DISTRICT COURT OF QUEENSLAND

CITATION:	*Saul v Machalek & Anor* [2020] QDC 69
PARTIES:	**KAIN JASON SAUL** (Plaintiff) **v** **PAUL MACHALEK** (First Defendant) and **ALLIANZ AUSTRALIA INSURANCE LIMITED ACN 000 122 850** (Second Defendant)
FILE NO/S:	D95/2018
DIVISION:	Civil
PROCEEDING:	Claim
ORIGINATING COURT:	District Court, Southport
DELIVERED ON:	28 April 2020
DELIVERED AT:	Southport
HEARING DATE:	14 and 15 August 2019 (Southport), 31 October 2019 (Brisbane), short further written submissions received from defendants on 19 December 2019.
JUDGE:	Muir DCJ
ORDER:	[1] Judgment for the plaintiff in the sum of $104,791.95. [2] I will hear the parties as to costs and to that end I direct that any submissions in respect of costs, or alternatively a proposed draft order if the parties are agreed, be emailed to my associate by 4pm on 19 May 2020.
CATCHWORDS:	PERSONAL INJURIES - DAMAGES – QUANTUM – where plaintiff rehabilitating from prior injury at time of accident – whether the accident delayed the plaintiff's return to work – whether the accident caused the plaintiff to be demoted – where plaintiff claimed general damages, past economic loss with interest, loss of superannuation benefits, future economic loss (and future superannuation), special

damages with interest and future medical expenses

PERSONAL INJURIES – MOTOR VEHICLE ACCIDENT – CAUSATION – where plaintiff rehabilitating from prior injury at time of accident – whether injury attributable to the accident – where plaintiff's evidence of symptoms conflicts with other evidence – where multiple inferences as to causality open on the expert evidence

LEGISLATION: *Civil Liability Act 2003* (Qld), Sections 11, 12, 55

Civil Liability Regulation 2014 (Qld). Sections 9, 4, Sch 4

CASES CITED: *Allianz v McCarthy* [2012] QCA 312.

Adelaide Stevedoring Co Ltd v Forst (1940) 64 CLR 538.

Australian Iron & Steel Ltd v Connell (1959) 102 CLR 522.

Beaven v Wagner Industrial Services Pty Ltd [2018] 2 Qd R 542.

Bell v Mastermyne Pty Ltd [2008] QSC 331.

Camden v McKenzie [2008] 1 Qd R 39.

Edington v Board of Trustees of the State of Public Superannuation Scheme [2016] QCA 247.

EMI (Australia) Ltd v Bes (1972) NSWLR 238.

Fox v Percy (2003) 214 CLR 118.

Gordon v RACQ [2015] QDC 313.

Graham v Baker (1961) 106 CLR 340.

Jones v Dunkel (1959) 101 CLR 298.

Kovan v Hail Creek Coal Pty Ltd [2011] QSC 51.

March v E.& MH Stramare Pty Ltd (1990- 1991) 171 CLR 506.

Metro North Hospital and Health Service v Pierce [2018] NSWCA 11.

New South Wales v Hunt (2014) NSWCA 47.

Obstoj v Van Der Loos (W.203 of 1995, 13 April 1987, unreported)

Onassis & Calogeropoulos v Vergottis [1968] 2 Lloyd's Report 403.

Pacific Coal Pty Ltd v Gaudry [1996] QCA 525.

Ramsay v Watson (1961) 108 CLR 642.

Reitano v Shearer & Anor [2014] QCA 336.

Robert Bax & Associates v Cavenhan Pty Ltd (2013) 1 Qd R 476.

Todorovic v Waller (1981) 150 CLR 420.

Tubemakers of Australia Ltd v Fernandez (1976) 10 ALR 303.

Watts v Rake (1960) 108 CLR 158.

COUNSEL:	S.J. Deaves for the Plaintiff
	R. Morton for the First and Second Defendants
SOLICITORS:	Chris Trevor and Associates for the Plaintiff
	McInnes Wilson Solicitors for the First and Second Defendants

Introduction

[3] The plaintiff is a professional motorcycle stuntman. On 20 September 2014, while rehabilitating from surgery to his left knee, he was knocked off his bicycle by a car driven by the first defendant, and insured by the second defendant. By this proceeding, he seeks to recover damages for the consequential injuries he suffered. Liability is admitted. Broadly speaking, the issues in dispute are:

(a) The nature and extent of the injuries suffered by the plaintiff as a result of the accident; and

(b) The quantum of damages to be awarded to the plaintiff.

[4] Before turning to these issues as they have been further confined by the pleadings, it is instructive to consider the uncontroversial circumstances of the accident.

The accident

[5] The **accident** occurred around 7.00am, on 20 September 2014, as the plaintiff was cycling along Mudgeeraba Road. A car being driven by the first defendant turned right from Mudgeeraba Road into Scullin Street and collided with the plaintiff as he continued riding straight ahead on Mudgeeraba Road. At trial, the plaintiff described seeing the first defendant's car slow down and that he thought the driver

must have seen him, but then, the first defendant "sped up and hit me right in the middle of his front bumper with my right leg, and that snapped on impact, which tumbled me through the air and I landed on my head in a seating position [sic]."[1]

[6] The plaintiff was in shock in the immediate aftermath and could not recall being in pain at the time.[2] The plaintiff suffered some relatively minor soft tissue injuries but the fracture to his right tibia was serious. He was left with the bone piercing his skin. The plaintiff was taken to the Gold Coast Hospital and that night, a pin (or rod) about 33 centimetres in length, was surgically screwed through the head of his right tibia. He was released from hospital the following day but required crutches for short distances for the next three to four weeks and for longer distances for the next six weeks. The plaintiff was given pain relief at the hospital and did not feel pain until he was discharged. For the following six to eight weeks he experienced pain from "where the bone come out of the skin, just above the right ankle." [3]

[7] The plaintiff underwent two further surgeries (in February and November 2016) to remove the pin inserted as a result of the accident.

The pleadings

[8] The plaintiff's pleaded case is that he sustained the following **injuries** as a result of the accident:[4]

(a) Compound fracture right tibia;
(b) Shoulder abrasions;
(c) Facial abrasions;
(d) Scarring to leg;
(e) Fracture right fibula;
(f) Meniscal tear right knee; and
(g) Post-traumatic chondromalacia patellae right knee.

[9] The defendants:

(a) Admit that the plaintiff suffered the injuries set out at (a), (c), (d), (e) and (f) above but do not admit the plaintiff suffered any shoulder abrasions.[5]
(b) Admit the plaintiff has the condition chondromalacia patellae of his right knee but deny that this condition is post-traumatic in origin because there has been no trauma (such as a fracture) to or of the patella and the cause of the condition may be the plaintiff's rotational deformity of his right leg and leg length discrepancy of his right leg or the plaintiff's training techniques or a combination of those matters.[6]

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1 Transcript 1-40, ll 41-45.
2 Transcript 1-41, l 21.
3 Transcript 1-42, ll 26-27.
4 Further Amended **Statement of Claim** filed 27 August 2019 ('Statement of Claim') at [8].
5 Further Amended **Defence** of the First and Second Defendants dated 14 August 2019 ('Defence') at [3](a) and (b).
6 Defence at [3](c) (i) and (ii).

(c) Say that the condition of chondromalacia patellae of the plaintiff's right knee is asymptomatic.[7]

[10] Confirmation of the shoulder abrasions is found in the first report by Dr Bruce Low.[8] The defendant's admission of the plaintiff suffering from chondromalacia patellae is supported by the medical evidence.[9] The real dispute on the pleadings (and at trial) in terms of the plaintiff's injuries was the extent and cause of the chondromalacia patellae of the plaintiff's right knee.

[11] The plaintiff's pleaded case is that as a result of these injuries he has:[10]

(a) Experienced significant pain in his right leg, impacting upon his everyday life as well as his ability to perform his chosen profession;

(b) Lost his position as lead full time rider for ShowTime FMX and is now the third rider, performing only part-time as a contractor in a fewer number of shows each year;

(c) Been unable to pursue career opportunities that may have been open to him but for the injuries he sustained, including work as a builder or builder's labourer.

[12] The defendants admit that the plaintiff "would have" experienced significant pain in his right leg impacting upon his everyday life "in the past" but otherwise deny that the injuries caused or impacted on the plaintiff's life as alleged because:

(a) It is contrary to the medical assessment and (self) employment/work history of the plaintiff; and

(b) The plaintiff has pre-existing/post-collision medical history/conditions, including to the left knee, bilateral shoulders, right ankle, right leg, right lower limb, neck/cervical spine, thoracic/back, lower back, left elbow and hand/wrist which are relevant to and /or have impacted on his everyday life and /or ability to perform in his chosen profession; and

(c) The plaintiff was not participating in (self) employment work activities at the time of the collision because of a pre-existing left knee condition.[11]

[13] The plaintiff also claims that as a result of the injuries he has:[12]

(a) Endured and continues to endure pain, suffering and the diminution of the enjoyment and amenities of life;

(b) Lost earnings and earning capacity;

(c) Required and may require in the future, medical treatments; and

(d) Sustained special damages.

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7 Defence at [3](e) (iii).

8 Exhibit 1 (Doc 6), p 7: **First Report of Dr Low** dated 7 March 2017.

9 Exhibit 1 (Doc 8), pp 25-26: MRI report of Dr Angus Watts dated 21 April 2017; Exhibit 1 (Doc 7), pp 14-24: **Second Report of Dr Low** dated 22 July 2019.

10 Statement of Claim at [9].

11 Defence at [4](a).

12 Statement of claim at [10].

[14] The plaintiff claims amounts for general damages, past economic loss with interest, loss of superannuation benefits, future economic loss (and future superannuation), special damages with interest and future medical treatment and medication expenses.[13]

[15] The defendants deny the plaintiff has suffered the losses claimed for various reasons including those set out in paragraph 9 above and additionally because:[14]

(a) The plaintiff retains an earning capacity commensurate with his pre-injury capacity, which he is currently exercising;

(b) The plaintiff has been capable of earning income from employment or engagements not only from motorcycle riding but from engaging in other income producing activities but has voluntarily chosen not to engage in other income producing activities or only engage in them to a limited degree.

Credibility

[16] The defendants submitted that the plaintiff was not dishonest or that he intentionally misrepresented the situation but rather, that his complaints of ongoing and worsening right knee problems do not correspond with an analysis of the objective evidence. The defendants' counsel submitted that "credit involves much more than honesty".[15]

[17] The defendants' approach to the issue of credibility in this case is consistent with the observations of Keane JA (as his Honour then was) in *Camden v McKenzie*[16] that:

> "… The rational resolution of an issue involving the credibility of witnesses will require reference to, and analysis of, any evidence independent of the parties which is apt to cast light on the probabilities of the situation."[17]

[18] The particular nuances of determining credit issues in personal injuries cases such as the present were identified by McMeekin J in *Bell v Mastermyne Pty Ltd*[18] as follows:

> "… The assessment of damages for personal injury depends to a very large extent on a plaintiff's honest reporting - of his or her

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13 Statement of claim at [11].
14 Defence at [6](c), and [6] more generally.
15 Transcript 3-18, ll 30-31.
16 [2008] 1 Qd R 39 at [34].
17 This passage was cited with approval by Leeming JA (with whom Barrett JA and Tobias AJA agreed) in *New South Wales v Hunt* (2014) NSWCA 47 at [56].
18 [2008] QSC 331 at [19].

> symptoms; of their impact on the plaintiff's life; of pre-existing problems; of the genuineness of effort to regain employment after injury; and of their capacity to maintain employment. These are all difficult issues for a defendant to thoroughly investigate and test. In truth no-one knows what level of pain an individual experiences and what impact that pain has on any particular plaintiff's capacity to maintain their activities…"

[19] My overall impression of the plaintiff was that he was an honest witness and a generally resilient and determined man with a threshold for pain. To his credit for example, he did not seek to exaggerate his pain levels, describing his right knee pain as a "7 to 8" when it was bad and as a 2 when sitting in the witness box. But there were also occasions that the plaintiff's evidence was not supported by the objective facts and other evidence which I accept. For example, the plaintiff's complaints of ongoing and worsening right knee problems (apart from the issue of the removal of the tibial nail and associated metalware) do not accord with the fact that he did not seek medical or physiotherapy treatment for any right leg or knee problems after January 2015.

[20] There were crucial aspects of the plaintiff's evidence relevant to his claim for economic loss that I do not accept. For example: his evidence about when he was planning to return to work after his surgery in March 2014;and his evidence about the extent of and impact of his right pain on his ability to train and carry out a number of physical activities.

[21] In my view, the plaintiff was telling the truth as he saw it. But his recollection was often distorted, having been altered by "unconscious bias, wishful thinking or by over much discussion of it with others".[19]

[22] It follows that a careful assessment of the plaintiff's evidence is required. In carrying out this task, I have assessed his evidence objectively having regard to all of the evidence before the court and upon a consideration of where the balance of probabilities lies on the basis of that analysis.[20] In taking this approach, as these Reasons reveal, I have rejected some, but not all, of the plaintiff's evidence.

Issues for determination

[23] The following issues are central to my determination in this case.

(a) First: When and why did the plaintiff lose his role as lead rider for Show Time FMX?

(b) Secondly: What is the extent of the pain from the plaintiff's diagnosed condition of chondromalacia patellae to his right knee?

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19 *Onassis & Calogeropoulos v Vergottis* [1968] 2 Lloyd's Report 403 at 431.

20 *Fox v Percy* (2003) 214 CLR 118, 129 at [31].

(c) Thirdly: What impact if any does the condition of chondromalacia patellae to the plaintiff's right knee have on the plaintiff's ability to perform his work as a stuntman?

(d) Fourthly: Did the accident cause the plaintiff's condition of chondromalacia patellae of the right knee?

[24] The plaintiff's case at trial was that the injury sustained to the plaintiff's right knee in the accident "is the worst he's sustained in his career."[21] In order to give some perspective and context to the plaintiff's claim and the issues for determination, it is instructive to briefly analyse the evidence about the plaintiff's personal and work circumstances (including injuries he suffered during the course of his work), prior to the accident.

Relevant factual context

[25] The plaintiff was born on 18 October 1984. He was educated to year 12 standard and has worked for most of his post-school life as a freestyle motocross rider. His only other experience is in labouring roles. He has no trade or formal qualifications.

[26] The plaintiff is currently 35 years of age. He was almost 30 at the time of the accident. The plaintiff is an athlete and entertainer who for the last 15 years has performed difficult and cutting edge motorcycle stunts. The plaintiff's job is a risky one and over the years it has led to him requiring a myriad of surgeries and periods of rehabilitation. At the time of the accident, the plaintiff was cycling as part of his rehabilitation, trying to build his left knee up following a left knee reconstruction.

The plaintiff's employment history at the time of the accident

[27] The plaintiff has worked for Showtime FMX Pty Ltd since 2005/2006. Gary Reid, the director and "owner" of Showtime FMX gave evidence for the plaintiff at trial. He described the company (which he established some 20 years ago) as specialising in "freestyle motocross live stunt shows and theme park stunt shows and live activations for events and corporate partners."[22] The stunt shows include performances at the Royal Easter Show in Sydney, the Brisbane Exhibition, the Royal Melbourne Show and various V8 supercar shows. The company also has a contract to perform two shows a day at Movie World on the Gold Coast. Mr Reid explained that the freestyle motocross team averages close to 100 shows a year with the two theme park shows (which do not involve motorcycle performances) being full every day of the year.

[28] The plaintiff was employed as one of two lead riders for Showtime FMX from sometime in 2012. Prior to that he was a third rider. The documentary evidence was that the plaintiff was originally engaged as a contractor but from January 2014

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21 Transcript 1-31, l 33.

22 Transcript 2-41, ll 18-19.

until June 2016 he was an employee of the company. Although in 2016, the company policy changed again and the plaintiff went back to contracting. The plaintiff was "not too sure exactly how it went."[23]

[29] Robbie Marshall was the third rider. He often filled in as the lead rider for the plaintiff and, as discussed below, he stepped in as lead rider when the plaintiff required left knee surgery in March 2014.

[30] Mr Reid explained the significance of being a lead rider as follows:[24]

> "All of our shows require two riders. Minimum two riders. Some of our shows require three, some four, and even upwards of five or six occasionally, but every show requires two riders. So being a lead rider means you're guaranteed those two – those two positions to two riders every show we get."

[31] The plaintiff described the position as a lead rider as follows:[25]

> "The lead riders get all the shows throughout the year and the third rider will take the - like, riders where they'd have three people doing the shows and - pretty much the third rider gets half - half the amount of shows as the first two riders, both lead riders."

[32] The role of lead rider entailed the plaintiff performing about "[o]ne hundred days of shows" a year.[26] This sometimes require the plaintiff performing up to four shows a day. As an employee the plaintiff was paid a salary for a certain number of shows a year but he was paid extra if he went over that number.[27] The quieter period for shows was ordinarily between November and February.[28] A lead rider is also given more ancillary jobs (and thus receives more income) than a third rider. These jobs include driving the truck to shows and carrying out maintenance work at the workshop.[29]

Overview of plaintiff's injuries prior to the accident

[33] Over the years, the plaintiff has had "a fair few accidents" required various periods of time off from his work to recover from a variety of injuries to his body.[30] Extensive records admitted into evidence reveal these injuries.[31] The plaintiff's

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23 Transcript 1-77, l 20.
24 Transcript 2-43, ll 18-23.
25 Transcript 1-38, ll 26-29.
26 Transcript 1-38, l 35; 2-43, l 25.
27 Transcript 1-77, l 31.
28 Transcript 1-83, l 25.
29 Transcript 1-69, ll 1-5.
30 Transcript 1-39, l 3.
31 Exhibit 2 (Part C); these were also summarised in a medical chronology prepared by the defendants' legal representatives and Marked For Identification F.

general practitioner was Dr David Hart and his usual physiotherapist was a group called Back in Motion.[32]

[34] A snapshot of the injuries suffered by the plaintiff in the years prior to and including the year of the accident as elicited from the various medical records is as follows:[33]

- 9 January 2009 – A fracture to the right ankle region and fibula with subsequent surgery to include the insertion of four screws;
- November 2010 – bilateral knee pain to old ACL tears, left ankle injury;
- 28 April 2010 to 10 December 2010 – treated on seven occasions to flare-up of lower back pain with impact of landing, right rib pain and back;
- 12 July 2011 to 19 December 2011 – treated on 23 occasions including in July 2011 after coming off bike and landing feet first, injured knee, got infected, swelling and injured wrist. Around this time dislocated arm;
- August 2011 – re-injured shoulder doing a jump – ongoing treatment to left shoulder;
- August 2011 – onset of right shoulder pain (same as the left);
- September 2011 – further crash, injury to left shoulder;
- Late 2011 – onset of left Achilles pain;
- Early/mid November 2011 – another crash, landed on left heel;
- 5 to 12 September 2011 – left shoulder injury, recurrent dislocation after fall off motorbike;
- August 2011 – severe injury when landing, crashing into concrete wall injuring shoulder;
- 2 to 9 March 2012 – treated on four occasions to left wrist injury/pain;
- 14 March 2012 – report of at least 10 episodes of dislocation of shoulder, one of which occurred in mid-air doing a jump;
- 17 July 2012 – claimant doing very well following hand and shoulder surgery – can go back riding at six months from date of surgery – no significant residual problems in the shoulder with partial rotator cuff tear and tearing of the head of the biceps and some early, arthritis in the joint but manageable;
- February 2014 – referred for left wrist surgery- un-united left wrist avulsion fracture and early degenerative change.
- March 2014 – onset of left knee pain after motorbike accident, heard snap, rapid swelling;

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32 Transcript 1-77, l 45; 1-78, l 1.

33 As helpfully summarised in a detailed chronology prepared by the defendants' legal representatives and further summarised in annexure Schedule A to the Outline of Defendant's Submissions.

- Physio treatment on 22 occasions between 16 April and 18 September 2014 regarding ACL injury, long history of knee injury; complained of ongoing knee pain aggravated with certain activities, particularly stairs;
- By 17 September 2014 – left knee feeling ok, continuing gym, still some joint pain, cycling each day up to 60 minutes.

[35] In 2009 the plaintiff had an internal fixation of the right tibia as a result of an accident in which his right lower limb was injured. Some of this fixation was later removed in order to accommodate the intramedullary nail which was required from treatment of the compound fracture sustained in the accident on 20 September 2014.

[36] In March 2012, the plaintiff underwent a left shoulder reconstruction (performed by Dr Hammond) due to a number of dislocations to this shoulder. While recovering from this operation, and to avoid a further and separate recovery period, he took the opportunity to undergo surgery to his left wrist. It took the plaintiff around 6 months to recover from this shoulder reconstruction, so he was not able to return to performance riding until September 2012.

[37] The plaintiff made the broad assertion that he always made a full recovery from these (earlier) injuries and [in terms of his job as a motorcycle stuntman] was able to "still do everything that I used to do."[34] This evidence is vague and of little persuasive weight in the sense that it purports to be a medical conclusion about recovery. But it is reflective of what I found to be the obvious passion of the plaintiff for stunt riding and his sheer resilience and determination to rehabilitate and get back on the bike. Further evidence of this is found in the plaintiff's evidence that when he returned to performing in February 2015, after the accident, he could not do the full raft of tricks he had been able to do before the accident (he could do some straight away) but as time has gone on he has got those tricks back.[35]

March 2014 injury to the plaintiff's left knee

[38] On 6 March 2014 the plaintiff was performing at a show in Sydney when he landed in an awkward position and his left knee bent backwards.

[39] Dr Christopher Vertullo, a specialist orthopaedic knee surgeon reviewed the plaintiff on 18 March 2014 and diagnosed a Left Knee Grade I-II medial collateral ligament injury, complete rupture of anterior cruciate ligament, complex tear medial meniscus, root tear meniscus. He recommended surgery.[36] The plaintiff was able to access workers compensation as a result of this injury.

[40] On 18 March 2014, Dr Vertullo wrote to WorkCover Queensland stating that, given the plaintiff was a professional athlete, he would not be able to return to full duties

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34 Transcript 139, ll 6-7.
35 Transcript 1-69, ll 7-10.
36 Exhibit 5; Exhibit 2 (Doc A5), p 20.

for at least 9 to 10 months from the operation, although he could return to some "suitable duties' earlier. [37]

[41] Dr Vertullo performed surgery on the plaintiff's left knee on 25 March 2014. He reviewed the plaintiff on 4 August 2014 and in his letter to Dr Hart he observed that:[38]

> "[the plaintiff's] anterior cruciate ligament graft is intact but he has ongoing swelling. He was quite active over the weekend and it has been quite swollen today."

[42] Dr Vertullo concluded that that the plaintiff was unable to return to work at that point but he would review him in 8 weeks (and if there was still swelling, it may be necessary to investigate further with MRI and/or arthroscopy to see what is happening to the damaged meniscus).

[43] On 29 September 2014, Dr Vertullo saw the plaintiff again about his left knee (observing that the accident had occurred) and reported to Dr Hart that:[39]

> "In regards to his knee, he is 6 months post-surgery and he gets some aching medially and I suspect that is either the medial meniscal tear or the Grade 2 medial femoral condyle change which was causing the problems. What I have suggested is that he see me in 4 months with an MRI of the knee to see how is travelling."

[44] It follows and I find that as at the end of September 2014, the ongoing issues with the plaintiff's left knee meant that he was not expected to be able to return to work before February 2015.

[45] On 8 October 2014, Dr Vertullo made some handwritten notes on a letter from WorkCover Queensland. The effect of these notes was that: "if not" for the right leg injury, the plaintiff could return to work to perform "suitable duties" as pain allowed; that the plaintiff required further physiotherapy for his left knee injury; and that Dr Vertullo was uncertain when the left knee injury would resolve.[40]

[46] There was no evidence about any "suitable duties" available to plaintiff. For example there was no suggestion in the evidence that there was an option for the plaintiff to return to "lighter duties" such as driving the truck or carrying out maintenance work at the workshop. Most relevantly in my view is that as at 8 October 2014, the plaintiff was not cleared by Dr Vertullo to return to riding or to performing due to the ongoing issues with his left knee.

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37 Exhibit 2 (Doc A5), p 21.

38 Exhibit 1 (Doc 1), p 1: Letter dated 4 August 2014 from Dr Vertullo to Dr David Hart (the plaintiff's GP).

39 Exhibit 1 (Doc 2), p 2: Letter dated 29 September 2014 from Dr Vertullo to Dr Hart.

40 Exhibit 1 (Doc 5), p 5: Handwritten notes dated 8 October 2014.

[47] On 4 December 2014 Dr Vertullo saw the plaintiff again at which time he reported to Dr Hart that:[41]

> "His left anterior cruciate ligament reconstruction is excellent. Despite tearing both menisci he is doing very nicely. The tibial fracture on the right side is obviously causing him more problems, it is slower to heal and it is disappointing that he had damaged this when he wasn't riding a motorbike but actually riding a pushbike and was struck by a car. I will see him in another 6 months for his knee for a final check but it looks like his fractured tibia is going to take a little bit longer to heal yet, probably another 3 or 4 months before he can go back to racing.
>
> From my point of view, he could go to performing on the motorbike now. The swelling and problem he was experiencing the last time I saw him has resolved."

[48] The observation from the then non-treating doctor of the plaintiff's right knee [although as discussed below, Dr Vertullo operated on the plaintiff's right leg in February 2016] is a curious one and not consistent with the plaintiffs evidence discussed in paragraph **[96]** below (that his right lower leg healed at the six to eight week mark and he has not experienced any pain in this region since that time; and that whilst he experienced some pain in his right knee when he started weight bearing– this did not flare up until about a year later). It is also inconsistent with the insurance claims forms that Dr Vertullo signed in November 2014 and January 2015 as discussed in paragraph [58] below which stated that the plaintiff was unable to ride a bike at a competitive level, and was expected to be able to return to his duties in February 2015. I am satisfied this tension can be explained by inferring as I do, that by 4 December 2014, Dr Vertullo was satisfied that the plaintiff was able to return to practising his stunts but that he would not be able to undertake stunt performances as part of his employment until February 2015.

[49] The evidence was that by 14 January 2015 the plaintiff was back practicing stunts.[42] The Instagram post the plaintiff made on 14 January 2014 is accompanied by a photograph which depicts him mid-air holding on to a motorbike with the caption "Picking things up pretty good". On 16 January 2015 the plaintiff posted a video of his stunt training. There was footage tendered at trial of the plaintiff performing difficult stunts including on 25 January 2015, 31 January 2015, 19 February 2015, 23 February 2015 and 30 March 2018 - without any apparent difficulty.[43] When shown the 25 January 2015 footage the plaintiff accepted that, "his knees looked pretty good then." [44]

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41 Exhibit 1 (Doc 3), p 3: Letter dated 4 December 2014 from Dr Vertullo to Dr Hart.

42 Exhibit 13.

43 Exhibit 14. The evidence about when the stunt posted on 30 March 2018 was performed by the plaintiff was unclear. But nothing turns on this.

44 Transcript 1-91, l 27.

[50] On 7 February 2015 the plaintiff "flipped a 40-foot gap" and "nailed it."[45]

[51] There was no explanation about why the plaintiff did not return to stunt training in December 2014. There was no evidence of the plaintiff was reporting any real issue with his right leg or knee at the end of December 2014 or early 2015. The contemporaneous records show that it was his left knee that the plaintiff was complaining of in the early part of 2015. For example, in January 2015 he reported left knee tightness with riding. On 12 March 2015, he experienced left calf tightness which started behind the knee and then spread down.[46]

[52] It follows that I am not satisfied on the evidence that there was any delay to the plaintiff's return to stunt practice because of any injury to his right leg.

Plaintiff's expected recovery time and return to work after March 2014 operation

[53] The plaintiff returned to his employment with Showtime FMX on 16 February 2015. The plaintiff's contended at trial that but for the accident he expected to be back at work at some point well prior to this date.

[54] In an Instagram post on 26 March 2014, the plaintiff stated that he had injured his knee and "was looking at 11 months off the bike."[47] But at trial, the plaintiff refused to accept that this is what he was told by the doctors at the time or what he thought his recovery time would be. His evidence was that the doctors would "usually" say six to 12 months recovery but he expected he would recover from a knee reconstruction in 5 months (about the same as for a shoulder reconstruction). The plaintiff said that whilst a doctor might say there would be an 11 month recovery period "but then, with our sport, you'd, sort of, you don't, exactly, go on what the doctor says."[48] He otherwise explained away the reference to an 11 month recovery period in his Instagram post as "exaggerating the truth for social media."[49]

[55] I accept that plaintiff as a resilient man with a real passion for his job and that he was very eager to get back to work as soon as was humanly possible. But for the reason set out below, I am not satisfied that the evidence supports a finding that following his left knee reconstruction, the plaintiff planned to be back at work, performing stunts at any time prior to January/ February 2015.

[56] For a start, in response to the question asked of him by his counsel as to whether he felt, from a felt symptom perspective, ready to return to work at the time of the accident [September 2014], the plaintiff said "yeah, I was pretty close. Yep." He did not say what he meant by 'pretty close.' Under cross examination the plaintiff maintained that he had intended to go back to work before February 2015. But again

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45 Exhibit 21.
46 Exhibit 2 (Doc C6), pp 398 & 502.
47 Exhibit 7, p 1.
48 Transcript 1-81, l 24.
49 Transcript 1-80, l 32.

he did not say when this was. In my view the plaintiff's answers on this issue were vague and unhelpful – and most crucially inconsistent with other objective evidence which I accept.

[57] First, the plaintiff underwent physiotherapy and rehabilitation exercises after this knee operation. The records from the Gold Coast physiotherapist and Sports Health show that in a consultation with his physiotherapist on 16 April 2014, the plaintiff stated that he had been told by the doctors that it would be 11 or 12 months before he could get back to jumping – or performing.[50] The plaintiff accepted that he was continuing to see the physiotherapist and his surgeon, Dr Vertullo, about his left knee throughout 2014. It is impossible in my view for the plaintiff to have held any realistic or reasonable view that he would be back after 5 months. For example, in early August 2014 the evidence shows that the plaintiff saw Dr Vertullo as he was experiencing considerable swelling around his left knee and Dr Vertullo considered that the plaintiff was unable to return to work.

[58] Secondly, on 15 September 2014, the plaintiff posted that "on a good note it's the half way mark for my recovery."[51] The plaintiff fobbed this off as "just another social media thing".[52] The plaintiff also attempted to explain this post on the basis that all of his mates who had undergone knee reconstructions were usually back on the bike within five to six months. I reject the plaintiff's explanations are a satisfactory answer to his post. The fact was at that point, the plaintiff was a week or so away from the six-month mark since his surgery. If he was not far off recovery, it is logical and reasonable to assume as I do that the plaintiff would have said so on his post – not that he still had a number of months to go. As set out above, when the plaintiff saw Dr Vertullo in late September 2014, he reported ongoing and apparently serious issues with his left knee.

[59] Thirdly, on 11 October 2014, the plaintiff was clearly still rehabilitating his left knee and did not consider it to have fully healed (despite the accident having occurred by this time) because on that date, he posted "Can't wait till [sic] both of my legs are better" to start riding "a new toy" (a mountain bike) he had purchased.[53] He also posted on that day that he had "2 farked [sic] legs."

[60] Fourthly, on 26 October 2014 the plaintiff posted that he would not be back at work until February.[54] This post again was after the accident but it is instructive that in early October Dr Vertullo had opined that the plaintiff needed further physiotherapy on his left knee and that he was still uncertain when it would be fully resolved. This post is consistent with the insurance claim form signed by Dr Vertullo on 29 October 2014, which provided that: the plaintiff was recovering from an ACL and

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50 Exhibit 2 (Doc C3), p 227.
51 Exhibit 8.
52 Transcript 1-58, l 33.
53 Exhibit 9.
54 Exhibit 10A.

meniscal repair surgery; was improving as his rehabilitation continued; was unable to ride a bike at a competitive level; and expected to be able to return to his duties in February 2015.[55] Dr Vertullo signed identical forms to the same effect on 20 November 2014 and 6 January 2015.[56] I reject the plaintiff's submission that the weight of these documents is somehow diminished because the forms were completed by Dr Vertullo's secretary and merely signed off by him. His evidence was that he signed the forms after agreeing with what his secretary had written out.[57]

[61] Fifthly, whilst the plaintiff said there was work in Sydney in January, this evidence was vague and speculative. Mr Reid said that November and December were normally very quiet and "January can be quiet sometimes."[58] This evidence which I accept is consistent with the plaintiff's evidence that November to February were quieter months for stunt performers. So, as a matter of common sense it is unlikely that the plaintiff would have been aiming to return to work during these months.

[62] Finally, the plaintiff also relied on his worker compensation claim being finalised in November 2014.[59] But I reject the submission that the Notice of Assessment document supports the contention that, but for the accident, the plaintiff would have returned to work prior to February 2015. After an objection to the tender of this document on the basis of relevance, was made by counsel for the defendants, it was "disavowed" by the plaintiff's counsel as a medical document. The objection was withdrawn after its only relevance was stated to be "the point in time the plaintiff's workers' compensation claim was closed."[60] I am unable to speculate why the plaintiff's claim was closed. In these circumstances, I find that this document of little if any weight on this issue.

[63] Of more relevance is the Workers Compensation Medical Certificate dated 18 February 2015.[61] This form has Dr Vertullo's stamp on it and states that the plaintiff is able to return to normal duties from 23 February 2015. The plaintiff submitted this document is of little weight because: Dr Vertullo had no record of examining plaintiff on the day; the signing box has the name of Dr David Hart on it; and the diagnosis of the form is of an "acute knee injury" with no distinction as to whether the knee injury which is the subject of the certificate is the left knee or the right knee.

[64] This submission is rejected for a number of reasons. First, whilst Dr Vertullo did not have the document in front of him when he gave evidence by telephone, there was no suggestion the document was a forgery and the signature on the form appears to

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55 Exhibit 2 (Doc A6), pp 22-24.
56 Exhibit 2 (Doc A7 & A8), pp 25-27.
57 Transcript 1-60, ll 17-18.
58 Transcript 2-42, ll 17-18.
59 Exhibit 4: Notice of Assessment dated 24 November 2014.
60 Transcript 1-40, l 18.
61 Exhibit 2 (Doc A9), p 28.

be identical to the signature on the insurance claims forms signed by Dr Vertullo referred to in paragraph [58] above. Secondly, it is understandable that Dr Harts name is typed on the form given he was the plaintiff's GP but more relevantly, the only signature on the form appears to be Dr Vertullo's as it is identical to the letters he sent to Dr Hart (and Dr Vertullo's stamp appears beside this signature). Thirdly the reference to acute knee injury is made in the context that the plaintiff was first seen for that injury on 18 March 2014, so the form could only be referring to the left knee injury that Dr Vertullo was treating. It was also the only knee injury subject to a workers' compensation claim at that time – the right knee injury was not of course sustained during the course of the plaintiff's employment.

[65] It follows and I find that:

(a) After his left knee reconstruction in March 2014, the plaintiff was not planning to return to work until early around February 2015; and

(b) The plaintiff was on track at the time of the accident to return to work in February 2015; and

(c) The accident [on 20 September 2014] did not delay the plaintiff's stunt practice in December 2014/ January 2014 prior to his return to work; and

(d) The accident did not delay the plaintiff's return to work in February 2015.

When and why did the plaintiff lose his role as lead rider for Show Time FMX?

[66] When the plaintiff returned to his employment with Showtime FMX in February 2015 he did not return as the lead rider but rather as a third rider.

[67] The plaintiff submitted that the decision by Mr Reid to permanently replace the plaintiff with Mr Marshall was made at the beginning of 2016 and occurred as a result of the plaintiff having suffered limitations to his training and performing as result of the pain he was experiencing in his right knee. [62] But this submission was contrary to the opening of the plaintiff's case which was "[b]ecause the plaintiff was unable to perform all of his duties, in early 2015 Showtime FMX promoted another rider to the plaintiff's role as lead rider and the plaintiff was demoted to another role."

[68] The plaintiff opened Mr Reid's evidence as follows:[63]

> "Mr Reid will say that as a result of the prolonging of the plaintiff's ability to return to his duties, he felt duty-bound to allow the then third rider, one Robbie Marshall, who had been covering for Mr Saul since the March incident - he felt by the early part of 2015 obliged to make that a permanent arrangement."

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62 Submissions of the Plaintiff at [99].

63 Transcript 1-32, ll 43-48.

[69] These articulations of the plaintiff' case differ from that contained in the plaintiff's statement of loss and damage dated 5 July 2018 which sets out the plaintiff's case somewhat opaquely in my view as follows:[64]

> "As a result of the injuries the sustained on 20 September 2014, the Plaintiff was unable to return to work until mid-January 2015 with his first show taking place at the end of February 2015. As a result, the Plaintiff was disadvantaged when negotiating his contract with his employer. The plaintiff's employer also noticed a decrease in the Plaintiff's performance since the subject accident. The Plaintiff's employer was unable to offer the Plaintiff a full-time position in 2016."

[70] It follows that I found the plaintiff's case on this issue confusing.

[71] The defendants submitted that the decision to replace the plaintiff with Mr Marshall was made in early 2015 and that there is no basis for a finding that it was the right leg injury (as opposed to anything else) which lead to the plaintiff losing his position as a lead rider.[65]

[72] The plaintiff also submitted that the defendants have not shown that there was any other reason for the plaintiff losing his lead rider status other than the limitations that the pain from his right knee caused him in training and performing.[66] I accept the defendants' submission that the latter submission incorrectly reverses the onus under s11 and s12 of the *Civil Liability Act 2003* (Qld). It follows that the plaintiff must show that "but for" the injury sustained by the plaintiff in the accident he would have remained in the lead rider position.

[73] The resolution of this question requires a careful and objective analysis of all of the evidence.

The plaintiff's evidence

[74] During the course of his evidence in chief at trial, the plaintiff said that after his surgery in September 2014, he was unable to return to performing until he could ride again. His recollection was the he started riding again in "February [2015] maybe" and that he started performing at the Sydney Royal Easter Show at the end of March/ beginning of April. [67] The plaintiff's Instagram posts show him riding in mid-January 2015 and that he was in Canberra preparing to ride with the Showtime team on 27 February 2015.[68] Under cross examination the plaintiff accepted, after being shown his PAYG slip for the first six months of 2015 that he was back performing for Showtime FMX on 16 February 2015.

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64 MFI A.
65 Outline of Defendant's Submissions [64].
66 Submissions of the Plaintiff at [110].
67 Transcript 1-68, ll 32-40.
68 Exhibits 13,14, and 23.

[75] At first, the plaintiff said he was not able to perform to his previous level as "obviously [he] had a lot of time off the bike and I wasn't as fit as I usually was and just needed to catch up on a lot of – a lot of my basic skills,"[69] but as time passed, he got his "tricks" back. The plaintiff did not say when this was. Mr Reid said the plaintiff's performances were not "back to his old self" throughout 2015 and 2016.[70] But he did not elaborate on this at all. In the middle of 2016, the plaintiff attempted "the world's first no handed front flip."[71] Although the plaintiff crashed and injured his left shoulder in the process of this stunt, it is reasonable to infer and I do so, that by this time the plaintiff was well back to his old tricks – and more.

[76] There was also no evidence about what tricks the plaintiff was unable to do as result of any injury let alone the injury to his left knee. There was also no evidence from the plaintiff about issues to his right knee that were impeding his performances. But it is instructive to recall that the plaintiff's case is not that he can no longer perform particular stunts, it is as articulated by his counsel during the post-trial submissions that "he cannot train as much and he can't ride for as long… [b]ecause he is in pain".[72]

[77] As discussed in more detail below, I accept the plaintiff's evidence that he has experienced right knee pain since the accident but relevantly in relation to the issue of losing his role as lead rider, it is instructive that he only first noticed this pain when he started weight bearing and walking properly on his right leg at around the six week mark. He gave no evidence about the extent of this pain nor how it impacted on his ability to ride at that point in time. There was no evidence that the plaintiff told Mr Reid or anyone else most relevantly any doctor or physiotherapist about any significant right leg or knee pain leading up to his return on the bike in early February 2015. This is not surprising given that the plaintiff's evidence was that it only really flared up at the one-year mark when the rod and nails started giving him "a bit of trouble".[73]

[78] It is instructive to recall the effect of my findings at paragraph 63 is that: the period of time the plaintiff had off work between March 2014 and February 2015 was as a result of the operation on his left knee in March 2014; and the accident did not impact on this timing.

[79] The plaintiff was asked in his evidence in chief whether he was able to maintain his employment with Showtime FMX as the lead rider. His response was "No. I got – Robbie Marshall took the number one spot from me after, because Gary had to make a decision to put another rider on while I was out injured".[74]

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69 Transcript 1-68, ll 44-46.
70 Transcript 2-46, ll 30-39.
71 Exhibit 29A.
72 Transcript 3-29, ll 9-12.
73 Transcript 1-42, l 43.
74 Transcript 1-69, ll 5-10.

[80] Despite the ambiguity to the question in terms of timing, the rational inference to be drawn from this answer is that the plaintiff was referring to a decision made by Mr Reid before the plaintiff returned to work in February 2015.

[81] This finding is supported by the following matters:

(a) First, around 11 February 2015, the plaintiff received a letter of offer from Mr Reid as director of ShowTime FMX. [75] The plaintiff described this letter as his contract for the third rider for the team "after I had come back and was able to ride."[76] Amongst other things, this letter offered the plaintiff a minimum of 50 days of travelling shows, stating that the minimum amount he would receive was $50,000pa plus super. The letter required confirmation in writing (via) email. There was no evidence of a written response to this letter but the plaintiff said and I accept, that he accepted the position as third rider because, "I kind of – kind of had to. It was either that or not ride for the team."[77]

(b) Secondly, the dearth of evidence to support a finding that the decision or a final decision to replace the plaintiff with Mr Marshall was made in 2016. For example, there was no evidence of any discussions between the plaintiff and Mr Reid about: the 2015 Contract; or the contract being a being a temporary arrangement; or the plaintiff's riding being below par in 2016; or of there being a final decision to replace the plaintiff in 2016.

Evidence of Mr Reid

[82] Mr Reid was an honest but not a particularly reliable witness. This is not surprising given that at trial he was being asked to recall events that occurred over 4 and a half years earlier. Mr Reid has known the plaintiff for a long time and was clearly supportive of him. His lack of recollection lead to him becoming obviously frustrated and defensive, particularly under cross examination. Again, this is not surprising given the passage of time and that lay witnesses can often find the legal process daunting and perplexing. Overall, I found Mr Reid's evidence rather general and non-specific and therefore not overly helpful in resolving this issue. But I have accepted his evidence to the extent it is corroborated by documentary evidence or other evidence I accept.

[83] Mr Reid recalled the plaintiff injuring his left knee in March 2014 and that he made a WorkCover claim in relation to this injury. His evidence was that "[i]t was a pretty common injury. So, we- we sort of knew the recovery time. And we just used Robbie and some other fill-in riders to fill in for Kain while he was off."[78] He did

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75 Exhibit 1 (Doc 15), p 61.
76 Transcript 1-69, ll 26-27.
77 Transcript 1-69, ll 38-39.
78 Transcript 2-44, ll 40-42.

not say what the expected recovery time was. But he said that it was expected that when he returned from his recovery, the plaintiff would go back to his "normal full-time position as lead rider."[79] I accept that at the time the plaintiff went off to have his operation in March 2014 both the plaintiff and Mr Reid anticipated that the plaintiff would return to his role as lead rider. But as discussed below – things changed, most crucially, Mr Marshall who had been filling in for the plaintiff wanted certainty.

[84] Mr Reid understood that the plaintiff's left knee injury was progressing really well in mid-September. He was adamant and I accept that the plaintiff "trained very hard to get back and did everything he could to get back to-to full riding ability."[80] There was no specific evidence from Mr Reid about when (prior to the accident) he was expecting the plaintiff to be returning to work or exactly what he was being told by the plaintiff. Mr Reid also said that when he became aware of the accident in September 2014, he "was very disappointed that the plaintiff would not be back as soon as we wanted him back."[81] He also said that he did not know how long before the plaintiff would be back (after the accident) – but that he knew the accident would set the plaintiff back "a while."[82] He did not elaborate on how long this set back was or exactly what information he had been given.

[85] But Mr Reid did say that he received updates from WorkCover [about the left knee injury]. I accept that as the plaintiff's employer, he would have received such information. Mr Reid was not taken to the WorkCover documents in evidence but as discussed above, these records show that the plaintiff was not cleared to return to stunt (performing following his operation in March 2014), until mid-February 2015. It follows that for this reason and for others discussed in paragraphs [51] to [63] above, there was no reasonable basis for Mr Reid to have had the view during 2014 that the plaintiff would be returning prior to February 2015.

[86] He could not recall exactly when the plaintiff started riding again but recalled that he performed for the team at the Royal Canberra Show at the end of February in 2015. Mr Reid was taken to the letter of offer of 11 February 2015.[83] He said that he knew the plaintiff was "off with his broken leg" but he wanted to give him some sort of security. This evidence is confusing given that as discussed above, the plaintiff's break had healed at this point and Mr Reid accepted that the plaintiff was back training in mid-January 2015.[84]

[87] Mr Reid said he could not offer the plaintiff the lead role because he was struggling with coming back on the bike. But he offered the plaintiff the third rider role, to

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79 Transcript 2-44, ll 44-45.
80 Transcript 2-45, ll 6-7.
81 Transcript 2-45, ll 36-39.
82 Transcript 2-45, l 41.
83 Exhibit 1 (Doc 15), p 61.
84 Transcript 2-60, l 11.

give him a bit more time to recover and get back bike-fit and healthy. It is instructive to observe at this point that there was no evidence of any conversations or negotiations between the plaintiff and Mr Reid at the time the letter of offer was received and accepted by the plaintiff. For the reasons set out below, I reject Mr Reid's evidence and the plaintiff's case that it was the injuries caused by the accident that lead to the plaintiff losing his position as lead rider.

[88] First, because as I have found, after his left knee operation in March 2014, the plaintiff was not expected to return work until at least early February 2015 and he was not cleared to return to stunt riding following the March 2014 surgery until this time. Further, whilst I accept the plaintiff's evidence that as he had been off the bike for so long he took some (unspecified) period of time to get some of his old tricks back, as at the beginning of 2015, there was no evidence of the plaintiff struggling to get back to form due to injuries suffered in the accident.

[89] Secondly, it was opened by the plaintiff that the accident prolonged the plaintiff's return to his duties and that in early 2015, Mr Reid felt duty bound to make Mr Marshall's arrangement a permanent one. But during the course of his evidence Mr Reid said he did not believe the plaintiff was back to 100 percent of his riding in 2016 and that he was complaining of his leg being sore, so he made the decision to keep the plaintiff as the third rider and he made Mr Marshall the lead rider. I reject the plaintiff's submission that it follows that Mr Reid made a permanent decision in 2016 to keep Robbie Marshall on as the lead rider. This evidence is not only inconsistent with the opening of the plaintiff's case, but, most crucially, is not supported by other evidence which I accept, including: the evidence of the plaintiff that the decision was made in 2015; the fact that, if the decision in 2015 was only temporary and there was a review a year later, it could be expected the plaintiff would have given some evidence about this and he did not do so; and the letter of offer in February 2015.

[90] I also do not accept Mr Reid's evidence that the plaintiff was complaining about his leg at the beginning of 2016. Apart from being vague, in that it does not specifically refer to his right knee, it is not corroborated by the evidence of the plaintiff (there was no evidence that the plaintiff was complaining to Mr Reid or to anyone else about pain in his right leg) or any medical or physiotherapy records during 2015 into early 2016. The evidence shows that the plaintiff saw the physiotherapist in February 2015 about bilateral shoulder pain, in March 2015 for calf tightness; April 2015 for neck and lower back pain and July 2015 for bilateral shoulder pain. He also was treated on seven occasions between 16 October 2015 and 9 May 2016 for groin strain, shoulder pain and neck pain. It is highly unlikely in my view that if the plaintiff was complaining to Mr Reid about his right leg that he would not have also complained about it contemporaneously to the physiotherapist.

[91] In my view the only plausible conclusion as to why there are no records of complaints of right leg or knee pain by the plaintiff during 2015 and well into 2016

is because the plaintiff was not experiencing pain or any significant pain in this region over this time. This finding is consistent with the plaintiff's evidence which I accept that the pain in his right knee increased considerably when the nail was removed in November 2016.

[92] Mr Reid was then asked why he made the decision [on the premise it was made in 2016] to keep Mr Marshall in the lead role and the plaintiff as the third rider and he said relevantly:[85]

> "Robbie had been filling in for Kain. He needed to know where he was going. He needed the security for himself and his family. He approached me. He done a really good job filling in. To be honest, I wasn't confident that – in Kain returning to 100 per cent, so I had to offer the lead rider role to Robbie."

[93] There was no evidence of any conversation between the plaintiff and Mr Reid about any decision in 2016. I am not satisfied that such a decision was made in 2016. In my view the premise of the question confused Mr Reid and the decision to replace the plaintiff with Mr Marshall was on the evidence most likely to have been made by Mr Reid in early 2015. There was no evidence from Mr Marshall.

[94] I am also not satisfied on the evidence that the decision was made by Mr Reid because of the accident. The evidence which I accept was that the plaintiff had recovered from his accident injuries and that he felt some minor pain in his right knee. Any concerns that Mr Reid had about the plaintiff returning to form could only have arisen as a result of his lengthy time off work – which was unrelated to the accident. There was no evidence of the date Mr Marshall approached Mr Reid but given Mr Marshall had been filling in for nearly a year, and the plaintiff was due to return in February 2015 it is reasonable to assume that it was at some point prior to February 2015 that Mr Marshall approached Mr Reid. The evidence was that Mr Marshall had filled in for the plaintiff for two of the last three busy seasons [as discussed above at [34], the plaintiff was disabled with a shoulder injury between 14 March 2012 and 14 September 2012]. This gives some context then to the letter of 11 February 2015. Mr Reid considered that Mr Marshall had done a really good job filling in for the plaintiff. It is most plausible and reasonable in these circumstances that Mr Reid felt a sense of loyalty towards Mr Marshall.

[95] On the above analysis it follows and I find that:

(a) The plaintiff was replaced as lead rider by Mr Marshall in February 2015; and

(b) The decision to replace Mr Marshall was not due to the accident; and

(c) The plaintiff was not disadvantaged when negotiating his contract in 2015 as a result of the accident.

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85 Transcript 2-50, ll 20-23.

[96] The onus rests with the plaintiff to prove that but for the injuries he suffered in the accident he would have returned to his role as lead rider in February 2015. It follows from the above analysis that the plaintiff has not satisfied this onus.

What is the extent of the pain from the plaintiff's diagnosed condition of chondromalacia patellae to his right knee?

[97] The plaintiff's case is that it is his inability to train and ride as much as he used to be able to due to the pain from his right knee that has caused him to suffer loss. But it is not easily discerned from this evidence when this pain impediment first affected the plaintiff's ability to train and ride.

[98] The plaintiff's evidence which I accept was that after the accident, the injury to his right lower leg healed at the six to eight-week mark (so by mid-November 2014) and he has not experienced any pain in this region since that time. He just took painkillers for the time it was healing. He was unable to mobilise on long distances without the aid of crutches for about six-weeks and he only needed crutches for short distances for three to four weeks.

[99] The plaintiff's evidence about his right knee pain in 2014 to 2016 was vague and unspecific. He "thought" that he would have started noticing it when he started walking on it properly [in late October 2014]. He also said that about the year mark [September 2015], the nails were giving him a bit of trouble.[86]

[100] Counsel for the plaintiff did his best to try and draw out more detail from the plaintiff. During the course of the plaintiff's evidence in chief, the following exchange took place between the plaintiff and his counsel:

> Counsel: You mentioned that the pain in your knee started after you started weight bearing and at about the 12-month mark, you really noticed it. And you've also told her Honour that the pain has gotten much, much worse. And you gave evidence that now, when your pain's bad, it's a seven or eight out of 10 on a visual analogue scale and sitting there in the witness box, it was a two. Can you give her Honour an idea of – before the pain got to the level that you've already described – that seven to eight when it's bad and the two sitting in the witness box – what was your bad pain earlier on? So between when you first started to notice knee pain and when it got to the point you've already given evidence about?-
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> **Plaintiff: Like I said, it's definitely gotten worse over the years. But when the – when the rod was in it – before the rod was getting taken out, I'd guess it was probably – like, at the highest, maybe a five – five or a six on a – on a bad day. But ever since**

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86 Transcript 1-42, ll 40-44.

that rod's been taken out, it's just been getting worse. [Emphasis added]

[101] The was little if any evidence of the plaintiff experiencing any noticeable or debilitating right knee pain during 2015 and well into 2016. Indeed, the evidence suggest that the plaintiff was not experiencing any significant problems with his right knee over this period. For example:

(a) Under cross examination the plaintiff was shown a photo he had posted on Instagram on 15 April 2015 showing him kicking a punching bag with his right leg.[87] The plaintiff was defensive when it was suggested to him that there was nothing wrong with his right knee at this time – responding that it could have been a show for social media. But ultimately when it was suggested to him that he had very little difficulty with his right leg or more particularly his right knee in April 2015 he said he was not sure.[88]

(b) A photograph posted on 26 November 2015 shows the plaintiff hanging off his motorbike with the bike above him in the air and the comment: "I stopped doing these years ago because of shit shoulders, but I thought I'd bring them back."[89]

(c) As discussed earlier, in May 2016 the plaintiff attempted the world's first no handed front flip – which did not go to plan.[90]

[102] The plaintiff required two operations on his right knee to try and get the rod and screws out. But he did not say these were removed due to pain but rather "[b]ecause I always get all my metal work taken out after-after a year's time to-in case I crash again and bend it- bend the rod in there or whatever."[91]

[103] On 11 February 2016 Dr Vertullo operated on the plaintiff's right leg to try and remove the tibial nail hardware. Dr Vertullo considered that had been an unusual insertion through the top of the knee rather than the front of the knee. He was unable to remove the tibial locking nail as the locking screws were deeply buried. On 16 November 2016, Dr Vertullo operated on the left leg and was able to remove the tibial nail. Contrary to the Statement of Loss and Damage, the plaintiff did not miss out on any work as a result of these surgeries.[92]

[104] Dr Vertullo saw the plaintiff in his rooms on 28 November 2016 and reported to Dr Hart as follows:[93]

> "He is doing really well post-surgery. The knee looks excellent. I have just explained to him about getting the nail out, I note that his anterior horn and his medial meniscus was lacking a little bit in the

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87 Exhibit 27.
88 Transcript 2-19, l 7.
89 Exhibit 28.
90 Exhibit 29.
91 Transcript 1-41, ll 41-43.
92 Amended Statement of Loss and Damage at (iii), page 6.
93 Exhibit 2 (Doc A10), p29.

> attachment to the underlying bone. I have reattached it quite easily with an anchor and this shouldn't cause a problem.
> I don't need to see him anymore but if he has any problems, he will give us a call. He can go back to riding, training and performing.
> In addition, he showed me a video on his left knee of something popping on the side of his knee. It is probably a little meniscal parrot beak tear that pops in and out of the lateral recess. If it isn't bothering him we can safely leave it alone, but if it is bothering him then we can do an arthroscopy to fix it, he will let us know if he wants to have an arthroscopy done and have it resected in a couple of weeks when he feels up to it."

[105] In March 2017 the plaintiff complained to his physiotherapist about his right knee "catching."[94] He was referred for an MRI on his right knee and this was carried out in April 2017. This report notes that the plaintiff is suffering from ongoing pain and diagnoses "moderate patellofemoral chondromalacia."[95]

[106] Dr Vertullo saw the plaintiff again on 3 May 2017 and reported to Dr Hart at that time that the plaintiff:[96]

> "Has a **little bit of aching and pain around his right knee** where I took out his tibial nail. This is slowly settling. MRI shows that the meniscal root I repaired is healing so I have suggested this this should just settle over time and I will see him as needed". **[Emphasis added].**

[107] Apart from these references to right knee pain nothing further appears in the medical records about the plaintiff's right knee. This is despite the plaintiff seeking treatment for his neck, lower back, right chest, thoracic spine; discogenic lower back pain, tennis elbow and right elbow since May 2017.[97]

[108] On balance I am satisfied that that the plaintiff:

(a) Did not suffer right knee pain prior to the accident;
(b) Experienced some very minor pain in his right knee (for a short period) when he started weight bearing about one month to 6 weeks after the accident;
(c) Experienced an increase in pain to his right knee – though not significant pain at around the one-year post-accident mark; and
(d) Continued to experience pain in his right knee after the nail was removed in November 2016 – though again not significant pain.

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94 Exhibit 2 (Doc C6), p 411.
95 Exhibit 1 (Doc 8), pp 25-26.
96 Exhibit 2 (Doc A11), p 30.
97 Outline of Defendant's Submissions at [72] and Schedule A to these submissions; medical chronology prepared by the defendants' legal representatives and Marked For Identification F.

(e) Has continued to experience mild to moderate aching and pain around his right knee from May 2017.

Consequences of returning as a third rider

[109] As set out above, as third rider the plaintiff was reduced to a minimum of 50 shows a year and he also lost the chance to do maintenance work in the worship. The plaintiff said that Mr Marshall had his truck license, so he drove the truck "a lot of shows". But the plaintiff did not give any evidence that he held a current truck license – or that he had previously driven trucks to shows.[98]

[110] Whilst contracting as third rider with Showtime FMX the plaintiff was able to generate income from riding with some other motorcycle stunt companies including a company called Nitro Circus.[99] The 2018 contract with Nitro Circus included a term that the plaintiff perform all of his "latest and best FMX tricks on a motorcycle but excluding any tricks from the "Next Level ramp".

[111] He also supplemented his income by carrying out labouring work for a mate (Jay Darragh) who ran a carpentry/ building business. This work entailed putting up frames for houses and roof installation.[100] After the accident, the plaintiff worked for Mr Darragh from around 5 February 2018 until 28 February 2018. He then was away performance riding. He then returned to work with Mr Darragh in April 2018 and was employed sporadically by him until 10 May 2018. The plaintiff said he found "climbing up ladders and lifting heavy things and all over the uneven ground and all that kind of stuff made it difficult with the - with my knee."[101] The plaintiff described climbing up the wall or a ladder and his knee would "kind of give way on him a little bit. And a couple of times I've – I hit the ground because of it."[102] He said he pushed through to see how he would go but "well, it's let me know I can't really do that for a career after-after motor-motorbikes."[103]

[112] The plaintiff accepted he did not seek any physiotherapy treatment for his knee whilst working with Mr Darragh.[104]

[113] Mr Darragh gave evidence by telephone at trial. He has known the plaintiff for about 15 years and the plaintiff had undertaken carpentry type work for him on and off for about 10 years previously. Mr Darragh did not go into detail but the effect of his evidence was that since the accident the plaintiff has not been able to get up on

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98 Transcript 1-70, ll 1-5.

99 Exhibit 2 (Doc D1), pp 517 and 536 show two written contracts between the plaintiff and this company dated 2016 and 2018. Only the 2018 contract is executed, but the plaintiff accepted he would have signed both contracts. Transcript 2-11.

100 Transcript 1-74, ll 38-47 – 1-75, ll 1-15.

101 Transcript 1-75, ll 5-10.

102 Transcript 1-75, ll 11-12.

103 Transcript 1-75, ll 13-15.

104 Transcript 2-32, ll 35-37.

the roof "and stuff like that" and that he had to make the plaintiff's job a lot easier by giving him ground duties.[105]

[114] Relevantly, he did not observe the plaintiff have any difficult doing any other aspect of his job apart from noticing his knee (he thought it was his right knee) gave way a couple of times.[106] Under cross examination, Mr Darragh conceded that he did not see the plaintiff's knee fail but recalled the plaintiff was complaining about his knee and being told by the plaintiff that his knee had given way.[107]

[115] Overall, I did not find Mr Darragh evidence particularly helpful as it was vague and unspecific. His evidence about the plaintiff's knee collapsing on site was unconvincing. But on balance I accept his evidence that he made some restrictions to the plaintiff working at heights due to the plaintiff having some physical problems with his knee. I also accept that the plaintiff made some complaints about his right knee to Mr Darragh. Otherwise I find that Mr Darragh's evidence did not corroborate the plaintiff's evidence of the extent of the pain associated with his right knee nor of any significant difficulties kneeling and squatting due to this knee.

[116] The plaintiff accepted that he was currently not working full time for Showtime FMX and that he could get another job, such as taxi driving if "you're into it."[108]

[117] His explanation for why he has not done this is a reasonable one which I accept. It is uncontroversial that a career as a stunt rider is a specialised and relatively short lived one. Not recommended for the fearful or faint hearted. The effect of the plaintiff's evidence was that he spent his spare time training as much as he could and that he liked to stay fit. The plaintiff's said and I accept that whether you are a lead or third rider you still need to train for the same amount of time, and you did your training when you were not needed for a show. The distinction as emerged during the cross examination of the plaintiff was that as lead rider you were able to do much of your training in work hours and so you were effectively paid to train but as third rider you usually did your training in your own time – so you were not paid to train.[109]

[118] Given the extreme stunts the plaintiff is required to perform as part of his role as a stunt rider and given how dangerous some of the stunts obviously are to perform, it is understandable and in my view a necessary "tool of trade" that the plaintiff work on his fitness as much as possible – while he can.

Other surgeries and injuries after the accident

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105 Transcript 2-77, ll 33-36; 1-78, l 1-5.
106 Transcript 2-77, ll 38-46; 2-78, ll 1-35.
107 Transcript 2-78, ll 5-10.
108 Transcript 2-29, ll 15-22.
109 Transcript 2-28.

[119] On 3 May 2016 (between the two operations on his right knee), the plaintiff attempted the world's first no-handed front flip at a Nitro Circus show in Brisbane. While doing so, he crashed and injured his left shoulder.[110] Shortly afterwards the plaintiff went on a European tour in again with Nitro Circus and further dislocated his shoulder. He returned from overseas in mid-July 2016 and was unable to return to work for the following nine months. Dr Hammond performed reconstruction surgery on the plaintiff's left shoulder on 4 October 2016 and returned to performing for the Sydney Royal Show in April 2017.[111]

[120] In January 2019, the plaintiff encountered problems with his left elbow. He described it as tennis elbow and conceded that he made a claim under his income protection policy which was rejected. He rejected the contention that he made this claim because he was off work. He said that he could work "a little bit" but not to the "the best of my ability."[112] He was not sure why he made a claim if he could still work but put his uncertainty down to having "a bad memory with everything, sorry."[113] The plaintiff was definite however that his bad memory did not extend to what may have been the condition of his right knee over the last few years.[114]

[121] But as discussed at paragraphs [95]-[106] above and further at paragraphs [120] to [129] below, I do not accept the plaintiff's evidence about the extent and impact of his right knee injury on his ability to train and ride.

What impact if any does the condition of chondromalacia patellae to the plaintiff's right knee have on his ability to perform his work as a stuntman?

[122] Prior to the accident the plaintiff intended to work as a motorcycle stunt rider for as long as his body would let him. Realistically, he accepted this was probably until his mid-40s. When asked how long he thought he could now keep going the plaintiff said, "[i]t's hard to say. It's definitely put a - put a dampener on it, but, like, I will - I will keep [going] as long as my body will let me, I guess."[115]

[123] The plaintiff said he previously trained three times a day and performed stunts most days. This evidence is general, but I accept that the plaintiff was dedicated to his profession and trained and rode as much as could when he was not injured. His

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110 Transcript 1-70, ll 30-33.

111 Transcript 1-71, ll 25-32. Dr G. Nutting (the defendant's expert) also signed a conference note on 18 June 2019 which is Exhibit 2 (Doc A4), pp 17-18. This note relates to a review of Dr Hammonds arthroscopic stabilisation procedure on the plaintiff's left shoulder in March 2012 and Dr Hammonds subsequent attendances and procedures on the plaintiff's shoulder in 2016.

112 Transcript 2-28, ll 40-44.

113 Transcript 2-28, l 1.

114 Transcript 2-28, ll 3-5.

115 Transcript 1-74, ll 24-35.

evidence at trial was that he is now flat out training once a day and he rides as "half as much" as he used to.[116] It was not clear on the evidence when the reduction in training and riding commenced. It is also not apparent how in real terms the plaintiff's riding has been reduced. There was no evidence that he could not perform his role as third rider, nor any evidence that he knocked back stunt performing roles as a result of any right knee pain. There is also no evidence that the plaintiff is unable to perform particular stunts as a result of any right knee pain. At its highest, the evidence is that the pain to the plaintiff's right knee has caused him to be able to train less and this will have an impact on his ability to perform stunts to the same level into the future.

[124] At trial, the plaintiff described movements such as squatting and stairs, and when he was working with Mr Darragh, climbing ladders, lifting beams and working on uneven ground, caused his right knee pain to get up around the "7/8s."[117] At one point in his evidence in chief he said that his right knee "definitely hurts" while he is riding but he is used to that and he has the suspension to help him out, "[s]o it's pretty much just the training, trying to keep fit" that was the problem. This evidence is difficult to reconcile with his later where he described the overall effect of his right knee pain on his stunt riding as follows:

> "If I ride heaps, yes, but if I - like, sometimes if I ride heaps I've got to - I've got to cut it off halfway through because it - my knee will starting hurting. Like, in - in the past years I could just ride all day and it wouldn't really be a problem, but now it's kind of - it holds me back a lot."[118]

[125] The plaintiff's evidence that his right knee holds him back "a lot" is difficult to reconcile with other evidence.

[126] First, a review of the medical and treatment records in evidence reveals that other than for medical attendances in relation to the removal of the nail in the plaintiff's right knee there is no mention of any ongoing problems with the right plaintiff's knee. The plaintiff's explanation was that he just followed what his physiotherapist had done with his left knee over the years, and so he did a lot of stuff [with his right knee] "on his own at home with a massage roller and little massage balls".[119]

[127] The plaintiff's evidence was that he did not know of any surgical procedures to help alleviate his right knee pain – and that "it was just one of those injuries I'm just going to have to deal with."[120] Other than taking medication the plaintiff said that the only other way to reduce his pain symptoms was to massage his right knee. Apparently, (and inconsistently with his evidence referred to in the preceding

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116 Transcript 1-43, ll 37-39.
117 Transcript 1-42, ll 15-25.
118 Transcript 1-72, ll 25-29.
119 Transcript 2-32, ll 20-45.
120 Transcript 1-72, ll 21-22.

paragraph , the plaintiff spoke to his physiotherapist "about it" and he was shown ways to massage his knee – and this is something he does on a regular basis.[121] I reject this evidence. Aside from being unspecific, it is uncorroborated by any other evidence. In the circumstances of this case it is reasonable to expect some skerrick of independent evidence to corroborate the plaintiff's evidence on this point. The evidence was general and unhelpful in the sense that there was no evidence about when this conversation took place and with whom; how long this daily massage took, or what if any oils or cream were used by the plaintiff; and the extent to which such massaging relieved the pain. There was also a dearth of corroborating evidence. For example:

(a) the plaintiff could not point to a record of any issue about his right knee being raised with his physiotherapist over the years, and given that he did not have to pay for such treatment[122] and that he sought treatment for all sorts of aches and pains such as "tightness' in his left knee and "tightness" or "pinching in his shoulders, the contention that he would not seek assistance for the most devastating injury of all - the injury to his right knee, is simply not plausible; and

(b) whilst I assume that the plaintiff may have already possessed such items because of other injuries, there was also no claim for any oils, massage rollers or massage balls to be used for daily massaging.

[128] Secondly, Instagram posts in more recent years show the plaintiff:

(a) On 20 June 2017, kneeling (on both knees) looking fit and happy (in a group of equally fit individuals) after a "killer training session".[123]

(b) On 29 April 2018, having a "fun weekend" doing "silly shit" on his bike. The photo shows the plaintiff jumping over an aircraft.[124]

(c) On 3 May 2018, is lifting weights and training with a friend – his right knee fully flexed at a 90-degree angle.[125]

(d) On 6 June 2018, at the beach with his dog, and squatting on his right knee (when questioned about this the plaintiff said he was just getting a photo at the time and had trouble when he got up after).[126]

(e) On 7 July 2018, at the top of Castel Hill in Townsville after doing "Saturday morning hill runs with my mates".[127] When challenged about this photo being inconsistent with his case that he can't run, the plaintiff's said "It was more of a walk" and that "it's just exaggerating for social media, I guess".[128] I reject this explanation as it is disingenuous.

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121 Transcript 1-72, ll 17-19.
122 Transcript 2-29, l 35; 2-30, l 1.
123 Exhibit 31.
124 Exhibit 32.
125 Exhibit 33.
126 Exhibit 34; Transcript 2-25, ll 43-45.
127 Exhibit 35.
128 Transcript 2-26, ll 10-26.

(f) On 10 January 2019, doing a handstand on the handlebars of his bike whilst in the air with the comment that it is "[f]irst practice for the year and I learnt a new trick".[129]

(g) On 10 August 2019, again doing a handstand on the handlebars of his bike whilst in the air with a comment from someone at ShowTime FMX saying: "@saulymate always training."[130]

[129] Mrs Karen Porter, the plaintiff's mother who lives in Hervey Bay was called by the plaintiff and gave evidence at trial.[131] I accept the plaintiff's description of her as a nervous and distracted witness.[132] Given that her son had to be taken to hospital due to problems with his ear at the time she gave evidence it is not surprising she presented this way. She said that on the occasions she saw her son (three to four times a year) since the accident, she observed him to have needed medication, but this was not said to be for any particular injury. To the extent she was referring to the plaintiff taking medication for the pain to his right knee, this is not in issue between the parties. Mrs Porter also observed some difficulties with the plaintiff's right leg – but this evidence does not demonstrate any particular problem with the plaintiff's right knee. Mrs Porter also recalled an occasion when the plaintiff rang her in Sydney with a sore leg. But again, there were no specifics. Overall, I did not find Mrs Porter's evidence of much assistance in this case.

[130] I accept the evidence establishes the plaintiff has a high threshold for pain and real determination to get back on his bike. But the plaintiff's case that his right knee is so troublesome that it has impeded his livelihood, yet he has not sought medical assistance to address this pain, is not credible and is rejected. Even accepting that the plaintiff self-treats his right knee at home on a daily basis as he contended and assuming this treatment is effective (a rational inference to draw if he keeps doing it), I accept the defendants' submission that "the logical conclusion is that the problems are not in any way serious as such as to impede the Plaintiff in his activities."[133]

[131] On the above analysis, I am not satisfied that:

(a) The plaintiff is experiencing such a high degree of pain from his right knee as he contends; or

(b) The pain in his right knee is holding the plaintiff back as much as is contended for in this case.

[132] These findings do not mean that I reject the plaintiff's claim that he has been experiencing increasing pain in his right knee over the years since the accident.

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129 Exhibit 36.
130 Exhibit 37.
131 Transcript 2-72 to T 2-75.
132 Submissions of the Plaintiff at [12].
133 Outline of Defendant's Submissions at [14].

[133] The medical specialists agree that the plaintiff now has chondromalacia patellae of the right knee.[134] In layman's terms, the condition was described by Dr Low at trial as "the softening of the cartilage under the kneecap," or "osteoarthritis of the kneecap."[135]

[134] Both Dr Low and Dr Nutting accept that some knee pain is to be expected from this condition. Dr Nutting accepted that in the case of a post-traumatic chondromalacia patellae the process tends to get worse with time.[136] Dr Nutting also accepted that the condition may make it painful for a person to run, hop, climb stairs, squat, kneel or load up the knee. The defendants accept the plaintiff experiences "some pain" but disagree about the level of pain.[137] The defendants accept the plaintiff's special damages claim for the anti-inflammatory medication Celebrex which he said he used occasionally prior to the accident (when he needed it) but now needs to take it "a lot more" for his right knee pain (sometimes daily if he is riding and training).[138]

[135] On balance I am satisfied that the plaintiff suffers from some relatively minor to moderate but persistent right knee pain and that this is likely to continue and become worse into the future. I am also satisfied and find that this pain has, at least in the last few years impended the plaintiff's ability to train as much as he would like and that the pain will be a further impediment to his training in the future.

[136] The question that now arises for my determination is whether the accident caused the condition of chondromalacia patellae. But before addressing this question, it is necessary to address what the defendants submit is a "startling" aspect of the plaintiff's case, namely the unexplained failure of the plaintiff to call his partner.

Jones v Dunkel issue

[137] The defendants submitted that the plaintiff's partner would have been able to throw some light on his "real condition" and that there is no suggestion that his partner was absent or not able to be called.

[138] The plaintiff gave no evidence of having a partner. There references to the plaintiff having a partner whom he lived with, arise from his instructions to the experts engaged by the parties in this proceeding. That is to: Dr Low (who was saw the plaintiff at the request of his solicitors) on 7 March 2017;[139] to Dr Nutting[140] (who saw the plaintiff at the request of the defendants' solicitors) on 6 February 2018 and again to Dr Low on 22 July 2019.[141]

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134 Dr Bruce Low for the plaintiff and Dr Gregory Nutting for the defendants.
135 Transcript 1-101, ll 11-5.
136 Transcript 2-8.
137 Transcript 3-25, ll 38-40.
138 The plaintiff voiced a concern about over use of this medication because "those things can't really be that good for you long-term: Transcript 1-43 l 3.
139 Exhibit 1 (Doc 6), p 7: First Report of Dr Low.
140 Exhibit 2 (Doc A2), p 9.
141 Exhibit 1 (Doc 7), p 16: Second Report of Dr Low.

[139] The defendants submitted that it followed that I should draw a *Jones v Dunkel*[142] inference that the plaintiff's partner's evidence would not have assisted his case and that this strengthens the proposition that there is a little wrong with the plaintiff's right knee. In making this submission, the defendants place much reliance upon the observations of Justice Muir in *Robert Bax & Associates v Cavenhan Pty Ltd*.[143] In *Bax*, Justice Muir considered that a letter that had been put into evidence as part of an agreed bundle of documents and tendered by consent was admissible "for all purposes".

[140] I reject the defendants' submissions on this issue for a number of reasons.

[141] First, the defendants were in possession of these reports prior to trial. They could have cross examined on this issue and chose not to.

[142] Secondly, in my view the letter of instruction considered in the Bax Decision is distinguishable to the situation of a statement made to a doctor during the course of an examination in a personal injuries matter. More relevant to the present case are the facts and the observations of the Court in *Beaven v Wagner Industrial Services Pty Ltd.* [144] In that case, Fraser JA observed that "in most cases, an expert statement of fact asserted by another person is not admissible of the truth of that fact."[145] And Fraser JA also relevantly observed, that ordinarily there is no need for a party to raise any objection to expert reports that contain statements of fact, because the parties proceed on the basis that the expert is required by the rules to set out the facts that he has been told and, it is then incumbent on the party who wishes to rely on the report to prove those facts.[146] In my respectful view there are sound reasons for such an approach. As the court also observed in *Beavan*:[147]

> "To require that counsel take formal objection to such material every time a report is led in evidence creates needless work, consumes valuable court time without any purpose, penalises a party unfairly should counsel blunder, and potentially rewards unmeritorious cases."

[143] In the present case, the three reports were admitted to evidence without objection to the fact that the contents were reciting facts that the experts had been told by the applicant. It does not follow that those underlying facts became evidence at trial.

[144] Even if I am wrong and the statement is admissible for the purposes suggested by counsel for the defendants, in my view no adverse inference ought to be drawn against the failure by the plaintiff to call his partner for two main reasons.

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142 (1959) 101 CLR 298.
143 (2013) 1 Qd R 476 at 488.
144 [2018] 2 Qd R 542.
145 Ibid, 545 per Fraser JA at [4].
146 Ibid, at [5].
147 Ibid, at [64].

[145] First, the weight and relevance of any admissible evidence the plaintiff's partner may have been able to give is minimal given she met the plaintiff two years after the accident and there is no claim for care. Secondly, it is uncontroversial that the plaintiff suffers from the condition of chondromalacia patellae of the right knee and that some pain is to be expected from this condition. Whilst the extent of the pain is in issue, I have resolved that issue with reference to a consideration of the plaintiff's evidence in the context of other objective evidence. In my view any relevant evidence the plaintiff's partner may have been able to give is likely to have added little probative value to that analysis.

Did the accident cause the plaintiff's condition of chondromalacia patellae of the right knee?

[146] The issue of causation is to be determined with reference to s 11 of the *Civil Liability Act* (Qld) 2003 which provides as follows:

> "**Division 2 Causation**
>
> **11 General principles**
>
> (1) A decision that a breach of duty caused particular harm comprises the following elements—
>
> (a) the breach of duty was a necessary condition of the occurrence of the harm ("factual causation");
>
> (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused ("scope of liability").
>
> (2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which cannot be established as satisfying subsection (1)(a) – should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.
>
> (3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—
>
> (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and

> why responsibility for the harm should be imposed on the party who was in breach of the duty."

[147] This section requires there that the breach of duty was a "necessary condition" of the occurrence of the harm. The section in effect reinstates the "but for" test.

The medical evidence

First report of Dr Low

[148] Dr Low saw the plaintiff at the request of his solicitors on 17 February 2017 and provided a report dated 7 March 2017.[148] His physical examination of the plaintiff at the time revealed as follows:[149]

> "After all his injuries, he was surprisingly intact and cheerful. He walked normally. **He could squat. He could hop on the right leg.** He had no distinguishable features. He looked a well-adjusted, well-muscled, fit young man.
>
> In stance, his pelvis was a little oblique. His right leg was a bit short, probably ½ inch.
>
> Supine examination revealed his right tibial fracture was compound just above the ankle joint on the medial side. The scar has healed and there was no infection. The right tibial fracture seemed to be between the lower third in the mid shaft area. It was clinically united. The right ankle had scarring anterolaterally and medially which were in relationship to an old right ankle fracture. The right ankle exhibited full dorsiflexion, full plantar flexion, slight loss of inversion and full eversion. The right foot and ankle were plantar grade and neurologically intact. He had active dorsi and plantar flexion and normal sensation in the right foot. There were normal pulses. There were no ulcerations or open areas. The scars were all well healed. There was scarring above the patella anteriorly where he said the IM interlocking nail was inserted rather than in the usual proximal tibial area with a patella split that I'm familiar with and would normally be done and the nail as removed from the medial side of the knee. This may be a new technique which I am unaware of.
>
> **The right knee was stable with a full range of motion and no effusion.** There was an obvious shortening of the right leg…"

[149] He concluded relevantly as follows:[150]

> "….

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148 Exhibit 1 (Doc 6), pp 6-13: First Report of Dr Low.
149 Exhibit 1 (Doc 6), p 9: First Report of Dr Low.
150 Exhibit 1 (Doc 6), p 12: First Report of Dr Low.

> The fracture site does not cause him any pain. He does not have any trouble with his right ankle where he had an old injury with internal fixation just above the ankle joint with multiple screws by the looks of things. **The knee is his main course of problems and no doubt he will attempt to rehabilitate his knee maximally, which he is very well motivated to do.**
> **If he has ongoing knee symptoms, he should have some investigations, for example a weight bearing film, plain x-rays and an MRI and seek an opinion from a knee surgeon regarding his ongoing symptoms. It may settle down now that the nail has been removed.**
> The nail looks like it has been put in across the knee joint, a technique I am unfamiliar with. It may be the latest technique and I am unable to comment. The usual pace for putting a tibial nail in would be to split the patella ligament and put it in just above the tibial tubercle anteriorly, which is the usual way of putting in a nail in. I am not familiar with putting a nail in the suprapatellar region. It would have to go across the knee joint, which does not seem quite right to me. **He has ongoing knee symptoms and this may need to be looked at down the future.**
> No doubt he will get back to work in this highly dangerous area that he works in which seems to be his passion.
> **I would award him a 6%WPI in relationship to this injury using the pain chapter 18 AMA5 and the scarring section of AMA5 page 178.** His shortening and rotational malunion may be due to this injury but may also be due to his previous fractured femur, he is neurologically intact, his ankle is a previous injury and there is a full range of motion, there's no calf wasting or weakness. **The knee has no current rateable impairment but is quite symptomatic and may need looking into**. His tibial fracture has untied in an anatomical fashion." **[Emphasis added]**

Second report of Dr Low

[150] Dr Low saw the plaintiff again at the request of his solicitors, on 12 July 2019 and provided a second report on 22 July 2019.[151]

[151] At this time, Dr Low noted the plaintiff's self- reported symptoms to be as follows:[152]

> "**His biggest symptom is pain under the right patella. He cannot do any high impact anymore. He cannot carry a bag up steps, for example. He cannot run anymore. He cannot kneel. He**

151 Exhibit 1 (Doc 7), pp 14-21: Second Report of Dr Low.
152 Exhibit 1 (Doc 7), pp 16-17: Second Report of Dr Low.

> **cannot walk on uneven ground. He cannot hop, jump or squat.** He has phobia about the road. **The knee does not lock but it does swell. It clicks**. He had no pain with his right knee prior to the accident. The tibial fracture has united. It does not give him any trouble."

[152] Dr Low concluded that the plaintiff's fractured tibia had united anatomically and there was no calf wasting. He also noted the plaintiff has a full range of motion of his foot and ankle with no neurovascular abnormality in his right foot and ankle, normal grade 5 strength of dorsiflexion and plantar flexion. He observed the plaintiff's right knee to exhibit a full range of motion but there is a shortening in his right leg and some internal rotation deformity which could be due to his fractured femur that he had years ago. Dr Low diagnosed the nature and extent the plaintiff's injuries from the accident as chondromalacia patellae, right knee, post-traumatic.[153]

[153] Dr Low relevantly opined that the plaintiff would have "ongoing disabling pain" for what the plaintiff wants to do in life".[154]

[154] He also relevantly observed:[155]

> "His right knee has been violated by the insertion of the nail. There are often injuries to the knee which are not apparent. The obvious injury being the fractured right tibia. He had no trouble with his right knee before this injury. **He has significant symptoms now of chondromalacia patellae, which is evident on the MRI and the clinical examination.** He does not have any mechanical symptoms of locking, **giving way** or recurrent swelling. The problem with is right knee is quite disabling for your client. As he is an elite athlete used to putting high impact through his knee. He does not ride his bike anymore. He works out in the gym and uses a stationary bike for exercise. He has no trouble walking on a flat surface but **he cannot kneel, squat, hop, climb or run. He can still do his dirt bike demonstrations as required of him in his job.** His knee problems are directly related to the accident of 20.09.2014. **There is no surgery that is likely to be of any benefit. He really has no choice but to put up with it and avoid things that stress his knee**. [Emphasis added]

[155] In reassessing the plaintiff's percentage of whole person impairment attributable to the injuries sustained in the accident, Dr Low did not resile from his previous assessment of 6% whole person impairment.[156]

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153 Exhibit 1 (Doc 7), pp 18-19: Second Report of Dr Low.
154 Exhibit 1 (Doc 7), p 19: Second Report of Dr Low.
155 Exhibit 1 (Doc 7), p 19: Second Report of Dr Low.
156 Exhibit 1 (Doc 7), p 19: Second Report of Dr Low.

First report of Dr Nutting

[156] The plaintiff saw Dr Gregory H Nutting, an Orthopaedic Surgeon, at the request of the defendants on 2 November 2015 and provided a report dated 10 November 2015.[157]

[157] Dr Nutting also reviewed the radiological investigations conducted on 20 September 2014 and observed that they demonstrated four screws in the distal tibia, two medial and two lateral, in addition to the fractures [to the right tibia and fibula]. He also observed the clinical notes designated the injury as a Grade 1 open fracture on the basis of a 5mm laceration over the medial aspect of the leg at the left of the fracture of the tibia.

[158] Dr Nutting conducted a physical examination of the plaintiff on 2 November 2015, and observed (amongst other things) that the plaintiff: [158]

- Had a lateral scar over the thigh with muscle herniation as a result of his previous fixation for the fractured femur;
- Had a suprapatellar scar on the right which is the site of the insertion of the nail;
- His patella does not show any effects of injury or irritation by fixation;
- Is capable of hyper-extension of the left knee to 10% and the right to 5%;
- Has a posterolateral laxity in the right knee and there is still anterior draw noted on the left side in excess of that on the right (i.e. the reconstructed knee);
- Had no effusion present in either knee;
- Was capable of single leg hopping (but that the plaintiff said it felt different).

[159] Dr Nutting was unable to assess any permanent impairment under the AMA5 Guidelines specifically related to the fractured tibia and fibula on the basis that he opined that there was no obvious malrotation and no knee or ankle impairment which could be related to the accident specifically. Dr Nutting observed that the cosmetic aspects of the plaintiff's condition would not be a consideration given the extent of the scarring already present from other procedures.[159]

[160] Dr Nutting opined relevantly as follows:[160]

- The accident as had been described to him caused a technically compound fracture of the tibia and fibula;

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157 Exhibit 2 (Doc A1), pp 1-16: **First report of Dr Nutting** dated 10 November 2015
158 Exhibit 2 (Doc A1), p 4: First report of Dr Nutting.
159 Exhibit 2 (Doc A1), p 5: First report of Dr Nutting.
160 Exhibit 2 (Doc A1), pp 5-6: First report of Dr Nutting.

- The plaintiff's history involves multiple fractures and treatments in the past which all have a bearing on his current presentation which he describes as quite reasonable under the circumstances;
- The plaintiff has some discomfort under extreme extremity activity;
- It is reasonable to suggest that the plaintiff has reached a level of maximal medical improvement – though he expected a small improvement over the next 12 months, but this would not alter the assessment more than 3% of the whole person;
- The plaintiff's injuries have reached stability, but he would not assess any permanent impairment on the basis of AMA5 Guidelines;
- No other specialists were necessary;
- The only treatment he would envisage is the removal of fixation so that the knee and ankle joint functions are more likely to be protected rather than having a stress shielding effective intramedullary fixation forcing extraneous pressures on the knee and ankle joints respectively;
- Some supplementary physiotherapy may be present, but the plaintiff already attends on a regular basis since the particular physiotherapists [Back in Motion] are sponsors of the motorcycle entertainment group; and
- There is likely to be some effect with respect to development of arthritis etc., in the future but this is only one of multiple contributions and there is no objective way of assessing this, suffice to say, that no particular surface was breached in this particular injury and, therefore, minimal arthritic changes would be expected given that the alignment and rotation have returned to almost anatomical alignment.

Second report of Dr Nutting

[161] Dr Nutting re-assessed the plaintiff on 29 January 2018 and provided a second report on 6 February 2018.[161]

[162] Upon examination Dr Nutting relevantly observed as follows:[162]

> "…..He has sustained a fractured right femur complicated by several procedures as a result of Compartment Syndrome and bleeding.
> He had not had any specific injury to the right knee in the past but had developed this over time and more specifically related to more recent activity than the injury sustained in September 2014, he relates.
> He has an area of numbness just above the patella at the site of the original insertion of the tibial nail.

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161 Exhibit 2 (Doc A2), p 7-13: **Second Report of Dr Nutting** dated 6 February 2018.
162 Exhibit 2 (Doc A2), p 9: Second Report of Dr Nutting.

> This was larger following the accident and surgery but has remained constant over the last few years.
> He states that he has noted in photographs of his stunts when he is 'hanging' inverted, that his right foot tends to turn in more than the left when he is relaxed.
> He has normal gait and has negative Trendelenburg gait and negative Trendelenburg sign.
> He right knee hyperextends.
> Here is a small effusion present which is not present on the left side and he has minor patellofemoral discomfort by no crepitus is noted.
> Incisions are noted in the suprapatellar and prepatellar region as well as distally at the site of the fixation over the previous ankle surgery and the procedures required for the subject incident.
> He is able to stand in single leg stance without any incapacity.
> He can carry out squats and hopping and he can kneel but relates that he cannot do this for too long."

[163] Dr Nutting also observed that the MRI carried out on 21 April 2017 (four months after the removal of the tibial nail):[163]

> "…essentially showed **patellofemoral degenerative changes and the persistence of a tiny focal tear in the anterior tear of the medial meniscus with the bulk of the medial meniscus appearing intact**. Note was also made of a complex Baker's cyst suggesting persistent pathology related to the medial meniscus and usually in its posteromedial corner but this area was reported as normal on this investigation." **[Emphasis added].**

[164] In his second report Dr Nutting opined as follows:[164]

> "The current systems and their relationship to the accident **simply revolve around discomfort in the knee which is in the main related to patellofemoral considerations which are not of major consequence** but he also has a hint of ligamentous stretching or strain in the right knee hyperextends when compared with the left knee by a few degrees and that there is still a small effusion. There is crepitus noted in the examination of the patellofemoral articulation."[**Emphasis added].**

[165] Dr Nutting diagnosed the plaintiff with the following injuries sustained as a result of the accident.[165]

(a) compound fracture of the right tibia and fibula with attendant scarring for the placement of internal fixation and subsequent removal;

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163 Exhibit 2 (Doc A2), p 10: Second Report of Dr Nutting.
164 Exhibit 2 (Doc A2), p 10: Second Report of Dr Nutting.
165 Exhibit 2 (Doc A2), p 10: Second Report of Dr Nutting.

(b) the anterior horn of the medial meniscus was also stabilised in the final removal exercise.

[166] Dr Nutting also opined that the plaintiff had pre-existing pathology, particularly on the right leg, with the previous open reduction and internal fixation required for a right ankle injury and internal fixation and open reduction and treatment of Compartment Syndrome in the right thigh. In his view, it is impossible to state the extent to which those pre-existing conditions have been made worse as a result of the accident. Dr Nutting assessed the plaintiff with a 2% Whole Person Impairment relating to his scarring under Table 8.2. These scars include the exit wound of the compound fracture just above the ankle medially, the site of insertion of the tibial nail in the suprapatellar region, the site of removal of the tibial nail in the parapatellar region, and the sites of removal of the stabilising screws. Dr Nutting opined further that the areas of numbness around the scarring were part and parcel of the skin assessment rather than being a peripheral nerve function assessment and he therefore assessed that according to AMA5 criteria, a 2% impairment existed.

[167] Dr Nutting assessed the plaintiff with a further 1% Whole Person Impairment taking into account the repair of the medial meniscus. His overall assessment was therefore of a 3% Whole Person Impairment.[166] He did not consider any further specialist opinions or investigations were required and that the likelihood of degenerative changes as a result of the multiple pathology suffered by the plaintiff would intuitively be symptomatic in the future.[167]

Dr Nutting third report

[168] On 7 March 2018 Dr Nutting provided a third report addressing further issues raised by the defendants solicitors.[168] By this report Dr Nutting opines that all of the plaintiffs' pre-existing injuries or subsequent injuries have an impact on the plaintiff's current employment and capacity as a motor cycle rider and that he was not able to determine the exact proportion made by each of these injuries. In particular has observed that the plaintiff:[169]

> "Has been able to return to this inherently high-risk activity on each occasion to date but he does note the complexity of the activities he now undertakes have been modified in the last few years. The question is whether this is because of discomfort or simply because of maturity and a lack of "recklessness" for want of a better word, as he has aged over the period."

Analysis

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166 Exhibit 2 (Doc A2), p 12: Second Report of Dr Nutting.
167 Exhibit 2 (Doc A2), p 12: Second Report of Dr Nutting.
168 Exhibit 2 (Doc A3), pp 14-16: **Third report of Dr Nutting** dated 7 March 2018.
169 Exhibit 2 (Doc A3), p 15: Third report of Dr Nutting.

[169] The real issue between the doctors is whether the condition of chondromalacia patellae is post traumatic.

[170] The plaintiff relies on the evidence of Dr Low to support his pleaded case that it is a post traumatic injury.[170] The defendants deny the condition is post–traumatic in origin on the basis that there has been no trauma (such as a fracture) to or of the patella. They attribute cause to potentially the plaintiff's rotational deformity of his right leg[171] and leg discrepancy of his right leg[172] of his training techniques of a combination of those matters.[173]

[171] Both Dr Low and Dr Nutting agree that the condition may be the result of any one of a number of contributions in this case such as the plaintiff's rotational deformity and leg discrepancy[174]or loading the patella-femoral joint (as in jumping bikes)[175]or even training techniques.[176]

[172] Dr Low agreed that all of these factors may make a contribution to the plaintiff's condition but during his evidence in chief at trial he described the plaintiff as a man "with bones like ivory" and that the forces needed to break his tibia would be enormous.[177] He was asked by counsel for the plaintiff whether it was his opinion that this makes is more likely that it was trauma that caused the condition as opposed to the other possible causes cited by Dr Nutting. Dr Low's response as follows is instructive:[178]

> "---I don't disagree with Dr Nutting, but I – I would say you cannot discount the fact that – because he had no pain before and he had pain afterwards, that trauma was the cause."

[173] The effect of Dr Low's evidence is that that the plaintiff did not have pain in his right knee before and he has had it since.

[174] The defendants submit that this reasoning is flawed because it involves the fallacy of the assumption that because an event occurs after another:[179]

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170 Exhibit 1 (Doc 7), p 19: Second Report of Dr Low.

171 Dr Nutting observed the plaintiff's right hip demonstrated internal and external rotation of 45% bilaterally whereas the left hip has the same range of motion with a slightly different measure of 60% of external rotation and 30% of internal rotation when he examined the plaintiff on 2 November 2015.

172 Dr Nutting also observed the plaintiff to be 1cm shorter on the right side when he examined him on 2 November 2015 but he was unable to assess the reasons for this given the plaintiff's past history of fractured femur and fractured tibia and fibula) on that side. Dr Low agreed with this finding.

173 Defence at [3](c)(ii);

174 Exhibit 1 (Doc 6), p 9: First Report of Dr Low; and Exhibit 1 (Doc 7), p 19, [6]: Second Report of Dr Low.

175 Exhibit 15: Dr Nutting's conference note dated 14 August 2019;

176 Ibid.

177 Transcript 1-100, ll 34-35.

178 Transcript 1-100, ll 38-42.

179 Relying on the observation of Gotterson JA with whom Dalton and Burns JJ agreed in *Edington v Board of Trustees of the State of Public Superannuation Scheme* [2016] QCA 247 at [57].

> "….that event must have been caused by the other. Reasoning on the basis of such an assumption, as the appellant does here, is flawed in logic. The flaw is deepened when the reasoning is sought to be used to exclude any other preceding event from having had a causal relationship with the event which occurs later in time."

[175] I accept the need to avoid descending into such flawed logic and that it is not the function of a court of law to resolve questions of medical or indeed any other science.[180] But it is important to also recall as the plaintiff submits, that the authorities also establish that an inference of causation can be drawn from the circumstances of the case (that is, from a common sense, non–medical perspective) even when the stated medical evidence is such that it merely admits of the possibility of causation.[181]

[176] The following observations of Connolly J in *Obstoj v Van Der Loos* (W. 203 of 1985, 13 April 1987, unreported) are also instructive on this issue:[182]

> **"**The function of a court of law in a situation such as this is to determine whether, for whatever reason, it is more probable than not that there is a causal relationship between the accident and the plaintiff's post-accident condition.'"

[177] Ultimately in my view, the question of the cause of a particular occurrence is to be determined by applying common sense to the facts of the case. [183]

[178] Dr Nutting opined a number of possible causes for the plaintiff developing chondromalacia patellae in his right knee by reasoning that there are "a number of possible causes for chondromalacia patellae in the general population".[184] During cross-examination by the plaintiff's counsel, Dr Nutting was asked to assume two different factual scenarios.

[179] First, that that plaintiff had sustained a blow to his knee in the collision, that he had two surgical "insults" to his right knee as a consequence of the collision, and that he began to experience knee discomfort when he began weight bearing which increased about the 12 months post-surgery point and became more acute again following the removal of the intramedullary nail.

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180 *Pacific Coal Pty Ltd v Gaudry* [1996] QCA 525 at p. 22.

181 *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538 at 56 to 564; *Australian Iron & Steel Ltd v Connell* (1959) 102 CLR 522 at [6]; *Tubemakers of Australia Ltd v Fernandez* (1976) 10 ALR 303 at [307]; *Watts v Rake* (1960) 108 CLR 158 per Dixon CJ at [1]; *EMI (Australia) Ltd v Bes* (1972) NSWLR 238 at 242; *Ramsay v Watson* (1961) 108 CLR 642 at 645.

182 Cited with approved by Lee J in *Pacific Coal Pty Ltd v Gaudry* [1996] QCA 525 at p. 22.

183 *March v E.& MH Stramare Pty Ltd* (1990- 1991) 171 CLR 506 at 515 per Mason CJ; See also *Metro North Hospital and Health Service v Pierce* [2018] NSWCA 11.

184 Transcript 2-6, ll 13-14.

[180] It was put to Dr Nutting in those circumstances, that "logically it's most probable that the cause of this man's chondromalacia patellae is the accident and its sequelae". His answer was:[185]

> "I'd have to say it was a – a possible contribution, because the situation after any lower limb injury, if you rest the knee, is that by the time six weeks has elapsed, even though there's been no injury to the patella, you can develop the symptoms and signs and attached findings of chondromalacia patellae."

[181] In the second scenario, Dr Nutting was asked to adopt the second two assumptions from the first scenario [that the plaintiff began to experience knee discomfort when he began weight bearing which increased at about the 12 months post-surgery point and became more acute again following the removal of the intramedullary nail] and assume there had been no direct blow to the knee during the collision. It was suggested to him that it was quite probable that the onset of the chondromalacia patellae was caused by those insults to the knee. This evidence was confusing, but I accept the effect of Dr Nutting's response was that there could well be contributions in this scenario.[186]

[182] The unchallenged evidence of the plaintiff at trial that I accept is that the accident involved him tumbling through the air and landing on his "head in a seating position".[187] The plaintiff submits the inference open is that the plaintiff did not remain balanced on his head and that his lower body must have contacted the ground, making it quite likely that he would have sustained a blow to his right knee.[188] I accept this submission. The records of the Gold Coast Hospital record that the plaintiff "fell on to right side".[189] Dr Nutting also accepted that it was "reasonable to assume that (the plaintiff) suffered some direct blow to his knee in (the) incident".[190] The photograph of the plaintiff's right leg taken a week or two after he took the bandages off reveal a dark mark consistent with bruising or an abrasion at the bottom of the plaintiff's patella.[191] As Dr Low observed when challenged under cross-examination the lack of fracture, scarring or ligamentous injury around the knee does mean there was not a blow to the knee. The most obvious injury from the accident was the compound fracture of the tibia and in this case the nail was put in above the patella- which is most unusual through the knee joint. The effect of Dr Low's evidence which I accept was that in these circumstances a non-injurious blow to the knee may have been overlooked and any symptoms of the condition may not be apparent until after the fractured tibia knows

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185 Transcript 2-7, ll 39-45.
186 Transcript 2-8, ll 2-7.
187 Transcript 1-40, ll 33-35.
188 Submissions of the Plaintiff at [23].
189 Exhibit 2 (Doc C3), p 112.
190 Transcript 2-6, ll 25-29.
191 Exhibit 1 (Doc 21) at p 171.

and stresses are applied to the knee.[192] I also accept that the trauma of the insults of the nail inserted at the time of the accident and subsequently are insults attributable to the accident.

[183] It follows that I am satisfied on the balance of probabilities and I find that the plaintiff sustained trauma but way forces or insults to his right knee as a result of the accident.

[184] That is not the end of the matter. The question remains whether this trauma was a necessary condition of the harm.

[185] As discussed above, I accept the plaintiff first started experiencing some pain in his right knee (although not to the extent alleged by him) after the accident - particularly when the nail was removed a year later. In light of this finding, I accept the plaintiff's submission that the common-sense approach adopted by Dr Low as follows is compelling:[193]

> "Yes. But Dr Nutting seems to be saying that in this plaintiff, it's impossible to distinguish between the theoretical causes and the trauma. What do you say about that?---I totally disagree.
> All right. Can you explain to her - - -?- - -He didn't have any pain before. He had pain afterwards. So common sense would tell you it's due to a – a high energy injury."

[186] I also accept the plaintiff's submission that Dr Low's rejection of other pre-existing condition as the cause for the plaintiff's chondromalacia as follows is equally appealing to logic:[194]

> "Yes. All right. And the examples given by Dr Nutting of adolescent growth spurts, the disuse of limb, inadequate rehabilitation – if any of those conditions existed prior to the injury, are you able to say anything about those?---Well, Mr Saul goes to the gym every day and he works out all the time and he – he – he – squats and – and gets enormous forces through his legs and he's had multiple injuries in the past and he's always been able to rehabilitate himself from multiple soft tissue injuries to his spine and – long bone fractures. He had a fractured femur in the past with compartment syndrome and – and tracheotomies before. He's got a left shoulder reconstruction and a left knee reconstruction and he's got over all these injuries with a very dedicated rehab program and if he's telling the truth, he had no trouble with his right knee prior to this injury. And when he suffered the fractured tibia, he had right knee pain when he was recovering from the fractured tibia which hasn't settled.

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192 Transcript 1-103, ll 31-48; 1-103, ll 1-25.

193 Transcript 1-1, ll 17-22; Dr Low did not resile from this view under cross examination at Transcript 1-102, ll 24-34.

194 Transcript 1-1, l 43 to 1-101, l 10.

> I'm able to say that he didn't have right knee pain prior to this injury but I'm not disagreeing that all those multiple causes can cause anterior knee pain, or chondromalacia as it's known."

[187] Dr Nutting's reports where premised on there being no insults or blows to the plaintiff's knee as a result of the accident. But under cross examination at trial his evidence referred to above (which I accept) was that the blow and insults to the plaintiff's knee (which I have found as a matter of fact occurred) were a possible and even probable cause of the condition of chondromalacia patellae to the plaintiff's right knee.[195] This evidence lends further support to the common sense approach of Dr Low which I prefer on the facts of this case.[196]

[188] It follows and I find that the evidence establishes the necessary casual connection between the collision and the plaintiff's condition of chondromalacia patellae. In other words, I am satisfied that, but for the accident, this condition would not have resulted to the plaintiff's right knee.

General Damages

[189] The plaintiff's claim for general damages falls to be determined under Schedule 4 of the *Civil Liability Regulation 2014* (Qld).

[190] As a result of the accident, the plaintiff suffered a number of injuries which entitle him to an award of general damages. These injuries are: a compound fracture of the right tibia; a fracture to the right fibula; scarring to the leg; a meniscal tear on the right knee and post traumatic chondromalacia patellae of the right knee. The plaintiff recovered from the compound fracture within six weeks, but I reject the defendants' submission that the fracture was only "technically" a compound injury. The evidence was that the bone pierced the plaintiff's skin and caused bleeding and a wound. The injury also required surgery on the day of the accident at which time a 33cm nail was inserted in the bone and affixed with screws on each end. Subsequently the plaintiff required two nails to remove the nail. The injury to the plaintiff's knee has caused some minor pain but increasing pain which may continue to increase further over time

[191] It follows and I find that the plaintiff has suffered multiple injuries as a result of the accident. In my view the plaintiff's right leg injury is the dominant injury.

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195 See paragraphs [183] to [186] of these Reasons.

196 It is not entirely clear, but I reject any suggestion by the defendants that the plaintiff had developed this condition as a result of a subsequent blow to the knee. This is not pleaded and there was no evidence of such any direct blow to the plaintiff's right knee since the collision.

[192] The plaintiff claims the sum of $23,240.00 for general damages based on an Injury Scale Value of 14 under item 138 (serious knee injury) and item 135 (moderate lower limb injury).

[193] The defendants submitted that the appropriate sum for general damages is $9,710.00 based on an ISV of 7 under item 136 (minor lower limb injury). They do not make any allowance for the plaintiff's right knee injury.

[194] Given the injuries to the right leg, including the multiple fractures and the other matters referred to in paragraph [188] above, in my view, item 135 is the appropriate scale. The range of injury scale values for this item is 11 to 20. An ISV at or near the bottom of the range will be appropriate if there is a whole person impairment for the injury of 10%. Dr Low assessed a whole person impairment based of 6% based on scarring and pain. Dr Nutting assessed 3% based on 2% for scarring and 1% for the meniscus injury.[197] The plaintiff submits that a whole person impairment of 7% based on scarring, pain and meniscus injury is appropriate. The defendants submitted the best assessment for the plaintiff is 6% (and that the assessment could be less). It follows that on either assessment the ISV is at the lower end of the scale values for item 135.

[195] In my view the appropriate ISV for the right leg injury is 11. But allowing a small uplift for the pain from the right knee injury, I find that an ISV of 12 is appropriate in this case.[198]

[196] It follows that I assess general damages in the sum of $19,320.00.

Past economic loss

[197] The plaintiff's claim for past economic loss is premised on his claim that he planned to return to work by October 2014 if not for the accident and, there was a causal link between his injury and the loss of his position as a lead rider with Showtime FMX. Both of these premises have been rejected by me. It follows and I find that the plaintiff is not entitled to any award for past economic loss based on his articulated claim.

[198] But given my factual findings, I have also considered whether it is appropriate to make an award for past economic loss based on the plaintiff's loss of capacity to perform as a third rider due to the impact of his condition on his ability to train. But having considered this further, I am not satisfied that the evidence supports such an award being given. For example, there was no evidence that the plaintiff has had to knock back jobs as a third rider or that he is unable to carry out a minimum of fifty shows per year as he is required to handle his contract with Showtime FMX. And the plaintiff's net income for the last three years shows no marked decline in his

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197 Dr Nutting did not assess any permanent impairment under the AMA5 Guidelines.

198 I have taken into account ss 9 and 4 of *the Civil Liability Regulations* 2014 (Qld).

income as third rider due to his right knee injury. For the year ending June 30 2017, his income after tax and expenses was low (only $24,948.00), but it must be recalled that he was off work for a considerable period that year (9 months) due to his shoulder injury. Otherwise on the plaintiff's figures his income (after tax and expenses) for the following two years are reasonably close. For the year ending 30 June 2018 it was $44,057.00 and for the year ending 30 June 2019 it was $42,486.38.[199]

Future economic loss

Plaintiff's case

[199] The plaintiff's claim for future economic loss of $237,915.00 is based on an alleged annual loss for the last three years of $33,700 (net) or approximately $650.00 (net) per week (being the difference between what the lead rider Mr Marshall earnt and what the plaintiff earnt as third rider) calculated for the next 10 years (assuming the plaintiff could have continued to work as a stunt rider for the next 10 years). The plaintiff accepted his average loss over the five years post the accident is approximately $27,000 (net) per year or $520 (net) per week but submitted it is more appropriate to take the average over the past three years to reflect extra duties the lead rider is now paid for.[200]

[200] The plaintiff also claimed a "buffer" of $50,000 beyond a further 10 years (after the plaintiff is 45) based on the plaintiff being at a marked disadvantage on the open labour market by virtue of the pain in his right knee. This figure was loosely based on a figure of $125 per week (15% of the average weekly earnings in Australia) to the age of 67, deferred by 10 years (856-403) to produce a figure of $55,375.00. This figure was discounted by 10% for the usual vicissitudes to arrive at a global figure of $50,000.[201]

Defendant's case

[201] The defendants submitted that there is no basis for an award of future economic loss based on the first aspect of the plaintiff's claim, as it is premised on the plaintiff losing his lead ride position to Mr Marshall as a result of the accident and the court would find (as I have) that this did not occur.

[202] Alternatively, the defendants submitted that the plaintiff's figures for past losses were inaccurate as they did not take expenses properly into account or the fact that

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199 The defendants' submitted that the plaintiff's figures for past losses were inaccurate as they did not take expenses properly into account or the fact that the plaintiff had considerable time off due to non-accident injuries. The defendants submitted that for the June 30 2017 year the correct figure is $18,132,94; for the June 30 2018 financial year the correct figure is $67,580.00 and for the June 30 2019 financial year is $56,587.00. Given my findings is unnecessary to resolve these discrepancies.

200 Cf. the plaintiff's Statement of Claim and Amended Statement of Loss and Damage claims the sum of $730.00 net per week and a total amount of $260,000 for future economic loss.

201 Submissions of the Plaintiff at [162].

the plaintiff had considerable time off due to non-accident injuries. On the defendant's figures, the plaintiff's loss as a result of losing the lead rider position is at best $125.00 (net) per week.

[203] Otherwise, the defendants submitted that no buffer amount should be allowed as it cannot be said that "but for" the plaintiff's knee injury as opposed to all of the other myriad injuries he has suffered that he will suffer any particular loss by reason of this injury.

Analysis of claim for future economic loss

[204] The plaintiff's statement of loss and damage particularises: a claim for future loss of earning capacity on the basis that the plaintiff is significantly troubled by his "right leg" particularly his knee and that he will be into the future.

[205] The plaintiff calculates this loss on the basis of the difference between his income as lead rider and as third rider.[202] But it follows, from my findings above, that the plaintiff has not discharged the onus of proving a diminution in his earning capacity on this basis.

[206] Section 55 of the *Civil Liability Act 2003* (Qld) (Reprint 2A) regulates the award of damages for economic loss in this case. This section provides:

> "**55 When earnings cannot be precisely calculated**
>
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
>
> (2) **The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.**
>
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.
>
> (4) The limitation mentioned in section 54(2) applies to an award of damages under this section." **[Emphasis added]**

[207] Bearing in mind the principles espoused in *Malec v JC Hutton Pty Ltd*,[203] I accept that the mere possibility (amounting to less than a 50% likelihood) of diminished capacity leading to actual economic loss must be taken into account recognising that it is the loss to the actual person I am assessing, and not a loss to a hypothetical, or

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202 By his Statement of Claim, Amended Statement of Loss and Damage and the Submissions of the Plaintiff.

203 [1990] 169 CLR 638

even, average person.[204] I am cognisant too of adopting a cautionary approach in order to reach a proper measure of compensation.[205]

[208] The assessment of whether the plaintiff suffered a diminished capacity as a result of his injury in this case is complicated by a number of factors including: the fact that the plaintiff's is 35 years of age; his profession is a dangerous one; he has suffered numerous injuries over the years during the course of his work; the average retirement age of stuntman is around 45 years of age; he has limited qualifications; he has worked for most of his post school life as a freestyle motocross rider; he has no trade of formal qualifications and his only other work experience is in labouring.

[209] But in my view, and for the reasons articulated below, this court should make a modest award of damages for future economic loss to take into account both the plaintiff's potential for diminished capacity to work and earn income over the next 10 years and after that, the general disadvantage the plaintiff might suffer on the open labour market. As the High Court observed in *Graham v Baker* (1961) 106 CLR 340:[206]

> "…an injured plaintiff recovers not merely because his earning capacity has been diminished but because diminution of his earning capacity is or may be productive of financial loss."

[210] Dr Low's evidence which I accept is that ongoing disabling knee pain will prevent the plaintiff from performing at the high physical level that he is used to as an elite athlete. Dr Nutting accepted that pain from post-traumatic chondromalacia patellae may get worse over time.[207] As discussed above, I am not satisfied that at present the plaintiff's is as significantly troubled by his right knee as is contended for but I am satisfied that he presently suffers some increasing pain from the condition of post-traumatic chondromalacia patellae to his right knee.

[211] In my view, given the high level in which the plaintiff is required to perform at, and given the medical opinions of both Dr Low and Dr Nutting, there is a real possibility that the plaintiff's right knee pain will increase and may diminish his prospects of continuing to perform to the level required as a third rider (or a stunt rider more generally) over the next 10 years and that after that he will be at a general disadvantage in the open work market.

[212] There is no precision which can be attached to a global assessment of the plaintiff's loss in this case. But the court must do its best on the evidence.[208] The plaintiff is aged 35. He has a long working life ahead of him. Given his commitment to work in

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204 *Kovan v Hail Creek Coal Pty Ltd* [2011] QSC 51 per McMeekin J at [45].
205 *Todorovic v Waller* (1981) 150 CLR 420 per Stephen J at 431.
206 *Graham v Baker* (1961) 106 CLR 340 at 347.
207 Transcript 2-8, ll 20-25.
208 See *Allianz v McCarthy* [2012] QCA 312 at [9] –[10] per McMurdo P and [71] per Gotterson JA; For an example of how global awards have been made in this court see too the observations of Bowskill QC DCJ as her honour then was in *Gordon v RACQ* [2015] QDC 313 at [114] to [115] .

the face of this and other injuries, it is reasonable to find as I do that he would have continued to work as a stunt rider for approximately another 10 years. For some, but almost certainly not all of those years, he would have been performing a minimum of 50 rides a year as third rider as he has been doing since this accident. I say "almost certainly not all" because it is reasonable to conclude, and I do, that other accidents and injuries from time to time would have meant that he would have had periods where he was unable to ride at all. In those periods, the whole of the plaintiff's loss will likely be caused by other accidents, and no part of that those times off work is compensable as a loss arising from the injuries sustained in the accident the subject of this proceeding.

[213] There are a number of ways in which the court might reasonably arrive at a figure in assessment for future economic loss without any particular way having superior validity.[209] In taking a global approach to the assessment of the plaintiff's loss in this case, the most reasonable approach in my view is to assume that, as the plaintiff's pain increases over the years, there is a reasonable possibility it will result in a shortening of his 10 year working life as a stuntman. This in my view is a sensible and practical approach given that the evidence is that his pain is not significant now but it has started to increase at this point and that the plaintiff has shown he is a resilient man, with a relatively high pain threshold, and the ability to combat through pain in order to continue, as long as possible, to work in a job he loves. At some point, later in the years of his expected career timeline, it is reasonable to assume as I do, that it will not be possible for the plaintiff to push on through due to his right knee pain. Doing the best I can, I assess that the plaintiff's ability to earn an income as a stuntman will be cut short by a period of approximately three years.

[214] On the plaintiff's figures he has earned an average of $43,000.00 net of expenses and tax in the last two financial years (the years ending 30 June 2018 and 2019) working (mostly without any injury time) as third rider. On the defendants' figures, the amount is the same. This equates to an amount of approximately $826.00 (net) per week.

[215] Taking into account the ten-year multiplier and deferring for 7 years, the correct multiplier is 104. Using a weekly income of $826.00, this equates to a deferred loss over three years of $85,904.00. But this figure does not take into account that the plaintiff will still retain a general residual work capacity in seven years. In my view this figure needs to be discounted by 50% in this case, taking into account the plaintiff's residual work capacity and all of the other contingencies discussed throughout these Reasons.

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209 *Reitano v Shearer & Anor* [2014] QCA 336 at [4] to [9] per Holmes CJ with whom Fraser JA and Philippides J (as her honour then was) agreed.

[216] It follows and I find that an award of $42,952.00 (which I round up to $45,000) is an appropriate assessment of the plaintiff's economic loss over the next 10 years.

[217] I am not prepared to make a separate assessment for loss of future superannuation even though there is evidence that the plaintiff was engaged as an employee for a few years, the nature of the industry is that most of the riders are engaged as contractors. I consider the assessment I have made for future economic loss properly compensates for this loss, if any.

[218] The plaintiff urged a further amount for economic loss for the risk to the plaintiff on the open labour market at the expiration of 10 years. By that stage of the plaintiff's life, I am satisfied he will need to be looking for alternative employment irrespective of this injury. That does not however mean that the injury will not cause him some ongoing difficulties, added to those he will suffer as a consequence of his work over the years. Matters such as these are very much of impression upon which reasonable minds might differ. I am persuaded to make a modest assessment of $30,000.

[219] It follows that I assess the plaintiff's claim for future economic loss in the sum of $75,000.

Special damages

[220] Special damages are agreed at $3,361.78. I will allow interest of $110.95 calculated at .66% over 5 years, as submitted by the plaintiff.[210] It follows that I assess special damages in the sum of $3,471.95.

Future expenditure

[221] The plaintiff claims a global sum of $10,000.00 under this head. The defendants submitted that a sum of $5,000.00 is appropriate. The evidence which I accept is that there is little that the plaintiff can do about pain for the right knee condition other than to medicate and modify his activities. The uncontroversial evidence is that the plaintiff takes Celebrex because of this pain. He pays $20.00 to $30.00 for a box which last him usually around 30 days.[211] A packet of Celebrex costs $22.71.[212] Allowing 12 boxes a year this equates to $5.25 per week. The plaintiff has a life expectancy of another 51 years. Allowing a week's loss of $5.25 over 51 years, using a multiplier of 981 produces a loss of $5,150.00. I accept that such an amount is appropriate for as a component of a future damages award.

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210 The plaintiff says interest should be $80.79 with interest at .49%.
211 Transcript 1-44, ll 22-25.
212 Exhibit 1 (Doc 25), p 190.

[222] The plaintiff claims an additional amount of $5,640.75 for visits to the doctor to obtain this medication. But this does not take into account that it is reasonable to expect that the plaintiff will have to attend his doctor for other reasons over the years. It follows that I am not satisfied the plaintiff is entitled to the full amount claimed. But I will allow a component of just under $2,000.

[223] I therefore assess future damages in the sum of $7,000.

Summary of damages assessed

[224] In summary, damages are assessed as follows:

Head of damage	Amount
General damages	$19,320.00
Past Economic Loss	nil
Interest on past Economic Loss	nil
Past Loss of Superannuation	nil
Future Economic Loss	$75,000.00
Special Damages	$3,471.95
Future Damages	$7,000.00
Total	**$104,791.95**

Orders

[225] There will be judgment for the plaintiff in the sum of $104,791.95.

[226] I will hear the parties as to costs and to that end I direct that any submissions in respect of costs, or alternatively a proposed draft order if the parties are agreed, be emailed to my associate by 4pm on 19 May 2020.