# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Brown v Holzberger & Anor* [2017] QCA 295 |
| PARTIES: | **ASHLEY DAVID BROWN**<br>**(appellant)**<br>**v**<br>**ROBERT WILLIAM HOLZBERGER**<br>**(first respondent)**<br>**AAI LIMITED trading as SUNCORP INSURANCE**<br>**ACN 005 297 807**<br>**(second respondent)** |
| FILE NO/S: | Appeal No 4526 of 2017<br>SC No 5 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Bundaberg – [2017] QSC 54 (McMeekin J) |
| DELIVERED ON: | 1 December 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 5 September 2017 |
| JUDGES: | Gotterson and Morrison JJA and Flanagan J |
| ORDERS: | **1. Appeal dismissed.**<br>**2. Appellant to pay the respondents' costs of the appeal on the standard basis.** |
| CATCHWORDS: | EVIDENCE – ADMISSIBILITY – HEARSAY – EXCEPTIONS: FIRST HAND HEARSAY – where the appellant brought a proceeding against the respondents for damages for personal injuries and consequential loss and damage arising out of a traffic accident – where the appellant claimed the collision was caused by the negligence of the first respondent – where a witness who attended to the appellant at the scene testified that his first words were "I thought he'd stop" – where the learned primary judge determined the statement was not relevant and otherwise hearsay and ruled against its admission – where the appellant submits that the statement came within the *res gestae* exception to hearsay – whether the statement was relevant to a fact in issue – whether the statement formed part of the *res gestae*<br><br>APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY |

OF WITNESSES – NECESSITY FOR FINDING TO BE CLEARLY WRONG – where a number of road users were witnesses at the trial – where the appellant submits that the various witnesses' testimonies conflicted and should not have been accepted – where one witness gave evidence as to the high speed of the appellant's motorcycle and location beside her vehicle, obscuring the appellant from the first respondent's view – where the learned trial judge's findings demonstrably supported that witness' testimony – where the appellant challenges that witness' testimony as unreliable – whether the learned primary judge erred by accepting that witness' testimony

DAMAGES – PARTICULAR AWARDS OF GENERAL DAMAGES – QUEENSLAND – where the appellant sought damages for gratuitous services under s 59(1) of the *Civil Liability Act* 2003 (Qld) – where the learned trial judge was not satisfied that the appellant received gratuitous services for six hours or more per week for a period of six months as required by that section – where the appellant submits that the learned primary judge failed to accept evidence demonstrating this requirement was satisfied – where the appellant contends the learned primary judge erred by only considering the six month period immediately following the appellant's discharge from hospital – whether the learned primary judge erred in his assessment of the evidence

*Civil Liability Act* 2003 (Qld), s 59

*AAI Limited v McQuitty* [2016] QCA 326, cited
*Eaton v Nominal Defendant* [1995] QCA 435, cited
*Robinson Helicopter Company Inc v McDermott & Ors* (2016) 90 ALJR 679; (2016) 331 ALR 550; [2016] HCA 22, cited
*Ross v Hamilton* [1997] QSC 170, distinguished
*Walton v The Queen* (1989) 166 CLR 283; [1989] HCA 9, cited

COUNSEL: T Matthews QC, with A J Williams, for the appellant
G F Crow QC for the respondents

SOLICITORS: Baker O'Brien Toll for the appellant
Quinlan Miller & Treston Lawyers for the respondents

[1] **GOTTERSON JA:** On 5 May 2016, the appellant, Ashley David Brown, commenced a proceeding in the Supreme Court at Bundaberg for damages for personal injuries and consequential loss and damage arising out of a traffic accident which occurred shortly before 9.30 am on 15 June 2013 in FE Walker Street, Bundaberg. Immediately prior to the accident, the appellant had been riding a Kawasaki Ninja 650 motorcycle in a north-easterly direction along the street.

[2] At that time, a Hyundai Terracan four-wheel drive vehicle was being driven by the first respondent, Robert William Holzberger, in a south-westerly direction along FE Walker Street. The accident occurred at a T-intersection where Reddan Street

joins FE Walker Street from the north and when the Hyundai was executing a right-hand turn into Reddan Street.

[3] A collision ensued between the motorcycle and the Hyundai. The appellant's pleaded case was that the collision was caused solely by the first respondent in not keeping a proper lookout, turning across the path of his motorcycle and failing to stop, slow down, steer clear or otherwise drive or control the Hyundai so as to avoid collision.[1]

[4] The appellant sustained personal injuries including a serious compound fracture to his left tibia and fibula and a fracture of his distal right ulna. The former required treatment by way of amputation of the left leg below the knee.

[5] Mr Holzberger was the first defendant in the proceeding. The second defendant was AAI Ltd trading as Suncorp Insurance, the compulsory third party insurer of the Hyundai. It is the second respondent to the appeal. As second defendant, the second respondent undertook carriage of the defence of the proceeding.

[6] The appellant's proceeding was tried in March 2017. On 12 April 2017, judgment was given for the second defendant.[2] In reasons for judgment delivered that day, the learned trial judge concluded that the appellant had not discharged his onus of proving that the collision occurred because of any negligence on the first respondent's part.[3]

[7] His Honour assessed damages at $891,846.48.[4] A claim for past and future gratuitous services was disallowed.[5] Later, on 21 June 2017, his Honour ordered that the appellant, as plaintiff, pay the defendants' costs of and incidental to the proceeding on the standard basis.[6]

[8] On 8 May 2017, the appellant filed a notice of appeal against the judgment entered on 12 April 2017.[7]

**The locale**

[9] Evidence adduced at the trial established that Elliott Heads Road intersects with FE Walker Street about 300 metres west of the T-intersection. From the former intersection, FE Walker Street has two eastbound lanes separated by a broken white line. Those lanes continue past a T-intersection with Sugden Street and then begin to merge into a single eastbound lane. The merger begins just before a "Form 1 Lane" sign positioned about eight house properties west of the subject T-intersection.[8]

[10] There is a continuous white line marking the northern edge of the eastbound carriageway. It continues through both T-intersections. In evidence, it was referred to as the "fog line". At the subject T-intersection, the eastbound lane is about four

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1 Statement of Claim, para 4: AB652.
2 AB677.
3 Reasons [74].
4 Reasons [131].
5 Reasons [130].
6 AB713.
7 AB714-719.
8 Exhibit 5: AB450.

metres wide. That is the approximate distance between the marked broken centre line and the continuous fog line.[9]

[11] To the east of the subject T-intersection, there is a slight dip in FE Walker Street. The dip impacts upon view along the roadway in either direction but oncoming vehicles remain in sight of each other.

**The unchallenged facts and the principal factual issues in dispute**

[12] The learned trial judge recorded that it was common ground that the collision occurred on or about the fog line. The impact on the Hyundai was on the panel behind the rear passenger wheel.[10] It occurred at a time when the Hyundai had almost completed the turn.[11]

[13] It was a fine, clear day.[12] The headlight on the motorcycle was illuminated.[13] The turn right indicator on the Hyundai was activated. The appellant did not see the activated indicator.[14] The first respondent did not see the motorcycle before the impact.[15]

[14] Within this context, the learned trial judge identified two principal disputed factual issues for resolution. They were the location of the motorcycle when the first defendant began his turn and the speed at which the appellant was travelling.[16]

**The evidence as to those issues**

[15] The appellant testified that he stopped at a red light at the Elliott Heads Road intersection. Of the two eastbound lanes, he was in the one on the left-hand side. He moved off when the lights changed. There was a green Toyota Hilux four-wheel drive in the eastbound lane on his right-hand side in the vicinity of the point where the two eastbound lanes merge. He merged in front of the Hilux about 150 metres west of the Reddan Street T-intersection. He was travelling about 60 kilometres per hour, the speed limit.[17]

[16] According to the appellant, he saw the first respondent's Hyundai when he was about two or three house properties from the T-intersection. It was moving and other vehicles were passing it on its left-hand side. He remembered next the Hyundai pulling in front of him in a turn into Reddan Street.[18] He recalled tapping his front brakes but there was no time for them to react. His motorcycle collided with the Hyundai and he was thrown from it.[19]

[17] The learned trial judge observed that if the appellant's account was accurate, his motorcycle should have been in plain view of the first respondent before the latter commenced his turn. There would have been no opportunity for the appellant to avoid the collision.[20]

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9 Ibid.
10 Exhibit 25: AB573.
11 Reasons [8].
12 Reasons [4].
13 Reasons [6].
14 Reasons [10].
15 Reasons [9].
16 Reasons [11].
17 AB30 Tr1-30 l23 – AB31 Tr1-31 l34.
18 AB31 Tr1-31 l42 – AB32 Tr1-32 l38.
19 AB35 Tr1-35 ll15-27.
20 Reasons [16].

[18] The defence called as witnesses a number of road users that morning. Leesa Smith, an experienced motorcyclist, was travelling eastbound to the rear of the appellant. She observed his motorcycle over about one kilometre of travel but lost sight of it about 800 metres west of the T-intersection. She noticed that, at one point, the appellant zigzagged in his lane, and at another point, he accelerated to about 80 kilometres per hour from a stop at lights.[21] His Honour regarded Ms Smith as being a very impressive witness.[22]

[19] The first respondent stated that he activated his right-hand turn indicator "probably 20 feet" before the intersection. He saw a dark green vehicle approaching about three house properties from the intersection. He did not see any motorcycle. He thought that there was enough time to turn right. He was travelling "at about 10 miles per hour".[23] His vehicle had all but cleared the intersection when it was struck.

[20] His Honour assessed the first respondent as being an "obviously honest" witness.[24] However, he doubted the reliability of his estimates of distance, bearing in mind that he told police that he thought that before he turned, the oncoming vehicle he saw was "five car lengths, about 300 yards" away.[25]

[21] Mr Gavan Wills, a retired police officer, was a front seat passenger in a vehicle driven by his daughter, Kathleen Stolzenberg, in Reddan Street travelling towards the intersection. The learned trial judge extracted from his evidence the following: immediately prior to, or as, the first respondent commenced his turn, Mr Wills looked to his right and saw no traffic approaching within a distance of 80 metres or so; that he thought there was ample time for the Hyundai to make the turn; and that the turn was done in normal way.[26]

[22] Ms Stolzenberg gave evidence that she pulled up at the intersection, looked to the right and saw traffic further down FE Walker Street, almost 50 metres away.[27] She did not see a motorcycle or a motorcycle headlight.[28] She had seen the Hyundai when she stopped at the intersection but did not remember seeing it turn into Reddan Street.[29]

[23] Mrs Evelyn Turner was a front seat passenger in the green Hilux which her husband was driving. Where the lanes merged, they were travelling at 60 kilometres per hour. She saw a "gold car" (the Hyundai) about 80 metres away. It was turning in front of them with "plenty of room to turn".[30] Mrs Turner said that she was given an "unholy fright" by a motorcycle "whizzing" past on her left. The motorcycle crossed over in front of their Hilux. Barely two seconds later, it collided with the Hyundai.[31] The motorcycle "would have been doing at least 80, plus".[32] Mrs

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21 AB312 Tr4-35 l17 – AB313 Tr4-36 l34.
22 Reasons [22].
23 AB 337 Tr4-60 l14-35.
24 Reasons [25].
25 AB184 3-17 l1.
26 Reasons [31].
27 AB241 Tr3-74 ll18-19; Exhibit 31: AB612.
28 Ibid ll30-33.
29 AB240 Tr3-73 ll37-42.
30 AB324 Tr4-47 ll19-22.
31 Ibid ll24-41.
32 Ibid.

Turner indicated that motorcycle passed their vehicle at a point, which, on the evidence, was just under 50 metres from the T-intersection.[33]

[24] I mention at this point that, in cross examination, Mrs Turner was asked about a conversation she had with the appellant soon after the collision when she went to render assistance to him. She answered that his first words were "I thought he'd stop".[34] Objection was taken to this evidence and the learned trial judge reserved ruling on its admissibility. In due course, he ruled against its admission into evidence.[35]

[25] His Honour found Mrs Turner to be "obviously honest". He considered her evidence to be "generally reliable".[36]

**The reasoning of the learned primary judge**

[26] The learned primary judge observed that the evidence of the defence witnesses was consistent. The account of each of them, however, was inconsistent with the appellant's version. In the end he could not accept that the appellant's testimony was accurate.[37]

[27] His Honour reached that view after identifying some six difficulties in accepting the appellant's testimony as accurate. The difficulties were these:

> "[60] The first problem for Mr Brown is that his evidence, to put it charitably, is not accurate. His claim that he had not exceeded the speed limit that day is wrong and in my view probably well known to him to be wrong. I refer at this point to Ms Smith's evidence. I do not accept that Ms Smith's observations are unreliable, as was submitted, because she failed to bring into account the greater rate of acceleration of a motorcycle compared to her vehicle. She was well acquainted with motorcycle characteristics and more familiar than most with that acceleration. I have no doubt that her account that Mr Brown accelerated away from her at a speed well in excess of the speed limit was a reliable one. The warming up of the tyres beforehand is consistent with the conduct observed and not in dispute.
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> [61] This creates a difficulty for Mr Brown. His traffic history shows that he was not averse to exceeding the speed limit. I accept that he was doing so as he left a set of traffic lights a few blocks back from the Elliott Heads intersection. It would not be out of character for him to have again done so again when leaving the Elliott Heads intersection. This evidence does not prove one way or another what he did do then, but it would be consistent with his manner of driving as observed by Ms Smith only a minute or two before for him to have behaved as Mrs Turner reported.
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> [62] The second difficulty with Mr Brown's evidence that he did not exceed the speed limit that day is that he had to have

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33 AB325 Tr4-48 ll16-17; Exhibit 36: AB649; Exhibit 24: AB570.
34 AB332 Tr4-55 l23.
35 Reasons [45] – [58].
36 Reasons [39].
37 Reasons [73].

exceeded the speed limit when overtaking Mrs Turner's vehicle. Senior counsel for Mr Brown conceded so much in his submissions. Mrs Turner was not challenged when she put the speed of her vehicle at 60 kph before being overtaken by the motorcycle. As senior counsel submitted Mr Brown had to be going faster to get past them. The key question is how much faster? I am not persuaded that there is any good reason to treat Mr Brown's evidence on the subject as of any assistance. He was plainly not doing "about 60 kph" as he claimed.

[63] A third problem is that Mr Brown's version requires that Mr Holzberger's lookout was not just poor but quite improbably nonexistent. There are two obvious points to make if Mr Brown's version be accepted. The first is that he had to have been in Mr Holzberger's clear view over about 150m yet was not seen. The second is that Mr Holzberger had to commence his turn when the motor vehicle was only metres from him. It is common ground that the headlight of the motorcycle was illuminated and so easily visible. I note that Mr Brown's version was that the vehicle turned in front of him when it was too late for him to avoid the collision despite his claim that he "hit" his brakes and that the distance separating him from the Terracan when the vehicle suddenly turned was only a car length or two (ie 8 to 10 metres). For this to be so Mr Holzberger's lack of lookout would have to have been on a staggeringly incompetent scale.

[64] A fourth problem is that on Mr Brown's version not only did Mr Holzberger fail to see the motorcycle as it crossed the distance from the end of the merging lane to the intersection but so did Ms Stolzenberg. On Mr Brown's version he must have been in her view when she looked but he was not. It will be recalled that Ms Stolzenberg looked after she reached the intersection. Ms Stolzenberg saw traffic approaching but did not see the motorcycle. Ms Stolzenberg thought that the approaching traffic she saw was only about 40 – 50 metres from the impact point when she first saw it (see my analysis above). The precise distance is not particularly significant. Whatever the distance Mr Brown's motorcycle had to be in the lead position at that point in time if his account is accurate. Ms Stolzenberg would need to be out in her estimate by at least 100 metres to falsify that proposition. There is no reason to think that she is.

[65] A fifth problem for Mr Brown is Mr Wills' evidence. Whatever the distance that Mr Wills could see along FE Walker St it is plain there was no traffic in view. Because of that absence of approaching traffic he formed the opinion that the Terracan had ample time to make its turn. Mr Holzberger commenced his turn at about that time. So there is independent support from an observant witness for Mr Holzberger's view that it was safe to turn when he did. Wherever the motorcycle was at that point it was not in a position to cause any concern.

> [66] Finally there is Mrs Turner's evidence. Mrs Turner's evidence is the crucial testimony. For Mr Brown's version to be accepted she must be wrong in her estimate of his speed, in her positioning of the place where he overtook, and in her estimate of the time that elapsed between him overtaking and the accident. I see no reason to think that she was wrong in any aspect. As the second defendant's calculations of relative speeds shows her version is internally consistent. Her account is consistent with the versions of the other witnesses. Significantly her account is in complete accord with both Mr Holzberger and Ms Stolzenberg – that is, when well advanced along FE Walker St her vehicle was the lead vehicle. As well she is in accord with Mr Wills - she thought that the gold car had ample time to make its turn when that turn commenced. And importantly her evidence explains the observations of the others. They did not see the motorcycle because it was not there to be seen. It remained hidden behind her vehicle until effectively a moment before the collision." (footnote omitted)

[28] The learned primary judge rejected a hypothesis advanced for the appellant that the first respondent had been distracted by the vehicle driven by Ms Stolzenberg and had hurriedly swung wide to avoid it without looking for oncoming traffic. In his Honour's view, the hypothesis was unsustainable: it conflicted with the reliable evidence of Mr Wills as to the turn made and required rejection of the appellant's evidence that he did not see Ms Stolzenberg's vehicle.[38]

[29] As well, the learned primary judge rejected a submission that Mrs Turner ought to be found to be an unreliable witness for the following reasons:[39]

> "(a) Mr Holzberger said that he activated his indicator only 20 feet before the place where he turned whereas Mrs Turner thought that it was much sooner;
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> (b) Mrs Turner was misled into thinking that the speed of the motorcycle was much greater than it in fact was because she was startled and misled by the noise of the motorcycle and by Mr Kerridge (Mrs Turner's husband) braking heavily after the motorcycle overtook them;
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> (c) Her capacity to make accurate observations should be doubted because she did not see the vehicle driven by Ms Stolzenberg which was stationary at the intersection or very close to the fog line and so in her clear view as she approached the intersection."

[30] In his Honour's view, those matters were of little moment in assessing Mrs Turner's credibility. He responded to them as follows:[40]

> "(a) I have commented above on my views as to the accuracy of Mr Holzberger's estimates of distance. I have no confidence that he was precise in this one and it impacts not at all on Mrs Turner's credibility;

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38 Reasons [68].
39 Reasons [70].
40 Reasons [71].

(b) Mrs Turner's observations and her manner of relaying them was compelling. She said that the motorcycle came "whizzing" past her vehicle "like a bullet". She was quite evidently not relating a sedate overtaking manoeuvre of the motorcycle travelling at a roughly comparable speed albeit slightly higher. Her husband's braking could have had little impact on her observations as the accident occurred moments later. As well Mr Kerridge had every reason to brake on her account – a collision was unfolding in front of him.

(c) That a witness has no recollection of seeing something years after an event does not render unreliable their evidence of what they say they did see. There was no particular reason for Mrs Turner to note or recall the presence of the slowly moving vehicle in a side road ahead and off to her left. And the submission ignores the fact that she had very limited opportunity, only a second or two, to register the presence of that vehicle before two things occurred – she was startled by the overtaking motorcycle and the first defendant's vehicle moved in front of the Stolzenberg vehicle."

[31] The learned primary judge concluded his reasoning on liability with the following findings:

> "[74] Mr Brown has not discharged his onus of demonstrating that the accident occurred because of any negligence on the part of Mr Holzberger. I conclude that the subject accident occurred because of Mr Brown's negligence. That negligence consisted of overtaking the vehicle being driven by Mr Kerridge on its left-hand side and in contravention of the road rules, when only a short distance from the intersection with Reddan St, and at a great speed, as Mrs Turner related. By then Mr Holzberger had commenced his turn to the right and was no longer looking down FE Walker St. That is why he did not see the motorcycle. There was no action reasonably open to Mr Holzberger to then avoid the accident."

**Grounds of appeal**

[32] The appellant's notice of appeal originally contained seven grounds of appeal. Grounds 5 and 6 were abandoned.[41] Grounds 1, 2 and 3 relate to findings as to liability. Ground 4 concerns the evidential ruling in relation to Mrs Turner's evidence. Ground 7 challenges the disallowance of damages for gratuitous services.

[33] The appellant did not advance separate written or oral submissions in respect of the first three grounds. The respondents followed suit in that regard. It is convenient then to consider those grounds together. Ground 4 relates to a discrete piece of evidence which, if admitted, would have fallen for consideration in the making of findings on liability. It is appropriate to deal with it first.

**Ground 4**

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41 Appellant's Outline of Submissions, para 2.

[34] The objection to the appellant's statement to Mrs Turner was that it was hearsay and did not fall within any recognised exception to the hearsay rule. The appellant contended that it came within the *res gestae* exception. The learned primary judge ruled against its admission on two bases: that is was not relevant; and that it was not within the exception.[42]

[35] **Appellant's submissions:** The appellant submitted that the statement was instinctive in nature and could not have been a reconstruction. It was sufficiently contemporaneous to be part of the *res gestae*. It was relevant because if the first respondent activated his indicator when he was only 20 feet from commencing his turn, the appellant was given only an instant's notice of the intention to turn.[43]

[36] **Respondent's submissions:** The respondent submitted that the finding that the statement was not admissible under the *res gestae* exception was correct. Further, the statement was not tied to any particular point in time or to any particular decision on the appellant's part. It lacked relevance on that account.[44]

[37] **Discussion:** In my view, this statement is not shown to be relevant. It was a statement as to a belief or state of mind on the appellant's part. Whether the appellant had held such a belief or was of such state of mind was, of itself, not a relevant issue at trial. The statement was not given possible relevance by evidence from the appellant as to when he arrived at the belief and as to what he then did or did not do, based on the belief.[45] Plainly, the statement would not have provided a sound evidential basis for a valid inference that there must have been sufficient time for the first respondent to have seen the appellant's motorcycle and to have made an assessment that he should not have turned. The lack of relevance was sufficient to support the ruling against the statement's admissibility.

[38] In any event, the appellant did not establish a basis for admission of the statement under the *res gestae* exception. The statement was made not long after the collision. However, contemporaneity alone, did not warrant admission under this exception. As the learned trial judge noted,[46] the justification for the exception, as explained in the High Court decision of *Walton v The Queen*,[47] is spontaneity as would tend to exclude the possibility of concoction or distortion. It is for a plaintiff to exclude such a possibility.[48]

[39] His Honour was justified in his conclusion that the appellant had not excluded the possibility of concoction or distortion. The appellant was apparently lucid when he spoke to Mrs Turner. He had reason to blame someone else for the collision. He was facing an almost certain loss of his driver's licence if he was found to have been at fault.[49] His statement stands in contrast to the statement made by the plaintiff pedestrian in *Ross v Hamilton*[50] which was made when the plaintiff was apparently "incapable of lucid conversation" and what he said was rooted in instinct, without any realistic possibility of a reconstruction of events.[51]

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42 Reasons [47].
43 Appellant's Outline of Submissions, paras 56, 58.
44 Respondent's Outline of Submissions, para 28.
45 Reasons [48].
46 Reasons [54].
47 [1989] HCA 9 at [25]; (1989) 166 CLR 283 per Wilson, Dawson and Toohey JJ at 304.
48 *Eaton v Nominal Defendant* [1995] QCA 435 per Pincus JA at pp 5-6.
49 Reasons [55] – [56].
50 [1997] QSC 170.
51 Ibid per Muir J at p 11, cited by his Honour at Reasons [70].

**Grounds 1, 2 and 3**

[40] Ground 1 contends that the learned primary judge erred in holding that the appellant had failed to prove negligence to any degree on the part of the first respondent. Grounds 2 and 3 are much more focused. Ground 2 attacks the finding that the appellant's motorcycle was travelling "at a great speed", a short distance from the intersection. Ground 3 challenges the acceptance of Mrs Turner's evidence as to the speed of the motorcycle in the absence of any finding as to the location of the Hilux in which she was travelling when the collision occurred.

[41] **Appellants submissions:** In oral submissions, senior counsel for the appellant advanced, as the primary submission, that it was not open to the learned primary judge to have accepted Mrs Turner's evidence that the motorcycle moved in front of the Hilux only about two seconds before the collision occurred and just under 50 metres from the intersection.[52] It will be recalled that the appellant's evidence was that he merged in front of the Hilux about 150 metres west of the intersection.

[42] The appellant submitted that Mrs Turner's evidence was unreliable. Specifically, it was argued, her evidence that the Hyundai had begun its turn when her vehicle was 80 metres from the intersection conflicted with the evidence of Mr Wills who said that he did not see any traffic within 80 metres when he first looked to his right. It was when he then looked to his left that the Hyundai made the right-hand turn.[53] It also conflicted with the evidence of Ms Stolzenberg which implied that the Hyundai began its turn when oncoming traffic was no more than 50 metres away.[54]

[43] **Respondent's submissions:** The respondent submitted that it was open to his Honour to accept Mrs Turner's account as reliable. Mr Wills' evidence was that when he looked to the right, he looked just as far as the TriCare centre on the other side of FE Walker Street and about 80 metres away; he did not "gaze down the whole road".[55] Furthermore, Mr Wills' assessment was that it was safe for the Hyundai to turn.

[44] **Discussion:** The appellant has asked this Court to interfere with the findings of the learned primary judge as to the course of travel of the appellant's motorcycle and its speed in the few seconds before the collision. That is a step that we may take only if the appellant has established that those findings are demonstrated to be wrong "by incontrovertible facts" or "uncontested testimony", or they are "glaringly improbable" or "contrary to compelling inferences".[56]

[45] The ultimate findings of negligence on the appellant's part and absence of any negligence on the part of the first respondent were well supported by Mrs Turner's evidence. On her version, the appellant overtook the Hilux on the left-hand side when it was in the single eastbound lane. He completed the overtaking less than 50 metres from the T-intersection. During the overtaking and after he had completed it, he was travelling at a speed well in excess of the speed limit.

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52 Appeal Transcript ("AT") 1-16 ll25-28.

53 AB229 Tr3-62 ll37-47.

54 It will be recalled that Ms Stolzenberg did not remember seeing the Hyundai begin its turn: AB240 Tr3-73 ll37-39.

55 AB229 Tr3-62 ll37-41.

56 *Robinson Helicopter Company Inc v McDermott & Ors* [2016] HCA 22; (2016) 331 ALR 550 per the Court at [43].

[46] On that version, before and during the manoeuvre of overtaking on the left, the appellant's vision of the T-intersection would have been obscured by the Hilux; as well, the Hilux would have obscured the visibility of the appellant and his motorcycle for oncoming traffic. Because of the appellant's position initially to the rear of the Hilux and then to its left-hand side during the overtaking manoeuvre, both the appellant and his motorcycle were obscured from the first respondent's view.

[47] The fact that the first respondent did not see the appellant or his motorcycle before he began his turn is explained on that account. Once the appellant began the turn, he was looking in his direction of travel and not down FE Walker Street. That he did not see the appellant was not due to any failure on his part to keep a proper look out.

[48] The version given by Mrs Turner strongly supports a conclusion that the appellant was careless to a point of reckless in his driving. He began the overtaking manoeuvre when he did not have a clear vision of the T-intersection ahead of him; he overtook on the left with the significant consequences that, firstly, his view of the intersection remained obscured, and secondly, he obscured himself and his motorcycle from the view of oncoming traffic in FE Walker Street, in particular traffic intending to turn right at the T-intersection; he was travelling in excess of the speed limit; in the result, by the time he had completed the manoeuvre and had an unobscured view of the intersection, he was too close to it to adjust his speed or take any other measure to avoid colliding with the rear of the Hyundai.

[49] Because the findings made by his Honour are demonstrably supported by Mrs Turner's evidence, the appellant was driven to an argument that he ought not to have accepted Mrs Turner's evidence as reliable. The basis for that argument is alleged conflicts between her evidence and that of Mr Wills and Ms Stolzenberg.

[50] I am unpersuaded that there was such a conflict in the respective accounts as precluded acceptance of Mrs Turner's evidence. The Hyundai had not begun its turn when Mr Wills looked to his right. He did not notice any traffic as far as the TriCare Centre on the other side of the street however, as he said, he did not consciously look down the full length of the street to check for traffic. His evidence was that, on the basis of the observation he did make, he made an assessment that there was ample time for the Hyundai to make its turn. He turned to the front and then again looked towards the left. It was at that time that the Hyundai made its right-hand turn across the front of the vehicle in which he was travelling.[57]

[51] Thus, Mr Wills' evidence did not speak to the traffic situation in the eastbound lane in FE Walker Street at the precise time when the Hyundai began its turn. This evidence, therefore, did not conflict with the evidence of Mrs Turner as to that.

[52] I acknowledge that Ms Stolzenberg gave evidence that there was oncoming traffic in FE Walker Street about 50 metres away when she looked to her right. His Honour had the advantage of observing her testify. He noted that at times she was uncertain. He considered that "her estimates of the precise positions of things nearly four years before and in a dynamic situation must be treated with some caution".[58]

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57 AB228 Tr3-61 l23 – AB229 Tr3-62 l46.

58 Reasons [36].

[53] Seen against that assessment of Ms Stolzenberg's evidence, her positioning of oncoming traffic as being 50 metres away ought to be viewed cautiously. Moreover, Ms Stolzenberg did not give specific evidence of the traffic situation in FE Walker Street at the very time when the Hyundai began its turn. Allowing for those two factors, it cannot be said that the evidence of Mrs Turner and Ms Stolzenberg differed sharply, much less irreconcilably, with respect to the positioning of oncoming traffic in FE Walker Street at the precise time when the Hyundai began its turn.

[54] For these reasons, the appellant's primary submission on these grounds of appeal has not been made out. The other criticisms embodied in these grounds, namely, failing to make a finding of specific speed of the motorcycle or as to the position of the Hilux immediately before the collision, are, with respect, beside the point. Once the learned primary judge had accepted Mrs Turner's evidence, it was plainly not necessary for him to make findings as to those matters in order to decide who had been negligent in causing the collision.

**Disposition of appeal - liability**

[55] As none of the grounds of appeal going to liability have succeeded, the judgment in favour of the second defendant is not to be disturbed. Notwithstanding that there will, therefore, be no award of damages in the appellant's favour, I shall state my reasons for dismissing the appeal as it relates to quantum.

**Ground 7**

[56] The learned primary judge was not satisfied that the statutory pre-conditions to the award of damages for gratuitous services set out in s 59(1) of the *Civil Liability Act* 2003 (Qld) ("CLA") were met. Those conditions are that the services are provided or are to be provided for at least six hours per week and for at least six months.

[57] His Honour noted that concessions were made to the effect that the appellant did receive gratuitous services for six hours or more per week for a period of five months and one week ending at the beginning of February 2014.[59] He analysed the evidence relating to services provided after that time. His objective was to determine whether there were any additional three weeks, whether consecutive or not, in which at least six hours gratuitous care had been provided to the appellant.[60]

[58] His Honour looked to the period from February 2014 to March 2016 when the appellant lived at his parents' home. He found that the evidence failed to establish that gratuitous services beyond about four hours per week were provided.[61]

[59] The appellant contends that his Honour acted upon an erroneous footing, namely, that the six month period addressed by s 59(1)(c) is the six months immediately following discharge from hospital following injury.[62] The contention is wrong. His Honour clearly did not act upon that footing. He had regard for the whole of the two year period when the appellant resided with his parents.

[60] The appellant next contended that two species of evidence were available to the learned primary judge which justified a finding that the preconditions were satisfied

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59 Reasons [114].
60 Reasons [117].
61 Reasons [129].
62 Appellant's Outline of Submissions, para 64.

for six months. It was submitted that once such a finding was made, then damages for both past and future gratuitous services should have been awarded.

[61] One species of evidence related to testimony given by the appellant's girlfriend, Ms Jessie Thomas, whom he met in October 2014 and with whom he resided initially at his parents' home and, from March 2016, at a rented house in Kepnock. Her evidence was that she would assist him transferring to the shower and treating infections that could arise where the stump of his left leg fitted in to the prosthesis.[63]

[62] In her evidence in chief, Ms Thomas stated that the time she spent assisting the appellant in this way "on a daily basis can be half an hour to an hour".[64] That evidence spoke of a range of three and half hours to seven hours per week. It was insufficient, in my view, to justify a finding that gratuitous services of at least six hours had been provided by Ms Thomas in any week during the pre-trial period. Nor would it have justified a finding that at least six hours gratuitous services would be provided by her for any weekly period thereafter.

[63] The other species of evidence was that given by an occupational therapist, Ms Rebecca Hague.[65] In her report dated 20 October 2014, Ms Hague estimated that the appellant, at that time, had "an accident related need for assistance in the order of four hours per week".[66] In the report dated 5 August 2016, she recorded, in tabular form, the assistance provided to him with activities of daily living as 8.5 hours per week, broken down into various tasks.[67] Some 4.5 hours of this were for "meal preparation and clean up" and 0.5 hours for "wound care and personal cares". Ms Hague thought that the appellant had a need for an additional one hour per week for assistance with outdoor chores and car cleaning.[68]

[64] Ms Hague's computations of hours of gratuitous services actually provided, or needed, were undertaken without regard for the operation of s 59(2) CLA which excludes from recompense gratuitous services of the same kind provided to the injured person before the breach of duty happened. For that reason alone, Ms Hague's evidence would not have provided a sufficient basis for a conclusion that the six hours per week condition was fulfilled.[69] Given that, this case is an inappropriate vehicle for resolution of the question left open by this Court in *AAI Limited v McQuitty*[70] whether gratuitous services are to be measured by those actually provided and without regard for any unmet need for such services.

**Orders**

[65] I would propose the following orders:

1. Appeal dismissed.
2. Appellant to pay the respondents' costs of the appeal on the standard basis.

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63 AB287 Tr4-10 l20 – AB428 Tr4-11 l43.
64 AB288 Tr4-11 ll26-27.
65 Report dated 20 October 2014, Exhibit 20: AB504-523; Report dated 5 August 2016, Exhibit 21: AB527-551; Report dated 19 March 2017, Exhibit 22; AB558-562.
66 At para 52.
67 At para 66.
68 At para 67.
69 It left in question whether the time attributed to meal preparation and clean up, or the majority of it, was not to be taken into account as excluded by s 59(2).
70 [2016] QCA 326 at [27].

[66] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes.

[67] **FLANAGAN J:** I agree with the orders proposed by Gotterson JA and with his Honour's reasons.