport Operations (Road Use Management—Road Rules) Regulation 2009 reg 73(3).
84 *Thomas v Macfarlane* [1969] Qd R 178; *Bradbury v Henshall* (1987) 5 MVR 248; *Jackson v Hamparsum* (1988) 7 MVR 80; *Trompp v Liddle* (1941) 41 SR (NSW) 108; *Sibley v Kais* (1967) 118 CLR 424; *Byrnes v Snare* (1986) 60 ALJR 507.
85 Transcript at 3-2.
86 [2017] 2 Qd R 639. An appeal from that decision was dismissed: *Brown v Holzberger* [2017] QCA 295.
87 (1966) 118 CLR 424.

> sources or from the common law. Whether or not in particular circumstances it is reasonable to act upon the assumption that another will act in some particular way, as for example by performing his duty under a regulation, must remain a question of fact to be judged in all the particular circumstances of the case."[88]

[92] In *Sibley v Kais*, the judgment of the Full Court of the Supreme Court of New South Wales in *Trompp v Liddle*[89] was cited with approval.[90] Jordan CJ, delivering the judgment of the court, said this:

> "A driver is entitled to assume that other drivers will observe the rules of the road. This does not mean that he may drive at any pace he chooses so far as roads coming in on his left are concerned, or with complete indifference to the possibility of a car suddenly emerging from the side road as the result of accident, miscalculation, ignorance or recklessness. It means that it is not unreasonable for him to act on the assumption that other drivers are obeying the rules unless there is something which should make him realise that they are not. Thus, the mere fact that he sees the bonnet of a car appear from a side street on his left does not make it imperative for him to stop. Drivers in such a position normally advance far enough to see whether cars are approaching on their right; and a driver so approaching may reasonably assume that the driver on his left is advancing to serve this purpose unless he gets some indication to the contrary.
>
> Again, it is not unreasonable for a driver to act on the assumption that other drivers are driving at reasonable speeds, in the absence of some indication to the contrary. It is negligent to drive at a higher speed than is reasonably safe in the particular locality; and it is evidence of negligence to drive at a higher speed than is allowed by any regulation in force in the locality. A driver approaching a street which comes in on his right may not unreasonably assume that drivers approaching on his right are not driving at excessive speeds, unless he receives some indication that they are in fact so doing. If he is in this way misled into under-estimating the speed of an unreasonably fast car, and a collision occurs through his moving forward in a way that would be safe if the other car were proceeding at a reasonable pace, it is not he but the driver of the other car who has been guilty of negligence."[91]

[93] As observed in *Trompp v Liddle*, drivers who have the benefit of a right of way are entitled to assume that they will be afforded that right of way by other drivers, but that does not absolve them from the obligation to take reasonable care themselves. Drivers giving way are entitled to assume that the drivers to whom they are giving way are also complying with the rules of the road and not, for instance, travelling unreasonably quickly.[92]

[94] So the principle is that, when considering negligence in any particular case, the road rules are one of no doubt various considerations in the assessment of whether there has been a

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88 At 427.
89 (1941) 41 SR (NSW) 108.
90 Sibley v Kais at 428.
91 *Trompp v Liddle* at 109–110.
92 Such as in *Brown v Holzberger* [2017] 2 Qd R 639 and on appeal [2017] QCA 295.

breach of duty. The cases cited by the plaintiff are consistent with the principle so stated, as are the provisions of the *Civil Liability Act*.

Findings on the question of negligence

[95] Mr Grant-Taylor QC correctly submitted that Mr McPartland gave evidence that he looked to the left and saw no traffic. The utility then proceeded into the intersection. If, it was submitted, that the motorcycle was not in sight when Mr McPartland looked, and assuming that the utility then immediately began its turn, there could, so Mr Grant-Taylor QC submitted, be no breach of duty by the first defendant.

[96] Mr Grant-Taylor QC's submission depends upon the acceptance of Mr McPartland's evidence. Mr Grant-Taylor QC pointed to the fact that Mr McPartland's evidence that he looked to the left was not challenged in cross-examination. By that submission, Mr Grant-Taylor QC meant that it was not specifically put to Mr McPartland that he did not look. Therefore, Mr Grant-Taylor QC submitted, the evidence was unchallenged and must be accepted. If accepted, for the reasons set out above, there must be a finding, so Mr Grant-Taylor QC submitted, that the first defendant did not breach his duty of care.

[97] Mr Grant-Taylor QC's submission that Mr McPartland's evidence must be accepted on the relevant point, because it was not put to him that he did not look, misunderstands, with respect, the rule in *Browne v Dunn*.[93] The principal rationale for the rule is to ensure fairness to witnesses and to the parties by ensuring that a witness has the opportunity to comment on evidence yet to come.[94] The failure to put an asserted fact does not constitute an admission that the contrary is true, although in an extreme case the party in breach of the rule may perhaps not be permitted to lead evidence to the contrary.[95] Before such an extreme step is taken, other measures to avoid any unfairness ought to be explored.[96]

[98] Failure to cross-examine a witness on a particular topic will not "render the course of the trial unfair if it is clear from the manner in which generally the case has been conducted that [the evidence] will be contested".[97]

[99] It seems to have been accepted that Mr Brown could not remember the accident so could not give positive instructions to his solicitors as to what the movements of the utility were immediately before the accident. The Second Amended Statement of Claim specifically alleges a failure of the first defendant to keep proper look out, so the defendant knew that Mr McPartland's evidence is contrary to Mr Brown's case. Mr Brown's case had not closed by the time Mr McPartland gave evidence as he was interposed, but Mr Brown had given evidence as best he could on matters relating to the accident. Mr Philp QC could have suggested to Mr McPartland that he didn't look down the road and Mr McPartland would no doubt have repeated his evidence-in-chief that he did look. No unfairness has been visited upon the defendant by any failure by Mr Philp QC to undertake that pointless exercise. Nothing can be taken from the fact that Mr Philp QC did not put to Mr McPartland that Mr McPartland did not look left.

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93 (1893) 6 R (HL) 67; (1893) 6 ER 67.
94 *R v Birks* (1990) 19 NSWLR 677 at 688.
95 *Reid v Kerr* (1974) 9 SASR 367 at 375, citing *R v Hart* (1932) 23 Cr App R 202.
96 Payless Superbarn (NSW) Pty Ltd v O'Gara (1990) 19 NSWLR 551 at 556.
97 Seymour v Australian Broadcasting Commission (1977) 19 NSWLR 219 at 236.

[100] As already observed there were two eye witnesses to the accident who were called to give evidence, Mr McPartland and Ms Facer. I found both to be totally unsatisfactory witnesses and I would not accept any of their evidence except to the extent that the evidence was uncontroversial or corroborated by other evidence.

[101] Ms Facer was clearly motivated by a desire to exculpate the first defendant, Mr McPartland and herself from any suggestion of fault for the accident. She was argumentative and combative in cross-examination. Her evidence was inconsistent in important respects with earlier statements that she had made. Her assertion that the manoeuvre of the utility turning right was completed or all but completed before the accident is inconsistent with the objective evidence, being the damage to the back of the utility and the tyre of the horse float.

[102] Of particular importance was the assertion by Ms Facer that she smelt alcohol on Mr Brown. That evidence was contradicted by Mr Hodson-Gilmore, the paramedic who attended Mr Brown at the scene. As already observed, Mr Hodson-Gilmore had to be on the lookout for indicia of alcohol consumption by Mr Brown as that could dictate the type of treatment which would be appropriate for him. Mr Hodson-Gilmore had to be alert to any indicia of alcohol save that he might administer drugs to Mr Brown which could, if alcohol were present, harm him. Mr Hodson-Gilmore gave evidence that there was no indicia of alcohol. I accept that evidence.

[103] Mr McPartland also asserted that Mr Brown smelt of alcohol. Mr Grant-Taylor QC, while not challenging Mr Hodson-Gilmore's evidence, submitted that Ms Facer and Mr McPartland could have been honestly mistaken in thinking that Mr Brown smelt of alcohol. Further, it was significant, so submitted Mr Grant-Taylor QC that they had both formed that view, he submits, independently. However, it is much more likely that Mr McPartland and Ms Facer have put their heads together and cynically invented the alcohol story to lay blame for the accident upon Mr Brown.

[104] I was also otherwise unimpressed with Mr McPartland's evidence. Mr McPartland's evidence that the utility and trailer had "95 per cent completed the turn" is inconsistent with the damage to the utility and the tyre of the horse float and does not explain why, if that were true, Mr Brown could not have simply driven past them. Mr McPartland's evidence that he looked to the left and then to the right struck me as very contrived. He seemed to remember some aspects of the accident very clearly, yet was completely unaware that Collingwood Lane intersected with the Gladstone-Monto Road at an angle far sharper than 90 degrees.

[105] Mr Brown was an honest and reliable witness doing the best he could in circumstances where he could not recall the accident itself.

[106] In the past, Mr Brown has breached the road rules on numerous occasions by speeding. This shows a propensity to disregard the road rules. He was not, though, speeding in the 600 or so metres between the Ridler Creek Bridge and the intersection. As already observed, the new motor in his motorcycle was being run-in. The motor would heat if not driven carefully. I accept the evidence of Mr Newbury that the correct way to run-in a new motor is to run with a top speed of between 80 and 100 kilometres per hour but not over 100 kilometres per hour and to avoid hard acceleration. I accept Mr Brown's evidence that he was running the new motor in and I accept his evidence that he would

not run the motorcycle at over 100 kilometres per hour. I accept his evidence that he would not engage in heavy acceleration when running-in the new motor.

[107] I accept Mr Brown's evidence that there was debris on the bridge and that it had to be taken slowly by him on his motorcycle. There is no reason why Mr Brown would, consistently with running-in a new motor on his motorcycle, slowly come over the bridge and then accelerate hard up the incline towards the bend leading to the intersection with Collingwood Lane. It is far more likely that Mr Brown would have accelerated in a normal fashion up the incline and was travelling at somewhere about 80 kilometres per hour by the time he reached the intersection with Collingwood Lane.

[108] A simple calculation shows that even if Mr Brown was travelling at 100 kilometres per hour, and assuming he came into the view of a person at the intersection when he was about 200 metres from the intersection, a person at the intersection would have Mr Brown in sight for about seven seconds before he reached the intersection.[98] If, as is more likely, he was travelling at 80 kilometres per hour, he would have been in view for about nine seconds.[99]

[109] Of course, Mr Brown would have the intersection in view for about seven seconds before reaching it if travelling at 100 kilometres per hour and about nine seconds if only travelling at 80 kilometres per hour.

[110] Mr Brown's motorcycle has hit the forward left tyre of the tandem wheels of the horse float and then crashed into the back of the utility, striking the left hand corner of the tray. That strongly suggests, contrary to the evidence of Ms Facer and Mr McPartland, that the utility and the trailer were across the road in some way and in the path of Mr Brown at the time of impact. I so find. If that had not been the case, then Mr Brown could simply have driven past the utility and trailer. That would not have been a problem even if to do so Mr Brown had to travel onto the southbound carriageway, as there was no southbound traffic.

[111] In the course of final submissions, Mr Philp QC submitted that the unexplained absence of the first defendant Mr Daniels should lead to a *Jones v Dunkel*[100] inference that Mr Daniels was not called by the defendant because his evidence would not support the defendant's case. It is not necessary to infer such a conclusion because Constable Hamilton's written record of his conversation with Mr Daniels[101] shows that Mr Daniels' evidence would in fact not have assisted the defendant's case. True enough, Mr Daniels told the police officer that he "check[ed] both ways and drove onto the road" but, importantly, he said that he heard the impact "as I was turning". This evidence contradicts, at least to a point, the evidence of Ms Facer and Mr McPartland. It is obvious that the utility and the horse float were across the road at the time of impact.

[112] Various scenarios are possible. Perhaps the utility and horse float did not stop at all. Perhaps one or more of the occupants of the utility looked to the left but simply did not see Mr Brown. Perhaps no-one looked. What is clear is that if any of the three occupants of the utility had looked left in the seven[102] seconds before impact they would, if they

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[98] At 100 kilometres per hour, the motorcycle is covering just less than 28 metres per second.
[99] At 80 kilometres per hour, the motorcycle is covering just over 22 metres per second.
[100] (1959) 101 CLR 298.
[101] Exhibit 14.
[102] Or nine.

were taking proper care, have seen Mr Brown approaching. It was negligent not to have seen him before commencing the turn[103] and it was negligent to attempt a turn with him approaching.[104] Mr Brown has proved that the first defendant breached his duty of care to him and has caused the accident.

[113] I find no contributory negligence on the part of Mr Brown. Mr Brown had right of way. He was travelling up the road in full view from the intersection and could reasonably expect the first defendant to give way to him. The first defendant has unexpectedly driven into Mr Brown's path. With the utility and horse float blocking his path, there was nothing he could reasonably do to avoid the accident. I do not find that he was driving at an excessive speed. I do not conclude that he failed to keep a proper lookout. The absence of skid marks are consistent with the utility and horse float being driven out in front of him in circumstances where he had little time to react and he has simply crashed into the back of the utility, clipping the front left tyre of the horse front as he did so. None of the pleaded particulars of contributory negligence are made out.

Quantum

General damages

[114] It is accepted by the defendant that Mr Brown suffered the following injuries:

(i) fractured right distal radial bone associated with dislocation;

(ii) degloving injury to his right foot;

(iii) fractured right second and third metatarsal on his right foot;

(iv) fractured left clavicle and injury to the left shoulder;

(v) multiple craniofacial bone fractures;

(vi) base of skull fracture with pneumocephalus; and

(vii) fractured sternum.

[115] Dr Gillett, whose reports were admitted by consent,[105] assessed a 50 per cent impairment of Mr Brown's right upper extremity function based on the right wrist and hand injuries. This equates to a 30 per cent loss of whole person function. With respect to the injury to Mr Brown's right foot and ankle, Dr Gillett has assessed a 5 per cent loss of whole person function and, in relation to the left shoulder injury, an 8 per cent loss of whole person function.

[116] General damages are to be assessed in accordance with the *Civil Liability Act* and the *Civil Liability Regulation* 2003 (Qld).[106] It is common ground that the correct approach for assessing damages where there are multiple injuries is to determine the dominant injury, identify the relevant Injury Scale Value (ISV) for that injury and then increase that value by some amount to account for the other injuries. The parties agree that the dominant injury is the injury to Mr Brown's wrist and hand.

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[103] Particulars of negligence, Second Amended Statement of Claim at [6(a)] and [6(b)].
[104] At [6(c)], [6(d)] and [6(g)].
[105] He was not required for cross-examination; exs 3 and 4.
[106] Now repealed. The reprint current as at 1 July 2012 is the appropriate version.

[117] Mr Brown submits that the relevant ISV item is 117 - Extreme hand injury, which provides for a ISV scale between 31 and 45. Mr Brown submits that the nature of the injury is towards the middle of the range and therefore an ISV of 40 is appropriate. The foot injury, Mr Brown submits, falls to item 149 - Moderate foot injury. That item provides for a ISV range of between 9 to 12 and Mr Brown submits that if that injury was being assessed, the injury would be assessed towards the bottom of the range. Mr Brown submits that the injury to the left shoulder would fall to item 97 - Moderate shoulder injury, which carries an ISV of 6 to 15 and that an ISV of 10 would be appropriate if that injury was being assessed. Mr Brown submits that the maximum ISV provided by item 117 does not adequately reflect the adverse impact of all injuries and therefore, pursuant to s 4 of Part 2 Schedule 3, the total ISV should be assessed at greater than 45; he submits 50.

[118] The defendant submits that the dominant injury falls within item 105 - Extreme wrist injury, which has an ISV of 25 to 40. A submission was made that an ISV of 34 would be appropriate, which could be lifted to 20 per cent beyond the maximum for that dominant injury. That would calculate to an ISV of 48.

[119] I find that the injury falls within item 117. The loss of 30 per cent of whole person function,[107] with a loss of 50 per cent of right upper extremity function, most appropriately fits the injury within item 117. I would assess the ISV for the dominant injury at 40 and I would increase that by 25 per cent to take into account the other injuries which are very serious in themselves. This gives an ISV of 50. By Schedule 6A, the general damages therefore equate to $120,100.[108]

[120] By s 60(1) of the *Civil Liability Act* 2003 no interest can be claimed on general damages.

Past economic loss

[121] Before the accident Mr Brown conducted what can conveniently be described as an earthmoving business. That involved him contracting for work and then performing work himself with his own machinery. That business effectively ceased when Mr Brown was injured.

[122] Mr Brown's net earnings in the four years ending 30 June 2013 (a few months after the accident) were as follows:

Financial Year	**Net earnings**	**Net average weekly earnings[109]**
2009 / 2010	$75,769.54	$1,457
2010 / 2011	$60,182.84	$1,157
2011 / 2012	$94,658.92	$1,820
2012 / 2013[110]	$151,385 or $71,560.18	$2,960 or $2,236

[123] The figures for the year ended 30 June 2013 require some analysis. Up to the date of the accident, the profit of the business from 1 July 2012 was $151,385. Not only did the income of the business virtually cease once Mr Brown was injured, but expenses continued to accrue with the result that losses were posted in the period 13 February 2013

[107] The note to item 117 speaks of 35 per cent.
[108] Regulation Reprint as at 1 July 2012.
[109] Rounded to the nearest dollar.
[110] Income earned in 32 weeks and 2 days from 1 July 2012 to 12 February 2013.

to 30 June 2013. In calculating past economic loss, Mr Brown has assessed his weekly earnings by adopting the figure of $151,385 as the net profit from the earthmoving business and dividing that by 32, being the number of weeks between the beginning of the financial year and the accident. That gives a weekly income before income tax of $4730.75 and $2,960 after tax.

[124] The defendant, in its calculations, has adopted the figure of $2,236 per week after income tax, which is calculated from a net profit of the earthmoving business of $71,560.18. That takes into account the losses in the latter part of the financial year ended 30 June 2013.

[125] Subject to what I say below, the correct measure of loss is the weekly income before the accident without deduction for losses posted thereafter. Adopting a figure of $2,960 per week for 289 weeks (being the time from accident to trial), past economic loss would be $855,440.

[126] There were various matters properly explored by Mr Grant-Taylor QC in cross-examination of Mr Brown and one was whether the business could have been continued with the use of contract labour.[111] In his final submissions, though, Mr Grant-Taylor QC only advanced one reason for discounting past economic loss from the 2012-2013 figures and that was the downturn in the mining industry. While it was proper for Mr Grant-Taylor QC to explore other issues, his approach in final submissions confining himself to this one real issue accords with my assessment of the evidence.

[127] Mr Grant-Taylor QC put to Mr Brown that there was a downturn in work generally since 2013. Mr Brown responded by saying that there was available work doing roadworks. In particular, he mentioned work necessary to repair flood damage.[112]

[128] Mr Stephen Alt is a Mining Operator Manager. He is very experienced and had previously employed Mr Brown. He said that Mr Brown was a particularly good plant operator and thought that work would always be available for him. In examination in chief, Mr Philp QC asked Mr Alt this question:

> "And what sort of work would have been available to him had he not been injured?---Because of the times we've had through the mining industry, that would have been – there was still work. There's always work in the mine, but it's not as – it's not as hot in the industry as it is at – at the current because we went through a pretty low time then, but, you know, there was probably still a lot of council work and railway work that was happening at the time."[113]

[129] Mr Grant-Taylor QC cross-examined Mr Alt on the potential impact of changes in economic conditions within the mining industry. This exchange occurred:

> "MR GRANT-TAYLOR: Mr Alt, the peak of the mining boom was probably in the course of the 2013 financial year?---Let me think for a second where we are. Yeah, it started, yeah, probably, yeah, 2013, correct. 2008 was the disaster for the world for the financial side, but it probably started – 2013, 2014 it started winding down, correct.

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[111] Transcript at 1-63.
[112] At 1-64.
[113] At 2-5 ll 1-7.

> Certainly. And things have really only begun to pick up again in the last 12 - - - ?---Six months, six months.
>
> Six months?---Yeah.
>
> So whilst you say that some work would have been available - - -?---Correct.
>
> - - - over the interim between the 2013 financial year and, say, the beginning of the current calendar year, there would be an expectation that that work would be somewhat harder to find if it was going to be pursued in the mining industry over that interval?---Yes, but, as I said before, there's always work on the peripheral of the – of the actual mine because they've always got to do upgrades. There's always drainage to be done, and it comes back to the person who's there chasing it and what they're prepared to do for it.
>
> There would have been less jobs. There would have been more competition over that interval?---Well, when you say more jobs and less competition, there's only a certain - - -
>
> No, less jobs and more competition?---Well, okay, but what I've just – let me just - - -
>
> Sure?--- - - - fill out on that. You have to have a vendor number or you've got to have someone that you can work for on those mines. If you don't have that access, you just – no one can just walk out there and walk onto a mine.
>
> HIS HONOUR: How common are people in the industry with Mr Brown's skills which you say are exceptional?---It's – it's – there's people out there with those – with those skills – there's no two ways about that, but it's the supply and demand, and right at the moment there's such a demand for those sort of skills at the moment. You know, I'm looking for people at the moment that, you know – and most of the good ones have always got a job and they'll always have a job, and they're the ones that you've got to come back to to see if you can put a better deal on the table or see what you can do to convince them to come across to where you are."[114]

[130] Carissa Gunston is an accountant who prepared Mr Brown's income tax returns and also prepared Exhibit 19. She explained that the term "gross business takings" in the summary which she prepared as part of Exhibit 19 represents the income of the business before any deductions.[115] What can be seen is a steady increase of gross business takings from the financial year 2009/2010 until the date of the accident:

(i)	year ended 30 June 2010	$155,670
(ii)	year ended 30 June 2011	$171,862
(iii)	year ended 30 June 2012	$239,000
(iv)	year ended 30 June 2013, adjusted figure of	$407,875

[131] The adjusted figure is one I have calculated by taking gross business takings to the date of the accident ($251,687) for the 32 weeks of the financial year and then extrapolating that out to a full 52-week year.

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[114] At 2-6 l 13 to 2-7 l 5.
[115] At 2-39.

[132] Even in the year ended 30 June 2011 where net average weekly earnings fell from $1,457 (year ended 30 June 2010) to $1,157, the gross business takings had in fact increased. Mr Grant-Taylor QC's submission is that, as the 2013 year was the peak of the mining boom, Mr Brown's income would have not been sustained. He submitted that an average of net weekly income over the three years ended 30 June 2011, 30 June 2012 and 30 June 2013 ought to be taken giving a net average of $1,738.[116] That average was done adopting a weekly net figure for the year ended 30 June 2013 of $2,236. For the reasons I have already given, the appropriate net weekly income for that year is $2,960 which adopting Mr Grant-Taylor QC's formula would result in an average of $1,979.[117]

[133] The level of income for the year ended 30 June 2013 (as adjusted) shows a marked increase over previous years. While I am sure that work would always have been available to Mr Brown, the economic conditions in the mines must, to a point, affect his profitability. Less work and therefore more competition must result in a fall of income even if significant work fell to Mr Brown because of his high skill levels. It is of significance that Mr Brown's highest earning point coincides with the most favourable economic conditions in the mining industry.

[134] Mr Brown's business had been growing over a number of years. It is safe to assume that growth would have generally continued but perhaps not as dramatically and not necessarily from the peak of 2012/2013. Further, the levels of profitability may not have been able to be sustained at 2012/2013 levels. I assess past economic loss on a weekly earnings figure of $2,200 after tax. I therefore calculate past economic loss at $635,800[118] and interest at 1.315 per cent for 5½ years at $45,926.38.

Future economic loss

[135] Mr Brown is 51 years of age. Based on a retirement age of 67 years,[119] he would be expected to retire in about 16 years. I have assessed his weekly earnings for the purposes of calculating past economic loss at $2,200 per week. I adopt that figure for the calculation of future economic loss.

[136] The parties are agreed that the appropriate multiplier[120] is 579, giving $1,273,800.

[137] The defendant submits that there should be a discount of 25 per cent applied for vicissitudes of life, because of the following:

> "(i) the plaintiff retains capacity to work;
>
> (ii) the retained capacity includes working in the role of hiring equipment;
>
> (iii) hiring equipment is work in which the plaintiff has demonstrated experience, competence, reputation and contacts. Mr Stephen Alt, a former colleague of the plaintiff, gave evidence to that effect;

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[116] $1,157 (year ended 30 June 2011) + $1,820 (year ended 30 June 2012) + $2,236 (year ended 30 June 2013) = $5,213 ÷ 3 years = $1,737.66.

[117] $1,157 (year ended 30 June 2011) + $1,820 (year ended 30 June 2012) + $2,960 (year ended 30 June 2013) = $5,937 ÷ 3 years = $1,979.

[118] 289 weeks at $2200 per week

[119] *Social Security Act* 1991 (Cth) s 23(5A).

[120] Five percent discount tables, Vincents Litigation Tables, April 2018, at 3, under s 57 of the *Civil Liability Act*.

(iv) the plaintiff gave evidence to the effect that he may take up such work in the future;[121]

(v) the plaintiff has a relatively long 16 year working life ahead of him."[122]

[138] Mr Brown concedes that a discount ought to be applied, but says that a 10 per cent discount is appropriate. Mr Brown relies upon the decision of McMeekin J in *Mills v BHP Coal Pty Ltd*,[123] where such a discount was applied.

[139] While Mr Brown may have no future as a plant operator, it is clear that he has skills which he may be able to use to generate income in the future. He has shown the capacity to operate a small business. Not only has he generated income from operating the machinery himself, but he has also earned income by hiring the machinery out. In the circumstances, I assess the appropriate discount at 15 per cent, giving a figure for future economic loss of $1,082,730.

Special damages

[140] Mr Brown claims special damages in the sum of $58,550.82. This is admitted by the defendant except in two respects:

(i) the three dental items involving treatment from Dr Omell in the sum of $252;[124] and

(ii) travelling expenses should be claimed at 50 cents per kilometre not 75 cents per kilometre reducing that item from $1,440 to $960.

[141] The point taken in relation to the dental treatment is that there is nothing pleaded alleging dental injuries. The defendant's point is not properly made. Paragraph 9 of the Second Amended statement of Claim gives particulars relevant to general damages and paragraph 9(a)(xiv) alleges that Mr Brown "suffered damage to his teeth". There is no other argument advanced by the defendant against this item of special damages and I will allow it.

[142] Fifty cents per kilometre (as opposed to 75 cents per kilometre) appears reasonable for travelling expenses. I therefore accept the defendant's submissions on that point. The difference is $480.

[143] I find special damages at $58322.82. Interest calculated at 1.315 per cent per annum over five and a-half years on the sum expended by Mr Brown[125] yields $362.52.

Past care

[144] Mr Brown was hospitalised after the accident and did not return home until 14 April 2013. No claim is made for care over this period.[126]

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[121] Transcript at 1-64 l 45 to 1-65 l 3.
[122] Second defendant's written submissions at [82].
[123] [2017] QSC 184.
[124] Exhibit 13 at 9.
[125] $5012.39 being $5492.39 (Schedule of special damages, ex 13 at 11) less $480 disallowed.
[126] *Civil Liability Act* 2003 (Qld) s 59(3).

[145] Section 59 of the *Civil Liability Act* prohibits an award of damages for gratuitous care unless:

(i) the need for the services arises only from the injury;

(ii) the necessary services exceed six hours per week for at least six months.

[146] The defendant concedes that the preconditions of s 59 are met. The only issue is as to assessment. By s 59(2) damages may not be awarded for services which were being rendered before the injury was sustained.[127]

[147] Ms Raine, Mr Brown's partner, cared for Mr Brown once he was discharged from hospital. She gave evidence that she was providing care for about 25 hours per week. This was particularised in her evidence as follows:[128]

Showering	25 minutes per day/175 minutes per week
Toileting	25 minutes per day/175 minutes per week
Cutting up food	10 minutes per day/60 minutes per week
Cooking	90 minutes per day/630 minutes per week
Laundry	75 minutes per week
Cleaning	180 minutes per week
Mowing	120 minutes per week
Transport	90 minutes per week
Total	**1,505 minutes/25 hours per week**

[148] Her evidence was not challenged. Her evidence was supported by Mr Brown, who said that he was largely incapacitated by the accident for a period after leaving hospital.[129] This state of affairs persisted until the end of 2013, about 38 weeks.

[149] Before the accident Mr Brown and Ms Raine were cohabiting and were sharing the load of domestic duties. After the accident Ms Raine was completing these duties single-handedly for all practical purposes. Some of the tasks that Ms Raine took over were tasks that Mr Brown had been doing for the benefit of both of them, eg the cooking. It is difficult then to assess with any accuracy the time spent by Ms Raine rendering services to Mr Brown which were necessary because of the accident. However, the provision of substantial services was necessary, which I assess at two and a-half hours per day, being a total of 17 and a-half hours per week. The hourly rate for past care has been agreed at $30[130] thus giving, for this period of 38 weeks, $19,380.[131]

[150] Mr Brown's physical state improved. The level of care that was required fell. Two occupational therapists provided reports, including a joint report[132] and gave evidence. While that evidence is relevant to future care, it is also relevant, for the reasons I now explain, to the assessment of past care.

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127 Section 59(2).
128 Transcript at 1-77 l 9 to 1-82 l 10.
129 At 1-45.
130 Transcript at 1-97 ll 25–29.
131 38 weeks at 17 hours a week at a rate of $30 per hour.
132 Exhibit 6.

[151] Rebecca Hague, who was called by Mr Brown, opined that Mr Brown's need for care, at the time of her report,[133] was seven hours a week. That was particularised in her report as follows:[134]

Service	Weekly assistance
Grocery shopping	1 hour
Meal preparation & washing up	2 hours
Laundry – wash, hang & fold	0.75 hour
Laundry – changing sheets	0.25 hour
Cleaning – vacuuming, mopping & bathroom	1 hour
Yard mowing, whipper snipping & maintenance	2 hours
Total	**7 hours**

[152] Occupational therapist Anne White was called by the defendant. She disagreed with Ms Hague's assessment.

[153] Much of the cross-examination of both Mr Brown and Ms Hague by Mr Grant-Taylor QC concentrated on whether or not Mr Brown could physically perform the tasks which Ms Hague identified as being the subject of him needing assistance. In cross-examination, Ms White took the stance that Mr Brown could physically do some of the things that were identified by Ms Hague.

[154] Mr Brown gave evidence that he was in pain performing the tasks. Ms White gave evidence that Mr Brown could cope, provided that he took time completing the tasks. Of course, this means that Mr Brown will spend a great proportion of his time doing housework. The real question is not whether Mr Brown could physically perform the tasks but whether he reasonably requires assistance in doing so.

[155] I accept Mr Brown's evidence that he is in pain when doing domestic tasks. It is, for that reason, no doubt that Ms Raine did them. When she left, his need for that assistance did not diminish and has not diminished. Mrs Pengelly, Mr Brown's mother stepped in, although she didn't provide the level of assistance that Ms Raine provided. Mrs Pengelly has her own health problems.

[156] Seven hours a week for past care from 1 January 2014 to the date of trial calculates to $51,030.[135] However, it is obvious that seven hours a week care was not ordinarily being provided. It is likely that Ms Raine was providing that level of care, but after she left, probably in about April 2014, her assistance was not completely replaced. I assess that an average 4 hours per week care was delivered over this period.

[157] I assess care for the period from 1 January 2014 to the trial at $29,160 giving a total, then, for past care of $48,540.00.

[158] No interest can be awarded on past gratuitous care and services.[136]

Future care

[133] February 2016.
[134] Report of Rebecca Hague, ex 6 at 17.
[135] Seven hours a week at $30 an hour x 243 weeks = $51,030.
[136] *Civil Liability Act* 2003 (Qld) s 60(1)(b).

[159] The hourly rate for future care has been agreed upon at $35.[137]

[160] The plaintiff claims four hours a week of future care for 23 years and concedes a contingency deduction of 10 per cent. There is a need for four hours a week care at least. Only four hours a week has been claimed because it is unlikely that Mr Brown will seek more.[138] It is unclear to me why, in Mr Brown's written submissions, future care is limited to the next 23 years when Mr Brown's life expectancy is to an age of over 84.[139] The claim for future care should be $140 over 34.64 years, which gives a multiplier of 866.[140] Before discount, the figure for future care is $121,240. There is, of course, great scope for events over the next 34 years to occur which will affect Mr Brown's need for assistance. In those circumstances, the figure should be heavily discounted to $90,000.[141]

[161] There is a complication given that, if Mr Brown has surgery to his left shoulder, then both occupational therapists agree that he will need 10 hours care per week for up to three months following the surgery. However, for reasons I will later explain, the future surgery seems unlikely. I will allow $1000.

[162] In all the circumstances, I allow a total amount for future care of $91,000.

Future expenses

[163] The two occupational therapists in their joint report, have agreed on a list of aids equipment and appliances.[142] I accept that evidence. I accept the defendant's calculation of the costs of these things (properly discounted) at $5,858.01.

[164] As previously mentioned, there is a prospect of future surgery. Dr Gillett puts further surgery at no more than a "consideration at some stage in the future".[143] A left shoulder reverse arthroplasty on today's values would cost $20,000, although an arthrodesis would cost $10,000. The appropriate operation depends on what stage of life Mr Brown reaches before pain levels justify surgery.

[165] Dr Duke, a shoulder and upper limb orthopaedic surgeon, is of the opinion that surgery is not justified.[144]

[166] Mr Brown also claims:

(i)	medication	$4,438.00
(ii)	visits to the general practitioner	$6,399.27
(iii)	travel	$3,000.00
	Total	**$13777.27**

[167] There is very little evidence about these things. Any claim for future surgery would have to be heavily discounted given the evidence of Dr Duke in particular. I will allow

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[137] Transcript at 1-97 ll 25–29.
[138] Plaintiff's submissions at [84].
[139] Prospective life tables, Vincents Litigation Tables, April 2018 at 13.
[140] Five percent discount tables, Vincents Litigation Tables, April 2018 at 3 under s 57 of the *Civil Liability Act*.
[141] *McQuitty v Midgley & Anor* (2016) 74 MVR 374; [2016] QSC 36 at [239].
[142] Exhibit 6 at 5–8.
[143] Exhibit 3 at 9.
[144] Report of Dr Phillip Duke, ex 17.

$5,808.51 for the aids equipment and appliances and a global sum of $10,000 for other expenses giving $15,808.81.

Summary of damages

[168] I have assessed the following:

(i)	general damages	$120,100.00
(ii)	past economic loss	$635,800.00
(iii)	interest on past economic loss	$45,926.38
(iv)	future economic loss	$1,082,730.00
(v)	special damages	$58,322.82
(vi)	interest on special damages	$362.52
(vii)	past care	$48,540.00
(viii)	future care	$91,000.00
(ix)	future expenses	$15,808.51
	Total	**$2,098,590.23**

[169] I give judgment for the plaintiff in the sum of $2,098,590.23. I will hear the parties on costs.