SUPREME COURT OF QUEENSLAND

CITATION:	*Schofield v Hopman & Anor* [2017] QSC 297
PARTIES:	**PETER MICHAEL SCHOFIELD** (Plaintiff) **v** **GARY HOPMAN** (First Defendant) AND **QBE INSURANCE (AUSTRALIA) LIMITED (ABN: 78 003 191 035)** (Second Defendant)
FILE NO/S:	S8 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	8 December 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	12, 13, 14, 21, 22 September 2017.
JUDGE:	McMeekin J
ORDER:	**1. Judgment for the defendant.** **2. Submissions to be provided by 4pm Thursday 14 December 2017.**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – where a collision occurred – where the plaintiff was travelling in a more or less westerly direction along a single lane of bitumen between Windora and Quilpie – where the plaintiff was riding on a Harley Davidson motorcycle – where the bitumen is wide enough for a single vehicle – where the defendant was travelling more or less in an easterly direction towing a caravan – where because of the narrowness of the bitumen strip the practise on the road is for motorists to move their left hand tyres off the bitumen and so share the centre strip – where the road rules require this approach – where the plaintiff alleges the defendant did not move their tyres off the

bitumen – where the plaintiff alleges the defendant remained at all times in the centre of the roadway – whether or not the defendant was negligent – whether the defendant was as far left as practicable

EVIDENCE – ADMISSIBILITY – HEARSAY – EXCEPTIONS: FIRST HAND HEARSAY – where the plaintiff seeks the admission of an out of court statement - where the defendant objects to the admission of the evidence as being a hearsay statement and not within any recognised exception – where the plaintiff supports its reception as coming within the *res gestae* exception – whether the statement is admissible – whether the statement falls within the *res gestae* exception

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – EXPENSE FLOWING FROM PLAINTIFF'S INABILITY TO WORK – PARTICULAR CASES – where the plaintiff has not worked in employment since the accident – where the plaintiff's efforts have been concentrated on a bed and breakfast business – where the bed and breakfast business has not been shown to be a profitable venture – where the plaintiff contends that he could not maintain the busines after the accident – whether the services provided for maintaining the business are gratuitous services within s 59 *Civil Liability Act* 2003 (Qld) – whether it is necessary for the plaintiff to show that he or she would have sustained a loss which is otherwise compensable, but for the provision of the services in question

Civil Liability Act 2003 (Qld), s 59
Civil Liability Regulation 2014 (Qld)
Transport Operation (Road Use Management – Road Rules) Regulations 2009 (Qld), s 132 & s 133
Superannuation Guarantee (Administration) Act 1992 (Cth), s 19

Adsett v Noosa Nursing Home Pty Ltd [1996] QCA 491, cited
Allwood v Wilson & Anor [2011] QSC 180, cited
Adelaide Chemical and Fertilizer Co Ltd v Carlyle (1940) 64 CLR 514, cited
Clement v Backo [2007] 2 Qd R 99, considerd
CSR Ltd v Eddy (2005) 226 CLR 1, considered
Eaton v Nominal Defendant [1995] QCA 435, considered
Geaghan v D'Aubert [2002] NSWCA 260, cited
Griffiths v Kirkmeyer (1977) 139 CLR 161, considered
Kriz v King & Anor [2007] 1 Qd R 327, considered
Medlin v State Government Insurance (1995) 182 CLR 1,

considered
Pollitt v The Queen (1992) 174 CLR 558, cited
Ratten v Queen [1972] AC 378, cited
Ross v Hamilton [1997] QSC 170, considered
Sydney Electricity Authority v Giles (1993) NSW CCR 700, considered
Shaw v Menzies & Anor [2011] QCA 197, cited
The Queen v Andrews [1987] AC 281, cited
Van Gervan v Fenton (1992) 175 CLR 327, considered
Vocisano v Vocisano (1974) 130 CLR 267, cited
Walton v The Queen (1989) 166 CLR 295, cited

COUNSEL: C C Heyworth-Smith QC with M X Kehoe for the Plaintiff

R C Morton for the Defendant

SOLICITORS: SR Wallace & Wallace for the Plaintiff

Curwoods Lawyers for the Defendant

[1] **McMeekin J:** The Diamantina Development Road is a single lane of bitumen between Windora and Quilpie. It has jagged edges and a drop off to a gravel verge. The bitumen is wide enough for a single vehicle.

[2] On 31 August 2014 at about 10 am the plaintiff, Mr Peter Schofield, was travelling in a more or less westerly direction along that road at that location, riding his Harley Davidson motorcycle. He was riding behind, but in the company, of two others. The defendant, Mr Gary Hopman, was approaching him (so travelling more or less in an easterly direction) and towing a caravan behind his Mazda Tribute. Mrs Hopman was in the passenger seat. A collision occurred. Mr Schofield was injured. He claims damages. Liability and quantum of damages are in dispute.

LIABILITY

[3] The issue is whether Mr Hopman was as far left as practicable.

[4] Because of the narrowness of the bitumen strip the practise on the road is for motorists to move their left hand tyres off the bitumen and so share the centre strip. The road rules require this approach.[1]

[5] The plaintiff's case is that Mr Hopman did not move his tyres off the bitumen. Indeed as initially presented the case was that he remained at all times in the centre of the roadway. Mr and Mrs Hopman say that Mr Hopman did move his tyres off the bitumen. The plaintiff was content to argue the case on that basis – not on the basis that while Mr Hopman moved off the bitumen he did not move off far enough.

[6] What is not in issue is that Mr Schofield was the third of three riders. His companions were Mr Craig Moyle, the lead motorcyclist, and Mr Rick Smith. All three riders were participating in a charity motorbike ride. The first two riders passed Mr Hopman's vehicle safely, Mr Schofield did not.

[1] See ss 132 & 133 *Transport Operation (Road Use Management – Road Rules) Regulations* 2009 (Qld).

[7] It seems to be common ground that the motorcycles could not move off the bitumen at any speed because of the great risk of a loss of control given the drop off to the gravel.

[8] The men were some distance apart as they rode along. Mr Moyle thought they were about 100 to 150 metres apart.[2] He said that he was careful to scan around himself and to use his mirrors. Mr Smith thought Mr Moyle was only 10 to 15 metres ahead of his motorcycle.[3] Mr Schofield did not know how far ahead Mr Smith was. They each said that they were experienced motorcyclists.

[9] It is agreed that Mr Schofield's right elbow came into contact with Mr Hopman's extended towing mirror on the driver's side. It is not in issue that Mr Schofield's motorcycle also came into contact with the right hand side of Mr Smith's motorcycle. Whether that was before or after he came into contact with Mr Hopman's vehicle remains in dispute.

[10] A number of measurements are agreed:

a. The overall width of the caravan was 2.286 metres;
b. The overall width of the Mazda Tribute was 1.8 metres;
c. The overall width of the Mazda Tribute and van taking into account the extended mirrors was 2.486 metres.
d. The overall width of the motorcycles was about, and did not exceed, 0.9 metres.

[11] The width of the bitumen is in issue and of some relevance. It was not measured by either party. The plaintiff initially pleaded that the bitumen was only 2.5 metres to 3 metres wide. That pleading was later amended to have the width as wide as 3.63 metres. A report by Dr Grigg, the well-known engineer, was tendered. Dr Grigg had not examined the road. He noted that the Guide to the Geometric Design of Rural Roads provided for roads such as the Diamantina Development Road to be "at least 3.5 m in width".[4] This is the only evidence that put the road so wide.

[12] Mr Schofield said that the bitumen was "barely wide enough for one car."[5]

[13] Mr Moyle estimated the width of the road to be somewhere between 3.2 metres and 3.4 metres but it is apparent that he worked backwards from his estimates of the width of vehicles. His evidence was:

> "Mate, my understanding, the width of the car is approximately two metres. My bike is approximately - well, it is 900 millimetres. That's nearly three metres. And I would say to you that that road was slightly over three metres. So 3.2, 3.4, somewhere around there. Yes."[6]

[14] I will detail what the witnesses said but I note that there are only two witnesses to the accident itself – Mr Schofield and Mr Hopman. Their accounts to the investigating officer after the accident have significant similarities. Their evidence at trial however differed in crucial respects.

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[2] T2-22/6.
[3] T2-38/40.
[4] See Ex 7.
[5] T1-15/28.
[6] T2-32/40-43.

The Plaintiff's witnesses

Peter Schofield

[15] Mr Schofield said that he was an experienced motorcycle rider and that he had been riding motorcycles since about the age of 15 years.[7]

[16] On the day in question he had passed 40 or 50 caravans and that on each occasion he moved as far to the left hand side as possible. At the time of approaching the defendant's caravan Mr Schofield thought that he pulled over to about the same place as he had done for the other cars. When he first saw the defendant's caravan it was about 100 metres away.[8] As the van approached the motorcycles it did not deviate from the middle of the road.[9] He at all times remained on the bitumen.[10]

[17] When he first saw the car and caravan, Mr Schofield said that he "took his hand off the throttle" and then "applied the brakes heavily as I'd got to 60 kilometres an hour".[11] He said that he pulled over as far to the left hand side as possible[12] and it was then at the point of reaching the car and caravan, that his right elbow collided with the right hand wing mirror causing him to lose control.[13] Mr Schofield recalls then spinning out of control on the ground.

[18] In the course of cross-examination, it was suggested to Mr Schofield that he clipped Mr Smith's motorbike prior to swerving to the right and colliding with the right towing mirror of the car. This was denied as was the suggestion that he had swerved to the right.[14] Mr Schofield stated that such a scenario was impossible, and in justifying this stated following:

> "Why is it impossible?---It's impossible, your Honour. There is no damage on the left-hand side of my motorbike. The only damage is on the right-hand side of the motorbike that hit the car and the caravan, not – no damage on the left-hand side of my bike at all."[15]

[19] This bears no great significance in Mr Schofield's version of events, but nonetheless highlights an important feature of this case which I will come to shortly.

Craig Moyle

[20] The lead rider, Mr Craig Moyle, was an experienced motorcycle rider having ridden motorcycles since about the age of 16.[16]

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[7] T1-14/44-45.
[8] T1-15/32-45.
[9] T1-16/4-7.
[10] T2-11/35-44.
[11] T1-16/9-11.
[12] T1-16/45-17/5.
[13] T1-16/19-23.
[14] T2-16/35-36.
[15] T2-16/38-41.
[16] T2-18/25.

[21] Mr Moyle first saw the defendant's oncoming vehicle when it was about three to four kilometres away. At that point the vehicle was travelling down the middle of the road.[17] It continued down the middle of the road at all times.[18] Mr Moyle was adamant that the tyres of the car and van did not leave the bitumen roadway.[19]

[22] When the car and van was about a kilometre away Mr Moyle could see that it was not moving off to the left.[20] He said that he gestured by waving to indicate that the car should move off to the left.[21] He moved his motorcycle to the edge of the bitumen, on his left-hand side.[22] On the day in question many cars and caravans had moved off the road and in doing so they had dropped at least two tyres off the road.[23]

[23] Initially Mr Moyle was travelling at somewhere between 100 and 110 kilometres an hour.[24] When the approaching vehicle was not moving to the left he started to slow down to 80 kilometres per hour.[25] At the time of passing the car, he was still travelling at 80 kilometres an hour. There was a distance of 1 or 2 inches between his right handlebar and the car and caravan as they passed.[26]

[24] After Mr Moyle passed the caravan, upon scanning his mirrors he saw an orange and black flash. He decided to pull over because something had gone wrong.[27] He saw Mr Rick Smith on the left hand side of the road and Mr Schofield lying on the ground on the right hand side. Subsequent to making enquiries as to how each of the riders were, Mr Moyle asked Mr Smith if he was alright to which he replied "Hillbilly just hit me" – Hillbilly being Mr Schofield. [28]

[25] Immediately after the accident, Mr Moyle stated that there was an exchange between himself and Mr and Mrs Hopman. Mr Moyle's evidence of the exchange that took place is as follows:

> "I was walking down the centre of the road at him and I said to him, "What the fucking hell are you doing? Why didn't you get off the fucking road?" And his response to me was, "I'm a towing vehicle. I have right of way." And I said, "Fucking bullshit." I said, "The best thing you can do is get back in your fucking car and piss off." And then I turned around and started walking back. Then sort of come to my senses, I suppose you could say, and realised what I'd sort of said, turned back around to him and said, "No, just wait there. I'm getting the cops." And that was pretty well the – the initial conversation I had with him."[29]

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[17] T2-20/30.
[18] T2-20/32.
[19] T2-25/34-36.
[20] T2-20/38.
[21] T2-20/38.
[22] T2-21/5-17.
[23] T2-31/44-46.
[24] T2-20/45-46.
[25] T2-21/12.
[26] T2-21/21.
[27] T2-22/11-15.
[28] T2-23/25.
[29] T2-24/16-23.

[26] It was accepted by Mr Moyle under cross examination that at the time he approached Mr Hopman, he said something like "you'd better fuck off" or he would kill him[30] and that it may well have been subsequent to that when the comment was made that he was getting the police.

Mr Rick Smith

[27] The second rider, Mr Smith gave evidence that he too was an experienced motorcycle rider and had been riding motorcycles for 20 years or so prior to the subject accident.

[28] He saw the defendant's caravan when it was 800 metres to one kilometre away. It became clear that the vehicle was not going to move off the road when it was about 80 to 100 metres away. He says that he moved to the extreme left hand side of the bitumen roadway.[31]

[29] Mr Smith said that he was able to pass Mr Hopman's vehicle and that at the time of passing there was a distance of no more than a few inches between the right hand side of his motorcycle and side of the car and van.

[30] Under cross examination Mr Smith reiterated that the car and caravan were sitting in the middle of the bitumen and had not moved from the middle of the road even when Mr Moyle's and Mr Smith's bike went passed the van.[32]

[31] Prior to the accident Mr Smith had observed that approaching caravans would drop their wheels to the side giving the riders clear access along the bitumen. This would happen when about 100 metres or so before the motorbikes would pass the approaching vehicle.[33]

[32] Mr Smith did not see the impact between Mr Schofield's motorcycle and the caravan. He said that after he had passed the car and caravan he was hit by Mr Schofield's motorcycle. He says that the handlebars on Mr Schofield's motorcycle collided with his mirror and leg on his right hand side.[34] He was then a few metres past the caravan.[35]

The Defendant's witnesses

Mr Gary Hopman

[33] Mr and Mrs Hopman were travelling from Quilpie that day. They had not travelled on this section of road before and were not particularly accustomed to a single bitumen carriageway. Mr Hopman was an experienced caravanner, having towed vans for over 30 years. Before leaving Quilpie he had called into the information centre and had been advised that as a towing car he had right of way over single vehicles. He says that he and his wife had discussed this and thought the advice to be wrong.[36] They had not followed the advice in the course of their journey that morning. They had passed several cars before coming upon the motorcycles and had driven their car off the bitumen to the left. That had been his practise in years past but he had not been called on to do so often.

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[30] T2-34/43-44.
[31] T2-39/34-36.
[32] T2-42/15-33.
[33] T2-38/33-34.
[34] T2-40/10.
[35] T2-41/30-31.
[36] T2-92/31-32.

[34] Mr Hopman thought that the motorcycles were about half a kilometre away when he first saw them. He slowed his vehicle down to a speed of 30kph[37] and moved over to the side of the road.[38] He said that his speed when there was no oncoming traffic was about 60 kph.[39] As he approached the motorcycles, his passenger side wheels were on the gravel[40] and the driver's side of the vehicle was occupying half of the bitumen.[41] He was unable to say what clearance there was between his car and the passing motorbikes, but maintained that there was enough room for the bikes to get past.[42] This, according to Mr Hopman, meant that his vehicle was "probably halfway on the road and halfway in the gravel".[43]

[35] Mr Hopman said that the first bike travelled past without issue. As the second bike was heading towards him the plaintiff's bike clipped the second rider, lost control and veered towards Mr Hopman's car, clipping his towing mirror.[44] Mr Hopman described the motorcycle veering in such a manner that he "thought [Mr Schofield] was going to hit the front of [his car]".[45] In his rear vision mirror he saw that after the motorcycle hit the towing mirror that it then clipped the caravan.[46]

[36] After the collision Mr Hopman pulled his car up and went back to check on Mr Schofield. An exchange took place with Mr Moyle, which, according to Mr Hopman, went as follows:

> "The guy said to me, 'Listen. It's your fault. You were in the middle of the road.' And I said, 'No, no, I wasn't.' And then he's turned around and says, 'Come on. Punch me. Punch me. So I can thump – thump you, and just get out of here.'"[47]

[37] Under cross examination, Mr Hopman accepted that Mr Moyle also said words to the effect, "what the fuck are you doing? You're supposed to give way to us".[48] According to Mr Hopman, his wife said something along the lines of him being a towing vehicle and that they had right of way.[49] He denies that he himself had said anything to that effect.[50]

Mrs Lorraine Hopman

[38] Mrs Hopman was seated in the passenger seat of the vehicle. She gave evidence that it was "dead straight road" road and you could see as far the eye would take you. She first saw the bike riders from at least a kilometre or more away.[51] As the bikes approached their vehicle, Mr Hopman slowed down and moved off the road so that the left wheels

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[37] T2-91/8.
[38] T2-90/45-46.
[39] T2-94/32.
[40] T2-91/11.
[41] T2-91/17; T2-96/45-46; T2-97/1-2.
[42] T2-92/44.
[43] T2-94/44-45.
[44] T2-91/19-31.
[45] T2-91/28-29.
[46] T2-91/46-92/7.
[47] T2-92/14-17.
[48] T2-95/38-39.
[49] T2-92/26-32.
[50] T2-92/24; T2-92/27; T2-96/40-43.
[51] T3-19/6-8.

were on the dirt.[52] Her attention was on the road ahead as she was worried that there could be a hazard on the gravel such as a rock, roadkill or a hole that Mr Hopman may not see but maybe she would.[53] She did not see what happened when the bikes came closer as she was not looking at them but noticed something was wrong when "there was this bang and the mirror was gone". She realised that something had hit them.[54]

[39] I interpose here that a submission was made that Mrs Hopman's version accorded with that of the plaintiff and his witnesses. This is entirely wrong.

[40] Immediately after the accident and after Mr Hopman had parked the car they left the vehicle, she following her husband. One of the bike riders approached Mr Hopman and accused him of not moving off the road. Mr Hopman replied "well, no, I moved over for you".[55] Either at this point, or later back at the car when one of the riders (presumably Mr Moyle) asked for Mr Hopman's licence details, she told him that they had been instructed they had right of way, but also said that despite what they had been told, they had moved over for everything that they had ever passed.[56] She was referring to the instructions from the Quilpie Information Centre. Her recollection was that another person had told them that "that [did not] always work", and they had decided to pull over for everything.[57]

[41] As to their habit when passing oncoming vehicles on the drive that morning she said:[58]

> Now, do you remember passing any vehicles as you journeyed towards Windorah? Yeah, we moved over for vehicles, I think, three or four times.
>
> Do you remember what sort of vehicles they were, particularly? Most of them were cars, although I think there were one lots of motorbikes before the ones we encountered.

Senior Constable Leesa Richardson

[42] One of the two investigating officers, and the only one to give evidence, was Senior Constable Leesa Richardson. Her evidence is of interest for two reasons. One is that she conducted interviews with Mr Schofield and Mr Hopman. The other is that she is the only witness with any great familiarity with the road in question.

[43] Senior Constable Richardson was stationed at the Windorah Police Station at the time of the accident and had been there then for a period of 4 months. By the time of trial she had moved to Ipswich. She had two years at Windorah in all. She was very familiar with the Diamantina Development Road.[59] She travelled the road "probably once a week, if not more".[60] She conducted mobile highway patrols on the road.[61] In her opinion there was

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[52] T3-19/16-17.
[53] T3-19/26-27.
[54] T3-19/36.
[55] T3-20/15.
[56] T3-21-26.
[57] T3-18/28-29.
[58] T3-18/38-43.
[59] T3-29/33.
[60] T3-29/35.
[61] T3-29/37-42.

only enough room for one vehicle[62] on the road and Mr Hopman's vehicle could not have passed the motorcycles of Mr Moyle and Mr Smith if each remained wholly on the bitumen.[63] Her evidence was: "seeing the van and seeing how wide it was…and knowing travelling on that road [it] is impossible to stay on the road if somebody else is coming the other way".[64]

[44] The senior constable had never measured the width of the road,[65] or the width of the respective vehicles in question and conceded that she was not familiar their dimensions.

[45] The Senior Constable conducted interviews with Mr and Mrs Hopman on the day of the accident. Due to Mr Schofield's injuries she was not able to speak to Mr Schofield at that time, but instead spoke to him some days later on 6 September via telephone when he was in hospital. When conducting the respective interviews, the senior constable said it was her practice to take down the version of events "verbatim" and that this would be reproduced in the police report.

Mr and Mrs Hopman's versions

[46] The constable could not locate her notebook but said that the contents of her notebook were copied into a Q Prime report.[66] Mr Hopman's version as recorded in the Q Prime document was:

> At about 8:00am on Sunday 31st August 2014 my wife, Lorraine Joyce HOPMAN 17/09/54 and I left Quilpie travelling to Windorah. At about 10:00am on that same day approximately 3 motor bikes (sic) were heading toward us in the opposite direction. I moved my vehicel (sic) off the road, I had one tyre off the road. I was giving the on coming (sic) bikes approximately half the bitumen. The first bike past (sic) me with no problems, it looked like the last bike travelled abreast to the 2nd bike. I slowed down to approximately 60kmph when the bikes came towards us. The last bike appeared to be wobbling and I heard him impact with my side mirror causing it to smash. Once the mirror smashed I was not able to see what happened next. I did not feel the bike impact with my van. I pulled over as I was not sure what happened. Once I had stopped and got out of the car I noticed the bike laying on the side of the road. I walked up towards the bike and noticed that the rider was on the ground. Upon approaching the rider another motor cyclist (sic) approached my (sic) and said "What the fuck are you doin (sic), you are suppose (sic) to give way to us". "Go on say something I want to thump ya (sic), get in your car and stay there". I walked back to my car and waited. The other motor cyclist (sic) walked over to my car and said, "I want all your details, your licence and your rego". I gave him my licence details and registrationdetails (sic). I wrote them down and handed them to him. The other motor bike (sic) rider said, "I'm sorry for going off as I did." He walked away and I waited for police to arrive.
> Q. What is your occupation? – Plant Operator

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[62] T3-30/20.
[63] T3-30/24.
[64] T3-39/8-10.
[65] T3-30/17-18.
[66] Ex 15.

> Q. Was anyone injured in your car? – No, just shaken up and in shock.
> Q. Was any other proeperty (sic) damaged as a result of the crash? – No
> Q. What damage was caused to your vehicle? – drivers (sic) side mirror, and the drivers (sic) side of my van including the window.
> Q. Was there any passangers (sic) in your car? – yes, my wife
> Q. Are you insured? – yes with Youi
> Q. In your opinion what do you think caused the crash? – The third bik (sic) that hit the vehicle riding abreast of the second bike.
> Q. What was the wether (sic) conditions? – fine, dry road
> Q. How far up the road could you see their vehicle? – about 1 km or as far as I could see.
> Q. did you apply your brakes at all? – no I had already slowed right down, I braked after the collision.
> Q. Was anything distracting you at the time of the crash? – no
> Q. Where were you looking prior to the crash? – straight ahead.
> Q. were you on your mobile at the time of the crash? – No there is no service here.
> Q. Were you eating of (sic) drinking anything at the time of the crash? – no
> Q. Could you have done anything to avoid the crash? – No, I couldn't move off any further or I would have lost my van and it all happened so quickly.
> Q. Are you on any medication? – yes, Blood pressure and colesterol (sic) medication.
> Q. Were you suffering from any illness or injuries prior to the crash? – no
> Q. Is your vehicel (sic) defect in any way? – no

[47] Mrs Hopman's statement to Senior Constable Richardson was very brief. Her statement in the QPRIME Report stated "I concur with everything Garry said however I did not see the motor bike (sic) rider wobble prior to the accident".[67]

Mr Schofield's version

[48] Mr Schofield's version as recorded in the Q Prime report[68] was as follows:

> I was travelling with two other friends on the Diamantina Developmental Road heading towards Quilpie. As we came up to other caravans they would pull off the road and we would slowly ride past without any problems. I saw the caravan coming about 80 yards from me, I started to slow down, I noticed the caravan was not moving off the road, I didn't realise the other two bikes had almost come to a stop and I applied my brakes quite firmly. To avoid colliding with the back of my mates bike I swerved to the right and hit the caravan coming the other way.
> Q. Can you estimate your speed prior to the crash? – about 40kmph
> Q. In your opinion, what do you think caused the crash? – The other driver not keeping to the left and not getting off the road.

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[67] Ex 15.
[68] Ex 15.

> Q. When did you first see the other vehicle? – a little way – over 100 yards (approximately 91.44 meters (sic)).
> Q. did anything distract your attention prior to the crash? – no
> Q. Where were you looking prior to the crash? – Straight ahead
> Q. Were you talking to anyone? – no I had a radio system fitted to my helmet but it was not connected and we were not talking.
> Q. Could you have done anything to avoid the crash from happening? – No other than run into the back of the other two bikes and we all would have been in hospital.
> Q. Are you on any medication? – Walferine (sic) and Dixione (sic) – heart medication
> Q. Were you suffering from any illness or injuries prior to the crash? – no
> Q. Did your vehicle have any defects which may have caused the crash? – no, I had it all checked prior to doing the big ride.
> Q. How close were you to the bike in front of you? – about 80 yards (approximately 73.152 meters (sic))
> Q. I am trying to understand how you almost ran up the back of the bike in front of you? – Because I thought the caravan was going to move over, the other bikes slowed down and I just didn't realise they were almost stopping and tried to stop but I realised I was going to hit the bike in front of me and swerved and hit the caravan.

Other Evidence

Photographs

[49] A series of photographs were tendered.[69] They are limited in the information that they convey. Photographs numbered 1, 4 and 7[70] show distinct tyre marks made by vehicles occupying the centre of the bitumen. They provide some support for the view that the bitumen carriageway is only wide enough for one vehicle.

[50] Senior counsel placed some emphasis on Exhibits 9A and 9B. I did not find them of much assistance. There are the usual problems with any photograph in determining the effect of focal lengths, angle of view, and possible parallax error.

Conversation between Mr Smith and Mr Moyle - The Res Gestae Exception

[51] Mr Smith gave the following evidence which was the subject of an objection:

> "As I got past the caravan, I got hit in the side by Peter by his handlebars which hits – hit my mirror and my leg and I veered off the road, which I thought I was going to end up in the dirt myself. Somehow I stayed on, continued down, stopped as soon as I could and Craig was on his way back and I just said to Craig, **'The prick didn't give us any road.'**"[71]

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[69] See Ex 9.
[70] Ex 9.
[71] T2-40/9-14.

[52] The plaintiff seeks the admission of Mr Smith's out of court statement to Mr Moyle, "[t]he prick didn't give us any road." Counsel for the defendant objects to the admission of the evidence as being a hearsay statement and not within any recognised exception. Senior Counsel for the plaintiff supports its reception as coming within the *res gestae* exception.

[53] The statement was made by Mr Smith after the accident and after Mr Moyle had pulled over and made his way towards Mr Schofield and Mr Smith. The time that had elapsed between the occurrence of the accident and the making of the statement cannot be precisely known. However, the relevant evidence from both Mr Moyle and Mr Smith makes clear that some little time elapsed.

[54] Mr Moyle did not support Mr Smith's recollection of the exchange between them. His evidence of his conversation with Mr Smith after the accident (which is the earliest point in time that the statement could have been made) is:

> "And as you approached, what happened? As you went - approached Peter, what happened?---As I - as I sort of turned around and sort of looked - looked back to - to see the - the carnage, for lack of a better word, I thought Peter was dead as far as that was concerned. He'd been hit and he was stationary, wasn't moving. As I approached, he did start to move. And I realised that he was not - not okay, but he'd obviously been injured and - but he was still alive. So I pulled up and progressed across the road to – to see if – what condition he was in.
>
> Did Rick [i.e. Mr Smith] come over as well?---Rick was sort of – he was sort of still getting himself together, as far as that was concerned, and then he – he came across to Peter, yes.
>
> Did he say anything to you?"[72]
>
> …
>
> "What did Rick Smith say to you?---Well, as I was sort of walking past Rick, I said, "Are you all right?" and that's when he said, "Oh, Hillbilly just hit me," and – and that was sort of basically the only discussion we had."[73]

[55] Both sides have relied on the dicta of Kirby P (as his Honour then was) in *Sydney Electricity Authority v Giles*[74] and Muir J's decision in *Ross v Hamilton.*[75]

[56] In *Giles,* after an extensive review of authorities, Kirby P said:

> "The foregoing authorities make clear the preconditions for the admissibility of hearsay evidence under the res gestae Rules. An out-of-court statement will be admissible as part of the res gestae, and hence admissible as capable of proof of that which it asserts, if the statement was made in circumstances:

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[72] T2-22/30-41.
[73] T2-23/24-26.
[74] (1993) NSW CCR 700.
[75] [1997] QSC 170.

> (1) which are approximately, if not exactly, contemporaneous with the event or transaction the subject of the Court's inquiry; and
>
> (2) which provide an assurance of the reliability and veracity of the statement. Such an assurance will ordinarily arise where:
>
> > (a) the statement is spontaneous or contemporaneous with the event or transaction the subject of a Court's inquiry; or
> >
> > (b) the statement is made by the maker while involved in the event or transaction the subject of the Court's inquiry."

[57] In *Ross* Muir J accepted Kirby P's analysis in *Giles* as accurately stating the law.

[58] In my opinion the statement allegedly made by Mr Smith is neither spontaneous nor contemporaneous and because of that I can have no assurance of the reliability and veracity of the statement.

[59] The statement was more in the nature of a narrative after the event and not an instinctive reaction to the event.[76] It was made after Mr Smith had continued along the road for whatever distance it took him to pull up safely off the road, park and dismount from his bike and for Mr Moyle to do the same and then walk back to him. It is not irrelevant that Mr Smith did not see and was not involved in the collision between Mr Schofield's motorcycle and Mr Hopman's vehicle.

[60] As to the reliability of the statement – it is evident from the cases that the onus lies on the party seeking admission to show that the possibility of concoction or distortion can be disregarded: *Ratten v The Queen*[77] per Lord Wilberforce at 391 cited with approval in *Pollitt v The Queen*[78] by Mason CJ[79] and Brennan J[80] and the effect of which was adopted in *Walton v The Queen.*[81] The relevant principle I take to be as follows from the majority judgment in *Walton*:

> "An assertion may be admitted to prove the facts asserted if it is part of the *res gestae*, but it is then an exception to the rule against hearsay: see *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* (1940) 64 CLR 514. The justification for that exception is now said to lie in the spontaneity or contemporaneity of assertions forming part of the *res gestae* **which tends to exclude the possibility of concoction or distortion**: *Ratten* at 389–90; *The Queen v Andrews* [1987] AC 281 at 300–1: see also *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* at 531. Of course, the discussion in *Ratten* and *Andrews* was in the context of the *res gestae* rule. The unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible: see *Vocisano v Vocisano* (1974) 130 CLR 267 at 273. But if sometimes there is an element of hearsay in evidence which is led of statements made by a

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[76] *Sydney Electricity v Giles* (1993) NSW CCR 700.
[77] [1972] AC 378.
[78] (1992) 174 CLR 558.
[79] At 567.
[80] At 581.
[81] (1989) 166 CLR 283 per Mason CJ at 295; per Wilson, Dawson and Toohey JJ at 304.

> person other than a witness for the purpose of founding an inference concerning that person's state of mind, the justification for disregarding that element of hearsay may be thought to be of a similar kind. Such statements will rarely be purely assertive. Ordinarily they are reactive and are uttered in a context which makes their reliability the more probable. On the other hand, if a statement by a person about his state of mind is a bare assertion not amounting also to conduct from which a relevant inference can be drawn, then it ought to be excluded as hearsay."[82]

[61] In *Eaton v Nominal Defendant,*[83] Pincus JA explained the difficulties facing a plaintiff in meeting the test of excluding possibilities of concoction or distortion:

> "Excluding mere possibilities is always a difficult task and one must take it that what the judge meant was that the circumstances must be such as to make concoction very unlikely. That condition is not satisfied here. The plaintiff's case was that his motorcycle left the road while he was overtaking another vehicle. Assuming that to be so, it is not absurd to suppose that when explaining what happened to others fairly shortly after the event, the plaintiff might have given an exaggerated or untrue version which placed the entire blame for the incident on the driver of the other vehicle. That might have been done, not with a view to bringing proceedings, but because of the tendency which people sometimes have to justify themselves in the eyes of others."

[62] It is not hard to imagine why Mr Smith might have wanted to give a version which placed the blame for the incident on someone other than him or Mr Schofield. I make no finding to that effect but the possibility that the statement is a self-serving narrative after the event, or a concoction or distortion, cannot be excluded.

[63] In my opinion, the statement is not admissible and does not fall within the *res gestae* exception.

[64] There was a further submission that a conversation between Mr Moyle and Mr Hopman also came within the exception. Mr Moyle's evidence was that he said to Mr Hopman: "Why didn't you get off the fucking road?" In my view the statement is not admissible as to its truth. It is later in time than Mr Smith's statement but more significantly it is made after Mr Moyle had been informed by Mr Smith that Mr Smith's view was that Mr Hopman did not get off the road. In no sense does it form part of the *res*.

Discussion

[65] There are several difficulties with the plaintiff's case. They stem principally, but not solely, from the version that he gave some days after the accident to the investigating police officer. Apart from anything else that version supplies an answer as to why the first two motorcycles passed safely by and Mr Schofield did not.

The centre of the road point

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[82] Per Wilson, Dawson and Toohey JJ at 304 – my emphasis.
[83] [1995] QCA 435.

[66] The first difficulty is that the case relies on the reliability of the versions of Mr Moyle, Mr Smith and Mr Schofield. They each claim that they observed Mr Hopman's vehicle to be in the centre of the bitumen strip at all times without deviation. It is certain that he did not do that. If he had done so there is no prospect that the first two motorcycles would have passed him – the strip is too narrow. The photographs alone make that abundantly clear. What evidence I have concerning the width confirms that. I will return to that evidence in a moment.

[67] One wonders then about the reliability of their claims that Mr Hopman's vehicle did not move to the left and their claims that he passed by them leaving only inches to spare. As counsel for the defendant submits the co-incidence of their versions on a point that cannot be right is a concern.

The motorcycle veers right point

[68] The second problem is that I am persuaded that Mr Schofield veered to his right before his elbow impacted with Mr Hopman's extended mirror. There are only two witnesses to the accident – Mr Schofield and Mr Hopman. Each provided a version to the investigating officer. They did so independently. In those versions they each agree that Mr Schofield veered to the right in an attempt to avoid the motorcycle ahead of him. The co-incidence of their versions provides compelling evidence that the point is accurate. This finding of course means that I am not satisfied as to the reliability of Mr Schofield's evidence in which he denied that movement.

The attack on Senior Constable Richardson

[69] The third problem is the evidence of Senior Constable Richardson. To a considerable degree the plaintiff's case depends upon a rejection of the constable's evidence. Senior counsel for Mr Schofield submits that I should not accept Mr Schofield's version given at the hospital that Senior Constable Richardson relayed as being an accurate account of what Mr Schofield said, or even if accurate, a reliable version of what occurred. The reliability argument turned on the timing of the interview. The accuracy argument turned on the constable's competence and professionalism.

[70] I thought Senior Constable Richardson to be an impressive witness. She certainly gave her evidence in a very frank way. She was independent of the parties. I can see no reason to doubt her evidence. There was a strong attack made on the constable's reliability, if not honesty. The attack came close to alleging impropriety on her part. I reject that attack. The attack depended on a close analysis of what each witness had to say about the versions that they gave to her and the words they would have used. While her memory of precisely how the statements were taken depended on her habit more than her memory there is no significant reason to doubt that the versions obtained reflect reasonably accurately what she was told.

[71] Senior counsel for Mr Schofield was critical of the constable interviewing Mr Schofield when he was still hospitalised. I reject that criticism. There is no evidence at all that Mr Schofield was not able to be safely interviewed when he was. He assured the constable when she enquired that he was "right to give [her] a version and answer some questions." He had been seen by visitors the day before, the point being that witnesses presumably exist who could speak as to his coherence at that time. None were called. The hospital records of the day of the telephone call show him as being "alert" with "nil concerns" and

"pain much improved". No evidence was called to counter what appears to be the plain effect of these records - that Mr Schofield was in a fit state to give his version. There is no evidence of slurring of speech, incoherence, lack of apparently cogent thought processes or the like to cause any concern. No expert evidence was called to explain whether any of the drugs that he had been administered were likely to impact on his capacity to give a coherent account. The record seems to indicate that there had been a substantial reduction in the dosage prior to the interview.[84] And what is striking about the version that he gave is that it matches up with Mr Hopman's version to a degree and with Mr Smith's account. As counsel for the defendant submitted it would be odd, to say the least, that Mr Schofield came up with an account that coincided with other accounts in some significant detail if he was in some form of hallucinatory state when interviewed.

[72] The versions given by Mr Schofield and Mr Hopman after the accident share two very significant features. One is that they each agree that Mr Schofield veered to the right. The second is that they each have Mr Schofield getting into difficulties with the rider ahead of him, Mr Smith. That Mr Schofield needed to avoid the motorcycle ahead of him is common ground. How that came about is not clear – evidently Mr Schofield was either not paying attention to the motorcycles ahead and so did not observe them to be slowing, or was travelling too close to that lead motorcycle, or some combination. But the present point is that the co-incidence of the versions provides some further support for the reliability of the constable.

[73] A submission was made that the last question asked of Mr Schofield showed that the constable was not understanding his version and so provided support for the argument that Mr Schofield was not coherent. The question and answer recorded was:

> Q. I am trying to understand how you almost ran up the back of the bike in front of you? – Because I thought the caravan was going to move over, the other bikes slowed down and I just didn't realise they were almost stopping and tried to stop but I realised I was going to hit the bike in front of me and swerved and hit the caravan.

[74] And this exchange occurred in the course of the constable's evidence in chief:

> And then we come to the last question. "I'm trying to understand how you almost ran up the back of the bloke in front of you." Why did you answer that – why did you ask that, I'm sorry?---From – basically, from what Mr Schofield was saying, I couldn't quite understand. In part of this version it says, "Where were you looking prior to the crash?" He said, "Straight ahead." I couldn't understand, if he was looking straight ahead, how he couldn't see the other bikes were slowing down.[85]

[75] In my view this in no way suggests that the constable was not following what she was being told or that Mr Schofield lacked any coherence. The constable was understandably puzzled that Mr Schofield ran into the back of the rider ahead of him if he claimed to be keeping a good lookout. So am I.

The motorcycle must be to the right of Smith point

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[84] There is a reference to "PCA use halved in last 24 hours" – presumably "patient controlled analgesia".
[85] T3-28/21-26.

[76] The fourth problem is that there is no doubt that when he impacted with Mr Smith's motorcycle Mr Schofield was positioned well away from the left side of the bitumen and towards or in the middle of the bitumen. It seems to have been a handlebar to handlebar contact. Mr Smith's evidence was:

> "And after his handlebars collided – sorry. I'll ask this: after his handlebars collided with yours, when did his bike go down onto the ground?---So he hit me. So I was in a bit of a – my bars were going from side to side. All of a sudden I seen Peter in front of me, which I thought I was going to run him over. His bike was sliding in front of me, and then Peter slid for another 50-odd metres, I suppose."[86]

[77] Mr Schofield, Mr Hopman and Mr Smith all agree that Mr Schofield struck Mr Smith's motorcycle. They differ as to whether that was before or after the impact with the caravan, but they agree the impact occurred. The significant thing about the impact is where it occurs. Mr Smith said it was to the right hand side of his motorcycle, while he was positioned on the far left of the bitumen. Mr Schofield said that there was no damage to the left hand side of his bike.[87] That it was to Smith's right hand side seems to be uncontested. If the impact occurred after the impact with the caravan as Mr Smith claims then it was only just after. Mr Smith thought he was a few metres past the van when impact occurred.

[78] That positioning puts Mr Schofield well away from the far left of the road. As counsel for the defendant submits he must have been at least the width of Mr Smith's motorcycle (525mm – making the generous assumption that Mr Smith was travelling as far left as possible with his left hand mirrors over the left edge of the bitumen) and the width of his own motorcycle (900mm) from the left edge – a total of 1.425 metres. It is common ground that Mr Schofield's elbow clipped Mr Hopman's extended towing mirror. The elbow must be some little distance out again from the handlebars. And this assumes that Mr Smith is riding essentially along the jagged edge, which I am confident that he would not have.

[79] I cannot conceive how Mr Schofield's right elbow could have impacted with the extended mirror of the car if his motorcycle was then positioned to the far left of the bitumen as he would have it and yet collided with the right hand side of Mr Smith's motorcycle when Mr Smith was only a few metres past the van. Mr Schofield could not move his motorcycle to the right until he passed the length of the van. And on Mr Smith's version he has neither the time nor space to get from the far left of the bitumen to the right of Smith's motorcycle before colliding.

[80] So far this leaves out of account Mr Hopman's version which is entirely consistent with this. Whether the impact with Smith occurred before or after the impact with the van the impression that Mr Hopman would have had of the motorcycles as they approached him, if Mr Schofield's motorcycle was so far over, is that the two motorcycles would be travelling abreast. That is what Senior Constable Richardson records as his version on the day. Whether the word "abreast" reflects his actual language (which, for some reason, he appeared to dispute) or the constable's understanding of what he conveyed, the point remains good.

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[86] T2-41/22-26.
[87] T2-16/38-41.

[81] If Mr Hopman is right as to the timing of the impact between the motorcycles, i.e. before the impact with his car, then for his car and van (which are 2.386m in width) to be positioned wholly on the bitumen, the bitumen must be over (2.386m + 1.425m) 3.8m in width. No one claims it was so wide. I do not see that the argument is any different if the impact with Mr Smith's motorcycle is a moment after the impact with the van.

The width of the road point

[82] The fifth problem is that the width of the road was not proved.

[83] The widest that the evidence puts the road is "at least 3.5 metres" and that is from Dr Grigg speaking of the applicable standard. That takes no account of the extent of the deterioration in the edges of the bitumen. The photographs taken on the day of the accident show that the edges are significantly jagged such that the trafficable surface of the road is quite a bit less than as originally laid. I do not mean to say that evidence of what the width of the road should have been is satisfactory proof of the width of the road in fact.

[84] For the plaintiff's case to succeed the bitumen strip must be wider than 3.5 metres. To allow for the known widths of the motorcycles, the width of the van with extended mirrors, the jagged edges which would certainly cause vehicles to be some distance in from the edge, and the gap that existed between the first two motorcycles and the van, the bitumen would have to be at least 3.6 metres wide.

[85] But taking the evidence at its highest the bitumen width is very likely less than 3.5 metres.

[86] The plaintiff himself thought that the bitumen was only wide enough for one vehicle. Mr Moyle thought the width was 3.2 to 3.4 metres but he was working backwards from his claim that the caravan did not leave the bitumen. However the most cogent evidence of the width came from Senior Constable Richardson. She thought that the caravan and bikes could not have passed one another with all vehicles remaining on the bitumen. As I have said I found the constable to be reliable and I thought particularly so with respect to the width of the bitumen.

[87] Quite apart from her experience with the road, she was at the scene in her professional capacity investigating a serious accident. She had the advantage of seeing the width of the bikes and the width of the van when present at the scene. She was under a duty to ensure that her observations were accurate. One of her roles was to assess whether charges should be laid. I see no reason why she would not have noted features of the vehicles and location which may have shed light on what had occurred. That she did not measure precisely these various things is of little moment.

[88] Acceptance of the constable's evidence as to the width of the bitumen means that I cannot accept that Mr Hopman's passenger side tyres remained on the bitumen when the first two motorcycles passed him.

The right of way point

[89] There are other, less cogent, considerations. The plaintiff's case is based on the hypothesis that Mr Hopman maintained his position in the centre of the road because of his misguided belief that he had a right to do so. Mr Hopman denies he ever had that belief. I

accept that denial. In doing so I expressly reject the accuracy of Mr Moyles's recollections. Apart from anything else he was in a towering rage at the time which is hardly conducive to taking in what was said. The probabilities favour the claim of right of way to being Mrs Hopman's contribution, as she said.

[90] What seems to have been overlooked is that these three motorcycles were not the first vehicles that Mr Hopman had passed that morning. In his oral evidence he spoke of passing other vehicles. So did Mrs Hopman. [88] It would be surprising if they had not. They had been on the road for two hours. Mr Hopman said that he gave way to these various vehicles by placing his left hand wheels off the edge of the bitumen. He was not challenged on any of this. It was not put to him that he had forced other vehicles off the road that day. No evidence was led to contradict their account and contrary evidence would not be difficult to obtain, if it existed.

The behaviour of the motorcyclists point

[91] The behaviour of the motorcyclists is quite odd if the assumption be that the caravan is maintaining a line down the middle of the bitumen. While Mr Moyle and Mr Smith said they slowed they did not slow much for such an obvious danger. Their evidence was that their speed after slowing was in the order of 60 to 70 to 80 kph.

[92] Mr Moyle gave evidence that if he had of gone over the edge of the bitumen "anywhere above 40, 50, 60 kilometres an hour, you would've lost control of your front wheel and you would've been over the handlebars yourself". [89]

[93] Mr Moyle's evidence was that when the approaching car and van were about a kilometre away he waved his left hand across his body to direct Mr Hopman to move off the road. He thought then that he was not being given any room. If he thought that there were problems when the car was a kilometre away he had time to slow and get off the road. Yet no further evasive action was taken.

[94] Mr Moyle thought that motorcycles were traveling about 100 to 150 metres apart. Mr Smith thought that they were "15 odd" metres apart. If Mr Smith is correct then they were far too close for safety. There was no apparent reason for the bikes to be so close. I think it much more likely that Mr Moyle has the better estimate. But whatever the distance Moyle and Smith had a significant time in which to react to what, on their version, would have been an obvious danger, yet they did not.

[95] Their collective failure to take any substantial evasive steps and their continuing along on the bitumen is inconsistent with any perception of significant danger. Their actions, or lack of reaction, is more consistent with a view that Mr Hopman moved partially off the bitumen as he claims.

[96] What the plaintiff's case also ignores is that it has Mr Hopman driving into a virtually certain accident with three motorcycles. There is an improbability about that.

[97] While not determinative the actions of all participants are at least consistent with the view I take of the probabilities.

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[88] T3-18/38-39.
[89] T2-29/2-4.

Mr Hopman's reliability

[98] I acknowledge that there are problems with the detail of Mr Hopman's evidence. His claim at trial of the speed of his vehicle is inconsistent with the version he gave Senior Constable Richardson immediately after the collision. The latter is more likely to represent the better estimate, closer in time as it is to the event. Similarly his claim that he saw the motorbike collide with the wing mirror is not consistent with what he told Senior Constable Richardson. Which version is accurate it is impossible to say now.

[99] However discrepancies like this are understandable given the time that has elapsed and the inevitable reconstructing that can occur, perfectly honestly, over that time.

[100] I have endeavoured to determine the case on the probabilities, placing reliance on those points which were agreed or seemed plainly right. Mr Hopman's reliability or otherwise on such details was, in my judgment, of no great moment.

Conclusion

[101] The plaintiff has failed to discharge the onus on him. I am satisfied that Mr Hopman moved the left wheels of his vehicle off the bitumen strip and left about one-half of the strip to the motorcyclists. The first two motorcyclists passed by safely. Mr Schofield got himself into difficulties when he veered right to avoid Mr Smith's motorcycle. He was not paying attention and so failed to observe the motorcycle ahead slowing.

[102] As I have mentioned no case was advanced that Mr Hopman was negligent on the ground that while he left the bitumen he did not get far enough off the bitumen. There is no satisfactory evidence on which I could make any such finding even if advanced.

[103] There should be judgement for the defendant.

QUANTUM OF DAMAGES

[104] Despite that finding I am required to assess damages. Mr Schofield was born on 4 May 1960. He was 54 years of age when injured and is now 57.

Applicable Legislation

[105] The assessment is governed by the provisions of the *Civil Liability Act* 2003 (Qld) ("the Act") and the *Civil Liability Regulation* 2014 (Qld) ("the *Regulation*"). I have set out my view as to how these provisions should be applied in *Allwood v Wilson & Anor.*[90] So far as I am aware my views in *Allwood* have not been disapproved and so I will adopt that approach here.

The Injuries & Issues

[106] The injuries suffered were:

a) Compound fractures to the right elbow and arm;
b) Degloving injury to the right forearm;
c) Compound fracture to the left lower leg;
d) Cuts and scratches to the left hand;

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[90] [2011] QSC 180.

e) Scars over the right forearm, left hand left leg;
f) Severe bruising to the left ankle.

[107] Dr Cook, an orthopaedic surgeon, diagnosed a 12% impairment to the right upper limb and an 8% impairment to the left lower limb in his original report. He increased that impairment assessment for the right arm to 16% in a later report. His opinions were not contested. Dr Gaffield, a plastic and reconstructive surgeon, assessed the impairment due to scarring at 9%. Again his opinions were not contested.

[108] The dispute at trial centred on the impact of the injuries on Mr Schofield's work capacity and on his entitlement to damages for care and assistance.

Credit issues

[109] The defendant submitted that I should treat Mr Schofield's claims with a degree of caution. Video surveillance was conducted. It showed Mr Schofield to be reasonably active about his bed and breakfast business, Sticks and Stones, which consists of a residence on acreage. He is seen to be welding for periods, moving timber posts, and generally quite fit and active. He has a shambolic gait which limits his mobility. He had assistance with the more significant lifting tasks. He was not shown to be active consistently throughout the day.

[110] As Mr Morton for the defendant said, much of the "sting" went out of the video evidence on Mr Schofield's ready concession in cross examination, and before he saw the video material, that he did not require much, if any, of the domestic assistance claimed. Mr Schofield conceded in cross examination that claims that he had made for meal preparation and laundry services were not needed by him after mid-January 2015. Why those claims were made at all, and why persisted in until cross-examination at trial, remained unexplained.

[111] While abandonment of unjustified claims can go to his credit, the fact that the claims were made and pursued to trial is a worrying feature. Those claims now abandoned throws Mr Schofield's credit into doubt. As counsel of a former era used tell juries – it is like the thirteenth chime of a crazy clock, you doubt not only the thirteenth chime but all that went before. I therefore treat the claimed difficulties with some caution.

The accident, subsequent treatment and problems

[112] Mr Schofield was thrown off his bike as a result of the collision. He fractured his right arm and left leg. He was beside the road for a good while until an ambulance could attend. He was taken then some distance to an airfield and the Flying Doctor took him to Brisbane. He was admitted to the Princess Alexandra Hospital. He was an inpatient there for some three weeks or so and then transferred to Mackay Base Hospital. He remained there for another five days. He was discharged in a wheelchair. He became ambulant in about January 2015 but with crutches for some months and then used a walking aid. By June of that year he was walking unaided.

[113] Mr Schofield has continuing problems with pain and mobility in both of his injured limbs. He has numbness in the right hand, stiffness in the elbow joint area and pain, worse with activity. The pain in his leg he describes as sharp with some sensory changes.

[114] His sleep is disturbed.

[115] The scarring he thinks is obvious and embarrassing.

[116] Mr Schofield likes to keep active (and he does) but says that he endeavours to limit his lifting, limit twisting movements, and avoids jarring impacts and sudden movements. He limits sitting or standing periods and has a reduced tolerance for sitting in motor vehicles. His stamina is reduced, he does not feel as strong and fit as pre-accident, and his mobility is still less than it was. He says that he struggles with stairs and slopes.

[117] Mr Schofield's de facto partner left him on 1 September 2016. They had been together for 28 years. Mr Schofield believes the accident caused injuries and their sequelae had an adverse effect on their relationship. He has been short tempered and "snappy" with her and with others due, he thinks, to ongoing pain and fatigue.

The plaintiff - pre accident qualifications and employment

[118] Mr Schofield was employed as a trades assistant and plant operator prior to the subject accident. He worked for UGL Group Resources. His main work was to assist fitters pulling out and fixing pumps at a wash plant. As well he held tickets qualifying him to operate a variety of machinery – backhoe, bob cat, and excavator. The work was heavy and physical. Although he had a slight limp (Mr Schofield has a pre-existing foot injury) he was observed to be fit, active, and capable. He had been employed at UGL for about three years prior to the accident. His superiors there spoke very well of his work ethic. Mr Paige, his direct supervisor, thought that he would not be able to carry out the work expected at UGL in his now injured state. That opinion was not contested.

Post-Accident Employment

[119] Mr Schofield has not worked in employment since the accident. His efforts have been concentrated on the bed and breakfast business. That is not a financially successful venture. Indeed there is no reason to think that it will ever be profitable.

My assessment of Mr Schofield

[120] I think that Mr Schofield is stoical. His complaints are supported at least to a significant degree by medical evidence. I note that Dr Cook thought that the state of his hands demonstrated a greater degree of activity than he had admitted to. He does have continuing problems. Having said that he is plainly quite active.

Pain & Suffering

[121] The assessment must be made in accord with the Injury Scale Values (ISVs) set out in the *Regulation*.

[122] Senior counsel for the plaintiff contended for an ISV of 35. She submitted that Item 122 of Schedule 4 of the Regulation applied **(**Serious upper limb injury, other than an injury mentioned in divisions 3 to 7 with an ISV range of 21 to 35) with an ISV of 21 but with an uplift to 35 because of the serious injuries to the left leg and scarring.

[123] Counsel for the defendants submitted that Item 107 applied (moderate wrist injury – ISV range of 6 to 15), that an ISV of 15 was appropriate for the dominant injury and a mark-up

of one-third to an ISV of 20 to allow for the multiple injuries. Counsel pointed out that his submission of an ISV of 15 for the dominant injury reflected the claim made by the plaintiff himself in his Statement of Loss and Damage.

[124] Item 107 is said in the Schedule to be applicable to "a wrist injury that is not serious and causes some permanent disability, for example, some persisting pain and stiffness". The injury here involves not just the wrist but the elbow. Dr Cook said of that latter injury that there was a fracture to the olecranon which involved the right elbow with likely future degenerative changes.[91] As mentioned Dr Cook assessed a 16% whole person impairment as a result of the injury to the upper limb. I have no reason not to accept that opinion. Item 107 is plainly not applicable.

[125] Item 122 is more applicable. Examples of the injury include "a serious fracture of the humerus, radius or ulna, or any combination of the humerus, radius and ulna, if there is significant permanent residual impairment of function". Here there are fractures of the radius and ulna and the olecranon – the significant point being that the fractures extend beyond the radius and ulna. The comment as to the appropriate level of ISV reads: "An ISV at or near the bottom of the range will be appropriate if there is whole person impairment for the injury of 16%". That applies here. I accept that the appropriate ISV for the dominant injury is 21.

[126] It is necessary to consider whether there should be an uplift given the nature of the remaining problems. Dr Cook found there to be problems with the ankle and mid foot. He assessed a 19% impairment of the lower limb. This converts to an 8% whole person impairment. The injury to the lower limb seems to fall between the descriptions in Item 135 (moderate lower limb injury) and 136 (minor lower limb injury). The impairment assessment suggests that it falls in Item 136 (ISV range 0 to 10) where the comment includes: "An ISV at or near the top of the range will also be appropriate if the injured person is left with impaired mobility or a defective gait. An ISV at or near the top of the range will also be appropriate if there is whole person impairment for the injury of 9%." The first comment certainly applies to Mr Schofield. And his impairment is just below the 9%. Section 10 of Schedule 3 provides: "The extent of whole person impairment is an important consideration, but not the only consideration affecting the assessment of an ISV." I assess an ISV of 10.

[127] Dr Gaffield assessed a significant impairment (9%) from unsightly scarring. The general comment introducing Part 7 of Schedule 4 is relevant:

> "Many of the physical injuries mentioned in this schedule involve some scarring from the initial injury and subsequent surgery, including skin grafting, to repair the injury and this has been taken into account in fixing the range of ISVs for the injuries."

[128] Given that provision I see no need to fix on a separate ISV for the scarring but record that it is extensive, unsightly and embarrassing and deserving of some consideration in fixing on the appropriate overall ISV. It is the overall adverse impact of the injuries that is important: Schedule 3 s 2(2).

[129] Section 3 of Schedule 3 of the regulation applies:

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[91] Ex 3 p7.

3 Multiple injuries

(1) Subject to section 4, in assessing the ISV for multiple injuries, a court must consider the range of ISVs for the dominant injury of the multiple injuries.

(2) To reflect the level of adverse impact of multiple injuries on an injured person, the court may assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only.

[130] The injuries to the left leg add considerably to Mr Schofield's problems. I think that an increase of the ISV for the dominant injury by one-third is appropriate in the circumstances. I assess an overall ISV of 28. I fix the damages at $57,350.[92]

Past Economic Loss

[131] The plaintiff claims $285,442.80 (as at the date of trial). Updated to the date of judgment and assuming no change to the assumptions underlying the submission the amount claimed would be about $305,000.

[132] The defendant contends for $190,000.

[133] The approach of both counsel was to adopt the pre-accident earning rate of $1806 net per week. The plaintiff assumes no residual earning capacity. The defendant accepts that assumption for the first 12 months but says that thereafter there plainly is an earning capacity, albeit unutilised. The defendant points to the video surveillance and the observations of Dr Cook:

> "…both hands to be soiled and stained and there was also thickened skin callous formation involving both hands and fingers, more so the left hand compared to the right indicates active moderately hard or heavy use of his hands over a period of time from physical type work."

[134] The defendant also points out:

(a) There is no evidence that the plaintiff's employment would have continued to have been available to him;

(b) There has been a significant downturn in the mining industry in recent years and in employment generally in the Central Queensland area;

[135] I am unpersuaded that these two factors are of any weight here. Mr Paige said in his statement made in March 2017 that "[t]here was no chance of Peter [i.e. Mr Schofield] losing his job. In fact there was some talk of Peter taking on some more hours…".[93] Mr Paige was not cross examined. There is no mention by Mr Paige of any reduction in the work available or the workforce. Mr Bragg is a maintenance supervisor employed (as at March 2017) by United Group at Hail Creek mine. Plainly Hail Creek has continued in operation. There is no mention by Mr Bragg of any reduction in work or employment or any prospective concern about such matters. In the face of this evidence an inference can

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[92] Schedule 7 of the Regulations Table 6 Item 6.

[93] Ex 12 para 20.

be drawn from the failure of the defendant to lead evidence of any fact that would suggest any change in the likely employment for Mr Schofield at Hail Creek or the United Group.

[136] I accept that the video evidence and Dr Cook's observations (which are consistent with that evidence) show that Mr Schofield has, and has had for some time, a residual capacity to earn an income. In so finding I am conscious of senior counsel's submissions:

- It was not put to Mr Schofield that there was some other commercial employment to that he could obtain;
- It was not suggested to him that he could go out and find a job with the abilities that Dr Cook has accorded to him;
- Mr Li Ng, the occupational therapist, was not challenged in relation to his opinion as to the employability of Mr Schofield. He says that he's not commercially employable now;
- He walks with a painful, awkward gait;
- The welding activities shown on the video were of limited duration, involved changes of position and included frequent breaks;
- The video shows that he has difficulty with stairs;
- The video shows him having a friend carry out all the heavier work in moving Koppers logs;
- The video showed Mr Schofield doing nothing that he has ever told anybody he's not capable of doing.

[137] The problem with Mr Ng's opinion is that the picture he paints of Mr Schofield's activities does not show any appreciation of just how active Mr Schofield is. His opinions were formed without the advantage of seeing the video. It is true that Mr Schofield had not denied carrying out any particular task that he is shown performing. But the overall impression is very different to that given in Mr Ng's report. As well, against that opinion is the view of Dr Cook who said that Mr Schofield could do some light to moderate work. The plaintiff led that opinion. The leading of conflicting evidence on such a point does not discharge the onus of proving the extent of the loss. Dr Cook is an orthopaedic surgeon of very great experience. As well, I think it is plain that the tasks shown on the video as being within his capacity fall into the category that Dr Cook presciently described.

[138] The fact is that the plaintiff has not sought employment in any capacity in which he might reasonably be expected to have managed. The limits then of his residual capacity are difficult to judge.[94] I accept that he cannot perform the arduous tasks that he was accustomed to do before he was injured. He could plainly carryout up to moderate work. He may be able to do so on a full time basis, but that is not certain.

[139] I allow $240,000 for past loss, adopting a residual capacity of about $500 per week for the last two years.

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[94] Cf. *Adsett v Noosa Nursing Home Pty Ltd* [1996] QCA 491 at 9-10 per Pincus JA.

[140] I allow interest at $9,576.[95]

[141] I allow loss of superannuation at 9.5% of that total - $22,800.[96]

Future Economic Loss

[142] For the future the plaintiff seeks $596,600. The defendant argues for an allowance of $220,000.

[143] Senior counsel for the plaintiff submitted that I should adopt the pre-accident average wage of $1,806 net per week, apply that over 10 years to age 57 and discount by 20% to allow for the heavy nature of the pre-accident work.

[144] Counsel for the defendant argued again that there was a significant residual earning capacity and that there were other discounting factors – the pre-existing right foot injury becoming symptomatic and an ongoing heart condition for which Mr Schofield takes medication. The submission allowed for a loss of $900 per week over 10 years discounted by 40%.

[145] The residual capacity that I assume is not as great as the defendant contends for. Nor are the discounting factors so compelling as to justify so large a discount. While the unrelated physical conditions need to be brought into account there is no evidence that they were likely to be of significant concern. The arduous nature of the work involved at Hail Creek certainly militated against its continuity to age 67, at least as a matter of certainty. On the other hand Mr Schofield is very stoical.

[146] Doing the best I can I allow $375,000. This equates to a loss of $1,300 per week over 10 years discounted by 30%.

[147] I allow a loss of superannuation at $37,500.[97]

Gratuitous care

[148] The claim for gratuitous care is governed by s 59 the *Civil Liability Act* 2003 (Qld). It relevantly provides:

> **59 Damages for Gratuitous Services Provided to an Injured Person**
>
> (1) Damages for gratuitous services provided to an injured person are not to be awarded unless—
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
>
> (c) the services are provided, or are to be provided—
>
> (i) for at least 6 hours per week; and
>
> (ii) for at least 6 months.

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[95] $240,000 x 1.25% x 166 weeks.

[96] Under the *Superannuation Guarantee (Administration) Act* 1992 (Cth), s 19 presently provides that employers are required to pay superannuation benefits at a rate of 9.5%.

[97] Adopting an agreed rate of 10%.

(2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.

(3) In assessing damages for gratuitous services, a court must take into account—

(a) any offsetting benefit the service provider obtains through providing the services; and

(b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution.

[149] Senior counsel for the plaintiff submits that the assessment should be $76,162.50 to the date of trial and $74,481 for the future.

[150] Counsel for the defendant submitted that no amount should be allowed.

[151] The services claimed differed depending on the extent of Mr Schofield's recovery. There was a period when he was wheelchair bound, a period when he was on crutches, and a period when he did not need a walking aid. The claim was summarised by counsel for the defendant in a table setting out both the claim (taken from the Statement of Loss and Damage mirroring a report prepared by an occupational therapist, Ms Vincent) and the amounts conceded by the defendant:

	Period 1		Period 2		Period 3	
	29/9/14 – 31/10/14		1/11/14 – 15/1/15		16/1/15 – 15/9/17	
	Claim	Allow	Claim	Allow	Claim	Allow
Personal Cares	8.58	8.58	4.08	4.08		
Toileting	7	7				
Meals (59 (2))	14		10.5		3.5	
Driving	1.5	1.5	0.45	0.45		
Wounds	2	2	2	2		
Laundry	1	1	1	1	1	
Bins/ Waste					1.17	
Yard etc 59(2)	20		20		20	

Dogs/Bird 59(2)	0.83		0.83		0.83	
Totals		**20.08**		**7.53**		**0**

[152] The analysis is complicated by the fairly sparse evidence of the extent of Mr Schofield's recovery. A submission is made that the assumed third period, which is meant to represent the time that Mr Schofield was ambulant and not in need of a walking aid, is wrong as there is some evidence that he used a crutch, at least from time to time, well into the third period. The problem is in the failure to keep any record of what services were needed and the extent of the services provided.

[153] The defendant's opposition to any allowance was based on the submission that s 59(1)(c) precluded any award – that is the 6 hours per week for 6 month threshold was not met. That proposition involves essentially an attack on the claim for yard work of 20 hours per week. The basis of that attack is in the propositions that follow.

[154] First, no account can be made for the assistance provided for meal preparation because prior to the accident nearly all meals were provided by Mr Schofield's former partner: s 59(2).

[155] Secondly, counsel submitted that the damages claimed were for services related to a business, that such services fell outside the principle explained in *Griffiths v Kerkemeyer*[98] and *CSR Ltd v Eddy*[99], and was not compensable. In making that submission counsel conceded that *Clement v Backo*[100] was appellate authority binding on me and to the contrary.

[156] Thirdly, counsel submitted that this case was distinguishable from *Clement v Backo*. The business in question there, it was submitted, was one that was expected to be profitable. That feature was essential to the findings supporting the award in *Clement*. The business here had never made a profit and there was no reason to think that it ever would.

[157] Fourthly, the services here were not "necessary" and did not reflect a "need" within the meaning of the common law principles or the legislation.

[158] Fifthly, the evidence as to what tasks are undertaken and when is not sufficiently precise to enable an award to be made citing *Shaw v Menzies & Anor*.[101]

[159] Sixthly, claims made for the care of animals – there were nine cattle, one miniature horse, four dogs, and two birds on the property – were not claimable as falling outside the established principles citing *Geaghan v D'Aubert.*[102]

The scope of the debate

[98] (1977) 139 CLR 161.
[99] (2005) 226 CLR 1.
[100] [2007] 2 Qd R 99.
[101] [2011] QCA 197.
[102] [2002] NSWCA 260 per Stein JA at [57]-[66] (Handley JA and Foster AJA agreeing).

[160] So far as the debate concerning what amount of care has been provided – i.e. the factual contest – the issues are very limited. Is the evidence sufficient to enable a decision to be made as to the amount of assistance provided in respect of yard work? Did Mr Schofield need assistance in moving wheelie bins? However the legal issues raised are more complex and fundamental to claims of this type.

[161] The video evidence makes it very plain that Mr Schofield would have no difficulty whatever preparing his own meals or doing his own laundry as indeed he conceded. Nor would I accept that he could not move wheelie bins into position given his physical capabilities evident from the video.

Meals

[162] It is common ground that prior to the accident Mr Schofield's partner provided meals on six out of seven days. It is not contested that after the accident Mr Schofield was unable to prepare meals for himself for a period up and until 15 January 2015. The number of hours claimed is not in contest. The defendant submits that, given that the meals were being provided pre-accident, s 59(2) precludes bringing the time spent in preparing meals post-accident into account in determining whether the threshold in subsection 59(1)(c) has been met.

[163] The plaintiff submits that this approach is wrong, that the error is in conflating the concept of the damages that can be awarded and which are limited by s 59(2) with the determination of the extent of the services that are (or are to be) provided under s 59(1). The point is that s 59(1)(c) does not provide that the services to be brought into account in determining the threshold are only those in respect of which damages can be awarded. Rather the pre-conditions are those set out in s 59(1) – that the services are necessary and that the need for them arises "solely out of the injury".

[164] No authority is cited that determines the issue. Senior counsel for the plaintiff submits that the decision of McMurdo P in *Kriz v King & Anor*[103] supports the approach contended for. The President there said in respect of s 59 (Jerrard JA and Helman J agreeing)

> "Because s 59 restricts a claimant's previously unfettered common law right to seek damages for gratuitous services, the section should only be regarded as limiting that common law right if it does so clearly and unambiguously: *Potter v Minahan*; *Bropho v Western Australia*; *Coco v R* and *Grice*. For that reason s 59(1)(c) should be interpreted in the way which least diminishes a claimant's common law rights to damages for gratuitous services."[104]

[165] I accept the plaintiff's submission. There is no evident reason to read s 59(2) as applying to the threshold test. The guidance given by *Kriz* suggests that clear words would be needed to import such a limitation on the rights otherwise existing.

[166] The effect of that finding is that the defendant concedes effectively that 34.08 hours of care per week were reasonably required up until 31 October 2014, and that a further 18.03 hours of care per week were reasonably required up until 15 January 2015. So for a period

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[103] [2007] 1 Qd R 327.
[104] [2007] 1 Qd R 327 at [18]. Citations omitted.

of four and half months services were provided that exceed the six hour per week threshold. That leaves the plaintiff well short of the required need for 6 hours care per week for 6 months.

Yard services

[167] To meet the threshold in s 59(1)(c) the plaintiff needs to substantiate his claim for at least 6 hours of assistance per week for approximately another six weeks (not necessarily consecutive or at any particular time) with what I will call compendiously yard services – the various activities carried out in and around the premises where Mr Schofield lives. The claim is for 20 hours assistance per week provided by a team of friends. The agreed rate for care is $30 per hour.

[168] Mr Schofield lives on an acreage – about 15 acres in total with about an acre under garden and lawn. The extent of the area that is maintained and the standard to which it is maintained depends on its character as a venue for a bed and breakfast or reception type business. An obvious example is that the lawns are mowed twice weekly. That is not usual in the domestic setting. In short the services are said to be reasonably required to maintain a commercial venture that was in operation before the subject accident. So far as the evidence shows this venture has never turned a profit and no attempt was made to show that it was ever likely to.

[169] The defendant submits that the decided cases do not authorise the awarding of damages in these circumstances.

Must the services be of a personal nature – nursing or domestic?

[170] The first issue is whether these services are within the concept of "gratuitous services" as that concept has been explained in the cases. As the submission recognised *Clement v Backo*[105] is authority for the proposition that the principle does extend to services provided in a commercial setting i.e. not limited to "nursing and domestic services" as expressly allowed in a number of High Court decisions.[106] The services in *Clement* were those needed to maintain and expand a mahogany planation.

[171] I am bound, of course, by *Clement*.

Is it necessary to show that absent the services the plaintiff would suffer loss?

[172] The extension so authorised in *Clement* was made in a very particular factual setting which engages the second issue - whether it is necessary for the plaintiff to show that he or she would have sustained a loss which was otherwise compensable, but for the provision of the services in question. Counsel for the defendant submits that fundamental to the decision in *Clement* is a finding that the commercial venture there under consideration was expected to be a profitable one.

[173] Senior Counsel for the plaintiff submits that is irrelevant.

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[105] [2007] 2 Qd R 99.

[106] *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Van Gervan v Fenton* (1992) 175 CLR 327.

[174] McMurdo P expressly held that the principle in *Griffiths v Kerkemeyer*[107] be extended to "Mr Clement's claim for Ms Clement's gratuitous services in the commercially operated plantation".[108] If that correctly described the limits of what was there found then the plaintiff's point is a good one - there can be no need to show that the impaired capacity (which resulted in the need for the services) was productive of loss. That heresy was expunged in *Van Gervan v Fenton* where Mason CJ, Toohey and McHugh JJ in their joint judgment concluded:

> "Although the judgment of Gibbs J in *Griffiths* has frequently been cited as though it contained the *ratio decidendi* of *Griffiths*, it was a dissenting judgment on the point of principle. Significantly, in *Nguyen*, at 262, Dawson, Toohey and McHugh JJ interpreted *Griffiths* as holding that 'the plaintiff's loss ... was represented by [his] need'. Consequently, it should now be accepted that the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her and that **the plaintiff does not have to show, as Gibbs J held, that the need 'is or may be productive of financial loss'**."[109]

[175] However it is evident from an examination of the reasons of the plurality that considered the issue in *Clement* that the extension of the *Griffiths v Kerkemeyer* principle that *Clement* authorises is only a limited one. And the limit goes to this precise issue.

[176] McMurdo P's reasoning is set out in the following passages:

> "The judge found the following. Mr Clement's need for Ms Clement's gratuitous services in establishing the plantation before and after trial for a total of five years arose solely from the accident. The plantation was already partly established when Mr Clement was injured and a failure to maintain it would have created a financial loss, namely the future commercial profit from the mature trees. Had Mr Clement lost the ability to pursue that venture because of the accident he would have been entitled to damages for loss of that opportunity, subject to the consideration of the vagaries associated with any agricultural enterprise.
>
> …
>
> It is instructive to apply *Medlin* and the analysis by Gleeson CJ, Gummow and Heydon JJ in *CSR* with which Callinan J also agreed to those facts. Apart from damages within the *Griffiths v Kerkemeyer* principle, a plaintiff may recover damages for loss first for non-pecuniary losses such as pain and suffering even where there is no actual financial loss caused. The third type of loss recoverable as damages referred to in *CSR* is actual financial loss. **The second type of loss recoverable as damages referred to in *CSR* is loss of earning capacity to the extent that the loss has been or may be productive of financial loss. Through Mr Backo's negligence Mr Clement lost the ability to work in his plantation for profit. The judge found that this**

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[107] (1977) 139 CLR 161.
[108] *Clement v Backo* [2007] 2 Qd R 99 at [33].
[109] (1992) 175 CLR 327 at 333. My emphasis. Citations omitted.

> **produced a diminution of earning capacity productive of economic loss, namely the future commercial profit from the mature trees, but for Ms Clement's gratuitous services**. Consistently with *Medlin*, **Mr Clement's entitlement to damages for his diminution of earning capacity which may be productive of financial loss should not be reduced because the prospect of that financial loss was diminished through gratuitous services provided because of Mr Clement's need arising out of his accident-related injuries.** The statements of the High Court in *Medlin* to which I have referred when applied to the facts here provide clear authority for supporting the extension of the principle in *Griffiths v Kerkemeyer* to Mr Clement's claim for Ms Clement's gratuitous services in the commercially operated plantation. They are also consistent with the cases referred to by his Honour and the approach taken by Luntz in *Assessment of Damages for Personal Injury and Death*."[110]

[177] That reasoning involves three crucial steps:

- Through Mr Backo's negligence Mr Clement lost the ability to work in his plantation for profit.
- This produced a diminution of earning capacity productive of economic loss, namely the future commercial profit from the mature trees, but for Ms Clement's gratuitous services, a loss expressly found by the trial judge.
- Mr Clement's entitlement to damages for his diminution of earning capacity which may be productive of financial loss should not be reduced because the prospect of that financial loss was diminished through gratuitous services provided because of Mr Clement's need arising out of his accident-related injuries.

[178] The reliance on *Medlin v State Government Insurance Commission*[111] is instructive and I will return to that. MacKenzie J's reasoning was different to that of McMurdo P but still assumed future profitability of the enterprise. So much is clear in the following passages of the judgment:

> "The case involves an unusual set of circumstances. What is involved is a long term enterprise that is loss making in the early years, **but is expected to generate a profitable outcome either by harvesting the timber when it reaches an optimum stage of growth or by selling the enterprise as a going concern**.
>
> …
>
> Damages for future economic loss are allowed to an injured plaintiff because diminution of earning capacity is or may be productive of financial loss. It is therefore necessary to identify both what capacity has been lost and what economic consequences will probably flow from that loss (*Graham v Baker*; *Medlin v State Government Insurance*

[110] At [32]-[33]. My emphasis. Citations omitted.
[111] (1995) 182 CLR 1.

> *Commission*; *Husher v Husher*). As Husher says (at 143), important as evidence of past events may be, the inquiry is about the likely course of future events …
>
> Essentially, the claim has its genesis in the proposition that the respondent cannot himself perform activities he previously performed in a commercial enterprise. In principle, leaving aside the issue of the application of *Griffiths v Kerkemeyer* to the facts, **the exercise of assessing loss of future earning capacity in this case should, in principle, involve assessing the diminution of what the respondent would have made from the plantation by reason of the accident happening**. In a case involving a business of this kind, which involves the uncertainties of primary production over an extended period**, it is not surprising that a methodology that avoided the complexities of predicting the future outcome of the project was attractive**. If the case is properly characterised as one involving general damages for loss of future earning capacity or economic loss, the question is whether it is a valid approach to assess the damages merely by discounting the cost of substitute labour over whatever period is found to be appropriate."[112]

[179] MacKenzie J essentially considered whether the methodology adopted was within principle against that background. His Honour then observed that there had been a line of authority pre-dating *CSR Ltd v Eddy*[113] in which damages had been allowed for services rendered to a commercial venture and that this line of authority had not been expressly overruled in *CSR Ltd v Eddy*.[114] In those circumstances he was not prepared to find that the trial judge's approach was wrong. The crucial point however is that, for his Honour, there was an undoubted economic loss and what was under discussion was the methodology involved in assessing the loss.

[180] The third judge (Fryberg J) approached the problem as one involving a claim for economic loss. The principles in *Griffiths v Kerkemeyer* were not engaged.

[181] The position here is the converse to that in *Clement*. The business, which Mr Schofield calls "Sticks and Stones", makes an annual loss of $25,000.[115] It has never made a profit. There was no evidence that it ever will. Mr Schofield will be saved the trouble of making a loss if the business closes down. He may make less gross income absent the gratuitous services. I do not see that even so much is shown. There is no evidence to enable an assessment of what any difference might be. But the diminution in the gross income, if any, is not shown to result in any less net income in Mr Schofield's hands. Nor is there any evidence that touched upon the effect on the capital value of the improved land or business enterprise, if the work performed by the friends was left undone.

[182] As mentioned McMurdo P relied on the reasoning in *Medlin v State Government Insurance Commission*[116] to justify the extension of the *Griffiths* principle. What is apparent from the reasoning in *Medlin* is that *Griffiths* did not provide authority for allowing damages for an impairment of earning capacity absent evidence that the

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[112] At [54], [56]-[57]. My emphasis. Citations omitted.
[113] (2005) 226 CLR 1.
[114] (2005) 226 CLR 1.
[115] T1-40/9-14.
[116] (1995) 182 CLR 1.

impairment would be productive of financial loss. In *Medlin* Deane, Dawson, Toohey and Gaudron JJ said:

> "A plaintiff in an action in negligence is not entitled to recover damages for loss of earning capacity unless he or she establishes that two distinct but related requirements are satisfied. The first of those requirements is the predictable one that the plaintiff's earning capacity has in fact been diminished by reason of the negligence-caused injury. The second requirement is also predictable once it is appreciated that damages for loss of earning capacity constitute ahead (sic) of damages for economic loss awarded in addition to general damages for pain, suffering and loss of enjoyment of life. It is that 'the diminution of ... earning capacity is or may be productive of financial loss'."
>
> …
>
> "It was submitted on behalf of the present appellant ('the plaintiff') that, in a case such as the present, the approach that damages for loss of earning capacity are recoverable only if, and to the extent that, the diminution of earning capacity is or may be productive of financial loss is inconsistent with the reasoning of the majority of the Court in *Griffiths v Kerkemeyer*, as that reasoning was explained in the majority judgments in *Van Gervan v Fenton*. That is not so. **No doubt, the considerations which supported the conclusion in those and other cases to the effect that compensation for the increased needs of a plaintiff should not be reduced to take account of the extent that those needs have been or will be satisfied by gratuitous services are applicable to preclude the reduction of damages for loss or impairment of earning capacity by reason of the financial or other support provided by relatives or friends to reduce the deprivations of unemployment. Those considerations are not, however, applicable to entitle a plaintiff to additional head of economic loss in circumstances where the diminution has had and will have no adverse effect on actual earnings and will be productive of no economic loss**."[117]

[183] It is one thing to argue that the defendant cannot use the provision of gratuitous services to avoid paying just compensation. It is quite another to assert that the provision of those services gives rise to a separate head of loss. Properly understood *Clement* does not authorise an extension of the principle in *Griffiths* to allow compensation for a need for services provided here. Rather it allows for the method of assessment for economic loss to be akin to that in *Griffiths* provided that the pre-conditions for a claim for economic loss – or more accurately impaired earning capacity - are established. If the impaired capacity in question that founds the need for the services provided falls outside a need for nursing or domestic services authorised by the High Court then more must be shown than the existence of the need.

[184] Section 59 does not provide a source of power to award damages. Rather s 59 is an attempt by the legislature to limit the damages that would otherwise be payable under

[117] (1995) 182 CLR 1 at 3 – 4. My emphasis. Citations omitted.

common law principles. So in *Kriz v King & Anor*[118] it was held that the term "gratuitous services" as used in s 59 of the Act has its meaning at common law in accordance with the principle established in *Griffiths v Kerkemeyer,* as interpreted by the High Court in *CSR Ltd v Eddy.*[119]

[185] In *CSR Ltd v Eddy*[120] the High Court made several observations on the principle of recovery for the cost of those services. These were summarized by McMurdo P in *Clement v Backo*:

> "The principle is controversial; it can produce what some consider to be disproportionately large awards compared to the sums payable under traditional heads of loss. It is also anomalous in that it departs from the usual rule that damages other than damages payable for loss not measurable in money are not recoverable for an injury unless the injury produces actual financial loss. … Damages under the principle established in *Griffiths v Kerkemeyer* relate to a plaintiff's need for personal care or services. *Griffiths v Kerkemeyer* should not be used by way of analogy to extend an award of damages in any case where its use is not covered by authority."[121]

[186] Far from authorising such an extension on the facts here *Medlin*[122] positively forbids the allowance of damages.

[187] What is essential is an accurate characterisation of the loss claimed. Mr Schofield is prevented by his injuries from carrying out the full extent of the duties necessary to run the bed and breakfast and venue centre. The purpose to running that centre is either to make a profit or as a hobby. If the former then Mr Schofield's real complaint is that the injuries have had an adverse impact on his earning capacity. *Medlin* requires that there be evidence that the diminution in earning capacity has had or will have an adverse effect on actual earnings or will be or may be productive of economic loss. If a hobby, there is even less reason to accept that a separate award is justified. I will discuss those issues below.

[188] There is a further problem. There is essentially no limit to the amount that can be claimed if the plaintiff's approach be the correct approach. If there is a level of profitability against which the cost can be measured then there is some guide as to what might be reasonable. But if the business is to be run no matter what the costs, as there is no prospective profit, then where is a principled line to be drawn? Is it reasonable to require the defendant to bear a burden in damages for the costs of running of a business for an indefinite time into the future with no prospect of any profit being made? How much loss is a reasonable one and for how long should it be sustained where there is no prospect of a profit? That was one of the problems that McHugh J identified with *Sullivan v Gordon* type damages that were disallowed in *CSR Ltd v Eddy*.[123] It provides a practical reason to not allow the damages here.

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[118] [2007] 1 Qd R 327.
[119] (2005) 226 CLR 1.
[120] (2005) 226 CLR 1.
[121] [2007] 2 Qd R 99 at [19]. Citations omitted.
[122] (1995) 182 CLR 1.
[123] (2005) 226 CLR 1.

[189] In my view no amount can be allowed. *CSR Ltd v Eddy*[124] does not permit an extension of the *Griffiths* principle by analogy, absent authority. *Medlin*[125] is against the application of the principle here. *Clement* does not provide authority for it.

Were the services provided "necessary"?

[190] In case I am wrong I will go on to consider whether the pre-conditions set out in s 59 are met. Section 59(1)(a) requires that the "services are necessary".

[191] If the "necessity" criteria is satisfied by merely showing that the injured person could not have carried out the full range of tasks involved in the services provided then that condition is satisfied here, albeit there remains some debate. But that was not the approach taken in *Clement v Backo*. There McMurdo P determined that services were "necessary" in the relevant sense if they were required to preclude economic loss:

> "The appellant contends that the services were not "necessary" within the meaning of that term in s 59(1)(a) of the Act. His Honour's finding that Mr Clement's need for the services arose solely from the accident was plainly open on the evidence. For the reasons I have given, the common law principle established in *Griffiths v Kerkemeyer* was extended in a limited way in *Medlin*, **so that a plaintiff's increased need for gratuitous services provided to preclude economic loss resulting from an accident is reflected in an entitlement to damages which does not abate simply because the services were provided gratuitously.** The services were "necessary" within the meaning of that word in s 59(1)(a) of the Act."[126]

[192] Mackenzie J's reasoning was to the same effect. His Honour said in *Clement*:

> "It was submitted by the applicant that, if services were to be treated as gratuitous services within the meaning of s 59, the services were not "necessary". The learned trial judge found that they were. **There was evidence that, if the work of the kind gratuitously done was not performed, the respondent's plantation would be at risk of becoming less productive and therefore less profitable**. In the circumstances it was open to find that the work was "necessary" if it falls within the description "gratuitous services" in s 59."[127]

[193] On this reasoning the necessity for the services arose because of the risk of loss. Without evidence of the existence or extent of that risk it is not possible to determine that there was any relevant need for the services.

[194] The pre-condition is not met.

Care of animals

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[124] (2005) 226 CLR 1.
[125] (1995) 182 CLR 1.
[126] At [36]. My emphasis.
[127] [2007] 2 Qd R 99 at [67]. My emphasis.

[195] Counsel for the defendant argued that the *Griffiths* principle did not extend to the care provided to pets. It certainly involves an extension of the *Griffiths* principle. No authority was cited which authorised such an extension. Counsel for the defendant cited *Geaghan v D'Aubert*[128] as express authority against the extension. The decision pre-dated *CSR Ltd v Eddy*[129] but is plainly in conformity with the reasoning there. Stein JA said:

> "I do not believe that *Griffiths v Kerkemeyer*, or any of its extensions, includes the provision of care to an injured persons' pets or a hobby. The cases have accepted domestic care at home, in the garden and shopping. But counsel has found no case which extends domestic assistance to the care of domestic pets or the retention of a hobby.
>
> It might be that no relevant 'need' of a plaintiff to the provision of such a service as pet care or a hobby has been established. Alternatively, it may be that if a plaintiff was unable to look after a pet, or lost a hobby, that loss more appropriately sounded in general damages. It may also be that such a loss may be seen as too remote a damage to be laid at a defendant tortfeasor's door.
>
> Some of these types of considerations are inherent in the discussion of Mason P in *Sullivan v Gordon* (at p322 - p324). Mason P stressed the exceptional nature of *Griffiths v Kerkemeyer* and the difficulty of recognising what 'needs' of a plaintiff are to be included, as well as their proper limits.
>
> While agreeing with Beazley JA, Mason P concluded by saying [at para14]:
>
> > Nevertheless, it may be necessary to consider whether it is always reasonable to lay at the tortfeasor's door the cost of care for children born after the injury. Pure logic is not the only matter at play in this difficult area of law.
>
> In my view, any consideration of an extension of the categories of needs under *Griffiths v Kerkemeyer* should be carefully evaluated, as for example in *Sullivan v Gordon* and *Sturch v Willmott*.
>
> Whichever way it is put, on a 'needs' basis, general damages or remoteness, it seems to me that *Griffiths v Kerkemeyer* does not extend to a plaintiff's hobby and his Honour was entitled to reject the care of the animals on that basis. Nor do I believe that it would be appropriate to extend *Griffiths v Kerkemeyer* to cover the care of animals kept as a hobby."[130]

[196] As McMurdo P, with respect, accurately summarised in *Clement*, one effect of the decision in *CSR Ltd v Eddy*[131] is that the principle identified in *Griffiths v Kerkemeyer*

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[128] [2002] NSWCA 260.
[129] (2005) 226 CLR 1.
[130] At [61]-[66]. Citations omitted.
[131] (2005) 226 CLR 1.

"should not be used by way of analogy to extend an award of damages in any case where its use is not covered by authority".[132] That applies here.

Extent of care

[197] It remains necessary for me to reach a decision on the extent of the care in fact provided.

[198] I am satisfied that in terms of time devoted to work around Mr Schofield's property 20 hours of assistance per week could be substantiated. The hours that the various witnesses spoke of would add up to that amount readily enough.

[199] The difficulty is in the various points that counsel for the defendant argued:

- While help is provided it is evident that Mr Schofield can do at least some of the tasks performed by others. Where the line should be drawn is impossible to say;
- Some of the assistance was provided out of a sense of obligation to Mr Schofield. He had done good turns in the past to others and they felt obliged to help him. It was by no means clear to me that the assistance rendered reflected a need;
- Some assistance was provided because it gave the provider something to do;
- Some tasks were performed by others before the injury;
- Mr Schofield would have required assistance to some degree anyway, perhaps not to the same level, but to some degree, with some of the tasks.

[200] In some cases s 59(2) precludes recovery. In some cases the pre-condition in s 59(1)(b) is not satisfied. In others it is not clear that the services are "necessary" as s 59(1)(a) requires. As the decision in *Shaw v Menzies & Anor*[133] shows, a lack of accurate records might defeat an otherwise deserving claim. The onus is on the plaintiff to sort this out.

[201] I would be prepared to find that on the balance of probabilities the accident caused injuries resulted in a need for assistance in running the bed and breakfast and venue hire business for at least six hours per week, for the necessary period to satisfy the threshold requirement. Mr Schofield's use of a walking aid at least from time to time well after January 2015, indicating a greater need for help than suggested by the video evidence, would justify that finding.

[202] However I am then left with the difficulty of not being able to make a finding as to the extent of assistance that satisfies the conditions of s 59.

Conclusion

[203] No amount can be allowed under this head of loss.

Future Paid Care

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[132] (1977) 139 CLR 161 at [19].
[133] [2011] QCA 197.

[204] There is a reference in the quantum statement to future paid care but it is included with gratuitous care.[134] I am unable to determine what services are said to fall under the one heading and what might fall under the other.

[205] Schedule F to the statement sets out the claims made. They appear to relate to the services provided to the business. I do not see that there is any difference in principle between paid and gratuitous services. If they are provided to minimise economic loss then *Medlin* requires that there be proof that the impact on earning capacity has had or will have an adverse effect on earnings and will be productive of economic loss. There is no such proof.

Special Damages

[206] The plaintiff claims $8,509.26. The defendant concedes $7,681.70.

[207] The difference of $827.56 reflects reductions for pharmaceuticals that are unrelated to any accident caused condition, an argument that an excessive amount is claimed for mobility aids, and a lesser amount allowed for travel expenses on the basis that not every trip claimed was exclusively for accident related needs.

[208] There is merit in the arguments on each side to an extent. Neither side descended to much detail. I will allow $8,000. Interest should be allowed at 1.28% over 3.2 years.

Future Expenses

[209] A global sum of $10,000 is claimed and an amount of $5,000 is conceded.

[210] The plaintiff would like to have plastic surgery to correct as well as can be done the scarring that he has. Dr Gaffield says that there are several concave scars that could be improved surgically. The total cost of revision would be $10,000.[135]

[211] Dr Cook expressed the opinion that "it is still recommended that it would be reasonable and appropriate for this gentleman to undergo removal of multiple plates and screws form his right upper limb and left lower limb."[136] The cost he estimates at $12,000 to $14,000.

[212] Further there are ongoing costs of medication and prescriptions.

[213] The claim for $10,000 is well justified.

Summary

[214] In summary I assess the damages as follows:

Pain, suffering and loss of amenities of life	$57,350.00
Past economic loss	$240,000.00
Loss of superannuation - past	$22,800.00

[134] See Ex 8 Section 19.
[135] Ex 6.
[136] Ex 3 p8.

Interest on past economic loss	$9,576.00
Future loss of earning capacity	$375,000.00
Loss of superannuation - future	$37,500.00
Future expenses	$10,000.00
Special damages	$8,000.00
Interest	$327.68
Total Damages	**$760,553.68**

Orders

[215] There will be judgment for the defendant.

[216] I will hear from counsel as to costs.