SUPREME COURT OF QUEENSLAND

CITATION:	*Habig v McCrae & Ors* [2013] QSC 335
PARTIES:	**JOHANNES BAPTIST HABIG** (plaintiff) **v** **IAN ALLAN McCRAE** (first defendant) **JWB HOLDINGS PTY LTD (ACN 101 841 338)** (second defendant) **AAI LIMITED (ABN 48 005 297 807)** (third defendant)
FILE NO:	SC No 65 of 2012
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	6 December 2013
DELIVERED AT:	Cairns
HEARING DATES:	14 – 18 October 2013
JUDGE:	Henry J
ORDERS:	**1. Judgment for the plaintiff in the sum of $400,000.** **2. I will hear the parties as to interest and costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO LOOKOUT – EXCESSIVE SPEED – where the plaintiff suffered a serious head injury when the van he was travelling in was struck by the first defendant's truck on the Bruce Highway – where the plaintiff claims damages for personal injury and consequential loss caused by the negligence and or breach of duty of the first defendant – where the plaintiff alleges the first defendant failed to keep a proper lookout and was travelling at an excessive speed in the circumstances – where the defendants deny any negligence on the part of the first defendant – whether the first defendant owed the plaintiff a duty of care – whether the first defendant exercised a reasonable standard of care TORTS – NEGLIGENCE – MISCELLANEOUS DEFENCES – OTHER DEFENCES – VOLUNTARY ASSUMPTION OF RISK – where the defendants allege the plaintiff voluntarily assumed the risk of injury by knowingly travelling in a vehicle that was in a dangerously unreliable

condition, failing to move the van off the highway, failing to warn oncoming traffic of the stationary van on the highway and failing to remove himself from the area of danger – whether the plaintiff voluntarily assumed the risk of injury

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – ROAD ACCIDENT CASES – where the defendants submit there should be a 100 percent reduction in damages by reason of contributory negligence – where the plaintiff submits no finding of contributory negligence should be made – whether the plaintiff was contributively negligent

TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – APPORTIONMENT IN PARTICULAR SITUATIONS AND CASES – PRINCIPLES AND MODE OF APPORTIONMENT – where the apportionment involves a comparison of the culpability and causal contribution of the acts of the plaintiff and the first defendant – whether responsibility and damages should be apportioned between the plaintiff and the first defendant

Civil Liability Act 2003 (Qld), s 9, s 11, s 12, s 13, s 14, s 23, s 24
Motor Accident Insurance Act 1994 (Qld)

Jones v Dunkel (1959) 101 CLR 298, cited
Lawes v Nominal Defendant [2007] QSC 92, distinguished
Manley v Alexander (2006) 223 ALR 228, considered
Pledge v Roads & Traffic Authority (2004) 78 ALJR 572, cited
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529, applied
Roggenkamp v Bennett (1950) 80 CLR 292, cited
Ticehurst v Skeen and Ors (1986) 3 MVR 307, distinguished
W T P Norris v P J Blake [1996] NSWSC 477, distinguished

COUNSEL: M Glen for the plaintiff
G Crow QC for the first, second and third defendants

SOLICITORS: Murray & Lyons Solicitors on behalf of the plaintiff
Jensen McConaghy Solicitors on behalf of the first, second and third defendants

[1] At about 10.00pm on 22 June 2006, a Toyota Hiace van was broken down, blocking part of the southbound lane of the Bruce Highway north of Pindi Pindi, near Calen. Its lights were off. The first defendant was unwittingly approaching this hazard on the highway ahead as he drove south. He failed to notice the van until the last moment and swerved to the right, impacting with the tail of the van and propelling the van off the highway. The plaintiff, who had been travelling in the van, suffered a serious head injury as a result of the collision.

[2] The plaintiff claims damages for personal injury and consequential loss caused by negligence and or breach of duty. The first defendant was transporting bread for his employer, the second defendant, in a DAF truck. The second defendant owned the truck and is vicariously liable for damages proved to be caused by the negligence or breach of duty of the first defendant in driving the truck in the course of his employment. The third defendant, as the compulsory third party insurer of the truck, is in turn liable for such damages, pursuant to the *Motor Accident Insurance Act* 1994 (Qld).

[3] The quantum of the damages sustained by the plaintiff is agreed in the sum of $800,000. Liability is in issue.

The issues

[4] The plaintiff alleges four main particulars to the negligence and or breach of duty of the first defendant, namely he:[1]

1. failed to observe the van on the highway within a reasonable time and until it was too late to avoid the collision with the van; that is, there was a failure to keep a proper lookout;[2]
2. looked for too long at a four wheel drive vehicle ("4WD") parked north of the van beside the highway rather than at the highway ahead;[3]
3. was travelling at an excessive speed in circumstances where his vision was impaired by the headlights of the 4WD on the side of the highway and where he perceived unusual and uncertain circumstances relating to that 4WD;[4] and
4. failed to activate his high beam headlights sufficiently early.[5]

[5] The defendants deny any negligence on the part of the first defendant. However, if the first defendant has been negligent, the defendants plead the plaintiff voluntarily assumed the risk of injury and that the negligence of the plaintiff entirely caused his loss. The defendants' arguments as to voluntary assumption of risk and contributory negligence allege the plaintiff:

1. was knowingly travelling in a van which was in a dangerously unreliable condition;[6]
2. failed to move the van off the highway by pushing it;[7]
3. failed to take any steps to warn oncoming traffic of the danger of the stationary van on the highway ahead;[8] and
4. failed to remove himself from the area of danger prior to the impending collision.[9]

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1 T4-61 L48, T4-62 L38.
2 Further Amended Statement of Claim ("SOC") [4](a)-(b).
3 SOC [4](c)-(f).
4 SOC [4](g)-(m).
5 SOC [4](n).
6 Further Amended Defence ("DEF") [13](g).
7 DEF [13](n).
8 DEF [13](o).
9 DEF [13](k).

Past problems with the van

[6] The plaintiff, a young German tourist, had travelled north from Sydney with two other German tourists, Elisa Maria Mann and Corinna Brichta, in the van. The girls were the owners of the van,[10] having purchased it in Sydney for $3,400.[11] Ms Mann left them after they reached Bundaberg. Ms Brichta did most of the driving thereafter, although the plaintiff drove to relieve her occasionally.[12] The plaintiff thinks the van had a manual transmission.[13]

[7] The plaintiff recalled there were two occasions when the van's engine would not start. The first was at Rainbow Beach, where he has a vague recollection of a mechanic tending to a problem with the starter motor[14] after the van would not start in the morning.[15] The mechanic, Mr Youngman, testified that he considered a fully reconditioned starter motor should have been installed in the van.[16] He recommended to Ms Mann that the starter motor be replaced but she opted for the less expensive option of having the existing starter motor fixed,[17] so it was at least operational.[18] Mr Youngman testified that during his discussions with Ms Mann she appeared to speak in German with her nearby travelling companions, one of whom must have been the plaintiff.[19] The plaintiff contributed to the cost of the van's repairs during the trip.[20] Against this background, it is likely the plaintiff knew the more expensive and preferable option was to replace the starter motor and that instead the mechanic was paid to implement the less expensive option of merely repairing the existing starter motor.

[8] The second occasion when the van's engine would not start was at Bundaberg, where a mechanic was called and fixed the problem by tightening a loose cable.[21]

[9] The plaintiff testified that there had not been any instances of the van stopping when it was being driven.[22] The difficulty lay in starting the van, particularly in the morning.[23] However that did not render the van dangerously unreliable.

[10] The collision in this instance occurred at night, probably at a time after the van's engine had been running but stopped and would not restart. There is no evidence of a past problem with the van's engine stopping once it was running or of a past problem in getting the van restarted soon after the engine had been running but had been turned off or stalled. Nor is there evidence that the plaintiff ought to have known such a problem was likely to manifest itself.

[11] Further, there is no evidence as to what defect ultimately caused the van to be broken down on the highway. The van was checked at Calen Motors in the

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10 T2-53 L37; Ex 20 [12].
11 Ex 20 [15].
12 T2-57 L21; T2-73 L22.
13 T2-74 L38.
14 T2-56 L25; T2-65 L38.
15 T2-63 L28.
16 T4-10 L14.
17 T4-11 L26; Ex 20 [18].
18 T4-15 L45.
19 T4-11 L15-29; T4-13 L3; T4-14 L14.
20 T2-62 L27.
21 T2-56 L47.
22 T2-66 L10.
23 T2-74 L8; Ex 20 [16].

aftermath of the collision for defects that may have contributed to the incident.[24] Collision damage prevented proper inspection of the van's battery, transmission, gearbox and drivetrain. Once the van was running the examiners found the alternator was generating no charge. The examiners' report does not explain why that was occurring or whether it was a pre-existing defect. There is no evidence whether the starter motor could be, or was checked, but it seems unlikely because the examiners started the van using an auxiliary battery and by manually priming the carburettor. The examiners could not determine whether any of the defects detected actually contributed to the incident.

[12] For all of these reasons there is no substance to the defendants' contention that the plaintiff was knowingly travelling in a van that was in a dangerously unreliable condition.

The sequence of events

[13] The key witnesses to events associated with the collision, who were called at the trial, were:

1. the plaintiff – who received a head injury as a result of the collision and has no recollection of it;
2. Peter Cooper – a truck driver of 25 years' experience, who witnessed events from outside his house at Pindi Pindi, about 250 metres to the west of the highway and about 100 metres to the south of the collision scene;
3. Daryl Cobden – a truck driver of over 30 years' experience, who was driving a southbound semi-trailer and, after nearly colliding with the stationary van, flashed his headlights to warn an oncoming northbound 4WD driven by Peter Sivyer;
4. Peter Sivyer – a truck driver of 17 years' experience, who was driving his 4WD northbound and, after being warned by the flashing of headlights from Mr Cobden's semi-trailer, pulled up along side the van before then pulling over to the north and witnessing the first defendant's truck collide with the van;
5. Sandra Sivyer – who was in the front passenger seat of the 4WD driven by Mr Sivyer; and
6. Ian McCrae – the first defendant, who was driving the truck, owned by the second defendant, which collided with the van.

[14] The sequence of events was that the van came to a stop at an approximate right angle to oncoming traffic, blocking part of the southbound lane of the Bruce Highway. A southbound semi trailer driven by Mr Cobden swerved, drove around the van and continued south. A northbound 4WD driven by Mr Sivyer stopped near the van and told its occupants to move the van. Mr Sivyer then pulled off the highway intending to return and help move the van but in the meantime another southbound truck, driven by the first defendant, collided with the van.

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[24] Ex 17.

The collision scene

[15] The collision occurred on an apparently clear night.[25] The van was unlit and there was no street or other fixed lighting. No evidence was led as to the intensity of the moonlight but the first defendant and another driver testified it was a very dark night.[26] The van was predominantly cream in colour. However its paintwork was old and dull and it did not have reflective fittings on its side panels.

[16] The bitumen highway surface consisted of north and southbound lanes separated by a continuous double white line. There were fog lines near the outer edges of the bitumen surface and grassed spoon drains running parallel to the verge of both sides of the highway. The marked speed limit was 100 kilometres per hour.

[17] According to the report of consulting engineer, Grant Johnston, the 900 metres of road the first defendant travelled along before reaching the scene was straight. In the early phase, the straight descended downwards about two degrees and then rose at an angle of about two to three degrees approaching the collision point.[27] The crest of the gentle incline upwards was about 100 metres beyond the collision point.[28] However, the photographs of the scene, particularly Exhibit 2, demonstrate that in the approach from the north, the direction in which the first defendant was driving, the steeper part of the incline upwards was before the collision point and the highway level was starting to flatten out by the collision point.

[18] It is apparent from the photographs[29] that from the perspective of a southbound driver near the start of the incline upwards, the slope of the incline may have partly obscured a line of sight of possibly the lower quarter to third of the van. However the bulk of the van would not have been obscured and any such obscuring would have lifted as a southbound driver ascended the incline.

[19] In a similar vein, the trajectory of a southbound vehicle's headlights may have been influenced by the angle of the incline so that its headlights did not light the highway horizon as far ahead as may have occurred when driving on a flat highway. However, even if there were such an effect it would have ceased substantially prior to the collision point. The defendants did not complain that the incline had any causative influence in this case.

The van stops across the highway

[20] The plaintiff's head injury left him with no memory of the collision, the circumstances under which the van in which he was travelling came to be stopped across the highway or who had been driving.[30] His travelling companion, Ms Brichta, was not called as a witness.

[21] Peter Cooper, who lived in a house to the south of the scene, heard a screech of tyres and went outside his home to look at what had caused the noise. He observed the van was positioned at a right angle across the southbound lane of the highway with the majority of it still in that lane.[31]

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25 T3-73 L13; Ex 1.
26 T3-113 L35; T3-57 L7.
27 Ex 14 [5.5].
28 Ex 14 [5.5].
29 For example, Ex 2(6).
30 T2-57 L54; T2-58 L13.
31 T3-69 L25.

[22] In a plan subsequently drawn by him,[32] Mr Cooper positioned the van to indicate that the front of the van was off the edge of the highway but its rear was encroaching across about two thirds of the southbound lane. The plan showed the van angled facing slightly south of a right angle to the highway, to the extent of about five or 10 degrees.[33]

[23] Mr Cooper initially gave evidence that the van had attempted a u-turn and stalled in that position. However he subsequently explained that was an assumption and that he had not ever seen the van in motion.[34] A logical explanation for the van's position is that it was attempting a u-turn when it stalled or stopped for some other reason and would not restart. A decision to make such a turn would be consistent with the plaintiff and his travelling companion deciding to turn back towards Pindi Pindi and rest the night there in the van rather than driving further on. However the evidence does not permit a finding as to why the van came to be positioned across the southbound lane as it was.

[24] The van had no lights on.[35] Mr Cooper did not describe seeing any persons associated with the van. On his account, the van did not move at all, nor did he see anyone try to move the van.[36]

Mr Cobden's semi-trailer misses the van

[25] Soon after Mr Cooper went outside and observed the van he noticed a southbound semi-trailer drive around the van.[37]

[26] Daryl Cobden was driving that semi-trailer. He recalls that in the straight prior to the location of the van his headlights had been on low beam because there were a number of oncoming northbound vehicles. After they had gone by he flicked his headlights onto high beam at which point he noticed the van.[38] He observed a person was standing near the passenger door and that the rear of the van protruded nearly to the centre line.[39]

[27] Mr Cobden started to apply the brakes to his semi-trailer and, on seeing there were no oncoming vehicles, swerved to get around the van, missing it narrowly.[40] He expressed the view in evidence that if he had not put his headlights onto high beam he would not have seen the van in time to react and would have hit the van.[41] He explained he had not seen the van on low beam.[42] However, that is because of the combined effect of being on low beam and facing oncoming headlights. Whether he would have seen the van in time using his low beam in the absence of oncoming headlights is unknown because he went to high beam as the oncoming vehicles went past him.

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32 Ex 15.
33 T3-77 L22.
34 T3-87 L10-20.
35 T3-70 L33.
36 T3-89 L24.
37 T3-70 L25.
38 T3-43 L20.
39 T3-43 L22.
40 T3-43 L25-31; T3-45 L35-43; T3-46 L6.
41 T3-55 L1.
42 T3-55 L6.

[28] Mr Cobden described the van, at the time he passed it, as being angled across most of the southbound lane and facing slightly to the north.[43]

The Sivyers encounter the van

[29] Mr Cobden kept driving south and soon passed a northbound 4WD driven by Peter Sivyer. Mr Sivyer was driving his wife, Sandra, and his infant child in his Landcruiser 4WD utility towards where the van was broken down in darkness on the highway.[44] Mr Cobden flashed his headlights onto high beam at the Sivyers' 4WD to warn them.[45] Mr Cobden estimated he was about 500 metres south of the van and 50 to 100 metres north of the Sivyers when he flashed his headlights at them.[46] Mr Sivyer, on the other hand, put his distance south of the van at the time he was passed by Mr Cobden at between one and one and a half kilometres to the south,[47] near Black Rock Creek.[48]

[30] Mr Sivyer was travelling at 100 kilometres per hour with his headlights on high beam when he noticed the van.[49] When his 4WD's headlights were switched to high beam spotlights would also be illuminated, considerably improving the brightness and distance of the view ahead in comparison to the low beam setting.[50]

[31] In approaching the van, Mr Sivyer turned his headlights to low beam and drove slowly past the van, as a precaution, before backing up to be level with it.[51] Mr Sivyer estimated his 4WD was opposite the van for about two minutes,[52] although Mrs Sivyer felt it was a shorter period than that.[53] Mr Cooper, adopting a leading question, estimated it was a period of 30 seconds.[54]

[32] Mr Sivyer noticed the van was unlit and parked in the southbound lane at a right angle to oncoming southbound traffic.[55] The front of the van was facing towards the table drain, just over the fog line and the rear was closest to the middle lanes. Mr Sivyer estimated it encroached at least half to three quarters of the way across the lane from the highway's edge.[56] Mrs Sivyer recalled it was blocking about half[57] to two thirds[58] of the southbound lane. She placed the van angled slightly south of a right angle to the highway, at a similar angle to that described by Mr Cooper.[59]

[33] Mr Sivyer noticed there were two persons, obviously the plaintiff and Ms Brichta, standing on what he described as the northbound side of the van.[60] As he reversed back to level with the van the two persons started to walk across towards him. Mr Sivyer recalls the two people were not "real quick" in walking to him and displayed

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43 Positions marked on Ex 4.
44 T1-76, 77.
45 T1-78 L40; T3-46 L20.
46 T3-46 L43.
47 T1-89 L43.
48 T1-78 L38.
49 T1-79 L8-29.
50 T1-77 L35 to T1-78 L30.
51 T1-79 L42 to T1-80 L30.
52 T1-89 L10.
53 T2-7 L18; Mrs Sivyer said the conversation lasted less than a minute at T1-104 L2.
54 T3-74 L5.
55 T1-79.
56 T1-81 L35.
57 T1-103 L2-15.
58 T2-11 L30.
59 Ex 4.
60 T1-80 L11.

"no urgency" in their movements.[61] They did not speak English well but he recalls he told them they had to move the van off the highway because it was dangerous to leave it there.[62] The Sivyers both recall one of the persons associated with the van, a female, said "nothing works".[63] As Mr Sivyer's 4WD moved away the two persons walked back to the van and around to the southern side of it.[64] That was the last Mr Sivyer saw of them.[65] Mrs Sivyer did not witness their movements.[66]

The Sivyers park off the highway

[34] Mr Sivyer decided to pull over with a view to then returning on foot and pushing the van off the highway into the table drain.[67] He testified that he drove his 4WD approximately 50 metres[68] north of the van and pulled off to the left, driving over the spoon drain and bringing his 4WD to a stop at a cane headland eight to 10 metres from the edge of the bitumen.[69] Mrs Sivyer estimated the 4WD was parked nearly 50 metres to the north of the van[70] and she also recalled that her husband had driven their 4WD over the drain and parked well away from the highway near the cane headland.[71] The highway's bitumen surface was about 11 metres wide.[72] The photographs and survey plan of the scene[73] suggest the headland was about the width of the highway again away from the edge of the highway. The location of the 4WD is relevant because of its potential in the foreground to distract drivers approaching the van from the north.

[35] The Sivyers' evidence of their 4WD's location was contradicted by the evidence of the first defendant and Mr Cooper. The first defendant gave evidence that when he saw the vehicle that must have belonged to the Sivyers, it was only one or two feet from the fog line at the edge of the highway surface.[74] In a similar vein, Mr Cooper also testified that the vehicle, that must have belonged to the Sivyers, was parked near the highway's edge, with its left wheels only just off the shoulder of the highway.[75]

[36] Further, Mr Cooper testified the 4WD was parked only six metres north of the van, rather than 50 metres as asserted by the Sivyers. The first defendant could not estimate the distance between the 4WD and the van but on his account he had time after passing the 4WD to see the van and swerve his truck a significant distance across the southbound lane. This is more consistent with the approximate 50 metre estimate given by the Sivyers than the mere six metre estimate from Mr Cooper.

[37] The Sivyers' estimate of their 4WD's distance from the van was more reliable than Mr Cooper's for four reasons. Firstly, Mr Cooper was watching from well south of

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61 T1-89 L15.
62 T1-80 L40; T1-88 L43.
63 T1-80 L40; T2-7 L45-46.
64 T1-84 L30.
65 T1-96 L23.
66 T2-8 L5-15.
67 T1-80 L45 to T1-81 L7.
68 In the trial transcript Mr Sivyer's estimate of 50 metres was at times mistranscribed at 15 metres.
69 T1-82.
70 T2-5 L46; Mrs Sivyer's estimate was a distance of three times the length of the 15.5 metre long courtroom.
71 T1-104 L24; T2-13 L36; Ex 4.
72 Ex 14 [8.2].
73 Exs 2, 13A & 13B.
74 T3-95 L8.
75 T3-71 L7-18.

the van, about 130 metres away,[76] at night. His depth of vision would not have allowed an accurate estimate of how far away the 4WD was from the van. Secondly, his reluctance to concede he could be mistaken[77] was because of an erroneous perception that the 4WD would not have been visible to him by reason of the crest if it had been 50 metres north of the van.[78] Thirdly, it is the Sivyers who actually travelled the distance and who would therefore have a more reliable perception of the distance. Fourthly, it is inherently improbable Mr Sivyer would have parked his 4WD containing his wife and infant child only six metres north of such a potentially dangerous traffic situation.

[38] As to the distance of the 4WD from the roadside, again I find the Sivyers' evidence on the point to be the most reliable. Mr Cooper was not well positioned to give accurate evidence on this topic. He was not standing at the roadside looking along the edge of the highway. Rather, he was standing 30 to 40 metres from the roadside.[79] This would have impaired the reliability of his perception of the lineal distance of the 4WD from the highway surface. His perception of how far from the highway surface the 4WD was depended upon his perception of how far away from him it was and, as has already been discussed, that perception was mistaken.

[39] Unlike Mr Cooper, the first defendant did at least bypass the 4WD, but his perception that the 4WD was very close to the highway's edge is less reliable than the Sivyers' evidence on the point. The first defendant's perception was necessarily formed in a matter of seconds as he drew close to and passed level with the 4WD. It is likely that in his hindsight rethinking of these quick events he has assumed, because he was apparently distracted by the 4WD, that it must have been closer to the highway's edge than it in fact was.

[40] The Sivyers on the other hand were actually in the 4WD and they could hardly be mistaken in their recollection that their 4WD traversed the spoon drain, thus putting it a material distance beyond the edge of the highway. Evidence was adduced by the defence from Mr Cooper that the highway's spoon drain near his house was slippery and boggy from rain the week before[80] but in the area where Mr Sivyer traversed the drain Mr Sivyer observed it was dry.[81] In any event, even if the drain was still damp that would hardly have prohibited the 4WD traversing it. The Sivyers' evidence that their 4WD was not parked immediately beside the highway but on the other side of the drain near the cane headland was credible and reliable and I accept it.

The 4WD's headlights and indicator remain on

[41] Mr Sivyer testified that his 4WD's left-hand indicator remained on and he and his wife each recalled their 4WD's headlights were on low beam.[82] In contrast, the first defendant testified that the 4WD's right-hand indicator was on and its headlights appeared very bright, causing him to assume they were on high beam.[83]

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76 Exs 13A & 13B.
77 T3-85 L20.
78 T3-84 L24; compare for example, Ex 2(11) & (12b) with Ex 3(2) & 5 (using the telegraph pole as the reference point).
79 Exs 2(12(b)) & 13A; T3-88 L15.
80 T3-72 L42.
81 T1-94 L27.
82 T1-83 L38; T1-104 L46.
83 T3-93 L40; Ex 12 [18].

[42] The first defendant later acknowledged he did not know if the headlights of the 4WD were on high beam or were just of high wattage.[84] If the 4WD did have its high beam on then its spotlights would have been on, but the first defendant did not believe the 4WD's spotlights were on.[85] Moreover, the first defendant did not flash his headlights at the 4WD[86] despite that being his normal custom when an oncoming vehicle left its headlights on high beam.[87] He offered no explanation for not doing so if he really perceived the headlights of the 4WD were on high beam. The fact he did not do so suggests the 4WD's headlights were not interfering with his vision ahead to any significant extent. I accept the headlights of the 4WD were not on high beam.

[43] It is conceivable, because of the height of their 4WD relative to the oncoming truck of the first defendant, that the 4WD's low beam appeared brighter than it would have if the two vehicles were facing each other on a flat road. However, the prospect that the 4WD's headlights were of dazzling impact upon the first defendant is remote, particularly bearing in mind that the driver's side of the 4WD was likely located at least eight metres from the highway's edge and at least 11 metres from the first defendant's side of the highway. Even the first defendant acknowledged the headlights were shining up the side of the highway and were not "staring" him "in the face".[88] It appears more likely that the first defendant, in rethinking these events in retrospect and looking to explain what occurred, reasoned that the 4WD's headlights must have been brighter than they in fact were and must have had a more adverse impact upon his vision of the highway ahead than they in fact did.

[44] My general impression of the first defendant's memory of events is that, because events had occurred so quickly and unexpectedly, he did not have an actual memory of much of the detail about which he was asked. It appeared the pressure on him to reliably recall factual details resulted in an unwitting tendency on his part to give information which was partly the product of speculation rather than genuine recollection. In contrast, Mr Sivyer, who had time to observe the scene and apprehend the risk of what could, and did, occur, appeared to have a more reliable knowledge of factual detail.

[45] Mr Sivyer's recollection that his 4WD's left-hand indicator was on is likely to be reliable given he had turned to the left off the highway and stopped. Against that background, it is unlikely he would have activated his right-hand indicator deliberately. The first defendant's evidence that an indicator signal was activated on the 4WD is undoubtedly correct, although his perception that it was the right-hand indicator is probably wrong. He acknowledged that he would not have been able to actually see the indicator light,[89] which is unremarkable given it would have been set against the 4WD's headlights, and rather was aware of an orange flash on the right-hand side of the 4WD.[90] If the 4WD's right-hand indicator was on, that impression would have been correct. However, even if the 4WD's left-hand indicator was on, that may have had the effect of throwing flashing orange peripheral light in the area behind the 4WD, which, from the first defendant's perspective, may have given the impression that a right-hand indicator was on. In

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84 T3-105 L46; T3-106 L47.
85 T3-104 L9.
86 T3-106 L40.
87 T3-102 L4.
88 T3-111 L25.
89 T3-112 L14.
90 T3-112 L19.

either event, I accept the first defendant's evidence that he perceived the 4WD's right-hand indicator was on.

[46] I accept the first defendant perceived that, while the 4WD was stationary, there was some prospect that it may commence movement onto the highway because its headlights and indicator were on, and for that reason the first defendant's attention was particularly drawn to it. Whether it was in fact the left or right-hand indicator which was on is ultimately not to the point. The point is the first defendant would have been more attentive to the 4WD than another stationary vehicle by the roadside because he thought it was strange[91] it had both its headlights and indicator on. It is those considerations which heightened the first defendant's wariness in respect of the Sivyers' 4WD to the side of the highway and caused him to be more attentive to it and less attentive to the highway ahead.

The first defendant drives along the straight towards the Sivyers

[47] As Mr Sivyer pulled his 4WD up on the cane headland he noticed the truck driven by the first defendant driving southbound on the highway.[92] Its headlights appeared to be on low beam.[93] Mr Sivyer estimated the first defendant's truck was travelling at about 100 kilometres per hour and did not slow down prior to reaching level with him.[94]

[48] In the aftermath of the collision, while still at the scene, the first defendant told the police officer in attendance, Senior Constable Spreadborough, the following version of his approach:

> "I was travelling south. I left Townsville at about 5pm to travel to Mackay. I stopped at Ayr, Bowen and Proserpine. I left Proserpine at about 21:15. I was just north of Pindi Pindi. I was doing about 95 to 100. There was a four-wheel drive parked on the northbound side of the road. His headlights were on. They were strong. He also had his right-hand blinker on. I took my foot off a little bit. He wasn't moving. I had just passed him when I saw a van across the road in my lane. ..."[95]

[49] The first defendant testified that the truck he was driving was laden with just over half of its 10 tonne load of bread.[96] It was speed limited to 98 kilometres per hour and the first defendant estimated he would have been travelling at that speed when he was first travelling along the straight.[97] As he travelled along the straight and noticed the 4WD was stopped off the highway with its right-hand indicator on, he took his foot off the accelerator and rested it on the brake pedal because he was uncertain of what the 4WD was going to do.[98] He estimates his truck would have gradually slowed by about 10 to 15 kilometres per hour when it was perhaps 500 to 600 metres from the 4WD.[99] By the time he was close to the 4WD he estimates his speed would have reduced to 75 to 80 kilometres per hour.[100] He glanced to the

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91 Ex 12 [19].
92 T1-84 L35.
93 T1-85 L15.
94 T1-85 L18-26.
95 T1-58 L21-30.
96 T3-98 L15.
97 T3-94 L7-17.
98 T3-93 L18; T3-94 L3; T3-95 L25.
99 T3-94 L21-33.
100 T3-94 L38.

right looking at the 4WD as he went by it and only noticed the van ahead after that point.[101]

[50] Mr Sivyer's evidence that the first defendant was travelling at about 100 kilometres per hour is only an estimate and at night he may not have detected some slight deceleration of the oncoming truck. However, it is unlikely he would have failed to detect the truck slowing to 75 to 80 kilometres per hour. Further, Mr Cooper's estimate of the truck's speed was 95 to 100 kilometres per hour.[102] While I accept the first defendant's evidence that he took his foot off the accelerator as he approached level with the Sivyers, I do not accept he had decelerated as markedly as he claims by the time he passed the Sivyers. It is more likely he was travelling between about 85 to 95 kilometres per hour at that point. Accepting, at best for him, that he was doing 85 kilometres per hour as he passed level with the Sivyers, or 23.6 metres per second, he would, at that speed, have been about only another two seconds from the van.

[51] The uncontested expert evidence was that the likely cued and uncued reaction times for a driver to perceive and initiate a response to a hazard are 1.4 seconds and 1.9 seconds respectively.[103] Even if the cued reaction time is adopted, on the basis of the first defendant's heightened wariness, if he only noticed the van as he passed the Sivyers he had considerably less than a second between the commencement of braking and or swerving and impact. If he was travelling at 85 kilometres per hour (23.6 metres per second) for the next 1.4 seconds after passing the Sivyers then he would only have been about 17 metres from the van when he commenced braking and or swerving. Taking a more generous approach, assuming that in the 1.4 seconds response time the truck had continued decelerating, and thus adopting an average speed in that time of 80 kilometres per hour (22.2 metres per second), then after 1.4 seconds he would have been about 19 metres from the van when he commenced braking and or swerving.

[52] Mathematical precision about such times and distances is impossible given the inherent imprecision of witness estimates of speeds and distances. However, the above calculations illustrate that if the first defendant did not see the van until he was only 50 metres from it, that is, when level with the 4WD, he is unlikely to have had sufficient time and distance to take successful evasive action. That probability is consistent with the first defendant's various answers to interrogatories to the effect that he was 20 to 30 metres and no more than several vehicle lengths from the van when he attempted evasive action.[104]

[53] If the first defendant had seen the van earlier than when approximately level with the 4WD his prospects of avoiding the collision would obviously have been better.

[54] With his headlights on low beam he would probably have had a typical visibility distance ahead of about 70 metres.[105]

[55] However, according to the first defendant the headlights of the 4WD interfered with his vision.[106] The Further Amended Defence admitted he could not see beyond the

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101 T3-94 L41; T3-119 L13.
102 T3-78 L11.
103 Ex 14 [8.34]-[8.35].
104 Exs 10A & 10B.
105 Ex 14 [8.26], a conservative estimate given the truck's age and condition.
106 T3-93 L44.

4WD.[107] When asked in cross examination whether the 4WD's headlights prevented him from seeing past level with it he responded variously:

> "Yes. They would've…
> Well, they did, obviously. Yes. I'd say so…
> Well, it was just black up there. You know, like, it was just night time. You know, like—yeah. …
> Well, it did to a point. Yes."[108]

[56] I do not accept the first defendant actually knew whether he could have seen beyond level with the 4WD at the stage when he was closing on level with it because on his own evidence he looked at it, not at the highway ahead. The folly of the first defendant's continued interest in the 4WD rather than the highway ahead, and in keeping his headlights on low beam, was highlighted by his concession that by the time he had closed to within 50 metres of levelling with the 4WD he knew it was stationary and he could have put his headlights on high beam.[109]

[57] Further, by the time he was within 50 metres of level with the 4WD, the first defendant should have realised, even if the 4WD did start to move towards the highway, that there was no prospect of it doing so in time to present any danger to him. Driving courtesy and wariness may reasonably have caused the first defendant to keep his headlights on low beam and direct some attention to the 4WD earlier in his approach. But once he drew closer and knew that vehicle was well off the highway and stationary that courtesy and wariness should have given way to the higher priority of having a properly lit view of the highway ahead.

[58] If by that time the headlights of the first defendant's truck had been on high beam, they would have generated a typical range of visibility ahead of 110 to 180 metres.[110] Further, by that stage it is improbable that the headlights of the 4WD, which the first defendant acknowledged were shining up the side of the highway, would have materially impaired the visibility range generated.[111]

The collision

[59] After the truck drove level with the Sivyers, Mr Sivyer observed its ongoing path in his driver's side rear view mirror.[112] Mr Sivyer's view of the van was obscured by the first defendant's truck once it had passed him.[113] Mr Sivyer estimates the first defendant's truck travelled 90 to 95 per cent of the distance between passing his 4WD and arriving at the van before swerving to the right, apparently trying to miss the van.[114] Mr Cooper also noticed that the truck swerved as if trying to avoid the van.[115] Mr Sivyer detected no sign of brake lights, braking or any other sign of slowing of the first defendant's truck.[116] When the truck swerved Mr Sivyer noticed

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107 DEF [4](o)(i).
108 T3-107 L35-45; T3-108 L9.
109 T3-109 L12-45.
110 Ex 14 [8.24].
111 Ex 14 [8.23], a diagram drawn by Mr Johnston demonstrated the diminishing range of headlights to the side as distinct from straight ahead.
112 T1-85 L39.
113 T1-96 L25.
114 T1-85 L45.
115 T3-72 L10.
116 T1-86 L7-35; T1-97 L3.

it go up onto its right-hand tyres for "quite a while" before then going over onto its side.[117]

[60] On the first defendant's account, as he was passing the 4WD he glanced quickly to the right to look at it[118] and, having passed level with it,[119] then noticed the van for the first time immediately in front of him.[120] He testified he did not have a chance to put his headlights onto high beam after he passed the 4WD.[121] His recollection was that the van was positioned across the whole of the southbound lane. In answers to interrogatories he went so far as to say the van's rear even protruded to the northbound lane but he did not persist with that obvious over-estimate at trial.[122]

[61] The first defendant testified that he put his foot onto the brake heavily and swung the steering wheel to the right.[123] The first defendant had been driving his truck so that his left-hand tyres were on the fog line.[124] Despite his last moment swerve of the truck it struck the van.[125]

[62] Whether the first defendant's claim of a last minute application of brakes is corroborated by skid marks left prior to impact is not discernable from the photographs of the collision scene. In the photographs there is a faint indication of either a skid or yawl mark commencing a few metres north of gouge marks, consistent with the approximate impact point of the collision.[126] However, given the truck's length, even if the mark was caused by the truck, it may have been generated by tyres towards the rear of the truck and it is not possible to know whether the mark commenced before or after the front of the truck collided with the van.

[63] In any event, I accept the first defendant's evidence that he did apply his brakes at the last moment. Mr Sivyer's failure to notice that is unremarkable given he was viewing a very fast moving event in his rear view mirror. Further, the application of the brakes, at what must have been less than a second prior to impact, is unlikely to have generated a deceleration discernible to Mr Sivyer and he could easily have missed the momentary glow of brake lights prior to impact.

[64] It appears from the damage to the van and it is the opinion of the consultant engineer, Mr Johnston, that the point of impact into the van was across its rear.[127] This is consistent with the evidence of Mrs Sivyer and Mr Cooper that the van was angled slightly to the south, which would have tended to increase the exposure of its rear to oncoming traffic.

[65] However it is inconsistent with the location of the van as described by Mr Cobden. He said it was angled across most of the southbound lane, facing slightly to the north. It was submitted by counsel for the plaintiff that this suggested the van may have moved between when Mr Cobden drove by it and the time of the collision. However, Mr Cooper had the van in view for the entirety of the period prior to Mr

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117 T1-86 L3.
118 T3-115 L27; Ex 12 [22].
119 T3-119 L13.
120 T3-94 L41.
121 T3-94 L45.
122 Ex 11.
123 T3-94 L42.
124 T3-128 L46.
125 T3-72 L12.
126 Exs 1(1) & 1(2).
127 Ex 14 [8.9].

Cobden bypassing the van through to the time of the collision and the van did not move during any of that time. Moreover, when the Sivyers came upon the van only a short time after Mr Cobden had bypassed it, it was already in the position in which it was to be ultimately struck. The probability that the van was moved in the short time between Mr Cobden driving by and the Sivyers arriving without Mr Cooper noticing is very low. It is more likely that the position the van was in when Mr Cobden drove by remained the same position it was in when it was ultimately struck by the first defendant's truck. Mr Cobden's memory of the precise position of the van on the highway surface is incorrect, probably because of the limited time he had to take in such detail. Mr Cooper and the Sivyers had more time to make a reliable observation.

[66] Photographs of the collision scene show gouge and tyre marks on the highway surface. The gauge marks probably represent marks caused by the compression of part of a vehicle or vehicles into the highway surface at or near to the point of impact between the vehicles. When the photographs of damage to the van and the highway surface are considered in conjunction with the evidence of the Sivyers and Mr Cooper it is likely that at the time of impact the rear of the van was positioned somewhere between half to three quarters of the way across the southbound lane.

The aftermath

[67] Although the defendants admit the plaintiff was injured as a result of the collision,[128] there is no evidence as to where the plaintiff and his companion were located at the time of impact.

[68] It is apparent that the impact caused the van to rotate about 180 degrees in what would have been an anticlockwise direction, a short distance south and almost off the highway surface.[129] It follows that for the defendant to have been injured he was either in the van or more probably within a short distance of the van, likely somewhere within the south east arc through which the van moved after impact. Photographs of the collision scene show parts of the van, such as the rear passenger door, were partly dislodged and property from within the van was propelled out of it. It is conceivable such parts or property may have hit the plaintiff, that is, he may have been injured because he was nearby to, rather than within the arc through which the van moved. However, on any view he was not positioned a safe enough distance away from the van to avoid injury in the event the van was struck by an oncoming vehicle.

[69] As to the truck driven by the first defendant, it is apparent from the photographs of the collision scene and the eye-witness accounts that, consistent with it swerving in the last moments before impact, it travelled south at a gradual angle across the northbound lane and in doing so tipped onto its side. It eventually slid off the bitumen and came to rest on the grassed roadside about 90 metres[130] from the point of impact and not far from Mr Cooper.[131]

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128 DEF [5].
129 Ex 1.
130 Ex 13.
131 T3-72 L12.

Liability

[70] The first defendant was driving a truck which was capable, in the event of carelessness on his part, of inflicting significant damage upon other vehicles proximate to his and significant injury to persons proximate to those vehicles or to his truck. He was therefore under a duty to take reasonable care in his manner and speed of driving to avoid injury to such persons. That obliged him to keep a proper lookout towards the illuminated highway ahead and drive at a speed that made safe allowance for the limits of that illumination. At the time of the collision, whether the plaintiff was in or out of the van, he was either on or nearby to the highway. He was proximate to the van he had been travelling in and both the van and he were proximate to the truck of the first defendant. The plaintiff, a person located on or nearby the highway, was owed a duty of care by the first defendant, a driver upon the highway.

[71] The circumstance of the plaintiff being in or near a vehicle broken down partly across the highway was the subject of much criticism in the course of defence submissions, particularly regarding voluntary assumption of risk and contributory negligence. However, it was not suggested the first defendant did not owe the plaintiff a duty of care. The nub of the defence argument as to liability went to whether there was negligence, that is, a breach of the standard of care required.

[72] An obvious difficulty confronting the defendants' case is it is well known to all drivers that there is an ever present risk they may encounter unexpected obstacles on the road ahead of them. On the Bruce Highway those obstacles might include, for example, stopped vehicles, fallen vehicle loads, pedestrians and living or dead animals. Perhaps the most obvious of those examples is that which manifested itself in this case, namely a stationary vehicle on the highway ahead.

[73] No driver can safely assume the highway ahead will be clear. Nor does the risk of unexpectedly encountering an obstacle diminish at night time when the reduced range of visibility characteristic of night time driving makes it even more difficult than in the day time to perceive unexpected obstacles on the highway ahead.

[74] Applying the relevant general principles in s 9 of the *Civil Liability Act* 2003 (Qld), the risk that the first defendant would encounter a vehicle blocking a substantial part of his lane of traffic was foreseeable and was not insignificant.[132] If care was not taken against that risk the probability of harm was not insignificant and the likely seriousness of such harm, should it eventuate, was high.[133] Moreover, the burden of taking precautions to avoid the risk of harm was not particularly onerous and merely required that the first defendant adjust his manner and speed of driving to have a sufficiently clear view of the highway ahead of him in order to have time to react and avoid colliding with obstacles on the highway ahead. In the circumstances a reasonable person in the position of the first defendant would have taken precautions against that risk.[134]

[75] Counsel for the defendants properly urged that the standard of care was not that of a hypothetical perfect driver. However, it is fundamental to a reasonable standard of driving care that a driver adjust the manner and speed of driving according to the

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132 *Civil Liability Act* 2003 (Qld), s 9(1)(a) & (b).

133 Ibid s 9(2)(a) & (b).

134 Ibid s 9(1)(c).

prevailing circumstances, which at night includes how well the highway ahead is lit. As the plurality observed in *Manley v Alexander*:[135]

> "[T]he reasonable care that a driver must exercise when driving a vehicle on the road requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events."

[76] In the present case, the defendants submit that from the standpoint of a reasonable person, it was a reasonable response to being unable to see the highway ahead beyond level with the 4WD for the first defendant to slow his truck down by taking his foot off the accelerator but not braking or putting his headlights on high beam.[136]

[77] The defendants placed reliance on parity of reasoning in *Ticehurst v Skeen and Ors.*[137] In that matter, the plaintiff motorcyclist struck a vehicle that was negligently left stationary and unlit on the highway at night by the first defendant. The first defendant in that case took no steps to move the vehicle or warn oncoming motorists of its presence. The plaintiff, whose position was said to equate to the first defendant here, was not found to be contributively negligent. However, in that case the road configuration of a dip and curve in the approach to a corner where the stationary vehicle was located meant, whether the first defendant's headlights were on high beam or low beam, he could not have seen the hazard until he was almost on top of it. The opportunity for braking and suddenly changing direction was so extremely limited that the court concluded there was no lack of care on the first defendant's part in failing to avoid the collision.

[78] Counsel for the defendants in the present case incorrectly submitted there were similar prevailing circumstances from the first defendant's perspective here. The road configuration in the present case did not have the consequence that it was impossible for the first defendant to have seen the van until he was almost on top of it. The road configuration was such that, even at night, unless there was some interference with his vision, the first defendant should have seen the van in time to take adequate evasive action.

[79] I do not accept that the headlights of the 4WD interfered with the first defendant's vision in such a way as to have prohibited him, had he been keeping a proper lookout and travelling at a speed appropriate to his range of vision, from seeing the van. If, as the first defendant claimed, the headlights of the 4WD effectively prevented him from being able to see the highway ahead beyond level with it then, appreciating as he did that the 4WD was stationary and off the highway, he should have flicked his headlights to high beam to improve his view ahead. Alternatively, he should have slowed down to a much greater extent than he did in order to afford him sufficient time to react to any hazards on the highway ahead as they came within his illuminated range of view. He did not do either of these things.

[80] Further, he was not looking at the highway ahead during the last couple of seconds prior to him drawing level with the 4WD but rather was looking at the 4WD. As explained earlier, there was by this time no real prospect, if the 4WD did drive towards the highway, of it travelling onto the highway before the first defendant passed level with it. Furthermore, the first defendant's wariness of the 4WD could

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135 (2006) 223 ALR 228, [12].

136 T4-40 L20.

137 (1986) 3 MVR 307.

never have justified him giving it his exclusive attention. In *Manley v Alexander* the plurality relevantly observed: [138]

> "[R]ecognising one possible source of danger does not mean that a driver can or must give exclusive attention to that danger. Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger. And much more often than not, that will require simultaneous attention to, and consideration of, a number of different features of what is already, or may later come to be, ahead of the vehicle's path."

[81] The fact that the first defendant allowed himself to be distracted by looking off the highway at the Sivyers' 4WD is no more than a particular and positive statement of the negative proposition that he was not keeping a proper lookout.[139]

[82] It is impossible to be precise about exactly how long the first defendant was looking at the 4WD rather than at the highway ahead. In court he mimicked a very quick glance, which if accurate would have taken his eyes off the highway for about only one second. As discussed earlier, allowing for deceleration to 85 kilometres per hour he would still have travelled 23.6 metres in that glance. However, his mimickrey of the speed at which he glanced at the 4WD was improbably quick. He had the 4WD in view for much of the straight. He was not surprised by its presence at the last moment such that he might instinctively glance quickly at it. Rather, he was puzzled as to what the Sivyers' 4WD was doing and likely took a more gradual look at it as he drew near and drove by. He likely looked away for a period of at least two seconds at the 4WD in the immediate lead up to drawing level to it. At 85 kilometres per hour he would therefore have travelled about 47.2 metres while looking at the 4WD.

[83] If, as the first defendant asserted, he could not see the highway ahead because of the headlights of the 4WD then that state of affairs made it especially important to direct his eyes on the highway ahead to give him the best possible chance of seeing beyond level with the 4WD as soon as possible. By the time he was within 50 metres of drawing level with the 4WD he should have been maintaining a constant watch on the highway ahead. Had he done so I am satisfied that he would have seen the van at a point in time prior to drawing level with the Sivyers. I am satisfied that by this point the headlights of the 4WD, which were angled down the side of the highway, would not have been interfering with the first defendant's view ahead. Even if the first defendant's headlights were on low beam, then within about 20 metres of drawing level with the 4WD, that is about 70 metres from the van, the van should have become visible.

[84] By the point of collision the first defendant's truck had nearly managed to swerve far enough to avoid the van. It was emphasised in submissions that had the first defendant seen the van even slightly earlier, as he should have, even on low beam, he likely would have been able to react in time to avoid the collision completely. That hypothetical is premised on the known fact that there was no traffic in the northbound lane, leaving it vacant to swerve into. The potential for there to have been oncoming traffic in the northbound lane proximate to the van underscores the need for the first defendant to have been travelling at a speed appropriate to the circumstances. However, it does not assist to speculate about what effects the

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138 (2006) 223 ALR 228, [11].

139 *Pledge v Roads & Traffic Authority* (2004) 78 ALJR 572, [12].

presence of such traffic might have had. There are too many variables involved in such an exercise and in any event there was no such traffic at the critical time. The first defendant's manner and speed of driving must be assessed by reference to the facts as they were.

[85] Given the first defendant's professed difficulty in seeing the highway ahead beyond level with the 4WD, he should have adjusted the manner and speed of his driving so that he was able to see what was happening on the highway ahead in time to take reasonable steps to react. In his approach towards level with the 4WD he should have adjusted to the limited illumination of the highway ahead of him by substantially slowing his truck or extending the range of illumination ahead by flicking his truck's headlights to high beam. He did neither of those things. Further, given his allegedly impaired view of the highway ahead beyond level with the 4WD, it was incumbent upon him as he approached the 4WD to keep a proper lookout at the highway ahead. He did not do this either. Instead he diverted his attention to the 4WD. Had the first defendant been keeping a proper lookout and adjusted his manner and speed of driving in accordance with the prevailing circumstances the collision and harm to the plaintiff would not have occurred.

[86] Applying the general principles of s 11 of the *Civil Liability Act*, the first defendant's breach of duty was a necessary condition of the occurrence of the injury to the plaintiff, given the collision and consequent injury would not have occurred but for the first defendant's breach of duty.[140] As the injury was a direct and immediate consequence of that breach, it is appropriate that responsibility for the harm occasioned should be imposed upon the first defendant.[141]

[87] The plaintiff has discharged his onus of proving the first defendant's liability for the harm caused to the plaintiff.[142] The liability of the second and third defendant flows automatically from the liability of the first defendant.

Voluntary assumption of risk

[88] The defendants raised the defence of voluntary assumption of risk.

[89] I have already rejected the argument that the plaintiff was knowingly travelling in a van which was in a dangerously unreliable condition. The defendants' other complaints – that the plaintiff failed to move the van, warn oncoming traffic and remove himself from the area of danger – tend to identify the risk which the plaintiff was allegedly taking as being the risk that an oncoming vehicle may collide with the van and cause injury to the plaintiff.

[90] The plaintiff was nearby to an unlit van partially blocking the southbound lane of the Bruce Highway at night. For as long as the van remained on the highway, the plaintiff remained nearby and oncoming traffic was not warned of the obstacle, there was a risk that an oncoming vehicle might collide with the van and thus cause injury to the plaintiff.

[91] The risk was plainly very obvious to Mr Sivyer when he came upon the scene and would have been obvious to a reasonable person in the position of the plaintiff. It was therefore an obvious risk within the meaning of s 13 of the *Civil Liability Act*.

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140 Section 11(1)(b).
141 Section 11(1)(b); s 11(4).
142 Section 12.

That conclusion triggers the application of s 14(1) of the *Civil Liability Act* which provides:

> "If, in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to be aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk."

[92] At first blush, it may appear difficult for a plaintiff to discharge the onus in circumstances where, as here, he has no recollection of the incident. However his awareness or lack of awareness of the risk may, as with any fact about a person's state of knowledge, be proved circumstantially.

[93] Just as the circumstances bespoke an obvious risk to Mr Sivyer as he arrived upon the scene, it is equally obvious from the apparent degree of inactivity of the plaintiff and his companion, that the plaintiff and his companion were exhibiting a lack of awareness of the risk. The plaintiff was a young tourist on holiday. There is no basis to suspect he was suicidal. His lack of action, as witnessed by Mr Sivyer, indicates a lack of awareness of the risk that an oncoming vehicle might collide with the stationary van and cause serious injury to him. The circumstances compel the inference on the balance of probabilities that the plaintiff could not have been aware of the risk.

[94] Even if that conclusion is incorrect, there remains another insurmountable obstacle to this defence. The onus remains on the defendants in raising the defence of voluntary assumption of risk to prove that the plaintiff voluntarily accepted the risk.[143] Even if the plaintiff knew or was deemed to know that the risk existed, that does not equate to consenting to the risk. In a case like the present, even if it be assumed the plaintiff was aware there was a risk that oncoming traffic may collide with the van and cause serious injury to him, the circumstances cannot sustain the inference that he freely and voluntary agreed to incur the risk. There is no evidence to suggest that he was consciously placing himself in harm's way. There is no evidence to suggest he chose in being a traveller using the van that it should be broken down in a position of danger partly blocking a highway lane. It is a notorious fact that collisions of motor vehicles can cause serious injury and death. It is inherently improbable the plaintiff was agreeable to accepting the risk that he would be injured in a collision on or near the highway.

[95] The defence of voluntary assumption of risk has not been proved.

Contributory negligence

[96] The defendants submitted there should be a reduction of 100 per cent in damages by reason of contributory negligence, relying on s 24 of the *Civil Liability Act* (2003) Qld. The plaintiff on the other hand submitted no finding of contributory negligence should be made. In the circumstances of this case, both positions are unsustainable.

[97] All parties submitted the proper approach to resolution of this issue was as described by the High Court in *Podrebersek v Australian Iron & Steel Pty Ltd*:[144]

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the

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143 *Roggenkamp v Bennett* (1950) 80 CLR 292, [300].

144 (1985) 59 ALR 529, 532.

> damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man and of the relative importance of the acts of the parties in causing the damage."[145] (citations omitted)

[98] Of the four key allegations relied upon by the defendants I have already rejected the first, namely that the plaintiff was knowingly travelling in a van which was in a dangerously unreliable condition. As to the allegations that the plaintiff failed to move the van off the highway, remove himself from the area of danger and take steps to warn oncoming traffic, the plaintiff contends there is insufficient evidence of his actions to make a finding of contributory negligence.

[99] In seeking to avoid a finding of contributory negligence the plaintiff emphasises the absence of evidence between the movement of the 4WD away from the van and the time of the collision. It will be recalled Mr Sivyer noted the persons associated with the van appeared to move to the back of the van and around to the southern side of it and he did not see them after that. No other witness saw them either. The plaintiff has no memory of where he went at that point and his companion, Ms Brichta, was not called.[146]

[100] The plaintiff's counsel made the point that in these final moments it could have been that either Ms Brichta or the plaintiff was in the driver's seat and the other was attempting to push the van, presumably from the southern side, off the highway. The plaintiff's counsel emphasised that because of the lack of evidence about the state of the van it was possible that some unheralded defect may have made the van immovable even when placed in neutral. The plaintiff's counsel also identified the possibility that at the last moment the plaintiff and his companion had realised that they could not move the van and were in the process of fleeing away from it and the point of danger when the first defendant's truck collided with their van.

[101] There is no direct evidence about what the plaintiff and his companion were doing after they moved to the southern side of the van as the Sivyers moved off through to the point in time when the first defendant's truck collided with the van. That period of time is likely to have been less than a minute.[147] It is misleading to focus attention exclusively upon this period and ignore the positive evidence of Mr Sivyer about the activity of the plaintiff and his companion during the period when the 4WD was stopped near them. That period was characterised by inaction on the part of both the plaintiff and his companion.

[102] Further, that inaction falls to be considered against a background where the van had already been stationary for some time. In that time the van had stopped, at least one of the occupants had alighted, Mr Cobden's semi-trailer had veered by it heading south and passed the 4WD heading north and the 4WD had in turn travelled further north to arrive at the van. Being generous to the plaintiff, it is unlikely that period of time would have been less than a minute. By the time the Sivyers arrived upon

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145 It was not suggested that s 23 of the *Civil Liability Act* 2003 (Qld) worked any departure from this conventional approach.

146 It was not submitted that a *Jones v Dunkel* (1959) 101 CLR 298 inference be drawn in that regard.

147 Assuming by way of illustration that it took the Sivyers 15 seconds to accelerate north and start to leave the highway and that at or about that time the first defendant embarked upon the 900 metre long straight prior to the point of impact and if during that ensuing period an average speed of 90 kilometres per hour or 25 metres per second is assumed it would only have taken 36 seconds for the first defendant to have travelled that distance. On those figures there would have been a period of approximately 51 seconds between the Sivyers' departure from the van and the point of impact.

the van there had been ample time for its occupants to have quickly attempted to push the van from the highway, the obvious immediate response to the predicament confronting them. This they failed to do, indicating either a lack of capacity to do so (on their part or because of some defect with the van) or a lack of awareness of the need to do so. Their behaviour when the Sivyers arrived at the van suggests it was the latter. That is, the plaintiff exhibited no awareness of the true extent of the danger presenting itself.

[103] During the period when Mr Sivyer had the plaintiff in his view the plaintiff was not attempting to push the van off the highway or attempting to flee or attempting to run by the roadside to the north to forewarn oncoming southbound traffic. Instead, he was apparently content to wander in no particular hurry towards the 4WD and engage in or listen to the conversation that ensued with Mr Sivyer. It should have been apparent to the plaintiff that time was of the essence in either removing the van from the highway surface or removing himself well away from it, preferably to the north where he might attempt to at least forewarn oncoming traffic to the presence of the van on the highway. He should have been attempting to do one or more of those things prior to and after the Sivyers' arrival at the van. The fact that in the period during which Mr Sivyer had the plaintiff in his view the plaintiff was doing none of those things suggests it is unlikely the plaintiff tried to do them after the Sivyers moved off.

[104] In any event, the time that had lapsed between the van becoming stationary and the Sivyers moving away from the van means the plaintiff's conduct does not fall to be assessed as if he was still acting in the agony of the moment. It would not have taken long to put the van into neutral and try and push it off the highway. There had already been sufficient time to try to do so. If it could not be moved it would have been dangerous to linger in darkness near the van pondering why it would not move. Unless the task of moving the van was successfully tended to promptly, and clearly it had not been, the safer course was to move a significant distance away from the van, preferably to the north of it, off to the side of the highway.

[105] That course would have had the secondary purpose of allowing the plaintiff to attempt to wave at oncoming traffic from the roadside to warn of danger ahead, but its primary purpose would have been to remove the plaintiff from danger. There is ample evidence the plaintiff did not take that course. The very fact he was struck as a result of the collision shows he must not have moved to the roadside to the north and must not have moved a significant distance away from the van. Mr Sivyer had a view of the northern side of the van and the roadside north of the van but did not see the plaintiff. He last saw the plaintiff moving out of view around the southern side of the van. The plaintiff must have either lingered at or in the van or moved somewhere close by to the south or southeast of it, still too close to the van to avoid injury in the predictable event the van was struck by a southbound vehicle.

[106] The evidence therefore shows the plaintiff failed to take reasonable care for his own safety. The appropriate apportionment for that contributory negligence remains to be determined having regard to the relative culpability and causal importance of the respective actions of the plaintiff and the first defendant.

[107] The defendants attempted to draw a comparison between the culpability of the plaintiff in the present matter and the appellant in *W T P Norris v P J Blake.*[148] In that case there was an admission of liability by an appellant who had wired his

[148] [1996] NSWSC 477.

repaired vehicle incompetently, with the consequence that the vehicle's lights went out when he was driving at night. His vehicle came to a stop, predominantly on the wrong side of the highway, and he was in the process of searching for a neon light to use to assist him in bringing his vehicle safely off the highway when the respondent's oncoming vehicle collided with his vehicle. The first instance apportionment of 25 per cent contributory negligence against the oncoming respondent driver was increased on appeal to 35 per cent to allow for the fact that he was under the influence of alcohol. In addition, the negligence of the respondent lay in maintaining too high a speed to be able to keep a proper lookout or take effective evasive action.

[108] A fundamental difference between that case and the present matter is that significant components of the appellant's negligence there lay in his inadequate wiring of the motor vehicle and his failure to take more care in ensuring that he stopped the vehicle off the carriage way. That is why the appellant bore the greater responsibility. Here there is no evidence that the plaintiff was driving the van when it came to a standstill across the highway and, as I have already found, there is no evidence he was knowingly travelling in an unsafe motor vehicle.

[109] In emphasising the plaintiff's culpability, particularly in failing to warn oncoming traffic, the defendants referred to *Lawes v Nominal Defendant*.[149] There the plaintiff motorcyclist was injured after hitting a dead or dying horse lying on the roadway at night. Byrne J concluded that the horse had been struck by a vehicle which left the scene and while it had not been shown that the unknown driver had been negligent in striking the horse he or she nonetheless had a duty to exercise reasonable care to prevent the hazard created by the horse lying on the highway surface harming highway users. His Honour concluded the interval between the unknown driver's impact of the horse and the plaintiff's collision with the horse was long enough for the unknown driver to have positioned his or her vehicle so that its headlights illuminated the carcass and otherwise warn of the hazard by turning on his vehicle's hazard lights. Had there been earlier clear warning of the presence of the horse his Honour concluded that such precautions would probably have allowed the plaintiff to avoid the collision with the animal.

[110] In *Lawes* Byrne J apportioned liability 80:20 in favour of the plaintiff motorcyclist, reasoning:

> "[B]y far the greater proportion of responsibility for the injuries must be borne by the driver. His vehicle was the instrument by which the danger was created. More importantly, that driver had ample time, as well no doubt as the means at hand, to adopt suitable precautions which had every prospect of obviating the risk that eventuated."[150]

[111] The defendants submitted the apportionment should be even more favourable to them than it was to the plaintiff in *Lawes* but there are differences between the cases suggesting the balance of culpability here is much more evenly balanced than in *Lawes*. Unlike in *Lawes*, the plaintiff's conduct does not fall to be considered as if he was the owner and driver of "the instrument by which the danger was created", although as a passenger associated with the van he should have appreciated the danger the van presented to other highway users and consequently to him if it remained on the highway and if he remained near it. Another point of distinction is that the motorcyclist in *Lawes* was confronted with a darker, smaller, more difficult

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149 [2007] QSC 92.

150 Ibid [45].

to see obstacle than the first defendant was confronted with here. Also, unlike the motorcyclist in *Lawes,* the first defendant here looked away from the highway ahead at a time when his limited vision of the highway ahead made it especially important to be watching the highway ahead.

[112] In *Lawes,* where it was assumed hazard lighting would have been available to the unknown driver, the most significant aspect of the unknown driver's conduct was the failure to warn other drivers of the danger ahead. Here there is no basis to assume the plaintiff had access to any torch or hazard lighting so the prospect of the plaintiff obviating the risk of collision by warning oncoming traffic was less certain than in *Lawes.*

[113] Here the most significant feature of the plaintiff's conduct in a causal sense is his failure to move well away from the van, preferably to the north, off the highway, the most obvious direction of safety. His act of staying at or nearby to the van was of critical causal importance. Had he taken reasonable care for his own safety and moved well away from the van to a safe position he would not have been injured.

[114] The causal contribution of the first defendant's conduct is no less significant. Had he been keeping a proper lookout and driving at a speed appropriate to his truck's range of illumination ahead the collision that injured the plaintiff would not have occurred.

[115] As to the culpability of the players' conduct, the plaintiff should have appreciated that other traffic would be using the highway and that at night drivers would not easily see the unlit van from afar. The fact that Mr Cobden's semi-trailer swerved closely around the van should have made it even more obvious that there was a grave risk of oncoming traffic colliding with the van. Unlike the first defendant, the plaintiff had ample forewarning of the inherently dangerous situation presented by the position of the van he had been travelling in and his proximity to the van, yet, remarkably, he remained in harm's way.

[116] On the other hand, the first defendant was in charge of a large truck that had the potential to cause great harm if not driven in a manner and speed appropriate to the circumstances. He failed to travel at a speed that allowed him to react safely to obstacles as they appeared ahead within the range of his truck's headlights. Moreover, he failed to keep a proper lookout on the highway ahead. The culpability of his failure to do so is well illustrated by his decision to look away at the Sivyers' 4WD at the very time when he had difficulty seeing the highway ahead beyond level with the 4WD.

[117] The relative culpability of both players as well as the relative importance of their acts in causing the injury is, overall, evenly balanced. In all of the circumstances there should be an apportionment of 50 per cent.

Orders

[118] Damages have been agreed in the sum of $800,000. There should therefore be judgment for the plaintiff in the sum of $400,000.

[119] That will be subject to hearing from the parties in respect of interest, it being uncertain from a comparison of the claim and the statement of claim whether the agreed quantum was intended to be inclusive of interest. It will also be necessary to hear the parties as to costs.

[120] My orders are:

1. Judgment for the plaintiff in the sum of $400,000.

2. I will hear the parties as to interest and costs.