

SUPREME COURT OF QUEENSLAND

CITATION: *Shepherd v Nominal Defendant* [2020] QSC 209

PARTIES: **Chase Shepherd**
(Plaintiff)
v
Nominal Defendant
(Defendant)

FILE NO/S: SC No 686 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Townsville

ORDERS MADE: 26 June 2020

TRIAL: 15, 16, 17, 18 April 2019

DELIVERED AT: Townsville

JUDGE: North J

ORDER:

- 1. Judgment for the defendant.**
- 2. Subject to order 3 or agreement between the parties the plaintiff should pay the defendant's costs of and incidental to the action to be assessed on the standard basis.**
- 3. The order for costs should be as stated in order 2 unless within 21 days a party should submit in writing for a different order. Such submission shall be no longer than three pages and the question of costs shall be decided on the papers.**

CATCHWORDS: TORTS – NEGLIGENCE – GENERALLY – where the plaintiff was driving a motorcycle – where the plaintiff lost control of his motorcycle and collided with the gutter – where the plaintiff claims the accident was caused by the negligent driving of an unidentified motor vehicle – where the plaintiff suffers serious head and physical injury including orthopaedic injury and memory loss – where the plaintiff did not immediately recall or report the motor vehicle – where the defendant alleges the accident and the plaintiff’s subsequent injuries were caused by his own negligence in driving at an excessive speed or failing to maintain effective control of the motorcycle or driving without due care and attention – consideration of liability and quantum of damages

COUNSEL: Mr Campbell SC and Mr di Michiel for the plaintiff
Mr Diehm QC and Mr Elliott for the defendant

SOLICITORS: Premier Compensation for the plaintiff
Jensen McConaghy for the defendant

Introduction

- [2] The plaintiff sues by his litigation guardian, his brother. In the early hours of 28 June 2012 he sustained significant head and physical, including orthopaedic, injuries in an accident when he lost control of his motorcycle. The plaintiff alleges the accident was caused by the negligent driving of an unidentified motor vehicle. As pleaded the defendant alleges that the accident and the plaintiff’s subsequent injuries were caused entirely by his own negligence in driving at an excessive speed or failing to maintain effective control of the motorcycle or driving without due care and attention. It is also alleged that the defendant was driving while adversely affected by alcohol contrary to s 47 of the *Civil Liability Act*.¹ Both liability and quantum are an issue though by the conclusion of the trial there was a substantial measure of agreement concerning the assessment of damages.
- [3] To understand some of the evidence and how the case for both plaintiff and defendant and the parameters of the evidentiary contest between the parties it is helpful to quote from the pleadings. As pleaded the plaintiff alleges that the accident and his injuries were caused as follows:²

¹ See para 4(d) of the defence filed 24 September 2018.

² See Statement of Claim filed 17 July 2015 at para 5.

- “5. At or about 2.00am on 28 June 2012:-
- (a) The Plaintiff’s vehicle was travelling along Duckworth Street, Garbutt between Dalrymple Road and Bayswater Road (“the Plaintiff’s journey”);
 - (b) During the Plaintiff’s journey, an unknown vehicle approached the plaintiff’s vehicle from behind, sped up towards his vehicle and began to tailgate him accelerating directly behind the plaintiff’s vehicle.
 - (c) The plaintiff’s vehicle was forced into the left Lane to avoid the defendant’s vehicle causing it to lose control and collide with a gutter (“the collision”).
 - (d) The plaintiff suffered injury, loss and damage as a result of the collision as set out below.
 - (e) The plaintiff’s injury, loss and damage were caused by the negligence of the defendant.

Particulars of Negligence for the defendant

- (i). Failure to keep a safe distance from the vehicle travelling in front;
- (ii). Failure to keep a proper lookout;
- (iii). Travelling at an excessive speed;
- (iv). Driving in a dangerous manner;
- (v). Failure to break, steer or otherwise manage the defendant’s vehicle to avoid the said collision;
- (vi). Exposing the plaintiff to risk of injury which could have been avoided with reasonable care.”

In its amended defence³ the defendant pleads:

- “4. With respect to the allegations contained in paragraph 5 of the Statement of Claim, the Defendant:
- (a) Admits that the Plaintiff on 28 June 2012 at or about 2.00 am was involved in a single vehicle accident whilst riding his motorcycle along Duckworth Street, Garbutt wherein he suffered injury, loss and damage, however;
 - (b) denies that an unknown vehicle approached the Plaintiff’s vehicle from behind, sped up towards his vehicle and began to tailgate him accelerating directly behind the Plaintiff’s vehicle as it is contrary to fact;

³ Filed 24 September 2018.

- (c) denies that the Plaintiff's vehicle was forced into the left lane to avoid another vehicle causing it to lose control and collide with a gutter as it is contrary to fact;
- (d) alleges the motor vehicle accident and the Plaintiff's subsequent injuries, loss and damage were caused entirely by the Plaintiff's own negligence by:
 - (i) driving at a speed excessive in the circumstances;
 - (ii) failing to maintain effective control over his vehicle;
 - (iii) driving without due care and attention;
 - (iv) driving whilst adversely affected by alcohol contrary to s.47 of the Civil Liability Act.

5. Denies the allegations contained in paragraph 5(e) of the Statement of Claim on the basis that there was no other vehicle involved in the Plaintiff's collision or loss of control leading to his collision."

The evidence – the accident and the plaintiff's life before

[4] The plaintiff was born on the 8th of March 1980 consequently at the time of the accident he was 32 years. He gave essentially uncontradicted evidence about his life and background. He was schooled until about 1997 and finished school part way through Year 11 when he was expelled from school for fighting.⁴ For about five years between 1999 and 2004 he worked as a tree lopper.⁵ After which he obtained various labouring jobs working for a labour hire business from about 2006.⁶ Until shortly before the accident the plaintiff had been working laying pipes. It was hard physical labour.⁷ He lost his job a weekend or so before the accident⁸ and he'd put his name down with the labour hire company again. He gave evidence of his personal circumstances in the months before the accident in June 2012. He said that at times he lived at his friend's residence Scott Cox where he slept on a couch. He said the address was at 4 Lindeman Avenue in Cranbrook.⁹ He'd also resided with his mother for a period at 1 Hubert Street South Townsville but at the time of the accident he was in his own residence at 409

⁴ T1-86, T2-57.

⁵ T1-86 145.

⁶ T1-87 18.

⁷ T1-87.

⁸ T1-88.

⁹ See T1-91 140. In fact that was incorrect. The correct address was 63 Laburnum Street Cranbrook. See T3-36 141.

Fulham Road Heatley.¹⁰ He also mentioned his ex-sister-in-law, Sarah Stockwell who lived in Cairns.¹¹ His evidence was that he would visit her from time to time.¹²

[5] The plaintiff was told by his counsel that ambulance records showed that he was attended to by ambulance staff at the accident scene at about 2:15 in the morning of 28 June. He was asked if he remembered the day before, the 27th to which he said “not really”.¹³ He said he remembered being at Scotty’s on the 28th on that evening. He said that earlier in the day he was at home but he could not remember what he was doing at home nor could he remember whether he’d been with anyone at home.¹⁴ He was asked whether he had any memory as to why he went to Scotty’s that evening to which he answered “**usually** go there in the afternoon”.¹⁵ The plaintiff said when he got there Mr Cox was working on a motor vehicle, he thought it was a Land Cruiser he was asked whether he helped Mr Cox to which he answered “I’d get him some tools. Ask him what he’s doing. Yeah, he **usually** tells me what he’s doing.”¹⁶ But the plaintiff could not remember what Mr Cox had told him that he was doing.¹⁷ He was asked how long this work that was being done continued after he arrived and he said “probably up till about 10, 11” in the evening but he was unable to recall approximately what time it was.¹⁸

[6] The plaintiff said that he was at Mr Cox’s for about four hours.¹⁹ And he said that he drank some Fourex Gold, his evidence was that he drank six cans over the four hours but he did not have any memory as to whether the beer had any effect on him.²⁰ He said that after work stopped on the motor vehicle he and Mr Cox sat underneath the house listened to music and the plaintiff drank some beer.²¹ After some time Mr Cox went to bed and he was left downstairs on his own.²² He then rode away from the house.²³ His explanation was that earlier in the evening he’d spoken to his ex-sister-in-law Sarah

¹⁰ See T1-91 - 92.

¹¹ T1-94.

¹² T1-95.

¹³ See T1-95.

¹⁴ T1-95 133-35.

¹⁵ T1-95 137 (Emphasis added).

¹⁶ T1-96 125 (Emphasis added).

¹⁷ T1-96 130.

¹⁸ T1-96 140-45.

¹⁹ T1-97 11.

²⁰ T1-97 125.

²¹ T1-97 145.

²² T1-98 118.

²³ T1-98 115.

Stockwell and he'd made a decision to visit her. She lived in Cairns.²⁴ He left riding his motorcycle. He was wearing thongs²⁵ and the journey to Cairns he estimated would take about four and a half hours.²⁶

[7] In evidence in chief the plaintiff said that after leaving Mr Cox's home he drove down Lindeman Avenue to the intersection with Charles Street where he turned right. After a short journey on Charles Street he arrived at the intersection with Nathan Street which was controlled by lights.²⁷ He said that he turned left onto Nathan Street and then he travelled for some distance along Nathan Street in a generally northern direction.²⁸ The plaintiff gave evidence that after some distance Nathan Street intersects with Dalrymple Road.²⁹ He was asked what was the distance or for how long he travelled on Nathan Street, he said that there's only one intersection between Charles Street and Dalrymple Road as well as a couple of side streets, in terms of distance his evidence was he was probably about maybe a kilometre (K).³⁰ It is also relevant to note the plaintiff's evidence under cross examination that as he rode up Nathan Street he passed on his right a Caltex service station at what was described the Vincent Village.³¹ This can be seen in the street directory (Ex 28) near the intersection of Nathan Street with Fulham Road. This circumstance is of relevance with context of the evidence of the ambulance paramedic, Mr Suringa which I will mention.

[8] At this point it is helpful to interrupt the narrative of the evidence and clarify matters by reference to the street directory, Exhibit 28. It will be seen from that that the intersection of Charles Street and Nathan Street is controlled by lights. A driver who turns left from Charles into Nathan will proceed in a generally northern direction for a distance until reaching an intersection with Dalrymple Road which runs approximately east-west. The intersection is controlled by lights. A driver who proceeds through the lights from Nathan Street continuing to travel more or less northerly will enter Duckworth Street. Following Duckworth Street for a short distance to the north one encounters an intersection with Woolcock Street. Woolcock Street forms part of the major highway

²⁴ T1-98 135.

²⁵ T2-48 13.

²⁶ T2-71 145.

²⁷ T1-99 118.

²⁸ See T1-99 127 and Ex 28.

²⁹ See T1-99 at 143 and see also Ex 28.

³⁰ See T1-99 147 - T1-100 14.

³¹ See T2-57 112-16.

leaving Townsville for travellers intending to journey north, say to Cairns. Drivers intending to travel to Cairns will therefore turn left from Duckworth into Woolcock Street.

- [9] My reason for interrupting the narrative of the evidence with this explanation is because of a leading question by senior counsel for the plaintiff which contained within it an error which the plaintiff accepted and which was not clarified or corrected until later in the evidence. The plaintiff was asked “and do you remember, as you said, proceeding in a generally northerly direction along Duckworth Street?”³² The plaintiff agreed with this suggestion by his counsel. This suggestion, that the plaintiff was travelling in a northerly direction along Duckworth Street, as matters unfolded was reinforced by a question asked by the plaintiff’s senior counsel with which he agreed, that is that he was going in a northerly direction on Duckworth Street.³³ This error was not clarified or corrected until the plaintiff gave evidence³⁴ that he then came up to the “Dalrymple Road” intersection.
- [10] Nevertheless, the plaintiff’s evidence from page 1-100 of the transcript through to page 1-103 of the transcript concerning the events on Duckworth Street must be in context a reference to events occurring on Nathan Street for reasons that will become obvious.
- [11] The plaintiff said that as he was driving along the road a flash came across his mirror, it resembled a set of headlights, he looked and saw a car behind him, it was approximately 50 to 60 metres behind.³⁵ The plaintiff said he kept an eye on the car and adjusted his mirror and he saw the car come up behind him and came as close as about two and a half to three metres.³⁶ The plaintiff said that his response was to accelerate “because they were in [his] space.”³⁷ Before he accelerated he’d moved over to his left but the car continued coming behind him.³⁸ The plaintiff responded by accelerating and moving to the inside lane³⁹ so that he was in the right hand of the two lanes going north⁴⁰ the plaintiff said that he moved his motorcycle on the road but that every time he moved

³² T1-100 17.

³³ See T1-100 115.

³⁴ T1-103 13.

³⁵ T1-100 133.

³⁶ T1-101 110.

³⁷ T1-100 122.

³⁸ T1-101 142.

³⁹ T1-102 16.

⁴⁰ T1-102 120.

there was a reaction from the car behind. The plaintiff's evidence in chief of how things then unfolded is as follows:⁴¹

“What happened then?---We came up to the Dalrymple Road intersection.

The which intersection?---Dalrymple Road.

Dalrymple Road, yes?---Yes.

And what happened?---Because I knew it was a dogleg turn – a dogleg right.

When you're saying dogleg?---It's a bend in the road.

What, in terms of degree of angle, of change of direction, are we speaking of? Is it a sharp turn a - - -?---It's - - -

- - - little turn, or what sort of turn?---It's a, not a sharp sharp turn. It's a sweeping bend.

And what happened then?---I looked back to see what they were doing. Then they

- - -

Where were they, in terms of your vision?—They were – they were a bit backwards, because I was already through, halfway through the intersection, and they were coming up through – past where they – the merging lane, the turn left – turn right, sorry, and, yeah, I looked back to see where they were – where they were, and then they took off towards the Dalrymple Pub.

You mean they turned left on an exit - - -?---Turned - - -

- - - road?---No, turned to the right

And was it Dalrymple road or further on that they made - - -?---No.

--- this right turn?---No, it was Dalrymple Road.

Right. And what happened to you and your bike at that point?---When I was on the lean, my toe hit the ground when I was looking back, and then I lost my balance on the bike, and then when I was going through the intersection, there was an – there was an old merging lane on the left, and then I went across that part where the loose rock was and then started to lose control, and then I put on the back brake to pull it up, and then I went into a speed wobble, where the handlebars were back and forwards, and then I was trying to control the bike because I seen

⁴¹ T1-103 13 – T1-104 19.

where I was going, and I power-slided out of that, and I was sat up straight, and then about 30 metres before Bunnings entrance, that's where everything just went wrong then.

Well, what's your last memory?---I closed my eyes.

But you mentioned the bike went into a wobble?---Yes.

And you leaned over. Are you saying you closed your eyes for a reason?---I seen the gutter coming.

And do you remember impacting the gutter, or not?---I can – I can feel the bike come up and hit me in the chest.

Right. And when's your next memory?---In hospital.”

- [12] The plaintiff gave evidence of fleeting memories of becoming aware that he was in the ICU or in a ward at times.⁴² He remembered a policeman coming to interview him but only vaguely.⁴³ His evidence of this occurrence was:⁴⁴

“Do you remember him asking you about what had happened to you?---Yes.

And do you remember what you said to him?---Yes.

What did you say?---I - I asked if they got the person that was behind me.

And what did he say to you?---He said no, they – they haven't found anyone.”

- [13] The plaintiff accepted that he told people in hospital who asked him that he could not remember what happened.⁴⁵ And he accepted that in hospital he could not remember the accident as distinct from some of what occurred before that night.⁴⁶ The plaintiff said that over time his memory changed and it got better.⁴⁷ And that his memory improved after his discharge from hospital when in 2013 he was living with his mother. He said that he had conversations about the circumstances of the accident with his mother and she told him to see a solicitor. The plaintiff also admitted to discussions he had with his brother about his memory as a result of discussions he'd had with his mother.⁴⁸ The

⁴² See T1-104 - 105.

⁴³ T1-105 128.

⁴⁴ T1-105 130-36.

⁴⁵ T1-105 145.

⁴⁶ T1-106 11-5.

⁴⁷ T1-106 124-26.

⁴⁸ T1-106 140-41.

plaintiff gave evidence that even after he completed a claim form in 2013 his memory continued to improve and his evidence was that it continues to improve.⁴⁹

- [14] In this context the plaintiff said that the motor vehicle he spoke of was a red sedan.⁵⁰ He said there was more than one person in the vehicle⁵¹ and that there was yelling coming from the vehicle.⁵²
- [15] The cross examination of the plaintiff began with him being taken through his traffic infringements history.⁵³ The plaintiff acknowledged that over the years before 2012 he'd variously driven a motorcycle or a motor car.
- [16] The plaintiff was challenged about his evidence that he'd asked the police officer who visited him when in hospital if they'd got the person that was behind him.⁵⁴ In cross examination the plaintiff appeared to recant from that recollection.⁵⁵

“Let me be clear about this, Mr Shepherd. The police officer asked you if you had a recollection about the accident and you told him that you did not?---Yes.

And that is because you did not have any recollection about the accident at that time?---Yes

And that includes not having any recollection about this car and the way in which it drove behind you?---Yes.”

When challenged the plaintiff accepted that his evidence that his friend Mr Cox lived at Lindeman Avenue was incorrect and he accepted that Mr Cox at the relevant time lived at 13 Laburnum Street.⁵⁶

- [17] The plaintiff was cross examined concerning the pre-admission history taken from him on 7 December 2012 when the plaintiff attended the Townsville Hospital.⁵⁷ The plaintiff had been originally booked to undergo a bone graft in December 2012. Eventually the procedure did not take place until January 2013. It was suggested to him that at the hospital on 7 December 2012 a history was taken from him about the accident and how

⁴⁹ T1-107 136.

⁵⁰ T1-107 143.

⁵¹ T1-108 14.

⁵² T1-108 16.

⁵³ See Ex 19, see generally T2-24ff.

⁵⁴ Recall evidence quoted at [12].

⁵⁵ See T2-31 129 – 138.

⁵⁶ See T2-32.

⁵⁷ See Ex 20 and T2-33 19ff.

he'd come to suffer his injuries and the plaintiff accepted that he "could have said something to them".⁵⁸ It was put to him that he'd told the person that made the notes to the effect that he'd been speeding and travelling through an intersection and that he changed traffic lanes and that his tyre caught a traffic island which caused him to crash. The plaintiff in evidence said that he could not recall and then when the suggestion was further put to him he said that he could not remember that far back.⁵⁹

[18] The plaintiff was challenged about his account of (when aged 19) experimental use of marijuana in his mid-teens and a use of methylamphetamine and ecstasy when aged 19 years.⁶⁰ The plaintiff's evidence was that he could not recall telling Mr Rawling that.⁶¹

[19] The plaintiff was extensively cross examined about a number of accounts given by him to others concerning the circumstances of the accident. He was challenged about paragraph 5(a) of the Statement of Claim⁶² that the events leading up to his losing control of the motorcycle occurred during "the plaintiff's journey" as he was travelling along Duckworth Street between Dalrymple Road and Bayswater Road.⁶³ He accepted that the following vehicle was never on Duckworth Street⁶⁴ and that this vehicle had turned right at the intersection onto Dalrymple Road.⁶⁵

[20] The plaintiff was challenged with an entry in exhibit 13, the Notice of Claim dated 16 July 2013.⁶⁶ In particular he was taken to the answer to the question "who caused the accident and why?" and the entry "trying to avoid a vehicle". The plaintiff contended that the entry was not in his hand writing though he accepted that he'd signed the document.

[21] The plaintiff was challenged by history with a version of events suggested by his solicitors in a letter by his solicitors to Dr Jungfer of 12 October 2015.⁶⁷ The plaintiff's explanation was that as he was going through the intersection and when he looked back he went through loose rock where he knew where there was a merging lane and that he

⁵⁸ T2-33 134.

⁵⁹ See T2-33 131 – 48.

⁶⁰ See T2-35 125 and Ex 14 at pg 3.

⁶¹ But see his acknowledgement that he told doctors who saw him for reports the truth at T2-21 143 – T2-22 114.

⁶² See para [2] above.

⁶³ Note also the "journey" described in para 5(b) of the Statement of Claim.

⁶⁴ See T2-40 120.

⁶⁵ Consistent with his evidence at T1-103 13 – T1-104 19.

⁶⁶ See T2-40 135ff.

⁶⁷ See Ex 21 and his evidence at T2-42 132 – T2-43 117.

lost control from there.⁶⁸ The plaintiff accepted that he told Dr Jungfer when he saw her on 20 October 2015 that he had a “reasonable recall up to 30 metres before the time of the collision”.⁶⁹ The plaintiff accepted that he made that observation to De Jungfer because he had no recall past the point of 30 metres away from the gutter and that the last thing he could remember was 30 metres away from the gutter and that he had closed his eyes by that point in time.⁷⁰

[22] The plaintiff agreed that in December 2015 he saw a Dr Faux in Sydney for the purposes of the doctor preparing a report concerning his injuries.⁷¹ He agreed that he told Dr Faux that he looked back and saw that the car had turned off to the right and that following this his back tyre struck a rock.⁷² The plaintiff agreed that he was travelling at about 100 kilometres per hour.⁷³ He could recall his right toe hitting the ground⁷⁴ and he was wearing thongs.⁷⁵ It was put to the plaintiff that he’d told Mr Rawling that his last memory prior to the accident was looking over his shoulder and seeing the car looming up.⁷⁶

[23] Concerning the plaintiff’s evidence identifying the motor vehicle as a red sedan⁷⁷ he was extensively cross examined about his evidence.⁷⁸ That there was no mention of a red sedan in the Notice of Claim nor in the Statement of Claim nor had he mentioned it to any of the doctors who had asked him about the circumstances of the accident. When asked when he first had a recollection of a red sedan he said “not long after the accident”.⁷⁹ And his recollection was that he recalled the presence of a red sedan that it came to him “probably leading in to 2013”.⁸⁰ He could offer “no explanation” why a red sedan was not mentioned to the doctors nor in the Statement of Claim or in the Notice of Claim.⁸¹ When senior counsel for the defendant suggested to him that he had no memory of the car being a red sedan until sometime “in the last 12 months” the plaintiff

⁶⁸ See T2-43 15.

⁶⁹ See the report dated 23 October 2015 forming part of Ex 16 at pg 3.

⁷⁰ See T2-45 15.

⁷¹ See Ex 15.

⁷² See T2-45 145 and Ex 15.

⁷³ See T2-46 11 and T2-49 11.

⁷⁴ T2-47 145.

⁷⁵ T2-48 13.

⁷⁶ See Ex 14, report dated 18 January 2016.

⁷⁷ Recall his evidence in chief at T1-107 143.

⁷⁸ See T2-50ff.

⁷⁹ See T2-52 17.

⁸⁰ T2-52 127.

⁸¹ See T2-52 110.

answered “yes”.⁸² However Exhibit 22 is a diary note of a conference on 1 May 2015 where reference is made of a red car.

- [24] The plaintiff agreed that when entering Duckworth Street having crossed the intersection with Dalrymple Road the driver would be presented with three lanes travelling north.⁸³ In this context it was suggested by senior counsel for the defendant to the plaintiff that he “simply lost control of the motorcycle and ran into the gutter on the side of the road”. The plaintiff’s evidence was that the bike “was pushing me towards the footpath”.⁸⁴
- [25] The plaintiff was cross examined about incidents in his life and treatment he received at hospitals from time to time.⁸⁵ He agreed that in Year 11 he’d been expelled from school for fighting. In August 2007 he was involved in a fight and was treated in hospital having been knocked unconscious. In September 2007 he was treated at hospital following a motorcycle accident when he came off his bike. In February 2008 he was treated for an injury to his right hand after punching a fridge. In November 2008 he was treated at hospital for an injury to his jaw following an incident involving nightclub security staff. In February 2009 he was treated in hospital following a head butt and suffering a short period of unconsciousness.
- [26] The decision to make the trip to Cairns the plaintiff confirmed that he made that decision after he’d drunk some cans of beer. He said his last can was about 11pm⁸⁶ and conceded that after his decision to go to Cairns he continued to drink some beer.⁸⁷
- [27] The plaintiff accepted that after he remembered that a vehicle had been involved in his accident he did not contact the police to tell them.⁸⁸ Nor, despite being on Facebook did he use it to try and find or identify the motor vehicle.⁸⁹ He did not try to find the car nor ask anyone else to find it.

⁸² T2-55 126.

⁸³ See T2-56 130.

⁸⁴ See T2-56 140.

⁸⁵ See T2-57ff and see also Ex 25.

⁸⁶ T2-62 118.

⁸⁷ T2-62 133.

⁸⁸ T2-67 115.

⁸⁹ T2-67 140.

- [28] The plaintiff agreed that, depending upon the lights, a journey from Laburnum Street at Cranbrook to the intersection of Nathan Street and Dalrymple Road would take about seven minutes.⁹⁰ It was his intention to travel to Cairns and that he intended to cross Dalrymple Road and drive up Duckworth Street some distance before turning a left onto Woolcock Street.⁹¹ The journey would take about four and a half hours⁹² and the journey started around about 2am.⁹³
- [29] Sarah Cook (Stockwell) gave evidence in the plaintiff's case.⁹⁴ She said that at the time of the accident she lived in Cairns. She had a recollection that on the night of the accident (before the accident) she had a telephone conversation with the plaintiff. Her evidence was that the subject of the conversation was his coming up to Cairns to help her with a move she was to make to Townsville. Her evidence was that the phone call occurred possibly between 9 and 10pm and that as a result she expected him to come up to Cairns to help her with the move.
- [30] The plaintiff tendered into evidence the text of an advertisement that the plaintiff's solicitor placed in the Townsville Bulletin on 9 July and 10 July 2015.⁹⁵ There was no suggestion in the evidence or at the trial that any person witnessed the accident or there was any evidence that might identify such a witness.
- [31] The defendant called three witnesses. Mr Scott Michael Cox was called.⁹⁶ He had been a friend of the plaintiff for many years. He has since moved but at the relevant time he lived at 13 Laburnum Street Cranbrook. He identified some pages of a police notebook that were handwritten⁹⁷ which were made by a police officer at an interview and his signature in the police notebook.⁹⁸ In cross examination Mr Cox said that on the evening in question he'd consumed between four and six beers over a long period of time.⁹⁹

⁹⁰ T2-71.

⁹¹ T2-71.

⁹² T2-71 145.

⁹³ T2-72 14.

⁹⁴ T3-44ff.

⁹⁵ See Ex 23 and T3-18.

⁹⁶ T3-36ff.

⁹⁷ See Ex 24.

⁹⁸ See Ex 24.

⁹⁹ T3-40 110.

- [32] John Robert Suringa gave evidence that at the relevant time he was an advanced care paramedic with the Queensland Ambulance Service.¹⁰⁰ He recalled attending the accident scene on 28 June 2012. He was shown Exhibit 2, the QAS report form. Mr Suringa recalled that he was on duty that night and that he was at the back gates of the ambulance station at Hugh Street when the communication to attend the accident scene was received. He said that the ambulance drove straight to the scene under lights and sirens.
- [33] Mr Suringa gave evidence that they had been refuelling the ambulance at the Vincent Village refuel service station on the corner of Nathan Street and Fulham Road immediately before returning to the Hugh Street ambulance station.¹⁰¹ Mr Suringa said that he heard a noise, a high pitched noise, he turned and saw a motorcycle passing down the road along Nathan Street travelling in the direction towards Dalrymple Road. The speed limit on Nathan Street at that point changes from 60 to 70 kph and it was Mr Suringa's assessment that the motorcycle was travelling in excess of that. He described it as travelling at "excessive speed".¹⁰² There were no other vehicles in the vicinity, the motorcycle was the only traffic on the road at that stage. When asked to give an estimate of the speed that he thought the motorcycle was travelling at Mr Suringa said that it was well in excess of probably 100 kilometres an hour, in his estimation.¹⁰³ When asked how long it was after he saw the motorcycle go past the service station before he received the call to attend the accident scene Mr Suringa said that it was maybe between five and ten minutes.¹⁰⁴ He was asked what distance it was from the service station to the ambulance station on Hugh Street and he said roughly about three or four kilometres along Palmerston Street.¹⁰⁵ When cross examined by senior counsel for the plaintiff Mr Suringa accepted that it could have taken up to a quarter of an hour to elapse between observing the motorcycle and receiving a call at the Hugh Street ambulance station. Further in cross examination Mr Suringa agreed that it was difficult to make a reliable assessment of the speed of a motorcycle in the circumstances he found himself at the petrol station.¹⁰⁶ When asked about his observations when he arrived at the accident

¹⁰⁰ See T3-22ff.

¹⁰¹ T3-23 - T3-24.

¹⁰² See T3-24.

¹⁰³ See T3-25 at 135.

¹⁰⁴ T3-27 120.

¹⁰⁵ T3-34 123.

¹⁰⁶ T3-32 - T3-33.

scene and whether the motorcycle at the accident scene was the same or different from the one he saw on Nathan Street Mr Suringa said that he could not recall.

[34] Senior Constable Angelo Busetti was called by the defendant.¹⁰⁷ He was involved in the police investigation at the accident and (together with Constable Goode) was the first of the police officers on the scene.¹⁰⁸ When he arrived Senior Constable Busetti said the QAS personnel were already on the scene. He identified Exhibit 10 as a diagram he prepared based on his observations at the scene. He did not make any measurements and the distances shown on the diagram were “estimates”.¹⁰⁹ Concerning the Figure 1 in the box near where the writing “ENT ROAD TO DOMAIN” appears he gave evidence that there appeared to be a sign of a motorcycle “impact” with the edge of the road or kerb, a “gutter type edge”.¹¹⁰ The figure on the roadway indicated as the “operator” was about 40 metres from the “impact” point.¹¹¹ The second box indicating Unit 1 represents the approximate position of the bike estimated at 80 metres from the “impact” point.¹¹² Senior Constable Busetti said that he observed no signs suggestive of the involvement of another vehicle in the accident.¹¹³

[35] When cross examined Senior Constable Busetti gave evidence that on the 24th July 2012 he had an interview with the plaintiff at the Townsville Hospital. No statement was taken from the plaintiff. The plaintiff told Senior Constable Busetti that he had no memory of the accident.¹¹⁴ When cross examined Senior Constable Busetti said that any CCTV footage of the intersection or approaches to the intersection would only be available for about 48 hours to about a week¹¹⁵ with the consequence that by the time of the interview on 24 July 2012 any CCTV footage would be lost. Senior Constable Busetti agreed that the Dalrymple Road Duckworth Street intersection is a major intersection with a lot of traffic. He agreed that at all hours of the day and night traffic might pass through that intersection and he would not expect the road to be unoccupied by cars for any stretch of time.¹¹⁶ Senior Constable Busetti agreed that Duckworth

¹⁰⁷ T3-52ff.

¹⁰⁸ T3-53.

¹⁰⁹ T3-55 137.

¹¹⁰ T3-55 120.

¹¹¹ T3-56 115.

¹¹² T3-55 135.

¹¹³ T3-56 140.

¹¹⁴ T3-58 135.

¹¹⁵ T3-62.

¹¹⁶ T3-63.

Street has a slight bend or curve to the right as a motor vehicle enters it having crossed Dalrymple Road from Nathan Street.¹¹⁷ Senior Constable Busetti said that other than some scrape marks¹¹⁸ on the road and bits of debris after the gutter marks¹¹⁹ there were no other marks or information showing from where the motorcycle had come.¹²⁰

The evidence – the injuries and consequences

[36] With the agreement of the defendant he, plaintiff, tendered a number of expert reports from doctors and psychologists who examined the plaintiff. With the exception of Dr Gillett who was called and asked some questions on some aspects of the plaintiff's need for care there was no challenge to the tender of the reports by the defendant or to the contents. The reports were as follows:

Exhibit 14	Report	Peter J Rawling (neuro psychologist)	18 January 2016
Exhibit 15	Report	Dr Steven Faux	15 December 2015
Exhibit 16	Reports	Dr Patricia Jungfer	23 October 2015, 12 November 2018, 18 December 2018
Exhibit 17	Report	Professor Bruce J Brew	4 April 2016, 15 August 2018
Exhibit 18	Report	Dr G. Gillett	27 July 2016, 17 September 2018

[37] In his report Mr Rawling concluded that the head injury sustained in the accident was severe in nature. He noted that the plaintiff complained that his memory was less reliable, that he was having difficulty in processing things said to him and that his own speech had become slow and hesitant. While on testing basic intellectual functions well maintained deficits were evident in a number of features. Mr Rawling concluded that the slowed rate of thinking and impairments were a direct result of post traumatic brain damage. Based on presentation and performance Mr Rawling expressed the opinion that it was difficult to see how the plaintiff could maintain the level of productivity required

¹¹⁷ T3-60.

¹¹⁸ T3-61 110.

¹¹⁹ T3-60 140.

¹²⁰ T3-60 130.

in most open employment positions. Since more than three years had elapsed since the accident the plaintiff's cognitive deficits could be considered permanent.

- [38] Doctor Faux (specialist in pain medicine and in rehabilitation) noted the plaintiff had suffered from injuries which included an injury to the spleen requiring its removal, a ruptured diaphragm, a small intestine laceration, a left kidney laceration, left ulna and radius fractures requiring open reduction and internal fixation and a later bone graft, a right radius fracture requiring an open reduction and internal fixation, a right foot toe fracture, fractured ribs, left superficial radial nerve quality and a closed head injury with post traumatic amnesia. In Dr Faux's opinion the plaintiff was unable to return to manual work. In her report of 12 November 2018 Dr Jungfer diagnosed that the plaintiff had suffered from a severe traumatic brain injury, cognitive disorder secondary to that injury and a grief disorder. She expressed the opinion that from a cognitive and psychiatric perspective the plaintiff would be capable of paid employment but that there would be issues with respect to employability due to his reduced coping resources and she was aware that there was a number of physical injuries sustained that may have a more substantial contributing factor to his long term employability.
- [39] In a report Professor Brew expressed the opinion that the plaintiff suffered from legal incapacity due to the nature of the head injury he sustained and the cognitive assessments that had been conducted as well as the neuro psychological assessment conducted by Mr Rawling.
- [40] In his report of 27 July 2016 Dr Gillett expressed the opinion that the plaintiff had suffered from permanent impairments to his left shoulder, left forearm and left upper limb. The overall upper limb impairments when combined gave the plaintiff a 45% impairment of the upper extremity function which he quoted to 27% impairment of the whole person. In addition the plaintiff suffered from permanent impairment as a result of injuries to his right toe, his left ankle and other injuries to his left lower limbs. In relation to the impact of the orthopaedic injuries upon the plaintiff's life was Dr Gillett's view based on the plaintiff's previous work history that he would not return to the work force and the type of work that he had done in the past.
- [41] The plaintiff described his symptoms pain and suffering when in hospital. He said that he felt sick and that he had difficulty sleeping at night. He recalled pain in his left arm

and from his right foot and big toe. He recalled an abdominal injury following the removal of his spleen. Eventually he was moved to a rehabilitation unit. He recalled pain when engaged in the exercise programme.

[42] Following his discharge from hospital in 2012 he lived for a time at 409 Fulham Road. For some months his friend Sarah Stockwell provided care and for a time another person, Sarah Dale. Before the accident he said that he was able to do his washing, cooking, cleaning, lawn mowing and care for his dogs. After the discharge he needed help with the mowing, the washing, the dishes, the cooking and the cleaning. His mother came over almost daily and stayed the day from about 8 or 8:30 to 5pm when Sarah Stockwell worked. Later in 2013 he lived with his mother for a period until 2014 (his mother passed away on the 7th of October 2014). She helped by driving him to the hospital for appointments doing the food shopping and doing housework. To this effect the plaintiff tendered a statement by the plaintiff's mother ultimately signed on 2 December 2013.¹²¹ In that statement the plaintiff's mother canvassed issues to do with care and the help and assistance that she gave him from time to time.

[43] With respect to his leg, foot and toe he said that he wore a moon boot for some months and had pain and difficulty in walking for a year or more until about 2015. He noted a slight limp.

[44] With respect to his left arm he had follow up surgery in January 2013 which involved a bone graft. He was an in-patient for some time and he said that he still has pain in his left arm. The plaintiff said that his left arm continued to be weak and he had limited power when lifting.

[45] With respect to his right arm he said that he still had pain on lifting items and that his limit with a two-hand lift was around four kilograms. This meant that he was no longer able to do work he used to do involving heavy lifting.

[46] His chest and rib injuries healed over time although he still noted pain.

¹²¹ See Ex 26.

- [47] The plaintiff gave evidence concerning his mental function.¹²² He said it takes him time to process things, he had a poor memory and he can forget or fail to do tasks such as brushing his teeth, having showers or attending doctors' appointments. He said that he had difficulty organising things, he said that he received Centrelink benefits from which he paid rent and electricity. He said that after his mother died in October 2014 he lived with his nephew for a period though he, the plaintiff, found that he did most of the housework.¹²³ At times a friend helped him with the mowing. With respect to his current circumstances the plaintiff said that he lived alone, watches television and that his brother visits from time to time. He does minimal housework.
- [48] The plaintiff said that he does not have a regular GP and does not necessarily take the medication prescribed for him. He finds himself lethargic and has put on weight and suffers from back pain in his lower back. He said that he had for a time a limited drivers licence (for use during daytimes) but he let it lapse in 2018. He does not own a car.
- [49] The plaintiff gave evidence that when from time to time he attended upon doctors who were to examine him and write reports for the purposes of the case he was truthful and accurate and answered as best was possible their questions.¹²⁴

Submissions – the accident

- [50] In submissions senior counsel for the defendant emphasised that the reliability of the plaintiff's memory was an issue. He pointed to what he submitted were differing versions of the events on the evening and various versions suggesting that his recollection changed. With respect to the interview of Officer Buseti on 24 July 2012 he submitted that the plaintiff recanted in cross examination from having any recollection that there was a driver of a vehicle behind and that there was no corroboration for that statement in the evidence of Officer Buseti. He pointed to Exhibit 22 the file note of 1 May 2015 and submitted that this was the first independent evidence of an account involving a red car. He pointed to the varying descriptions given to doctors by the plaintiff of the incident and to the variations or versions differently given at trial including the plaintiff saying that he closed his eyes, that he felt the bike coming up into his chest and that he could see and hear the occupants of the car behind

¹²² T2-11.

¹²³ T2-15.

¹²⁴ T2-21 143 – T2-22 114.

him. Further he pointed to statements or accounts that suggested that a toe made have played a part in the circumstances of the accident the accounts of a loss of control contributed to by a rock or gravel.

[51] Counsel for the defendant emphasised that Exhibit 10 was a sketch and not a scale map or plan of the scene. With respect to the consumption of alcohol it was submitted that the plaintiff had a practice of drinking heavily on weekends and he pointed to the note in the police notebook signed by Mr Cox that the plaintiff was slurring his speech. He submitted that the plaintiff's apparent decision to travel to Cairns was an impulsive decision for somebody who had been drinking alcohol and was wearing thongs. He submitted that the various accounts given by the plaintiff and the occasions when he gave contradictory evidence suggested that his reliability as a witness was in question. I was urged to accept the evidence of the ambulance officer Mr Suringa particularly concerning his observations of a speeding motorcycle. It was submitted that the sighting of the speeding motorcycle on Nathan Street and the ultimate accident in the intersection of Duckworth Street was remarkable coincidence. It was submitted that having regard to the evidence of Mr Suringa with respect to the timing of the observation at the service station, the time it would have taken to travel to the ambulance station and then when the emergency notification of an accident was first recorded suggest that it was the plaintiff's motorcycle that Mr Suringa saw and that the driving at an excessive speed explained how the accident happened. It was submitted that s 47 of the *Civil Liability Act* was satisfied and that I should find that the plaintiff was intoxicated. Further it was submitted that the plaintiff had not proven proper inquiry and search within s 31(2) of the *Motor Accident Insurance Act*.

[52] For the plaintiff it was submitted that a proper inquiry and search had been made. It was pointed out that the police had no evidence to follow up because by the time of the interview with the plaintiff at hospital in July any CCTV footage would have been lost. It was submitted that the combination of the plaintiff's head injury, his period of amnesia and the slowness of his recovery of memory meant that by mid 2013 the trail was cold and that what was proper by way of enquiry was done in 2015. With respect to the submissions concerning contributory negligence arising from a consumption of alcohol it was submitted that there was insufficient evidence to draw an inference that the plaintiff was intoxicated. That inference could not be drawn merely from the evidence that approximately six cans of Fourex Gold were consumed over a period of

some hours. With respect of the circumstances of the accident senior counsel for the plaintiff emphasised the serious injuries including the head injuries sustained by the plaintiff. It was submitted he was plainly in a confused state for a lengthy period and there was a period of post traumatic amnesia for 24 days or more. Nevertheless, senior counsel pointed out there was no evidence of fractures to the skull or bleeding or damage to the brain. There was no evidence suggesting that it was not possible that the plaintiff could not recover to the extent that his memory could be restored. It was submitted that there was no evidence of confabulation on the part of the plaintiff and that instances of forgetfulness or inconsistent accounts should be understood in the context of the established cognitive impairment and a brain injury he did sustain. With respect to the circumstances of the accident senior counsel for the plaintiff emphasised that in the state of the intersection combined with the plaintiff being an experienced motorcycle driver it was extremely unlikely that there would be a single vehicle accident without some contribution or involvement by another source such as another vehicle. It was submitted that something very unusual must have happened to bring about the plaintiff losing control and to the suffering the injuries he did. It was submitted that when that is considered along with giving due allowance for the plaintiff's incapacity his account of the involvement by the unidentified motor vehicle was neither unlikely and was coherent. In response to the defendant's reliance upon notations in hospital notes and records and notations made by doctors as to the circumstances of the accident senior counsel referred me to the observations by Basten JA in *Mason v Demasi*¹²⁵ and to the difficulties attending an exercise which involved discounting a witness's oral testimony on the basis of accounts given to various health professionals for the reasons given by his Honour. For example senior counsel submitted that the hospital records may just have been copied from other clinical records. Referring to the pre-admission notation of 7 December 2012 (Ex 20) counsel for the plaintiff pointed out that there was no evidence of who made the notation and who gave the information to the person who made the notation and whether the information came from the plaintiff. With respect to the evidence of the ambulance driver Mr Suringa in his observation of a motorcycle travelling fast on Nathan Street it was submitted that it was not put to the plaintiff that he was speeding on Nathan Street past the Caltex service station. It was submitted that it was not established by the evidence that the motorcycle observed by the ambulance office was the one and same

¹²⁵ *Mason v Demasi* [2009] NSWCA 227 at [2].

motorcycle as that driven by the plaintiff. It was submitted that the evidence with respect to the distances to be travelled, the time that it would take to travel the distances when compared with the contradictory evidence as to when the emergency call was made meant that it was distinctly likely that the motorcycle seen by Mr Suringa was different from the one ridden by the plaintiff. It was submitted that the plaintiff's evidence was reliable and that the evidence didn't permit any finding that he was untruthful or confabulating and it was submitted that an argument that his evidence was attended by reconstruction was not open. In that context it was submitted that there was no medical evidence from an expert that a person can reconstruct evidence following a brain injury. Senior counsel for the plaintiff submitted that it was unfair of the defendant in the conduct of the trial not to call the doctors whose versions might have seen to contradict the plaintiff's account.

Discussion and findings

- [53] Ultimately I have concluded that I am unable to accept the plaintiff's account of the events and circumstances of the journey upon Nathan Street, to and through the intersection with Dalrymple Road, including the loss of control of the motorcycle and subsequent accident in Duckworth Street. But that does not mean that all of the plaintiff's account is rejected. There is corroboration for some of his evidence of his doings on the evening of the 27th and the early hours of the 28th, some of his account is likely because of known circumstances and some of his account accords with my conclusions concerning his character in light of the evidence of his life and behaviour before.
- [54] But before elaborating upon what I have just said and explaining my reasoning it is necessary to address aspects of the evidence and make some findings.
- [55] The evidence of Senior Constable Buseti and from the sketch he made (Ex 10) suggests that the motorcycle struck part of the concrete kerb or gutter near and just past the driveway entrance to the Domain Shopping Centre. The estimated positions of the plaintiff and the motorcycle suggest that after that the plaintiff came off the motorcycle. It is uncontroversial and likely that the plaintiff then sustained his injuries. The difficulty with further elaboration is the paucity of the evidence. The sketch is not a scale map. No measurements were taken. No photographs were taken. No witnesses

were identified. It can be concluded from the evidence from the witnesses who attended the scene¹²⁶ and from Exhibit 27¹²⁷ that the road surface was sealed and dry, it was a “divided road” with six lanes with “active” street lighting and the speed limit was 70 kph. While it is possible to postulate from the sketch and the evidence of Senior Constable Busetti of the possible direction of travel of the motorcycle and the plaintiff from the site of the damage to the kerb there is no reliable evidence of the direction of travel of the motorcycle through the intersection and along Duckworth Street to the position of the damage to the kerb or gutter. No measurement was taken of the distance from the intersection to the point of that damage. No photographs were taken to enable any assessment to be made of the distance and the road topography.

[56] Reconstructing the time of events is also fraught. The evidence of the time of events from the ambulance officer Mr Suringa and the documentary records from the police¹²⁸ and the QAS¹²⁹ and the recording¹³⁰ is contradictory. Assuming the plaintiff left Mr Cox’s house near 2am and his evidence of how long the journey from the residence to the intersection might take¹³¹ it is reasonable to conclude that the accident occurred sometime after 2am but before 2:14 or 2:15 when the couple identified in Exhibit 27 came upon the scene and telephoned emergency services.

[57] What I have just said raises the issue of the plaintiff’s movements and journey. It was uncontroversial that the plaintiff was at Mr Cox’s residence at Laburnum Street for some hours on the evening on the 27th and the early morning of the 28th. At some time, probably around about 2am, he left on his motorcycle. The evidence of Sarah Cook (Stockwell) corroborates the plaintiff’s evidence of a conversation between them that evening. From that she expected the plaintiff to come up to Cairns. However her evidence did not go so far as to suggest that she expected him to journey up that night. I infer that the plaintiff made a decision to leave and travel to Cairns sometime after the conversation with Ms Cook when he was at Mr Cox’s. To embark upon a four and a half hour journey to Cairns at 2am on a motorcycle wearing thongs suggests an

¹²⁶ For example the evidence of Senior Constable Busetti mentioned at para [35].

¹²⁷ Traffic crash report.

¹²⁸ Ex 27.

¹²⁹ Ex 2 and Ex 31.

¹³⁰ Ex 30.

¹³¹ About seven minutes depending on the lights. See T2-71.

impulsive decision. The plaintiff's history of sustaining injuries in fights and by other means suggest he was prone to impulsive decision making.¹³²

- [58] For a person leaving Laburnum Street intending to drive to Cairns a convenient route was that suggested by the plaintiff. That is to journey up Lindeman Avenue, to turn right into Charles Street and then left at the intersection with Nathan Street then onto the intersection with Dalrymple Road and after crossing that to travel up Duckworth Street before turning left onto Woolcock Street. The likelihood of that route permits me to find that the plaintiff drove that route to the intersection of Nathan Street and Dalrymple Road intending to drive up Duckworth Street to the intersection with Woolcock Street.
- [59] I was impressed with the evidence of the ambulance officer Mr Suringa. He was careful not to speculate upon matters. He was aware of the limitations upon the capacity to accurately estimate speed. The circumstance that he was an experienced ambulance officer with many years of driving ambulances suggested to me that he was well capable of forming a reliable impression when a vehicle is travelling at an excessive speed. While I am prepared to accept his evidence that he observed a motorcycle travel up Nathan Street towards the intersection with Dalrymple Road whilst he was at the service station and that there was no other vehicle on the road at the time and the motorcycle appeared to be travelling at an excessive speed having regard to the speed limit I am not prepared to conclude as urged by the defendant that it was the plaintiff and his motorcycle that Mr Suringa saw. Mr Suringa was careful in his evidence but he was unable to say it was the same motorcycle that he saw at the accident scene. Tantalising as it is because of the circumstance of occasion and the timing of events the defendant has not proven on the balance of probabilities that the plaintiff was riding that motorcycle.
- [60] On the plaintiff's case there is a conflict between the plaintiff's evidence and the evidence of Senior Constable Busetti concerning the interview that occurred at the hospital on 24 July 2012. Senior Constable Busetti's evidence was that the plaintiff said he had no memory of the accident. The plaintiff said that he asked Senior Constable Busetti if they got the person who was behind him,¹³³ although it should be noted that

¹³² See Ex 25 and the cross examination of the plaintiff summarised at para [25].

¹³³ See the evidence at para [12].

the plaintiff recanted from that when cross examined.¹³⁴ In my view it is unlikely the plaintiff mentioned another vehicle or that there was a person behind him. The likelihood is that if that had been said by the plaintiff Senior Constable Busetti would have noted it, inquired more from the plaintiff and ultimately some reference to that account would have appeared in the documents forming part of the Queensland Traffic Crash Report, Exhibit 27. I prefer the evidence of the police officer to the self contradicted evidence of the plaintiff.

[61] I now return to the topic that I briefly addressed at the commencement of my discussion and findings. The assessment of the plaintiff's evidence and his reliability as a historian of course has to be undertaken in this case in the context of any compromise of his capacities to understand questions asked of him, to explain or communicate his thoughts and knowledge in response to questions and in generally to cognitively process the information and communicate. For example at times in evidence the plaintiff appeared tired and at times he became confused. There were occasions when he appeared to be at cross purposes with counsel and not understand questions.¹³⁵ This assessment has to occur in light of the undeniable circumstance that he has suffered a significant cognitive insult as a result of the head injury sustained in the accident. For this reason allowances have to be made for the plaintiff, it would be unfair to judge him by the standards of a healthy person without any cognitive disability. Bearing these matters in mind and making due allowance there are a number of reasons for my conclusion that I should not accept the plaintiff's evidence relating to the events and circumstances of the journey on Nathan Street and at and through the intersection with Dalrymple Road. My conclusion is for a number of reasons both individually and in combination. I will address them in turn.

[62] In addresses I raised one aspect of my concern with senior counsel for the plaintiff¹³⁶ in what I described as a "disturbing variation in demeanour".¹³⁷ At times the plaintiff in his evidence (even when counsel was leading him) was very slow and deliberate, even hesitant, in answering. This feature was, to my mind, consistent with a man who had suffered a significant cognitive insult. But when asked questions about the events in question (the driving on Nathan Street and what happened at the intersection) his

¹³⁴ See para [16].

¹³⁵ One example can be seen at T2-53 114-25.

¹³⁶ T4-62ff.

¹³⁷ T4-62 120.

evidence flowed more deliberately and easily, as if it had been rehearsed. I described it in colourful terms to counsel.¹³⁸

[63] I am well aware of the limitations upon fact finding, particularly on questions of credit based on demeanour.¹³⁹ In submissions senior counsel reminded me of that and I acknowledged it. Nevertheless I have a deep concern that in this respect the plaintiff's evidence was rehearsed and not a reliable account based on memory. The concern I have with the feature of the plaintiff's demeanour however is but one reason for my ultimate conclusion.

[64] Of significance are the various accounts the plaintiff has given over the years concerning his recollection of events and the inconsistencies between the accounts.

[65] There is no doubt that the plaintiff suffered a significant head injury in the accident and with it a cognitive insult. It is common ground that he suffered a loss of memory. It was not in doubt that with time and healing it is possible for a person with a head injury to recover some of the lost cognitive function and with it memory. The question however in this case is the reliability of the plaintiff's asserted memory because of inconsistencies. Some of the matters relevant to this issue include the limited account of the circumstances of the accident contained in the Notice of Claim (Ex 13) and the rather curious way in which the plaintiff's case is pleaded in paragraph 5(a) and 5(b) of the Statement of Claim which suggest that the journey in question occurred on Duckworth Street. There are the various statements or comments made to doctors¹⁴⁰ such as to Dr Faux in 2015 that his back tyre struck a rock, the account to Mr Rawling in 2016 (Ex 14) that his last memory was the looking over his shoulder and seeing a car looming up whereas in cross examination¹⁴¹ he said that his last memory was seeing the car turn right and then he looked forward onto Duckworth Street when everything unfolded. There is no mention of a red sedan in the Notice of Claim nor in the Statement of Claim. There were inconsistencies with respect to the timing of his recollection of a red sedan, "not long after the accident"¹⁴² and "into 2013".¹⁴³ There is

¹³⁸ T4-62 118-19. "He rattled it off as though it was an eisteddford that he'd been practising for for some years."

¹³⁹ See for example the discussion of this issue in *Fox v Percy* (2003) 124 CLR 118.

¹⁴⁰ Recall the plaintiff's evidence that he made truthful and accurate statements to doctors. T2-21 143 – T2-22 114.

¹⁴¹ T2-48 120.

¹⁴² T2-52 17.

¹⁴³ T2-52 127.

the account recorded in the Townsville Hospital notes on 7 December 2012¹⁴⁴ suggesting that he was speeding and travelling through the intersection and that he changed lanes and his tyre caught a traffic island. There is no mention of a motor vehicle or a red sedan.

- [66] In submissions senior counsel for the plaintiff pressed me with the observations made by Basten JA in *Mason v Demasi*¹⁴⁵ and submitted that I should discount the significance of the notations in the hospital notes or in the doctors notes and approach that evidence with caution for the reasons stated by his Honour. The objection raised by plaintiff's counsel is well made. Individually the matters I have mentioned might not assume great significance or weight but the number of them and in the context of the other issues that I have mentioned and will mention they cannot be dismissed.
- [67] Of greater concern is the poor memory of the plaintiff coupled with his propensity in evidence to accept propositions from others that were false or inaccurate. I formed the impression that the plaintiff was susceptible to suggestion and prone to reconstructing his evidence.
- [68] Instances of his poor recollection and of his acceptance of statements or propositions that were inaccurate include his statements to people in hospital¹⁴⁶ and the evidence he gave of the incorrect address of Mr Cox.¹⁴⁷ It will be recalled that the evidence he gave when questioned in evidence in chief¹⁴⁸ suggested that the events involving the following car occurred on Duckworth Street. A reading of the transcript shows that the plaintiff readily accepted an inaccurate proposition contained in a leading question asked by his counsel. Further of significance is the evidence he gave concerning his memory of a red car. When pressed in cross examination by senior counsel for the defendant he accepted the proposition that he had no recollection of a red car until the last 12 months¹⁴⁹ though earlier he'd said that his recollection came to him "not long after the accident"¹⁵⁰ and then later said that his recollection didn't come to him until

¹⁴⁴ See Ex 20.

¹⁴⁵ *Mason v Demasi* [2009] NSWCA 227 at [2].

¹⁴⁶ See T1-105 – T1-106 and the evidence summarised at para [13].

¹⁴⁷ See T1-91.

¹⁴⁸ See T1-100 – T1-103.

¹⁴⁹ T2-55 126.

¹⁵⁰ T2-52 17.

“into 2013”.¹⁵¹ The documentary evidence from Exhibit 22¹⁵² suggests that the plaintiff gave instructions about a red car on the 1st May 2015. His evidence under cross examination that his recollection only came to him in the last 12 months cannot be correct. There were occasions in the plaintiff’s evidence when I gained the distinct impression that his evidence may be affected by reconstruction.¹⁵³ It is apparent that the plaintiff’s memory was only partial. He could not remember much of the day before¹⁵⁴ and there is a more general concern.¹⁵⁵

[69] It is this combination of the plaintiff’s admittedly poor memory at times,¹⁵⁶ his demeanour in the way he answered questions and gave evidence of events, the varying and inconsistent accounts of the circumstances that evening, his susceptibility to suggestion and the appearance of reconstruction in the evidence lead me to regard the plaintiff as an unreliable historian and it is for these reasons that I reject his evidence.

[70] To avoid misunderstanding, I have not found that the plaintiff is an untruthful witness but, for the reasons given, an unreliable witness. I have considerable sympathy for him and his predicament.

[71] In submissions senior counsel for the plaintiff submitted that it would be unfair to conclude that the plaintiff’s evidence was affected by reconstruction because there was no evidence called from any medical witness that a person with the plaintiff’s disabilities might be reconstructing when asked to recall memory. As I understood the submission it was based upon the Rule in *Browne v Dunn* which concerns circumstances of unfairness at trial if a proposition is not raised with the witness. The difficulty with that submission in this case is that senior counsel for the defendant squarely raised with the plaintiff in cross examination the issue of whether the plaintiff was reconstructing his evidence.¹⁵⁷ The issue having been squarely raised by the defendant with the plaintiff there was no unfairness and it was the plaintiff’s counsel

¹⁵¹ T2-52 127.

¹⁵² The solicitor’s diary note of 1 May 2015.

¹⁵³ See for example his use of the word “usually” at T1-95 137 and T1-96 125.

¹⁵⁴ See T1-95 114.

¹⁵⁵ See T1-95 to T1-97.

¹⁵⁶ See for example his statement to Senior Constable Buseti on 24 July 2012 that he had no memory.

¹⁵⁷ T2-49 15-125. Whether the plaintiff understood what Counsel was driving at may be doubtful but his Counsel cannot have failed to appreciate the issue.

who made a forensic decision to tender medical reports without calling the doctors to offer evidence, if they could comment, upon this issue.¹⁵⁸

[72] At this juncture it is relevant to mention another matter. Senior counsel for the plaintiff submitted that it was unfair for the defendant to submit that the plaintiff was speeding down Nathan Street in the circumstances suggested by the ambulance officer Mr Suringa. Because of my findings upon this issue it is strictly speaking not relevant or necessary to go into this issue at any detail. But for the record I express my view that there was no unfairness by senior counsel for the defendant in his conduct of the cross examination of the plaintiff. The question of the plaintiff speeding was squarely raised on the pleadings. It was a live issue. On two occasions the plaintiff frankly admitted speeding, see for example his estimate of his speed in the intersection at “about 100 maybe”.¹⁵⁹ These statements were made in the context of an account of involving the actions of the unidentified motor vehicle but nevertheless is consistent with the plaintiff’s own case that he was induced to drive fast on Nathan Street. In the context of the issues at trial and the evidence senior counsel for the defendant was not obliged to put to the plaintiff that he was the motorcyclist observed by Mr Suringa.

[73] Senior counsel for the plaintiff submitted that the circumstances of the intersection and the reliably demonstrated facts supported the plaintiff’s case and supported an inference justifying a finding that the accident and injuries had occurred as a result of the intervention of the unidentified motor vehicle as contended for by the plaintiff. He pointed to the circumstances of the intersection, that it appeared to be safe and wide, well lit, sealed and on the evening in question it was a dry surface. There were multiple lanes and the intersection was one that should have been easily negotiable by an experienced motorcyclist. He pointed to the position of the suggested collision with the kerb or gutter and he submitted that it was indicative that something very unusual had happened. These factors favoured accepting the plaintiff’s account. I reject this. The available evidence he points to does not give independent support for the plaintiff’s account.

¹⁵⁸ See for example *R v Birks* (1990) 19NSWLR 677 and *Smith v Advanced Electrics Pty Ltd* [2005] 1QdR 65 at pg 77.

¹⁵⁹ T2-46 11 and see T2-49 11.

[74] Alternatively, he submitted, that even if the plaintiff's account was rejected the available uncontradicted evidence of the circumstances of the accident scene and the plaintiff's experience as a motorcyclist enabled a finding to be made on the balance of probabilities that the injuries were caused in an accident brought about by the intervention of an unidentified motor vehicle.¹⁶⁰

[75] In *West v Government Insurance Office of New South Wales*¹⁶¹ the plurality¹⁶² said:

“... It is well to recall what was said by Dixon C.J. in *Jones v. Dunkel* (7) where he said:

“In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of a judicial mind.”

His Honour went on to say that the law “does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied” and see also *T.N.T. Management Pty. Ltd. V Brooks* (8) per Gibbs J.” (footnotes omitted)

[76] Once the plaintiff's account of the journey from Nathan Street to the accident scene on Duckworth Street is rejected one is left with the circumstances of a damaged motorcycle, an injured plaintiff, some marks on a gutter or kerb some distance away, a crude sketch plan, no eye witness evidence and an empty intersection. To infer the involvement of an unidentified motor vehicle as part of the causation of the accident and plaintiff's injuries involves an impermissible degree of speculation. There are other possibilities other than the intervention of the negligent driving of an unidentified motor vehicle. Speeding and momentary inattention individually or in combination might be suggested. By the plaintiff's own admission he was speeding at about 100 kph through the intersection.¹⁶³ When one recalls that the plaintiff had embarked upon a long journey to Cairns in the early hours of the morning in the circumstance of likely

¹⁶⁰ See for example *Bradshaw v McEwans Pty. Ltd.* 217 ALR 1.

¹⁶¹ *West v Government Insurance Office of New South Wales* (1981) 148 CLR 62.

¹⁶² Stephen, Mason, Aickin and Wilson JJ.

¹⁶³ See T2-46 11 and T2-49 11.

impulsive decision the possibility that the plaintiff was speeding cannot be dismissed. Indeed it is consistent with his traffic record and not out of character.¹⁶⁴

[77] The plaintiff has not proved his case.

Proper inquiry and search

[78] At trial in submissions the defendant submitted that the plaintiff had not established that “proper inquiry and search” had been made which had failed to establish the identity of the motor vehicle within s 31(2) of the *Motor Accident Insurance Act 1994*.

[79] No point was taken that the issue was not raised on the pleadings.¹⁶⁵

[80] The defendant submitted, consistent with the reasons of Martin J in *Nominal Defendant v Smith*¹⁶⁶ that proof of proper inquiry and search was an element of the cause of action against the defendant and not a condition precedent to the right to bring the action.

[81] Further it was submitted that the introduction of the word “proper” into the legislation required an inquiry and search of the highest standard than previously required.¹⁶⁷

[82] In this context I was referred to the decision of the Court of Appeal of New South Wales in *Nominal Defendant v Meakes*¹⁶⁸ where it was submitted¹⁶⁹ there was a useful summary of the cases upon the subject.

[83] Senior counsel for the defendant submitted that while each case turned on its own facts the cases showed that where a plaintiff is rendered comatose there is no failure to engage in due inquiry and search for the time period that the plaintiff is suffering from that condition. He accepted that it was not a factor to be weighed against the plaintiff that nothing was done in for example a post traumatic amnesic phase or indeed at any stage when a plaintiff had no recollection of there being a vehicle involved.

¹⁶⁴ See Ex 19.

¹⁶⁵ See T4-23 134.

¹⁶⁶ *Nominal Defendant v Smith* [2016] QSC 227 at pg 3.

¹⁶⁷ See *Murray v Nominal Defendant* [2014] QDC 144 at [28].

¹⁶⁸ *Nominal Defendant v Meakes* [2012] NSWCA 66.

¹⁶⁹ At [34]-[45] in the reasons of Sackville AJA.

- [84] Senior counsel for the defendant pointed to Exhibit 22, the diary note of the conference and dated 1 May 2015. It can be noted in that document there is reference to a red motor vehicle. Notwithstanding that the only evidence of inquiry or search are the two advertisements placed in the Townsville Bulletin on the 9th and 10th of July 2015 (Ex 23).
- [85] There are however other matters that are proven by the evidence. The evidence of Senior Constable Busetti (which I accept) is that when on 24 July 2012 he attended upon the plaintiff at the Townsville Hospital the plaintiff told him that he had no memory of the accident. This is less than a month after the accident. By that time the possibility of evidence from CCTV footage was lost (it would have been available for only about 48 hours to a week after the accident) and there were no witnesses to the events or the accident. Senior Constable Busetti's evidence of his investigations on the night and of the circumstance that the plaintiff told him that he had no memory of the accident suggest to me that no inquiry and search would have been fruitful either as things stood on 24 July 2012 when the Senior Constable interviewed the plaintiff or later. I note that the plaintiff's solicitors made attempts to obtain information by placing advertisements in July 2015. There is no suggestion that they bore any fruit. The evidence as a whole but in particular the evidence of the plaintiff's problems with memory and recollection, the absence of any known eye witnesses to the accident and the absence of any lines of inquiry because of the loss of any CCTV footage (assuming there was any relevant footage) persuades me in these particular circumstances that the inquiry made by the plaintiff's solicitor by the advertisements was proper.

Contributory negligence - intoxication

- [86] The defendant pleads that the accident and the plaintiff's subsequent injuries were caused or contributed to by his driving while adversely affected by alcohol contrary to s 47 of the *Civil Liability Act*.
- [87] After the accident no blood tests were made consequently there is no evidence of the extent to which the plaintiff had alcohol within his system at the time of the accident.
- [88] While there is evidence in some of the reports that the plaintiff admitted to a history of drinking heavily on weekends the evidence of his consumption of alcohol comes from

himself that he drank up to six cans of Fourex Gold over the hours that he was with Mr Cox. In the police notebook, signed by Mr Cox (Ex 24) there is a notation that at some stage the plaintiff was slurring his speech. When called Mr Cox was not asked to elaborate upon this. The evidence does not enable me to conclude that the slurring of speech was caused by alcohol consumption as opposed to perhaps tiredness.

- [89] The paucity of the evidence falls well short of establishing that the plaintiff was under the influence of alcohol to the extent that his capacity to exercise proper care and skill on the night in question was impaired. Consequently he was not intoxicated within the meaning of that term used in s 47 of the Act.

Assessment of damages

- [90] I am obliged to assess damages. I've already indicated there was a large measure of agreement with respect to damages. Most heads of damages were agreed or the parameters for the assessment of the damages were agreed.¹⁷⁰

- [91] For the reasons outlined by counsel¹⁷¹ it was agreed that general damages for pain and suffering and loss of the amenities of life should be assessed at \$67,950.

- [92] Past and future expenses were agreed. Past expenses were agreed at \$3,145.35¹⁷² and future expenses at \$5,000.

- [93] Past and future care was agreed at \$87,600.¹⁷³

- [94] The calculation for claims for lost superannuation past and future was agreed at 9.5% of the assessed loss for past and future loss of income.¹⁷⁴ It was agreed that interest on past losses (where applicable) was to be calculated at 0.9%. It was noted and agreed that no interest was to be allowed for lost past superannuation benefits.

- [95] The substantial issue between the parties was the assessment for loss of income past and future. The submissions were made having regard to the evidence of past income as set

¹⁷⁰ See generally T4-27ff and the discussion with counsel.

¹⁷¹ See T4-27 114 – T4-28 14.

¹⁷² T4-29 129.

¹⁷³ See T3-7.

¹⁷⁴ See T4-28 115.

out in Exhibit 32.¹⁷⁵ There was a measure of consensus that an assessment of the plaintiff's loss of income past and future might proceed on a notional loss of approximately \$1,000 net per week (subject to discounting) having regard to the historical earnings of the plaintiff before trial.

[96] I should interpolate at this point that my conclusion based on the evidence of the plaintiff's life before the accident, the medical evidence and my assessment of his capacities as they were likely to have been before injured that his working life would have been as a labourer or possibly a plant operator. By aptitude and training he was not suited to clerical or supervisory roles. Further the combination after injuries, both physical and cognitive had effectively destroyed his earning capacity.

[97] Broadly speaking for the defendant it was submitted that the assessment of past and future economic loss should be calculated on a notional \$700 net per week loss. In other words the defendant contended for a discount for the vicissitudes of life of the order of 30%. For the plaintiff it was submitted that this discount was excessive and that a discount of 20% was appropriate.

[98] My view allowing for the plaintiff's history, the evidence of past admissions to hospitals and the need for treatment indicating a certain impulsivity and the nature and extent of his capacity the discount suggested by the defendant of 30% is excessive. My assessment of the past loss of income is \$332,800 based on net weekly loss of \$800 per week over the eight years between the accident and judgment.¹⁷⁶ It follows from the agreement that the assessment for part superannuation loss should be calculated at 9.5% of the cost income that head of damage should be assessed at \$31,616. With respect to future economic loss I note that it was agreed between the parties that this should be calculated to a notional retirement at age 67 (which includes a certain discount in itself). My assessment will proceed on the basis of a net weekly loss for future income at \$750¹⁷⁷ which accords with my assessment of the plaintiff's likely earnings over the next 27 years, he now being 40 years of age.

[99] Consequently the allowance for future economic loss is \$587,250 arrived at by applying the net weekly loss at \$750 against the 5% multiplier for the next 27 years at 783.

¹⁷⁵ See further T4-31 14 – T4-36 123.

¹⁷⁶ In other words a discount of 20%.

¹⁷⁷ In other words a discount of 25%.

Following the agreement between parties the allowance for the plaintiff's future loss of superannuation benefits should be assessed at 9.5%, in other words \$55,788.75.

[100] Drawing the foregoing together therefore the assessed damages are as set out in the table below:

General damages	\$67,950.00
Past Expenses	\$3,145.35
Past & Future Care	\$87,600.00
Past Economic Loss	\$332,800.00
Interest	\$2,995.20
Past Loss of Superannuation	\$31,616.00
Interest	\$285.54
Future Expenses	\$5,000.00
Future Economic Loss	\$587,250.00
Future Loss of Superannuation	\$55,788.75
	<u>\$1,174,430.84</u>

Conclusion and orders

[101] There should be judgment for the defendant. Subject to submission or an agreement by the parties costs should follow the event.