SUPREME COURT OF QUEENSLAND

CITATION:	*Mansi v O'Connor & Ors* [2012] QSC 336
PARTIES:	**GIOVANNO ASTRUO MANSI** (Plaintiff) **v** **JAMES EDWARD O'CONNOR** (First Defendant) **QBE INSURANCE (AUSTRALIA) LIMITED** **(ABN 78 003 191 035)** (Second Defendant) **THE NOMINAL DEFENDANT** (Third Defendant) **PETESAGI PTY LTD (ACN 077 602 790)** (Fourth Defendant) **SABDOKE PTY LTD (ACN 010 290 525)** (Fifth Defendant) **SUNCORP METWAY INSURANCE LIMITED** **(ACN 075 695 966)** (Sixth Defendant) **SHANE ELLIS** (Seventh Defendant) **GRACHELLE TRANSPORT PTY LTD** **(ACN 102 485 272)** (Eighth Defendant) **ASHMA PTY LTD (ACN 112 666 001)** (Ninth Defendant) **ALLIANZ AUSTRALIA INSURANCE LIMITED** **(ABN 15 000 122 850)** (Tenth Defendant)
FILE NO/S:	BS No. 7262 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED ON: 2 October 2012

DELIVERED AT: Brisbane

HEARING DATE: 28, 29, 30 May 2012
Further written submissions 19 September 2012

JUDGE: Ann Lyons J

ORDER:

1. **There will be judgment for the Plaintiff in the sum of $93,757.51.**

2. **I will hear from the parties as to costs.**

CATCHWORDS: TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – MISCELLANEOUS CASES – Where the Plaintiff was injured after losing control of his motorcycle when it hit an amount of concrete slurry which had discharged from the back of a cement truck as it went around a corner – Where the Plaintiff suffered documented fracture to his right wrist and maintains that he also suffered an injury to his lumbar spine – Where the Plaintiff has had previous wrist and back injuries – Whether there is evidence to support Plaintiff's claim of a back injury

TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – MISCELLANEOUS CASES – Where the Plaintiff was injured after losing control of his motorcycle when it hit an amount of concrete slurry which had discharged from the back of a cement truck as it went around a corner – Where the Plaintiff is not able to identify the responsible concrete truck – Whether a particular defendant can be identified on the balance of probabilities

Civil Liability Act 2003 (Qld), s 59, s 60, s 60(3)
Civil Liability Regulation 2003 (Qld), Schedule 4

Jones v Dunkel (1959) 101 CLR 298
Kalgannon v Sharpe Bros Pty Ltd (1986) 4 NSWLR 600
Muller v Cherrie & Anor [2000] QSC 330
Walker v Allen & Anor [2011] QSC 131
Wheeler v French (1990) 11 MVR 354

Luntz, H Assessment of damages for personal injury and death 4th ed Reed International Books Australia Pty Limited, Australia, 2002

COUNSEL: S J Given for the Plaintiff
T Mathews with S J Williams for the Defendants

SOLICITORS: Sinnamon Lawyers for the Plaintiff
Jensen McConaghy for the Defendants

ANN LYONS J:

[1] On 23 July 2007 the Plaintiff was injured when his motorcycle hit a quantity of concrete slurry, which had discharged from the back of a cement truck as it went around a corner, in the vicinity of the intersection of Hope Island Road and the Old Pacific Highway at Oxenford. The Plaintiff's injury occurred after he lost control of the motorcycle as it slid in the concrete slurry. He fell from his motorcycle and suffered a fracture to his right wrist. He also received some other superficial injuries. He also maintains that he injured his lumbar spine.

[2] An operation was carried out on 26 July 2007 to repair the wrist fracture. He developed post-operative complications including a lung collapse and his recovery was extended due to his readmission to hospital.

[3] The issues in this case relate to the identity of the driver of the concrete truck, the extent of the injuries suffered by the Plaintiff and the exact nature of the economic loss which arises as a direct result of the accident.

The circumstances of the accident

[4] The Plaintiff gave evidence that around 4.00 pm on 23 July 2007 he was riding his Ducati motorcycle behind a large cement mixer with a Readymix badge and that as he was following the truck around the corner a quantity of concrete slurry fell from the back of the truck onto the road. This caused him to lose control of his motorcycle and have an accident. The truck which spilt the concrete did not stop and its registration number was not obtained by any of the witnesses.

[5] The Plaintiff's evidence is that the truck was painted red and had the sign 'Readymix' painted on the side. He stated that he hit the slurry as it came out of the back of the truck and said:

> "I was high-sided on the bike and I was flipped over. I - and I was - basically, I flipped over. I had my hand on the handlebars. It snapped my wrist but when I came over I landed on my back as well and I was knocked unconscious for a while, maybe five minutes, and I don't - I don't really remember too much after that."[1]

[6] The Plaintiff indicated that the Readymix truck was a six-wheeler, large Readymix truck and not one of their smaller trucks. It is difficult to ascertain the identity of the vehicle because Readymix has a concrete batching plant close to the accident site at Coomera. A number of trucks operate from that batching plant.

[7] The accident was witnessed by Trevor Duncan, a spare parts manager of an automotive shop on the corner of the Old Pacific Highway and the Hope Island overpass on Hope Island Road, which is on the western side of the Highway. He stated that he was very familiar with Readymix concrete trucks and was very firm in his view that a Readymix truck was involved. He stated "I remember the red

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1 Transcript 1-18 at 30-35.

agitator truck with Readymix on it".[2] He also stated it was a good size truck and was not one of the small trucks.

[8] Mr Duncan gave evidence about the physical location of accident scene and how a driver could access it at the time. He indicated that traffic could cross the Highway on an overpass from Hope Island Road to the western side of the Highway. He stated that to access Tamborine-Oxenford Road, a driver would need to turn left at the corner and head down the Old Pacific Highway to the roundabout. That roundabout was at the intersection of the Old Pacific Highway and Tamborine-Oxenford Road. He stated that Maudsland Road was further west up Tamborine-Oxenford Road and came off Tamborine-Oxenford Road before the Coomera River causeway. He also indicated that that road went to the left as you travelled along Mt Tamborine Road.

[9] Mr Duncan's evidence was that on 23 July 2007 it was after 4.00 pm and he was about to go home. He was heading over to his car on a grassed area in his car park. As he was getting ready to get into his car to go home he remembered watching a cement truck come down the overpass and vaguely remembered "hearing the exhaust brake, I think, and looking up and seeing it going quite quick around the corner. It was quite a - quite a fast sweeping corner. I was thinking to myself, "Gee, that's going pretty quick"."[3] He remembered then hearing the sound of a Ducati motorcycle because it had a distinct, unmistakable sound. The truck then turned left and headed down the Old Pacific Highway towards the south.

[10] Mr Duncan stated that he saw the truck come around the corner quickly and lean severely to the side. It was going rather fast. He then saw it spill something onto the roadway. He continued: "I saw the Ducati come around the same corner. Soon after, very soon after, I just thought, 'This isn't going to be really nice', and, yeah, as it turned out, no, it wasn't." After that he saw the truck "keep heading off down the road south".[4] He saw the motorcycle hit whatever was spilt on the roadway and, as he came through the corner and out of the corner, he saw him crash the motorcycle.

[11] Mr Duncan stated that there are service stations on the western side of the Highway. He also stated there are a number of service stations on the eastern side of the Highway as well, particularly a Mobil which is north of Hope Island Road on the eastern side and another one south of Dreamworld. In total he said that there were about five service stations in the vicinity. He stated that the Ducati motorcycle was travelling at a reasonable speed and that he could hear it "under deceleration going into the corner".[5] He said that the Ducati motorcycle was not sitting on the tail of the truck and it certainly "[w]asn't tailgating by any means".[6]

Injuries

[12] Mr Mansi is currently 53 years of age and was 48 years of age when the accident occurred. Mr Mansi completed grade 12 in the United Kingdom and then qualified in carpentry and joinery. He moved to Australia in 1989 at the age of 30.

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2 Transcript 2-14 at 40-41.
3 Transcript 2-12 at 39-43.
4 Transcript 2-13 at 22-24.
5 Transcript 2-15 at 41-42.
6 Transcript 2-16 at 5.

[13] At the time of the accident he was working as a subcontract carpenter. He undertook various short and long term contracts in film set construction and theme park maintenance and construction. He normally worked 40 hours per week. He also had a part-time antique furniture and restoration business which commenced in April 2007 and traded as Mansi's Antiques. That business operated at weekends for about 12 hours per week.

[14] Mr Mansi stated that immediately after the accident he was taken to a medical centre at Coomera. An ambulance was called and took him to Pindara Hospital. The following day he was released from Pindara Hospital but was readmitted within 24 hours because he had a collapsed lung. He was readmitted for another week for observation and to ventilate his lung.

[15] Mr Mansi stated that for six months after the accident he really could not work. He indicated that after the accident he found it difficult to do things around the home and that he was getting increasing back pain so that normal things like washing, standing, vacuuming and mowing the lawn were difficult. In the first month he needed a few hours help each day and that two or three and his friends would come around and help because he could not do it. He stated that he subsequently recovered over the next five months but was still receiving help from friends over that period, for around one to two hours a week, mainly "to do the lawns and mowing the lawns".[7] Some of the tasks around the house became easier but if he was standing for long periods it would become painful.

[16] Mr Mansi stated he was on Centrelink for the first six months after the accident but did not receive any further payments after that period. Mr Mansi stated that when he went back to work after six months he tried to get into his normal trade, which was carpentry and cabinet making, but it was too painful on his wrist because of the vibration from the tools. He therefore undertook 'second fix duties' such as hanging doors and assisting with kitchen installations. He states that he has not been able to work to the extent he was able to before the accident because his wrist continually aches with the vibration and he has lost strength in his arm and his wrist. With his cabinet making work, he is right handed and uses tools and machinery in his right hand. He stated that using tools in his right hand means that his wrist constantly aches all the time.

[17] Mr Mansi also gave evidence that his back suffered from the heavy lifting after he returned to work. He stated that being in a workshop meant lifting heavy sheets which were eight by twelve foot square and they were too heavy for him. He indicated that had a pre-existing back problem as 10 or 15 years ago when he was lifting a motorcycle he pinched a nerve. His evidence was that he had not, however, had any further back problems until this accident. Mr Mansi also indicated that he had had a previous wrist injury around 2004 where he had a hairline fracture in his wrist but had recovered and had no ongoing problems with his wrist.

[18] Mr Mansi stated that he was unable to operate his antique business for a couple of weeks after the accident and after he returned to the business he sold off stock and undertook minimal restoration work. He states he closed the business in February 2008 as he was unable to maintain the rent due to his accident-related incapacitation.

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[7] Transcript 1-27 at 31.

[19] Mr Mansi reopened that weekend antique business in January 2010 but it was not profitable and he again closed that business in early 2012. Mr Mansi filed for bankruptcy in February 2012. He stated that whilst he had tried to apply for jobs, he does not seem to be able to find employment because he has to indicate on every form that he has sustained wrist and back injuries.

[20] Mr Mansi indicated that the only way he has been able to live has been by doing part-time work and by selling his assets including antiques that he owned. He stated that when he tried to restart the business he sold his art collection to finance that business. He stated he now has no money left and no assets.

Who is the responsible Defendant?

[21] Gary Payne, the Senior Safety Coordinator for Holcin Concrete, gave evidence. He stated that in mid-2007 he was working for Readymix Concrete as a concrete allocator. That position meant that he took the orders for concrete deliveries for customers and allocated the trucks to those jobs on the day they were required. He indicated that he has been working in the concrete industry for approximately 12 or 13 years. He commenced with Readymix in 1996 as an owner/driver of a concrete truck and moved into administration in 2006. Mr Payne stated that Readymix has gone through a number of name changes over the years, commencing as Rinker, then Cemex, then Readymix and then in 2009 it became Holcin.

[22] Mr Payne indicated that in 2007 there was a Readymix batching plant at Coomera and there were other plants at Southport, Burleigh Heads, Tweed Heads and Murwillumbah. Mr Payne outlined the administrative steps necessary to place orders and stated that most of the jobs for concrete would be allocated to the batching plant closest to the job due to the drying speed of concrete. He indicated that the batching plant could change if the customer wanted more than the particular plant could supply or they might want concrete at a different time to the opening hours of the closest plant. Additionally a customer might want a particular quantity per hour and the closest plant might not be able to supply that quantity.

[23] Mr Payne gave evidence in relation to the concrete allocation jobs from the Coomera batching plant on 23 July 2007. He also explained the docket system and the times that were on the docket system. Mr Payne explained that the time printed on the docket was the time the whole process started and the loading process commenced after that. The docket also recorded other details, including the number of wheels the truck had as that was related to the load a truck could carry.

[24] Mr Payne stated that on average the loading process would take place after about eight minutes from the time the ticket commenced recording the time. Accordingly, the normal process was that a particular truck would leave the batching plant within a short space of time after the ticket time was stamped on the docket. He stated, however, that some delays could occur in making sure there was the correct water adjustment and making sure the mixture was not too wet.

[25] Mr Payne gave a detailed account of the docket records[8] for the day of 23 July 2007. He also referred to an Order Recap Report[9] for 23 July 2007 which records details not only of times and quantities but details of the customer, the delivery address as

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8 Exhibit 2, Tab 21.

9 Exhibit 2, Tab 24.

well as the zone code and the computer-calculated estimated distance travelled by each truck to deliver the load to a particular work site based on the zone and the shortest route to UBD address. Mr Payne indicated, however, that whilst the drivers were paid on the shortest possible distance, drivers would often choose a route different to the calculated route to avoid traffic or wear and tear on their vehicles.

[26] When regard is had to the Readymix documents and the evidence given by Mr Payne, I am satisfied that the evidence indicates the following:

(1) The First and Second Defendants' truck, number 6626, had a ticket printing time of '1547' and is likely to have left the Coomera batching plant about eight minutes after at 15.55. It was heading to the Broad Constructions site at the corner of Old Coach Road and Days Road, Upper Coomera and it was the last job of the day. The distance on the docket was nine kilometres.

(2) The Fourth and Sixth Defendants' truck, number 6643, had a ticket printing time of '1427' and was heading to the Seymour White construction site on Hope Island Road. The distance on the docket was 10 kilometres.

(3) The Fifth and Sixth Defendants' truck, number 6706, had a ticket printing time of '1457' but was an 'eight-wheeler' truck and therefore different to that identified by the Plaintiff;

(4) The Seventh and Tenth Defendant's truck, number 6677, had a ticket printing time of '1514' and was taking the load to the Broad Constructions site at the corner of Old Coach Road and Days Road, Upper Coomera. The distance on the docket was nine kilometres.

(5) The Eighth and Tenth Defendants' truck, number 6629, was a 'mini' and different to the type identified by the Plaintiff and Mr Duncan;

(6) The Ninth and Tenth Defendant's truck, number 6640, had a ticket printing time of '1437' and was making a delivery south to the South East Excavation's site at Harmsworth Street, Pacific Pines. The distance on the docket was 11 kilometres.

Relevant legal Principles

[27] In this case, given the evidence of the witness Mr Duncan and the Plaintiff, as well as noting the injuries he suffered, I accept that the accident occurred in the manner described. In my view, there is no doubt that the discharge of slurry was caused by the Readymix cement truck as it went around the corner around 4pm on 23 July 2007. The Plaintiff was then injured as a result of losing control when the motorcycle he was riding slid out from under him as he came around the corner and hit the slurry which had been discharged.

[28] Unlike the position in *Muller v Cherrie & Anor*,[10] where Atkinson J held there was no evidence properly capable of establishing that the Defendant had driven negligently, I consider that there is evidence in this case that a driver of the concrete

[10] [2000] QSC 330.

truck allowed concrete slurry to discharge from his truck onto a busy roadway used by members of the public. Her Honour referred[11] to the statements of Dixon CJ in *Jones v Dunkel*:[12]

> "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..."[13]

[29] In my view the Plaintiff has proved that it was more likely than not that the accident occurred as a result of the negligence of the driver of the Readymix cement truck which came through the intersection around 4pm on 23 July 2007. The available inference is that the concrete slurry spiled onto the roadway due to the negligence of the driver. He was responsible for the load he was carrying and had to ensure that none of the product he was carrying left the truck and caused injury to others. He was required to take steps to ensure there was no discharge. There was a discharge. It was entirely foreseeable that a motorist or road user would be injured should there be such a discharge. It was also entirely foreseeable that road user would be injured in the manner described by Mr Mansi.

[30] Accordingly, I am satisfied that the negligence of the driver of that Readymix concrete truck caused an accident on 23 July 2007 at Oxenford and that the Plaintiff was injured. Clearly there were a number of Readymix trucks in the area at the time. Is it possible to identify the particular truck? This may initially seem to be a difficult task, however it must be remembered that *Wheeler v French*[14] made it clear that the standard of proof is on the balance of probabilities. President Kirby (as his Honour then was) stated:

> "There was no dispute that each of the parties was in the relevant motor vehicle and that one of them was the driver, the other being the passenger. Accordingly, on the face of the conclusion reached, the legal process has certainly failed to provide justice to one of the parties. Indeed, a significant injustice has occurred, for one certainly suffered injuries as a result of the negligence of the other. Compensation has been denied simply because of the suggested inability of either to prove which one was at fault. Against the background of the system of compulsory third party insurance in force in this State for nearly half a century, such a result is unpalatable.[15]

His Honour continued:

> "These are not criminal proceedings, in which a much high standard of proof is required for an affirmative conclusion on the issue in contest. In civil proceedings of the present character, it is enough that

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11 Ibid at [14].
12 (1959) 101 CLR 298.
13 Ibid at 304-305.
14 (1990) 11 MVR 354.
15 Ibid at 355 per Kirby P.

> one of the contending parties *should have shown his or her case to have been more probable than not*. His Honour was right to avoid speculation. But, *at least in the facts of this ease, the matter could be approached from the starting point that one or other of the parties was the driver. The possibilities were, to that extent, narrowed*. This was not a case where there was doubt that the accident had occurred at all. Nor was it a case where there was any suggestion that the accident occurred in a different way or that some other, third party or unidentified person was the driver or the person responsible for the collision. The issue was confined to which of these two parties had been proved to have been the driver at fault. The very purpose of the consolidation of the two actions was to avoid (or at least diminish) the risk of the outcome which eventuated. It was to permit the trial judge, weighing all the evidence, to look to where the probabilities lay."[16]

Priestly JA also noted:

> "Whatever the reasons may have been for the sketchy nature of the evidence put before the trial judge, it was not open, on the way the trial was conducted for any possibility to be entertained that some person other than Mr French or Mrs Wheeler had been driving the car at the time of the accident. Thus, for the purposes of the case, the trial judge had to examine the evidence on the footing that Mr French or Mrs Wheeler had been the driver. After discarding the evidence of various witnesses in the way that he did, evidence remained upon which, as it seems to me, it was slightly more probable than not that Mr French was the driver. In a case where one of the few facts which was certain (for the purposes of the proceeding) was that one or other of two persons was the driver of the car, it seems to me that even a slight balance of probability that one person rather than the other was the driver, should be accepted as fulfilling the civil standard of proof."[17]

[31] What is the correct approach therefore when there are a number of possibilities as to the actual identity of the real tortfeasor? In *Kalgannon v Sharpe Bros Pty Ltd*,[18] Kirby P held:

> "It is otherwise where the plaintiff has brought before the Court all those who, on the evidence, could be responsible for the unspecified negligence alleged. In such circumstances, negligence is not left in the air... There is a difference between failing to identify the tortfeasor liable and failing to specify which of a number of tortfeasors sued may be liable in negligence, where it is shown that the plaintiff has before the Court all of those who are potentially liable.[19]

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16 Ibid at 361 per Kirby P (emphasis added).
17 Ibid at 362 per Priestly JA.
18 (1986) 4 NSWLR 600.
19 Ibid at 617.

His Honour continued:

> The *common law permits sensible inferences to be drawn by processes of logical reasoning from proved facts*. If a plaintiff brings all relevant parties to the court and establishes to the satisfaction of the tribunal of fact that one or more of those parties is responsible even though the plaintiff cannot identify which, it would be unjust that those parties, who have the detailed knowledge of their own arrangements should be able to escape liability by declining to give evidence and by asserting that the plaintiff has failed to make out his case, because he has failed to specify who is liable."[20]

Findings

[32] The first question which I need to be satisfied about is whether the Plaintiff has brought all possible Defendants to Court. In my view, for a Readymix truck to be in the vicinity of the accident location at that time, the available inference is that it was more likely than not that it was a truck which was either leaving or returning to the batching plant. In my view it is unlikely that a Readymix truck would be in the vicinity at that time of the day without a connection to the Coomera batching plant.

[33] I consider that Mr Payne, as a person with knowledge of the batching plant and the despatching process in operation at the time, has identified all possible Readymix concrete truck options for that particular day. I do not consider that there is any other inference available on the evidence before me.

Can a particular Defendant be identified on the balance of probabilities?

[34] Having considered the evidence of Mr Payne, I am satisfied that the following findings can be made on the balance of probabilities.

[35] The accident occurred late in the day and whilst it occurred after 4.00 pm the time cannot be precisely calculated.

[36] The accident occurred when the Plaintiff was travelling on a motorcycle at the intersection of Hope Island Road and Old Pacific Highway Oxenford and he hit a 'slurry of concrete' which was discharged from a Readymix truck.

[37] All of the Readymix trucks using the Coomera batching plant have been identified by Mr Payne using the company's archived records. The loading times of the trucks at the batching plant have all been identified.

[38] The usual time required to load and leave the plant is approximately eight minutes.

[39] The last load of concrete to leave the Coomera batching plant was in truck number 6626 and had a docket load time of load time of '1547' and would have left the batching plant around 3.55 pm or 4.00 pm.

[40] I consider that it is more likely than not that a truck with a load of concrete on board is more likely to discharge concrete slurry than a truck which has discharged its load

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[20] Ibid at 618 (emphasis added).

given the distances that all the trucks travelled to the job sites that day and the drying time of concrete.

[41] I am satisfied that the Fourth Defendant, namely truck number 6643, would not have been in the area of the accident at 4.00 pm on the day of the accident with a load of concrete as its last load left the batching plant one and a half hours earlier.

[42] As the Fifth Defendant owned an eight wheeler type truck, different to the truck identified by the Plaintiff, I am satisfied that the Fifth Defendant did not cause the spill of slurry.

[43] I am also satisfied that as the Seventh Defendant, truck number 6677, had a ticket printing time of '1514'. Accordingly that load of concrete would have been well beyond the intersection at the time of the accident, which was 45 minutes later.

[44] As the Eighth Defendant operated a 'mini' truck, different to the type of truck that was identified by the Plaintiff and Mr Duncan, the Eighth Defendant is not likely to have been the relevant driver.

[45] I also accept that the Ninth Defendant, truck number 6640, would have left the batching plant at about '1445'. As he was delivering a load south of the batching plant at Pacific Pines, I am satisfied that the Ninth Defendant's truck would not have been at the subject intersection north of the batching plant with a load of concrete, when it had headed south more than an hour before the subject accident.

[46] I am satisfied that the First Defendant would have been in the area at the critical time as that truck left the batching plant with a load of concrete around 4.00 pm. I am also satisfied that truck would have been in the vicinity of the relevant intersection at the time. I accept that given the job site he was travelling to he would have had to travel to the north which does not exclude him from being at the intersection at the relevant time. I also accept that to avoid residential areas the driver may well have taken a route which involved looping around this intersection.

[47] I consider that all the relevant trucks have been identified.

[48] I consider that all the trucks apart from the First Defendant would have discharged their loads by 4.00 pm on 23 July 2007. I consider that the First Defendant is the most likely truck to have been in the area at the relevant time. Whilst it is not an overwhelming case, having considered the available evidence I am satisfied to the requisite standard, by a process of elimination, that the First Defendant was more likely than not to have been the driver responsible for the accident. I consider that inference is available to me on the evidence.

[49] As an alternative to the Plaintiff's claim that the First Defendant is responsible for the accident it is submitted that the Nominal Defendant would be the appropriate Defendant if the Court was satisfied that none of the current Defendants were in the vicinity at the time of the accident and that an unidentified truck was responsible. As I have indicated I consider that the responsible Defendant was one of the Readymix trucks which worked out of the Coomera batching plant. Accordingly I do not need to consider that aspect of the claim.

The Plaintiff's injuries

[50] I note that Mr Mansi had suffered a previous schapoid fracture as well as previous back injuries. There is no doubt however that the Plaintiff suffered a 'Smith's fracture' to his right distal radius which required surgical repair as a result of the accident. He underwent an open reduction and internal fixation of the fracture. He was hospitalised for five days and was discharged on 28 July 2007. He was then readmitted the next day with a collapsed lung and was hospitalised for a further week. The Plaintiff required bandages and a splint for about 12 weeks. He states that he can no longer lift heavy items as his strength has decreased, as has his range of movement.

[51] Orthopaedic surgeon Dr Pentis states that x-ray images reveal that the fracture has united and that the plate and screws are still in position. He also considers that his wrist will remain a long term problem and that he will develop arthritis.

[52] Dr Pentis also states that the Plaintiff is suffering from a musculo-ligamentous injury to his spine and that he has mild degenerative problems in the lower back. Dr Pentis considers it is unlikely that the existing conditions have been aggravated to a great extent.

[53] Dr Pentis indicated that the Plaintiff had not advised him of a previous right wrist injury in the year prior to the accident in July 2007. Dr Pentis stated that a previous injury to the wrist would affect his assessment of the impairment and agreed with Dr Steadman that about one third of the impairment assessment was due to the previous injury. Dr Pentis thought he would now assess him at about five per cent whereas Dr Steadman thought it was initially six per cent but ultimately now about four per cent.[21]

[54] Dr Pentis also stated that the Plaintiff had not advised him of previous back injuries. In terms of whether he injured his spine in the accident Dr Pentis indicates that the hospital notes record "lateral thoracic" pain two days after the accident and he cannot tell whether that was a reference to his lumbar spine or not.[22] He notes the record of pain in the thoracic area and the fact that the Plaintiff was re-admitted to hospital with a punctured lung.

[55] Dr Pentis stated that if there is an injury to the lumbar spine in an accident then normally a person would present within the first month of the accident. Dr Pentis' notes record that the Plaintiff told him, when he saw the Plaintiff in September 2008, that his back had been playing up since the accident. He confirmed, however, that if the first mention of lumbar problems is a year after the accident then it is unlikely they are related to the accident and that he would expect symptoms to appear six months after returning to work.

[56] Dr Steadman indicated that when he saw the Plaintiff in March 2009, the Plaintiff indicated that he had back pain and a restricted range of movement. He recorded that the Plaintiff told him that he had experienced back pain since the accident but agreed that the first recorded note of back pain was an entry at his local surgery on 3 June 2008. Because of that gap, Dr Steadman was concerned about the 'medical continuum', particularly given the fact that the application for sickness allowance to Centrelink in February 2008 only mentions his wrist injuries.

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21 Transcript 2-19.

22 Ibid.

[57] Dr Steadman noted that the Plaintiff's view was that he had not really noticed his back problems as the focus was essentially on his wrist and that the analgesia for his wrist masked the pain from the back injury. Dr Steadman did not consider however that this would explain the failure to report the back injury for a year. He also noted previous back complaints to doctors in Sydney in 1999.

[58] Dr Steadman considers that the investigations do not reveal any crush fracture but that there was disc degeneration. Dr Steadman concluded that despite the severity of the complaint and his work limitations, there was no objective support for it on MRI.

[59] In terms of his wrist injury, Dr Steadman noted the loss of grip strength and the difficulty the Plaintiff experienced with vibrations from some electric tools. Dr Steadman considered that the Plaintiff suffered from a loss of 20 degrees of dorsi and palmar flexion and that the radial and ulna deviation was reduced by 15 degrees. He also noted the significance of the Plaintiff's pre-existing wrist injury and that a bone scan had revealed a distal radius fracture to the schapoid.

[60] Dr Steadman indicated that the 2005 injury equated to a pre-existing injury that necessitated a reduction of the six per cent impairment he had assigned in 2009. He indicated that he would reduce it to a four per cent impairment of the wrist.

[61] Having considered those reports and the oral evidence of the medical I consider that it is significant that there is no documented complaint about a back injury until 12 months after the accident and that on his Centrelink claim he made no mention of a back injury. I am unable to be satisfied about the medical continuum in relation to the back injury and the accident. I am not satisfied therefore that there is evidence to support a back injury as a result of the accident on 23 July 2007. Accordingly, the occupational therapist Mr Ng's evidence in relation to Mr Mansi's impairments is relevant only to the wrist injury.

Quantum

[62] There is no basis for a gratuitous care claim as it does not meet the requirements under the s 59 of the *Civil Liability Act 2003* (Qld) ("CLA"), as the assistance the Plaintiff required was not 'at least six hours per week' for 'at least six months'.

[63] I do not consider there is any evidence that the Plaintiff requires gratuitous care into the future. There is no basis for such an award.

[64] I consider that the only accident related injury is the wrist fracture. It is the dominant injury and it is a 'moderate' injury. I accept that it is properly assessed within Schedule 4 of the *Civil Liability Regulation 2003* (Qld) ("CLR") as Item 107. In terms of an Injury Scale Value ("ISV"), having considered the evidence of Dr Pentis and Dr Steadman in relation to the percentage impairment and the requirements of the CLA and the application of the CLR, I consider that an injury scale value of six is appropriate.

[65] Accordingly, general damages should be assessed pursuant to Schedule 6A of the CLR at $6,200. Pursuant to s 60 of the CLA, no award of interest is payable on general damages.

Economic Loss

[66] In terms of economic loss, at the time of the accident the Plaintiff was working as a sub-contract carpenter at Thunderbird Park and also worked about 12 hours per week operating Mansi's Antiques. In early 2008 the Plaintiff returned to self-employment as a carpenter but undertook light work. He returned to his part time work in his antiques business two weeks after the accident.

[67] I am satisfied that he remained off work as a self employed carpenter for six months.

[68] The Plaintiff owes child support in the order of $16,465.78 which remains unpaid and, with the cumulative effect of penalties and interest, is now a debt in the sum of approximately $28,000.

[69] Due to credit card debts, in December 2011 judgment was entered against the Plaintiff in favour of Credit Corp Services Pty Ltd in the sum of $17,384.13.

[70] In February 2012 the Plaintiff was declared to be bankrupt, which he states was due to debts associated with the recommencement of his antiques/second hand goods on consignment business, which he recommenced in January 2010 and closed in 2012. Mr Mansi outlined that he had a lot of debt at the time he declared himself bankrupt, particularly personal debt, mainly on his credit card and child support debts. At present he is renting a very small room, basically a bedsit underneath a house.

[71] His taxable income in the period 2004 to 2011 is as follows:

2004-2005	$41,662
2005-2006	$37,023
2006-2007	$34,939
2007-2008	$19,616
2008-2009	$6671
2009-2010	$13,090
2010-2011	$31,049

[72] There is no evidence of the Plaintiff's earnings between 1 July 2011 and the date of trial.

Past Economic Loss

[73] I accept that Mr Mansi's weekend antique business has closed and I accept that he no longer works as a self employed carpenter. The real issue is the connection between those events and the accident in July 2007. As I have indicated, I am not satisfied that he injured his back as a consequence of the July 2007 accident.

[74] I am satisfied that Mr Mansi was unable to work in his business as a self employed carpenter for six months after the date of the accident. He was on Centrelink benefits throughout that six month period. There is therefore identifiable economic loss from his business as a self employed carpenter in the six month period from the date of the accident until he resumed work six months later. I am satisfied that that economic loss is due to his injury to his wrist as a result of the accident.

[75] I accept that $600 per week as submitted by the Plaintiff represents a reasonable figure for his average earnings during the pre-accident period. The loss of income in the six month period that he was unable to work as a self employed carpenter is therefore $15,600.

[76] The question of whether there was any economic loss in relation to his antique business as a result of the accident is more problematic. That business was a part time business which involved selling antiques for about six hours a day on weekends. The Plaintiff's evidence was that the business continued to operate until February 2008 when it closed due to lack of profitability. There is no direct evidence that he was no longer able to work in that business because of his wrist injury from the accident. I note in particular that Mr Mansi reopened that business in January 2010 and ran it for a further two years. When it closed again in 2012 it was due to a lack of profitability. The defendant however concedes that a modest global sum should be allowed for the prospect of the loss of the chance for those potential earnings until January 2010 when he opened the new business. I will allow $5,000.

[77] The question of the true extent of his economic loss as a result of the accident after this initial six month period is problematic. The evidence is that after February 2008 Mr Mansi returned to his pre-accident employment as a self employed carpenter.

[78] It is clear that a Plaintiff's entitlement to damages for loss of earning capacity only arises if the loss of earning capacity actually arises as a result of the injury suffered in the accident. Mr Mansi's evidence was that he was able to work doing 'finishing off' jobs and that he had reopened his business of restoring and selling antiques. His income post accident did initially decrease in the years 2008, 2009 and 2010. His income in 2011, however, rose to a level which was in the vicinity of his pre-accident income. I consider that there should be some entitlement to economic loss for the two and a half years from February 2008 when he returned to work until to July 2010 when his income rose to near its normal levels.

[79] However, I am not able to be satisfied that his total decrease in income in the years post-accident was totally due to his wrist injury given his pre-existing back condition which Mr Mansi has indicated is a significant restriction on his ability to work. The evidence of Dr Pentis was that, long term, Mr Mansi would not have to change his occupation because of his wrist injury. Dr Pentis indicated "Working as a carpenter, it is probably best that he does carry out only light duty work". Dr Steadman's evidence was "Mr Mansi reports minimal difficulties with his wrist". Dr Steadman also indicated that "his function in the wrist will improve with regard to discomfort but unlikely to restore a full range of motion".

[80] The evidence from Mr Mansi was that six months after the accident he was back working three or four days a week. That was at a time when there was no mention of back pain. It would seem fair therefore to estimate that he was working in the order of 30 hours per week in the two and a half years from February 2008 until July 2010 rather than his usual 40 hours due to his wrist injury. The Plaintiff claims he would have earned $600 per week for a 40 hour week in that period. I consider therefore that for those two and a half years he lost income of approximately $20,000 due to his wrist injury and the reduction in the hours he could work.

[81] I will therefore allow $40,600 for past economic loss ($15,600 + $5,000 + $20,000) The interest on that figure of $40,600 is to be calculated in accordance with s 60(3) of the CLA which is currently a rate of 2.75 per cent per annum since the date of the accident. Interest, calculated pursuant to s 60(3) of the CLA, therefore totals $2,902.90.[23]

[82] I am simply unable to be satisfied about the evidential basis for a calculation that he is entitled to damages for past economic loss from July 2010 to today based on his wrist injury.

Future Economic Loss

[83] I do not accept that Mr Mansi can no longer work at all because of a 'moderate' wrist injury five years ago which has now fully healed. I accept, however, that he experiences pain when using electric tools and that he has lost his grip strength and cannot therefore lift heavy objects. I accept that there are some restrictions to his employment as a carpenter and that he has to do 'light work'. I also accept Dr Pentis' opinion that it was unlikely that he would have to change his occupation as a carpenter due to his wrist injury and that by July 2010 he was not experiencing any significant restrictions due to his wrist injury.

[84] I consider that his ongoing wrist pain will mean that he is at some disadvantage in the open market into the future. I will therefore adopt the approach of Daubney J in *Walker v Allen & Anor*[24] and allow an amount of $25,000 as a global figure to reflect that disadvantage into the future.

Special damages

[85] In terms of Special Damages the Plaintiff claims $17,986. There is, however, a paucity of evidence in relation to the substantiation of the amount claimed and the Plaintiff's evidence was that most of his medical care was paid for by Manchester Unity.

[86] Whilst the Defendant argues that there is no evidence that the Plaintiff is liable to repay the monies and there cannot therefore be an award for the expenses incurred at the Pindara Hospital, no authority is cited for that proposition. Indeed, Luntz indicates that the payment should be disregarded in the assessment of damages.[25] I am satisfied that the following amounts should be allowed for special damages:

Pindara Hospital:	$1,816.00
Pindara Hospital:	$7,077.53
South Coast Radiology:	$1,324.05
South Coast Radiology:	$1,932.55
Medicare:	$500.00
TOTAL:	**$12,650.13**

[87] The interest on that figure of $12,650.13, calculated in accordance with s 60(3) of the CLA, totals $904.48.

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23 $2,902.90 = (2.75% x $40,600) / 100 x 5.2 years x 0.5.

24 *Walker v Allen & Anor* [2011] QSC 131.

25 Luntz, H Assessment of damages for personal injury and death 4th ed Reed International Books Australia Pty Limited, Australia 2002.

Future Surgery

[88] Drs Pentis and Steadman both indicate that there should be some allowance for the future removal of the plate from the Plaintiff's wrist. Whilst Mr Mansi has not given evidence that he intends to have the operation, the evidence from Dr Steadman was quite clear that the plate was both obsolete and prominent. Dr Steadman also accepted that it would cause discomfort to Mr Mansi as the tendons can slide over the top of the screws in the plate. I consider that it is reasonable to conclude that Mr Mansi will undertake the surgery and that an amount should be allocated for the future cost of this surgery. I will allow and amount of $5,500 as estimated by Dr Steadman. I can see no evidentiary basis for any other expenses into the future.

Superannuation

[89] As the Plaintiff has been largely self employed, it is unlikely that a claim for employer superannuation contributions can be maintained.

Summary

[90] In summary, I assess the Plaintiff's damages as follows:

HEAD OF DAMAGE	**AMOUNT**
General damages	$6,200.00
Special damages	$12,650.13
Interest	$904.48
Past economic loss	$40,600.00
Interest on Past Economic Loss	$2,902.90
Loss of Superannuation Benefits	NIL
Past Gratuitous Assistance	NIL
Interest on Past Gratuitous Assistance	NIL
Future Economic Loss	$25,000.00
Future Cost of Surgery	$5,500.00
TOTAL	**$93,757.51**

[91] In the circumstances, there will be judgment for the Plaintiff in the sum of $93,757.51

[92] I will hear from the parties as to costs.