

SUPREME COURT OF QUEENSLAND

CITATION: *Wynne v Davey & Anor* [2015] QSC 200

PARTIES: **MARK DAVID WYNNE**
(plaintiff)
v
JOHNATHAN ALEXANDER DAVEY
(first defendant)
and
NRMA INSURANCE ACN 000 016 722
(second defendant)

FILE NO/S: No 12089 of 2014

DIVISION: Trial

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 July 2015

DELIVERED AT: Brisbane

HEARING DATES: 17, 18, 19, 20 March 2015; further written submissions
2 April 2015 and 16 April 2015

JUDGE: Burns J

ORDER: **Judgment for the plaintiff on the issue of liability apportioned 85%:15% in the plaintiff's favour**

CATCHWORDS: TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – GENERALLY – where the first defendant had stopped his vehicle to conduct a manoeuvre across a roadway – where the plaintiff was a motorcyclist approaching the first defendant's stationary vehicle – where the plaintiff had seen the first defendant's vehicle with right indicator activated – where the plaintiff's vision became obscured – where the plaintiff believed the first defendant's vehicle would give way and allow the plaintiff to pass – where the first defendant turned his vehicle across the southbound lane and into the northbound lane – where the plaintiff collided with the front driver's side door of the first defendant's vehicle – where the plaintiff suffered personal injuries – where the quantum of damages is agreed – where the first defendant claims that the plaintiff attempted to overtake the first defendant's vehicle – whether the first defendant's vehicle was off the road or in the southbound lane when it began the manoeuvre – whether the first defendant attempted a U-turn or a right hand turn across the centre of the road –

whether the first defendant's vehicle turned across centre double white lines or a centre single white line – whether the collision occurred in the southbound or northbound lane – whether the first defendant's manoeuvre was permitted under the *Transport Operations (Road Use Management—Road Rules) Regulation 2009* – whether the defendants are liable for the plaintiff's personal injuries

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – ROAD ACCIDENT CASES – where the plaintiff saw that the first defendant's vehicle intended to turn right – where the plaintiff assumed it was safe to pass the first defendant – where the plaintiff's vision became obscured – where the first defendant's vehicle turned across the southbound lane 20 to 30 metres ahead of the plaintiff – where the plaintiff failed to come to a halt to avoid a collision – whether the plaintiff was travelling at an excessive speed – whether the plaintiff sufficiently reduced his speed upon sighting the first defendant's vehicle – whether the plaintiff should have appreciated the heightened risk that the first defendant's vehicle may turn across the plaintiff's path – whether the plaintiff's failure to sufficiently slow down contributed to his personal injuries

Civil Liability Act 2003 (Qld), s 23
Transport Operations (Road Use Management—Road Rules) Regulation 2009 (Qld), reg 37, reg 38, reg 132

Pennington v Norris (1956) 96 CLR 10
Sibley v Kais (1967) 118 CLR 424
Tebbit v Dunne & Anor [\[2009\] QCA 86](#)

COUNSEL: J Kimmins for the plaintiff
 G O'Driscoll for the defendants

SOLICITORS: Shine Lawyers for the plaintiff
 Moray & Agnew for the defendants

- [1] At some time after 9.00 am on Sunday, 23 December 2012, the plaintiff, Mark Wynne, and his wife, Salle-Anne, set off on Mr Wynne's motorcycle from their home in Agnes Water to ride to Rosedale for breakfast. Before leaving town, they rode to the home of their friend, Daniel McGarry, who, together with his daughter, accompanied them on his motorcycle. They then proceeded towards Rosedale, heading south out of Agnes Water and eventually along Tableland Road.
- [2] With Mrs Wynne seated in the pillion position, Mr Wynne took the lead. Mr McGarry and his daughter followed behind, maintaining a safe distance. For most of the journey, Mr Wynne adopted a position in the southbound lane of the roadway adjacent to the centre line whereas Mr McGarry rode closer to the edge line. Both Mr Wynne and Mr McGarry

were experienced motorcycle riders and familiar with the route from Agnes Water to Rosedale.

- [3] Ahead of them on Tableland Road and travelling in the same southerly direction was a campervan being driven by the first defendant, Johnathan Davey. Mr Davey and his passenger, Samantha Styles, were visitors to Australia from the United Kingdom. They had hired the campervan in Melbourne after arriving in Australia earlier that month and were on a driving holiday. After spending the night in Seventeen Seventy, they hoped to travel that day to Airlie Beach.
- [4] In order to do so, it was necessary for Mr Davey and Ms Styles to follow a route that included driving south along Tableland Road until they reached the turnoff to Fingerboard Road which, once taken, would lead them to the Bruce Highway for their journey north. However, they missed the entrance to Fingerboard Road and soon realised they needed to turn around. Mr Davey looked for a place to do so and, to that end, he reduced the speed of the campervan until he eventually brought it to a halt at a point on Tableland Road between Fingerboard Road and Williams Way in Taunton, approximately 30 kilometres from Agnes Water.
- [5] When Mr Davey was attempting a turning manoeuvre, Mr Wynne's motorcycle travelled around a left hand bend in the road and collided with the front driver's side of the campervan. In consequence, Mr and Mrs Wynne were thrown from the motorcycle. Mr McGarry and his daughter were more fortunate, avoiding any mishap.
- [6] In this proceeding, Mr Wynne claims damages for personal injuries and consequential loss arising out of the collision with the campervan. The quantum of those damages has been agreed. The trial was therefore solely concerned with the issue of liability.

Findings of fact

- [7] The section of Tableland Road over which the campervan and the two motorcycles travelled immediately prior to reaching the place where the collision occurred consisted of a single lane heading south and a single lane heading north. The speed limit was 100 kilometres per hour. Travelling south on this section, road users passed through a relatively flat stretch over a floodplain before reaching an incline. After reaching the crest of the incline, the road continued down and into a slight dip before emerging into a sweeping left hand bend.
- [8] On the northbound side of Tableland Road, and close to the apex of that bend, was a cleared area. It was visible to road users travelling down the incline on the approach to the bend. A portion of this cleared area was covered in gravel with the remainder, mainly to the south, well grassed. In the vicinity of the gravelled portion was the entrance to a rural property. In addition to providing access for that property, the cleared area had from time to time been used to stockpile road-making material including gravel.
- [9] The centre markings along the bend in Tableland Road were double white lines. These gave way to a single, continuous white line approximately ten metres in length opposite

the entrance to the rural property,¹ after which the centre markings reverted to double white lines.

- [10] It had been raining on the morning of the collision and the conditions were overcast. It had not, however, been raining during the journey south from Agnes Water and it was not raining at the time of the collision. Although patches of water were encountered on the roadway in the area of the floodplain, it was not suggested that there was any surface water in the vicinity of the accident scene or that the conditions played any particular role in the happening of the accident.

The competing cases

- [11] The case advanced on behalf of Mr Wynne was to the effect that, after travelling over the crest of the incline on Tableland Road, he observed the campervan in a stationary position on the shoulder of the southbound side of the road with its brake lights illuminated and right side indicator flashing. It was contended that Mr Wynne decreased his speed and then continued down the road, believing that the campervan would remain in that position until he had passed. However, it was alleged that, as Mr Wynne was negotiating the bend, the campervan pulled out across the road in front of him and, despite Mr Wynne's best efforts, the collision could not be avoided. It was also alleged as part of Mr Wynne's case that Mr Davey was attempting a U-turn and that, moments earlier, he had attempted the same manoeuvre but had to abandon that attempt due to the presence on the roadway of another vehicle travelling in the opposite direction (and driven by a Mr Frankcom). In that regard, it was alleged that Mr Davey had to stop and reverse back to the shoulder of the roadway to avoid colliding with that vehicle before then attempting the turn that ended in the collision. The particular place on the roadway where it was alleged Mr Davey turned was across double white lines at a point some metres south of the end of the single white line. The initial point of impact was contended to be in the vicinity of the double white lines or slightly over into the northbound lane.
- [12] The case advanced on behalf of the defendants was materially different. It was alleged that, at the time when Mr Wynne must have first observed the stationary campervan with brake lights illuminated and indicating to turn right, the vehicle was wholly within the southbound lane of Tableland Road. Mr Davey did not, it was alleged, intend to perform a U-turn. Rather, it was said that Mr Davey intended to enter the cleared area to the right of the road so that he could turn the campervan around in that area and then return to Tableland Road in order to travel in a northbound direction. It was also contended that Mr Davey checked his rear- vision mirror on two separate occasions prior to turning: first, when he saw that Mr Wynne's motorcycle was approximately 200 metres behind and, secondly, immediately prior to commencing his turn when he observed that the

¹ The centre markings on Tableland Road opposite the entrance to the rural property are pleaded inconsistently in the Amended Defence filed on behalf of the second defendant. In two paragraphs, the markings are described as "a broken dividing line to the left of a single continuous dividing line" (see paragraphs 18(d) and 39(a)(iii)), in one paragraph they are described as a "single dividing line to the left of a single continuous dividing line" (paragraph 12(a)) and in another they are described as a "single white line" (paragraph 9(a)). However, the witness testimony in the case was uniformly to the effect that the relevant centre markings consisted of a single continuous white line, and this was supported by other evidence (see, for example, the photographs taken by the investigating police on 21 January 2013 (Exhibit 3) and the two drawings prepared by the police (Exhibit 5; pages 24 and 25)). The case was conducted on that understanding and the submissions of counsel were made accordingly.

motorcycle had closed that gap to approximately 100 metres. For the defendants it was maintained that Mr Davey gave way to Mr Frankcom's vehicle before turning, that Mr Wynne was travelling at a speed "well in excess of 70 to 80 kilometres per hour" without any reduction and that he was attempting to overtake the campervan when the collision occurred. As to the position along Tableland Road where the turn was effected, the defendants' case was that Mr Davey was turning from the southbound lane across the single white line opposite the entrance to the cleared area and that, when he did so, Mr Wynne crossed over into the northbound lane with the intention of overtaking the campervan. Indeed, the case was put on the basis that the campervan had advanced well into the northbound lane by the time of impact. It was specifically alleged that, in all of the circumstances, the speed at which Mr Wynne was travelling was "excessive" and the attempt to overtake the campervan "dangerous".

- [13] Given the content of these competing cases, the principal factual issues for determination are these: the position of the campervan before it commenced the turn that ended in the collision; which turning manoeuvre was being attempted by Mr Davey; whether Mr Davey checked for the position of the motorcycle approaching from the rear before commencing that turn; the point *along* the roadway where the turn was effected; the point *across* the roadway where the initial impact occurred; the orientation of the campervan at the point of impact; and the speed at which Mr Wynne was travelling immediately prior to attempting evasive action.

The witnesses and exhibits

- [14] Mr Wynne, Mrs Wynne, Mr McGarry and Mr Frankcom were called in the plaintiff's case. For the defendants, Mr Davey and Ms Styles were the only witnesses. In addition, a number of photographic and other exhibits were tendered, either through one of these witnesses or by agreement of the parties.
- [15] Mr Wynne gave his evidence in a straightforward manner and without exaggeration. He struck me as a witness who was doing his best to give an honest account of what he could recall, even when parts of that account did not necessarily assist his case. For example, Mr Wynne said in evidence that he did not see the campervan moving forward or reversing and could not recall Mr Frankcom's vehicle passing him on his approach. In this respect, the significance of what was alleged to have occurred between the campervan and Mr Frankcom's vehicle was a key part of Mr Wynne's pleaded case and was expressly opened by his counsel. That notwithstanding, Mr Wynne could not support Mr Frankcom's observations about the manoeuvring of the campervan prior to the collision with his motorcycle and, by attesting that he had no recollection of being passed by another vehicle, he left himself open to criticism that he was not keeping a proper look out. On the whole, and although I have not acted on all of the evidence Mr Wynne gave where I found other evidence to be more persuasive, he impressed me as a truthful witness.
- [16] Similarly, Mrs Wynne gave a frank account of what she could recall. Her evidence was of limited scope given that she was not looking ahead until she heard her husband shout as he commenced his attempt to take evasive action, but Mrs Wynne made no attempt to bolster the evidence going in support of her husband's case by venturing more than she could actually recall. Mr McGarry was also an impressive witness who, despite his long-

standing and close friendship with Mr Wynne, provided a candid rendering of the relevant events. Mr Frankcom was the only truly independent witness called in the case. He gave an entirely credible account.

- [17] On the other hand, I found Mr Davey and Ms Styles to be unsatisfactory witnesses. Both were unduly argumentative. Both thought it necessary to make the point when giving evidence that they had no interest in the outcome of the proceeding – an assertion that might be accurate in a financial sense, but not otherwise. Each was reluctant to entertain the notion that some aspects of their version might be wrong, let alone to consider the making of reasonable concessions in that regard. I also found their evidence as to the marking and endorsement each made on a photograph forwarded to them by the defendants’ solicitors to be particularly concerning. Each had been separately sent a series of photographs and asked to mark where the campervan turned across the road.² This was of course an important and contentious aspect of the case.³ Each selected the same photograph,⁴ and marked the turning point in approximately the same position. Mr Davey was the first in time to do so. In addition to his mark, Mr Davey added the following handwritten endorsement:

“This is the only photograph I believe I can accurately mark where I had turned”.⁵

Some months later, Ms Styles marked the photograph and, like Mr Davey, endorsed her copy of the photograph.⁶ When she did so, she wrote in the same corner of the page where Mr Davey had made his endorsement, and she used almost precisely the same phraseology:

“This is the only photograph I believe I can accurately mark where I believe Johnathan turned”.⁷

- [18] Mr Davey denied that he had provided a copy of what became Exhibit 16 to Ms Styles or discussed with her what he had endorsed. Ms Styles also denied that she had seen the endorsement made by Mr Davey before she made her endorsement. The explanation she advanced for her choice of words was unconvincing: “We’re both teachers, so I assume I’ve tried to word it in the most formal way I can and so has he as to what I’ve believed and what he’s believed”. I do not accept that explanation any more than I am prepared to accept the denials made by Mr Davey on this point. The proposition that Mr Davey and Ms Styles had independently of each other chosen the same words⁸ and, furthermore, adopted the same unusual sentence construction is fanciful.

- [19] Otherwise, and for the reasons developed below, the versions advanced by Mr Davey and Ms Styles were, in a number of important respects, at odds with what could be reliably

² See Exhibit 19.

³ In Exhibit 19 – a letter from the defendants’ solicitors to Ms Styles dated 27 August 2014 – the clarification sought as to “where exactly on Tableland Road did Mr Davey’s vehicle cross at the time of the accident” was described as “crucial”.

⁴ Photograph 5. See Exhibits 16-18.

⁵ Exhibit 16.

⁶ It is noteworthy that Exhibit 19 did not, by its terms, request Ms Styles to add an endorsement.

⁷ Exhibit 18.

⁸ Up to the phrase, “where I”.

discerned from some of the photographic and other exhibits as well as the evidence of the other witnesses, including the independent account of Mr Frankcom. For instance, Mr Davey and Ms Styles both denied that there had been any attempt to turn before Mr Frankcom's vehicle passed and, yet, the very reason why Mr Frankcom came to be in a position to observe the collision with Mr Wynne's motorcycle was because he was forced to brake to almost a complete halt in order to himself avoid colliding with the campervan. This was a "near miss", and not something Mr Frankcom was at all likely to misapprehend. Furthermore, this was no mere difference in recollections between witnesses; both Mr Davey and Ms Styles positively asserted that Mr Davey waited for Mr Frankcom's vehicle to pass before commencing the turn which resulted in the collision. Put another way, each maintained that the "near miss" described by Mr Frankcom never occurred. I have no doubt that it did.

[20] In the end, I am not prepared to act on any aspect of the testimony of Mr Davey or Ms Styles unless it is supported by evidence independent of the other.

[21] As to the exhibits, I have not placed any reliance on the video recording made by Mr Wynne in February 2014 or the photographs taken by him at that time.⁹ Not only was the recording made, and the photographs taken, a considerable time after the accident occurred, but that was really done as part of a reconstructive exercise. As to the other photographs which are in evidence, I have had regard to the images taken on the day of the accident as well as the video footage (and the still images derived from that footage). The photographs taken by the investigating police in January 2013 have also assisted me.¹⁰ The two plans which are to be found in the police material, although not to scale, were also of some assistance, but I found the series of annotated photographs comprising Exhibit 10 to be particularly helpful given their depiction of the location of markings on the road surface as well as what are described as "Guide Post 1" and "Guide Post 2".¹¹ For reasons I express later, these objectively ascertainable features and their location – agreed, as all of that information was, by the parties – permitted the drawing of much more reliable conclusions regarding the happening of the collision.

[22] I turn now to a consideration of the principal factual issues for determination.

The position of the campervan before commencing the turn

[23] It was not in controversy that, after Mr Wynne reached the crest of the incline, he saw the campervan in the distance with the brake lights on the top of its rear window illuminated and right indicator flashing. In this regard, I accept that Mr Wynne's vision of the campervan was partly obscured by his position on the roadway and vegetation on the eastern side of Tableland Road. I also accept that he lost sight of the campervan as he proceeded through the dip in the road before regaining sight of it when he emerged ahead of the commencement of the left hand bend.¹²

⁹ Exhibit 2.

¹⁰ Part of Exhibit 5.

¹¹ One of the photographs in that series also depicts the "double continuous lines".

¹² See Exhibit 4.

- [24] Nonetheless, I accept that Mr Wynne had a sufficient view of the campervan after he reached the crest of the incline to make reliable observations about its position. According to Mr Wynne, the campervan was stationary on the side of the road, although he added that its driver's side wheels might have been on the bitumen to the left of the edge line. His recollection was that the campervan was "outside of the southbound lane".
- [25] Mr Wynne believed that he was riding his motorcycle in a corridor of the southbound lane to the right of the edge line whereas Mr McGarry's evidence was to the effect that he was riding in that corridor and that Mr Wynne was riding in the corridor to the left of the centre markings. On this point, I prefer Mr McGarry's account given that he was the following rider and seemed to me to have had a clearer recollection about this aspect of the matter. However, for the reasons Mr Wynne gave during his re-examination, I accept as likely that he moved to the left of the southbound lane as he emerged out of the dip in the road in order to negotiate the left hand bend.
- [26] It was while Mr Wynne was riding through the dip that he lost sight of the campervan. When he re-emerged, he saw that the campervan was still in position on the side of the road with its brake lights illuminated and right indicator flashing. He believed that the driver of the campervan had seen him and was "going to stay there". He thought that he could "roll around" the bend but, when he was between 25 and 30 metres away, the campervan pulled across the roadway in front of him. Mr Wynne applied his brakes, stood the motorcycle up from the left-leaning position it had been in as he rounded the bend and tried to veer to the right to lessen the impact.
- [27] Neither Mrs Wynne nor Mr McGarry were able to give any evidence as to the starting position of the campervan before it commenced the turn.
- [28] Mr Davey said in evidence that, after he saw the cleared area in the distance when travelling down the incline, he slowed down, looked in his rear vision mirror and activated the right hand indicator. He saw a motorcycle approximately 200 metres behind him. He said that, when he reached a point on the road opposite the cleared area, the campervan was at "crawling speed" and that he took up a position wholly within the southbound lane and close to the left of the centre markings. He recalled another vehicle coming in the opposite direction, but he said that he waited for that vehicle to pass before he commenced his turn. He asserted that he checked his rear-vision mirror again after the vehicle passed and then saw that the motorcycle was about 100 metres or so behind him. He said that he expected the motorcycle to slow down because his indicator had been on "for a good 200 metres". According to Mr Davey, he then commenced the turn.
- [29] He said:
- "I was going slowly, because again, it's a rental vehicle. I knew I needed to go completely into the gravelled area to turn the vehicle because of the turning circle the vehicle. I wouldn't have been able to do it on the road, so I knew that I was entering into the gravelled lay-by area to do a U-turn to turn the vehicle around, and I was going slowly because it's a rental vehicle. I don't own the vehicle and I didn't want to cause any damage to the vehicle."

- [30] Ms Styles gave a similar account although she said that she was not taking particular notice of Mr Davey's "driving". Nevertheless, she did say that the campervan was positioned close to the single white line and that Mr Davey waited for an oncoming vehicle to pass before commencing the turn.
- [31] Mr Frankcom was travelling in his Nissan Patrol motor vehicle with his wife and three children from Bundaberg en route to Agnes Water on the morning of the accident. He was driving at the speed limit in the northbound lane of Tableland Road and, as he approached the bend, he saw the campervan "pulled over on the side of the road". Mr Frankcom said that it was "half on the road, half off the road". He further explained that the campervan was "offset" with its driver's side wheels on the road surface and its passenger side wheels "on the grass side". He marked a photographic exhibit to depict this position.¹³
- [32] According to Mr Frankcom, as he drove around the bend in Tableland Road, the campervan turned in front of his vehicle. He said:
- "He then seen me and reversed back, and I got around him. And, yeah – that's when we've seen the collision in the rear-vision mirror".
- [33] Mr Frankcom indicated with reference to a photographic exhibit¹⁴ that the campervan travelled across the southbound lane and part of the northbound lane before stopping and then reversing out of his way. According to Mr Frankcom, the campervan proceeded approximately one metre into the northbound lane before it stopped. He said that he braked heavily to avoid a collision and almost came to a halt. He also veered to the side of the road but remained on the road surface. He then started off again in the northbound lane but saw the two motorcycles heading towards the bend. He observed the collision in his rear-view mirror. He recalled with reference to the driver of the campervan:
- "He's had another go at his U-turn and the bike had nowhere to go. He was – he was in the middle of the road."
- [34] Mr Frankcom was cross-examined about the position of the passenger side wheels of the campervan and, at one point, he agreed that they were "on or about" the edge line and on the road surface. However, the cross-examination continued and, as it did, it became clear that Mr Frankcom had not actually looked to where the passenger side wheels were situated and that what he was recalling was the "relative position of the vehicle" as he came around the bend. The true effect of Mr Frankcom's evidence was that the campervan commenced its turn across his path of travel from a position off to the side of the road.
- [35] Mr Frankcom also agreed under cross-examination that, when the campervan reversed, it took up a position in the middle of the southbound lane. The difficulty with reliance on that evidence, however, is that it is inconsistent with the paths of travel depicted on the photographic exhibit.¹⁵ It is also inconsistent with the evidence of Mr Wynne, which I generally accept, as to the starting position of the campervan. Further, for reasons I

¹³ Exhibit 7.

¹⁴ Exhibit 7.

¹⁵ Exhibit 7.

express below, I find that the initial impact between the motorcycle and the campervan occurred a short distance (of no more than one metre) into the northbound lane with the campervan oriented at 90 degrees to the centre markings. I do not accept that the campervan could have ended up in such an orientation if it had turned from a position wholly within the southbound lane.

- [36] I therefore reject the evidence of Mr Davey and Ms Styles that the campervan started from a position wholly within the southbound lane of Tableland Road. Instead I find that, after reversing out of Mr Frankcom's way, the campervan commenced its turn from a position which straddled the edge line of the southbound lane such that its passenger side wheels were off the road surface and its driver's side wheels were to the right of the edge line.
- [37] I also find that, immediately prior to commencing the turn that ended in the collision, Mr Davey attempted, but was then forced to abandon, a turn across both lanes of Tableland Road. His starting position for that turn was, as described in evidence by Mr Frankcom – "half on the road, half off the road". Mr Davey, I find, proceeded with that turn until he saw Mr Frankcom's vehicle approaching from the opposite direction. He then braked, stopping at a point approximately one metre into the northbound lane and then reversed out of the way. Mr Frankcom was forced to brake and veer to his left to avoid colliding with the campervan.
- [38] When Mr Davey reversed the campervan, it came to rest in a position further south along the roadway than his initial position. So much was made clear by the evidence of Mr Frankcom who depicted on Exhibit 7 the path the campervan had taken. Of course Mr Wynne's impression was that the vehicle was in no different position when he emerged from the dip to the position it was in when first seen by him after he passed the crest of the incline. But, although I accept that its position across the shoulder and edge of the southbound lane was not substantially different, I find that the campervan's starting position on its second attempt to turn was, as depicted by Mr Frankcom, some metres south of its starting position for the turn which Mr Wynne did not observe (and this was probably for the reason that Mr Wynne was riding through the dip in the road at that time).

What was Mr Davey attempting to do?

- [39] On a number of occasions when giving evidence, Mr Frankcom referred to what he twice observed as an attempt on the part of the campervan to perform a U-turn, but this was just his impression. On the other hand, Mr Davey and Ms Styles were adamant when giving evidence that Mr Davey was attempting a right hand turn to leave Tableland Road so as to enter the cleared area and then turn around in that area. Mr Davey said that he knew that he "needed to go completely into the gravelled area to turn the vehicle because of the turning circle the vehicle" but, at the same time, he was concerned about causing damage to the campervan.
- [40] I have already rejected the evidence of Mr Davey and Ms Styles as to the position of the campervan at the commencement of the turn that ended in the collision. Instead, I have found that the campervan was off to the side of the road and straddling the edge line. The only rational explanation on the facts which I accept for the campervan being in that

position is that Mr Davey was attempting a U-turn over both lanes of Tableland Road. It may be that he envisaged that part of that turn might traverse an unsurfaced portion on the edge of the gravelled area but I think it more probable than not that he was anxious to effect the turn at least substantially on the road surface so as to minimise the risk of damage to his vehicle. If Mr Davey truly intended to make a right hand turn to leave the road and fully enter the cleared area, he would not have pulled over to the shoulder and edge of the southbound lane, let alone commenced the turn from that position.

- [41] My finding in this regard is further supported by the findings I make below as to the initial point of impact and the orientation of the campervan at that moment – the point of impact being no more than one metre into the northbound lane road with the campervan oriented at 90 degrees to the centre markings. Such a position indicates that the campervan was at the apex of its turn, at a point near the middle of the road.

Did Mr Davey check for the position of the motorcycle before turning?

- [42] The evidence of Mr Frankcom was to the effect that, after the campervan reversed out of his way, its driver “had another go at his U-turn”. Mr Davey of course denied that he did anything other than allow Mr Frankcom’s vehicle to pass before commencing the turn, but I have rejected that part of his account. Be that as it may, Mr Davey also asserted that, before commencing his turn, he looked in his mirror to check the position of the motorcycle he had earlier observed and saw that it was approximately 100 metres from his position.
- [43] I am unable to accept that Mr Davey did so. In the first place, it is likely that Mr Wynne was riding through the dip at the time when Mr Davey made his first attempt to turn which he was forced to abandon. If after reversing, Mr Davey then checked his mirror, Mr Wynne’s motorcycle would either have still been in the dip (in which case, it is unlikely that Mr Davey could have obtained a proper view of it) or it had emerged from the dip (in which case, it would have been too close behind to attempt a turn). Secondly, when regard is had to what Mr Davey asserted transpired between when he first observed the motorcycle at a distance of 200 metres away and when he commenced his turn – slowing his vehicle to a crawl and then coming to a stop in preparedness for the turn – a motorcycle travelling at 70 to 80 kilometres per hour would have been much closer to Mr Davey than the 100 metre estimate Mr Davey supplied in evidence. Accepting those propositions, had Mr Davey checked his mirror before commencing the turn that ended in the collision, he could never have formed the view that it was safe to do so.
- [44] It is instead more probable that Mr Davey was unsettled by the “near miss” with Mr Frankcom’s vehicle and, after reversing back to the side of the road, set off immediately on another attempt to turn without keeping a proper lookout. In this regard, it is useful to recall the impression formed by Mr Frankcom at the time that the driver of the campervan was “panicking”, “hesitating” and “not in control of the car”. The contrary version advanced by Mr Davey to the effect that he checked the position of the motorcycle before commencing the turn was one of calm deliberation and one which, in all of the proven circumstances, I am unable to accept. I find that Mr Davey did not check the position of Mr Wynne’s motorcycle before commencing the turn that ended in the collision.

The point along the roadway where the turn was effected

- [45] Throughout their evidence, Mr Davey and Ms Styles insisted that the campervan turned across the single, continuous white line opposite the entrance to the cleared area. On the other hand, each of Mr Wynne, Mrs Wynne, Mr McGarry and Mr Frankcom said that the campervan turned at a more southerly point, and across double white lines.
- [46] Mr Wynne said that the collision occurred at a point along the roadway about five to eight metres after the recommencement of the double white lines. Mrs Wynne estimated that point to be between five and six metres after the recommencement of the double white lines and Mr McGarry's estimate was two to three metres. Mr Frankcom marked a similar point on Exhibit 7.
- [47] As to the evidence of Mr Frankcom on this point, the paraphrased version attributed to him in the police material¹⁶ includes a statement that the campervan was "turning across double white lines before the break in the lines closest to the Agnes Water end". When asked about the apparent difference between that statement and his oral evidence, it became clear that, at the time of providing his version to the police, he did not have the benefit of reference to any photographs of the scene. He also confirmed that his oral evidence on this point was in accordance with his proper recollection. There is also reason to doubt the accuracy of what was attributed to Mr Frankcom because the same version records a belief on his part that "the driver of the van saw (his) vehicle approaching and didn't commence the turn until after (he had) passed". If that is to be taken as suggesting there was no attempt on the part of Mr Davey to turn until Mr Frankcom had passed, that is wrong.
- [48] It is possible that Mr Davey's first attempt to turn commenced at a point which was opposite the single, continuous white line but, even then, I accept the evidence of Mr Frankcom – as depicted in Exhibit 7 – that the campervan in fact turned across double white lines during that attempt. But, even if that was not the case, by the time Mr Davey abandoned that attempt in the face of Mr Frankcom's vehicle, and then reversed to the position from where he commenced the turn which resulted in the collision, that position was, as I have already found, some metres south of its initial position. The turn which was then effected, I find, was across double white lines and at a point approximately three to five metres south of the recommencement of those lines.
- [49] An attempt was made to establish the point on the roadway where the campervan turned by reference to the place where Mr Wynne landed after being thrown from his motorcycle, and a number of witnesses were asked about this aspect of the matter. Not surprisingly, their evidence in this respect lacked precision and, for that reason, I am not prepared to act on it. For the same reason, I am not prepared to act on the evidence as to the position where the motorcycle came to rest following the collision in order to draw any conclusions on this point. The evidence as to what happened with the motorcycle after it was stood up is not sufficiently certain to rely on it.
- [50] I am, however, satisfied that the evidence as to the position of the campervan following the accident goes in general support of the evidence of Mr and Mrs Wynne, Mr McGarry

¹⁶ Exhibit 5.

and Mr Frankcom to the effect that the campervan turned across double white lines. A number of the photographs taken following the collision, when considered with the information and markers agreed by the parties in Exhibit 10, supports this conclusion. That evidence establishes that the campervan was located some distance to the south of the gravelled portion of the cleared area and, when that evidence is combined with the confirmation provided by Mr Davey and others that the campervan was driven directly off the road following the collision, it is more probable than not that the campervan must have turned across double white lines after their recommencement following the single, continuous white line.

- [51] So, too, is such a conclusion supported by a portion of the police officer's notebook which is in evidence.¹⁷ That portion records some particulars of the version provided to the police officer by Mr Davey. It includes this entry:

“Has turned on double white lines.”

When cross-examined, Mr Davey was asked if he could recall telling a police officer that he had turned across double white lines, and he said that he could not. Nevertheless, the notebook entry was admitted by agreement as part of the police material and without any reservation. It therefore provides, as I have said, further support for the finding I have made.¹⁸

The point across the roadway where the initial impact occurred

- [52] Mr McGarry was in a very good position to observe the impact. According to him, the initial point of impact was just into the northbound lane by a distance of no more than one metre. His evidence was that the campervan was still in the southbound carriageway and “probably (its) front wheels were just over the other side of the line”. Mr Wynne believed the point of impact to be closer to the centre markings. Mr Frankcom viewed the impact in his rear-view mirror. He said that the campervan was “blocking the whole southbound lane”.
- [53] Mr Davey was asked how far over the centre dividing line into the northbound lane the campervan was on impact. He said, “I was way over. I was a good – the vehicle was pretty much completely over the line” and, later, “I was well over onto the other side of the carriageway, a good (80 to) 90 per cent over, and that's when he hit the vehicle on the driver's side”. When the same enquiry was made of Ms Styles, she said that the campervan was “a significant amount” over the centre dividing line into the northbound lane.
- [54] I do not accept the versions offered by Mr Davey and Ms Styles. If they were correct, most of the southbound lane would have been available to Mr Wynne to ride through unimpeded. There would have been no need at all for evasive action. I accept, instead,

¹⁷ Part of Exhibit 5.

¹⁸ See, also, the plans which form part of Exhibit 5 and what is there indicated about the position in which the campervan was found.

that the initial impact occurred at a point across the road which was just into the northbound lane but by no more than a distance of one metre.

The orientation of the campervan at the point of impact

- [55] According to Mr Wynne, at the point of impact, the campervan was at an angle of “90 degrees across the road”. Mr McGarry agreed, before adding that Mr Wynne’s motorcycle “virtually T-boned” the campervan. Ms Styles said that the campervan was at an angle to the roadway of between 45 and 90 degrees at the time of impact.
- [56] For the reason again that Mr McGarry was in a very good position to observe the impact, I prefer his evidence on this point, as supported by the evidence of Mr Wynne. I find that the campervan was, at the time of impact, in the orientation described by Mr McGarry.

At what speed was Mr Wynne travelling?

- [57] Mr Wynne’s evidence was to the effect that, prior to noticing the campervan, he was travelling in fifth gear at a speed of 70 to 80 kilometres per hour. This is slower than he would ordinarily have travelled, but the presence of patches of water on the roadway in the area of the floodplain had caused him to ride at a more moderate speed. According to Mr Wynne, he last looked at the speedometer on his motorcycle when he was travelling up the incline but, after he saw the campervan, he downshifted to fourth gear and released the throttle. He estimated that releasing the throttle had the effect of reducing the speed of his motorcycle to “50 to 60 kilometres an hour, maybe 70”. At one point when being cross-examined, Mr Wynne appeared to accept that he was travelling at between 70 and 80 kilometres per hour immediately prior to attempting evasive action, although I accept that he may have been confused when he did so. Mr Wynne a short time later said:

“my reasoning was, he’s got his foot on the brake and he’s got his indicator on. He must have seen me. So I thought, I’ll just slow down, 70 to 80, back to 50/60, roll me way around the corner. He’s pulled out in front of me, and I’ve just gone, wow.”

In re-examination, Mr Wynne said that when he rolled his hand off the throttle after he first saw the campervan, his speed reduced to “60 to 70 kilometres an hour” and that he remained at that speed up until the point when the campervan pulled out on to the road.

- [58] In the paraphrased version attributed to Mr Wynne by the investigating police, he said that he was “travelling about 70-80 km/hr because there was still water on the road from an early shower”.¹⁹ In response to a direct question as to “how fast were you travelling?” the answer recorded is, “approximately 70-80 km”.²⁰ Although it was not made clear during Mr Wynne’s evidence whether he took that question to be an enquiry as to the speed he was travelling at the time of the collision as opposed to the speed of his motorcycle as he came over the crest of the incline, it is entirely open that Mr Wynne was speaking of the former rather than the latter and that his more contemporaneous recollection of the speed he conveyed to the police should be preferred to the recollection

¹⁹ Part of Exhibit 5.
²⁰ Ibid.

he gave in that regard in evidence at the trial. It is also to be kept firmly in mind that Mr Wynne did not profess to be able to do anything other than provide an estimate of the reduction in speed of his motorcycle after he “throttled off”. All that he could reliably say was that his motorcycle had slowed down.

[59] The most reliable evidence as to Mr Wynne’s speed was provided by Mr McGarry. He was travelling at the same speed behind Mr Wynne. His recollection was that, prior to braking, he was traveling at 80 kilometres per hour. Further, he was very familiar with that corner, and knew that he could travel around it safely at that speed. Mr Frankcom’s belief that Mr Wynne was travelling at the speed limit was not reliable given the limited opportunity for him to have made observations in that regard.

[60] I accept that Mr Wynne reduced the speed of his motorcycle when he released the throttle after first seeing the campervan. I find that, until he did so, he was travelling at approximately 80 kilometres per hour. However, on the whole of the evidence I am not persuaded that the reduction in speed achieved by Mr Wynne in that respect was any greater than 10 kilometres per hour.

[61] I therefore find that, immediately prior to attempting evasive action, Mr Wynne was travelling at between 70 and 80 kilometres per hour.

Who is responsible for the collision?

[62] I have found that, starting from a position which straddled the edge line of the southbound lane on Tableland Road, Mr Davey attempted to execute a U-turn across both lanes of the roadway in order to turn the campervan around and head north. He had moments before attempted the same manoeuvre but was forced to abandon that attempt when Mr Frankcom’s vehicle approached from the opposite direction. Although he knew that a motorcycle was approaching his position from behind, Mr Davey failed to check its position before embarking on his second attempt. When Mr Davey did so, he turned across double white lines at a point approximately three to five metres south of the end of the single, continuous white line. Mr Davey proceeded across the roadway until Mr Wynne’s motorcycle collided with the driver’s door of the campervan at a point that was no more than one metre into the northbound lane.

[63] I have also found that, at all times, the right hand indicator of the campervan was activated and flashing and this was observed by Mr Wynne after he passed the crest of the incline and, again, when he emerged from the dip on the approach to the bend. Further, I have found that Mr Wynne saw that the brake lights at the top of the rear window of the campervan were illuminated on both such occasions. He was travelling at a speed of approximately 80 kilometres per hour when he passed over the crest of the incline but, when Mr Wynne observed the campervan in the distance, he reduced his speed to between 70 and 80 kilometres per hour. He was travelling at that speed until he saw the campervan pull across the roadway.

[64] On the facts as I have found them to be, Mr Davey was negligent to a substantial degree. The U-turn he attempted which ended in the collision flouted a number of provisions of

the road rules²¹ and was, in any event, a particularly dangerous manoeuvre. He knew that there was a motorcycle travelling towards his position but, despite that, he turned without looking.

- [65] Mr Wynne was also negligent, although to a lesser degree. Knowing of the existence of the campervan on the side of the road with right indicator activated, he approached its position at too fast a speed to take effective action to evade a collision if the vehicle pulled out onto the roadway. He wrongly assumed that the campervan would remain in its stationary position. Regardless of the substantial failure on the part of Mr Davey to take reasonable care, it was not reasonable for Mr Wynne to have made such an assumption given, particularly, his distance from the campervan when he first observed it by the side of the road and the feature that he lost sight of it as he travelled through the dip ahead of the bend.²² By travelling at the speed which he did, Mr Wynne was guilty of contributory negligence.
- [66] After comparing the degree of departure from the standard of care required of Mr Davey and that required of Mr Wynne,²³ it is just and equitable that the liability be apportioned 85%:15% in Mr Wynne's favour.
- [67] I shall hear the parties on the form of orders required to give effect to this judgment as well as on the question of costs.

²¹ See *Transport Operations (Road Use Management—Road Rules) Regulation* 2009; regulations 37, 38 and 132.

²² See *Sibley v Kais* (1967) 118 CLR 424, 427; *Tebbit v Dunne & Anor* [2009] QCA 86, [27] per Douglas J.

²³ See *Pennington v Norris* (1956) 96 CLR 10, 16. And see s 23 of the *Civil Liability Act* 2003.