SUPREME COURT OF QUEENSLAND

CITATION:	*Lee v Lee & Ors* [2017] QSC 42
PARTIES:	**LIEN-YANG LEE** (applicant) **v** **CHIN-FU LEE** (first respondent) **CHAO-LING HSU** (second respondent) **RACQ INSURANCE LIMITED (ABN 50 009 704 152)** (third respondent)
FILE NO/S:	No S5357 of 2015
DIVISION:	Trial Division
PROCEEDING:	Civil trial
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	23 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	17-21, 24, 25 October and 2 December 2016
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the form of orders, and costs.**
CATCHWORDS:	INSURANCE - MOTOR VEHICLES - INSURANCE OF MOTOR VEHICLES FOR LOSS OR DAMAGE - LIABILITY FOR PERSONAL INJURY – where the plaintiff suffered catastrophic spinal injuries as a consequence of a motor vehicle accident – where the plaintiff seeks damages in negligence – where the plaintiff contends the first defendant was driving at the time of the accident – where the third defendant insurer denies liability and counterclaims – where the third defendant insurer contends the plaintiff was driving at the time of the accident – where the quantum of damages is uncontroversial – where only the identity of the driver remains in dispute - whether the plaintiff or the first defendant was driving at the time of the accident *Motor Accident Insurance Act* 1994 (Qld) *ASIC v Hellicar* (2012) 247 CLR 345; [2012] HCA 17, cited *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8, considered *RHG Mortgage Corporation Ltd v Ianni* [2015] NSWCA 56, applied

COUNSEL:	GW Deihm QC with D Callaghan for the plaintiff/defendant by counter-claim The first defendant appeared on his own behalf The second defendant appeared on her own behalf R Douglas QC with B Charrington for the third defendant/plaintiff by counter-claim
SOLICITORS:	Schultz Toomey O'Brien for the plaintiff/defendant by counter-claim Gilchrist Connell for the third defendant/plaintiff by counter-claim

[1] On 25 September 2013, the plaintiff sustained catastrophic spinal injuries when two vehicles, a Toyota Tarago and a Nissan Patrol, collided on an isolated road on Stradbroke Island in the State of Queensland. Whilst quantum of the plaintiff's damages have been agreed between the parties, liability remains in dispute.

[2] There is no dispute the collision occurred as a consequence of the negligence of the driver of the Tarago. At issue is who was the driver of that vehicle at the time of the collision. There are two rival contentions. First, that it was the first defendant, the plaintiff's father, an experienced, licensed driver. Second, that it was the plaintiff, an inexperienced, unlicensed 17 year old student.

Parties

[3] The plaintiff was born in Taiwan on 26 June 1996. He and his family came to live in Australia in 2008. In Australia, the plaintiff was known by the name "Mason". He completed his secondary schooling and is currently completing an engineering degree at University, although his paraplegia and associated injuries significantly impact on his day to day activities.

[4] The first defendant is the plaintiff's father. He was 41 years of age at the time of the collision. Since emigrating to Australia he has not undertaken employment in Australia. In Taiwan, his occupations included professional bus driver for the family business.

[5] The second defendant is the plaintiff's mother. She was the registered owner of the Tarago, which was purchased new in late 2008. Prior to coming to Australia, she worked as a business representative in a family travel industry enterprise. She has not been employed since coming to Australia. She intended to commence working by June 2014.

[6] The third defendant is the compulsory third party insurer of the Tarago, pursuant to the *Motor Accident Insurance Act* 1994.

Background

[7] The plaintiff, the first and second defendants and the plaintiff's two younger brothers, James and Adam, had travelled to Stradbroke Island a few days earlier to participate in a family Church camp with members of their congregational Church. The first defendant was a leader on the camp.

[8] Prior to this trip, the plaintiff had formed the intention of obtaining his driver's licence. He had yet to undertake any driving lessons and had not completed the written test for obtaining his

learner's permit. He had undertaken multiple practice tests on the internet. He intended to apply for his learner's permit within one or two weeks of returning from Stradbroke Island.

[9] The first defendant is an experienced driver. Habitually, when the family was travelling in the Tarago, the first defendant drove with the second defendant in the front passenger seat. The three children would be in the second row of the vehicle. The plaintiff sat behind the driver. The plaintiff's brother, James, sat behind the front passenger. His other brother, Adam, sat between James and the plaintiff.

Pleadings

[10] The plaintiff's claim and statement of claim were filed on 1 June 2015. In his statement of claim, the plaintiff alleged that at about 1.30pm on 25 September 2013 the first defendant was driving the Tarago when it collided with the Patrol. Alternatively, the plaintiff alleged that at about 1.30pm on 25 September 2013 he was driving the Tarago when it collided with the Patrol.

[11] The plaintiff further alleged that the collision was caused by the negligence of the first defendant as driver of the Tarago or, alternatively, as a consequence of the negligence of the first and second defendants in allowing him to drive the Tarago when they knew he was not, and never had been, the holder of a driver's licence or of a learner's permit and was inexperienced and unskilled in the driving of a motor vehicle.

[12] By amended statement of claim, filed 15 April 2016, the plaintiff deleted reliance upon an alternative plea that he was driving the Tarago at the time of the collision. The plaintiff pleaded that if, as contended by the third defendant but denied by him, the plaintiff was driving the Tarago at the relevant time, the first and second defendants owed him a duty of care which was breached in all the circumstances.

[13] The amended statement of claim was the subject of a successful application to strike out aspects of it, with the plaintiff being given liberty to re-plead. The further amended pleading maintained the contention that the first defendant was the driver of the Tarago at the time of the collision.

[14] The third defendant defended the plaintiff's claim on the basis the first defendant was not driving the Tarago at the time of the collision; the plaintiff was and that by reason of the plaintiff's conduct in doing so without being the holder of a driver's licence or a learner's permit the plaintiff was wholly responsible for his injuries or 100% contributorily negligent such that the third defendant is not liable to the plaintiff.

[15] The third defendant also counterclaimed for recovery of monies paid to the plaintiff and members of his family on the basis such payments were induced by the deceit of the plaintiff and the second defendant in falsely claiming the first defendant was the driver of the Tarago at the time of the collision.

Evidence

Generally

[16] The plaintiff gave evidence at trial and called a number of witnesses. One of those witnesses was the second defendant. Other witnesses called by the plaintiff were his two brothers who were present in the Tarago at the time of the collision.

[17] The first defendant attended Court each day during the trial but did not give evidence. The plaintiff accepted the first defendant resided with him and had done so since coming to Australia in 2008. He accepted he saw him "virtually every day". He knew the first defendant was not being called in the plaintiff's case. He did not know if the first defendant had been issued with a subpoena to give evidence in his case.

25 September 2013

[18] The plaintiff and his family had enjoyed the morning at Brown Lake, a recreational area located off Tazi Road on Stradbroke Island. They had travelled in the Tarago from Point Lookout to the recreational area at Brown Lake. They swam, picnicked and otherwise enjoyed themselves with other members of the Church camp for some hours.

[19] At around 12.30pm, the plaintiff and his family left Brown Lake in the Tarago. They intended travelling to Blue Lake which was located further along Tazi Road. Some members of the Church group returned to their accommodation at Point Lookout. Other members of the Church group also travelled to Blue Lake. They left in separate cars, before the Tarago.

[20] The plaintiff gave evidence that when they left Brown Lake, the first defendant was driving the Tarago with the other occupants located in their habitual positions. The plaintiff could not recall if he put his seatbelt on but said he did so normally when travelling in the Tarago. The plaintiff said both of his brothers fell asleep soon after they commenced travelling to Blue Lake. The plaintiff said he also fell asleep.

[21] Initially, the plaintiff gave evidence that he fell asleep after the Tarago stopped on the side of the road. Later, the plaintiff said he fell asleep soon after the Tarago left Brown Lake but awoke when the Tarago stopped on the side of the road. At that point, he heard the first and second defendants talking about going in the wrong direction. They discussed a map. After some minutes, the Tarago commenced to proceed towards Blue Lake. The plaintiff again fell asleep.

[22] The plaintiff said no-one changed positions whilst the Tarago was stopped by the roadside. The plaintiff said at no time did he drive the Tarago that day. The plaintiff said he had never driven a motor vehicle. He accepted he had, prior to the collision, undertaken online practice for the written test for a learner's permit on "around 15, 20 times".[1] The plaintiff said he intended, after obtaining his learner's permit, to first seek instruction in a motor vehicle with dual controls.

[23] The plaintiff agreed he saw obtaining a driver's licence as giving him independence as well as being of assistance to his parents. However, he did not accept he saw the quiet roads on North Stradbroke Island as "an excellent place" where he could practice driving.[2] The plaintiff accepted he and his family returned each year for a period to live in Taiwan. He accepted the Taiwanese drive on the other side of the road to Australia.

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1 T1-49/40.

2 T1-62/24.

[24] The second defendant gave evidence that when the family left Brown Lake the first defendant was driving the Tarago. She was seated in the front passenger seat. The three children were seated in the row behind with the plaintiff seated behind his father. It was her habit to tell her children to fasten their seatbelts upon entering the vehicle.

[25] The second defendant said after leaving Brown Lake they initially travelled in the wrong direction towards Dunwich. They realised their error when they arrived at "the place for the boats to get down".[3] At that point, the Tarago stopped and the second defendant went to the rear of the vehicle to retrieve a map. She sat in the front passenger seat and "spent some time on the map"[4] with the first defendant who was seated in the driver's seat. The map was in English and difficult to read.

[26] The second defendant gave evidence that no-one changed seating positions in the Tarago at the time they stopped on the side of the road or any time from when they left Brown Lake until the collision. No-one, other than the second defendant, left the Tarago when they were stopped on the side of the road.

Collision

[27] The collision occurred at around 1.30pm on 25 September 2013, when the Tarago travelled onto the wrong side of the road into the path of the Patrol. An almost head-on collision occurred despite the driver of the Patrol swerving to the left in an attempt to avoid the collision.

[28] At the time of the collision, the Patrol was being driven by David Hannan in a north-westerly direction on Tazi Road, Stradbroke Island. The Tarago was travelling in the opposite direction. The occupants of the Patrol were Hannan and his dog. The occupants of the Tarago were the plaintiff, his two younger siblings, the first defendant and the second defendant.

[29] The plaintiff gave evidence he had no recollection of the collision whatsoever. The second defendant said she recalled seeing the Patrol shortly before the collision. She was concerned they were very close and "was worried about a collision".[5] She told the first defendant there was a car coming just prior to the collision. She could not recall his reaction, if any. The first defendant did not give evidence at the hearing.

[30] Hannan gave evidence that he was travelling along Tazi Road around a blind curve when he observed a vehicle travelling in the other direction in front of him wholly on the wrong side of the road. The vehicle was approximately 50 metres in front of him and "could not have been further into" his lane. Hannan said he swerved to the left and braked in an effort to avoid the collision. His observation was that the driver of the Tarago swerved in the same direction. As a consequence, the vehicles collided virtually head-on on Hannan's side of the road.

Aftermath

[31] The plaintiff gave evidence he had no recollection of getting out of the Tarago. He said his first recollection after the collision was lying on the ground beside it with an unknown female

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3 T2-11/40.

4 T2-12/38

5 T2-13/38.

holding his neck, telling him not to move his neck. The plaintiff could not move his body at all from the chest down. The female was not a member of his Church group.

[32] The plaintiff accepted that whilst he was on the ground beside the Tarago he was drifting in and out of consciousness. He recalled telling doctors at the hospital he had been knocked out and had no recollection of the collision. He accepted it was difficult for him to remember what had occurred and he may have remembered things he had now forgotten.

[33] The plaintiff accepted that the Court pleadings initially filed by him alleged the collision occurred at about 1.30pm. Further, they alleged that either the first defendant was driving the Tarago or, in the alternative, that he was driving the Tarago. The plaintiff was unable to explain that pleading. He denied it was because he was "very uncertain" as to the events which preceded the collision.[6] The plaintiff said he was not uncertain – he was not the driver of the Tarago.

[34] The plaintiff denied that what had happened shortly prior to the collision was that when the Tarago stopped near Dunwich, the plaintiff entered the driver's seat and drove thereafter up to and including the point of the collision. He denied he did so with the agreement of the first and second defendant who thought it would be beneficial for him to practise driving.

[35] The plaintiff accepted he subsequently provided a DNA sample to police at the request of his solicitors. He accepted police had advised him they were of the view he was the driver of the Tarago at the time of the collision. He accepted the police asked if he wished to say anything about that assertion and that he had declined to say anything about the matter.[7] He denied the first and second defendants told him, whilst he was in hospital, that if anyone asked who was driving the Tarago he was to say it was the first defendant.

[36] The second defendant gave evidence that her first memory after the collision was that the first defendant was very nervous and left the vehicle through the driver's door. The first defendant was about to open the door at the back of the driver's seat. She did not recall the first defendant undoing his seatbelt or moving his seat before getting out. She heard him retrieving their children out of the car from the seats behind, one by one. She was not able to see this happening because of her injuries. Further, as a consequence of damage to the Tarago, she was unable to move in her compartment.

[37] The second defendant said she recalled seeing Hannan get out of the Patrol and move to the Tarago. She heard the first defendant and Hannan speaking outside the Tarago. She did not see Hannan carrying a dog but recalled hearing the sound of a dog. She could not recall whether Hannan opened the rear driver's side passenger door of the Tarago.[8]

[38] The second defendant said that after the first defendant had removed the children from the Tarago he came back into the driver's side to see if she was alright. He then unsuccessfully tried to open her door from outside the vehicle. The second defendant asked him not to move her as she was in pain. She knew she had suffered injuries. She was bleeding as a consequence of her injuries. The second defendant agreed that because of those serious injuries "maybe she

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6 T1-74/15.

7 T1-79/20.

8 T2-55/25.

had an unclear recollection of events prior to the collision".[9] The second defendant said she noticed at one point that her husband had blood on the top of his hands. Both her airbag and the driver's airbag deployed in the collision. The second defendant did not recall any blood on either bag.

[39] The second defendant denied the plaintiff was driving the Tarago at the time of the collision. She said she had never seen the plaintiff drive a motor vehicle. She was not aware of him having had any driving lessons. She was aware he intended to sit for his learner's permit shortly. She was encouraging the plaintiff to obtain his learner's permit. She raised him to be independent. The second defendant agreed that the plaintiff having a driver's licence would be of assistance to the family. However, she said it was only after the plaintiff had passed his written test and obtained his learner's permit that he would be allowed to sit in the driver's seat.

[40] Both the plaintiff's brothers gave evidence they were seated in the second row of the seats at the time of the collision. Neither had any recollection of the collision. Both said they had fallen asleep after the family left Brown Lake. One brother, James, estimated they left Brown Lake at around 12.30 that day. The other brother, Adam, estimated they arrived at Brown Lake at that time.

[41] James, the brother closest in age to the plaintiff, gave evidence that when they left Brown Lake the first defendant was seated in the driver's seat of the Tarago with the second defendant in the passenger seat in front of him and the plaintiff seated behind his father in the second row of seats. James said he had never seen the plaintiff drive a car. To his knowledge, the plaintiff had never had any driving lessons.

[42] Adam, the plaintiff's youngest brother, gave evidence that he had little recollection of events after leaving Brown Lake. He said when they left Brown Lake, the first defendant was driving the Tarago. He was seated in the middle of the second row of seats with the plaintiff seated beside him and behind the first defendant. His brother James was seated on the other side of him, behind the second defendant.

[43] Hannan gave evidence that immediately after the collision he was concerned about the risk of fire. He was also concerned about the welfare of his dog. He left his vehicle and carried his dog to a safe point approximately 30 metres away from the collision. Hannan then returned to the two vehicles. His estimate of the time this took varied between 30 seconds and 90 seconds. Hannan was unsure but believed he approached the Tarago initially from the driver's side of that vehicle.

[44] Hannan could not say specifically whether the Tarago's doors were open when he first arrived at the vehicle. His memory was there was no door open and no-one was outside of the Tarago. He saw no-one in the driver's seat. He also had been unable to identify anyone in the driver's seat in the brief instance before the collision.

[45] Hannan said he recalled seeing two adults and three children in the Tarago. The first defendant was standing in the area between the first and second row of seats, trying to help one of the children. The second defendant was seated in the front passenger seat. She appears to be seriously injured at that time. Two or three children were seated in the second row of seats, accessed by a sliding door.

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[9] T2-36/18

[46] Hannan recalled opening the sliding door. The first defendant picked up the first child and passed that child to Hannan. The first defendant repeated that manoeuvre. Hannan recalled walking some metres and placing the child on the ground. Hannan recalled that one child was either unconscious or nearly unconscious. The other had head wounds. Hannan recalled the adult female was unable to vacate the front passenger seat. His explanation was that she had suffered serious injuries.

[47] Whilst Hannan could not state who had been driving the Tarago, he had said in an earlier statement that his recollection was that there were three younger male children in the backseat of the vehicle and from what he saw he believed the older male must have been the driver at the time of the collision. Hannan had little recollection of the plaintiff. However, his description of the injuries of the children he assisted to remove would be consistent with the injuries sustained by the plaintiff.

[48] Dean Hough and his wife were the first people to arrive at the scene after the collision. They were travelling in their vehicle from Blue Lake back to Dunwich. Their daughter and a family friend were also in the vehicle but did not approach the scene. Hough and his wife assisted the plaintiff.

[49] Hough's first observation of the vehicles was that there was only one occupant in either vehicle, namely, the second defendant who was trapped in the front passenger seat of the Tarago. Hough went to assist those outside the vehicles. He checked the Tarago and Patrol to ensure they were safe. He disconnected the battery terminals on both cars and checked there was no leaking fuel.

[50] Hough first approached the Tarago from the driver's side. The first person he spoke to was the plaintiff who told him his name was Mason. The plaintiff was located about a metre away from the driver's side of the Tarago. Hough positioned them outside the open sliding door to the Tarago. Hough could not recall anything about the driver's door.

[51] Hough said the plaintiff was lying with his back against the first defendant's chest. The first defendant was cradling the plaintiff in a seated position, supporting his upper body, touching his chest and face and calling his name.

[52] Hough told the first defendant to lie the plaintiff down. Hough's wife held the plaintiff's head and shoulders to keep him still. At this point, the plaintiff told them he could not feel his legs. He also spoke about his missing teeth. Hough observed the plaintiff had bright red blood on his face. It looked fresh but was starting to dry. Hough could not remember seeing any blood on the first defendant. Hough observed one other injured male child. He had a cut on his head and a broken arm. This person was sitting to the right of the plaintiff, approximately 1.5 to 2 metres away, under a bush or tree.

[53] Hough said there was no mobile phone reception. He left the scene to drive to Dunwich to call emergency services. Hough's estimate was it took about 30 minutes to drive to Dunwich. Hough returned to the scene before emergency services first arrived at the scene. Those services were subsequently assisted by three helicopters. They transported those who had been injured in the collision, from the scene.

[54] Sometime after the collision, Dr Cheng-Chang Lee arrived at the scene. He is a medical practitioner with previous experience in Taiwan in emergency medicine. He knew the plaintiff's family. They were members of the same Church. Dr Lee was on Stradbroke Island

attending the same Church camp. Dr Lee gave evidence he was at the entrance to Blue Lake when he was informed by another member of the Church camp that there had been a collision. Dr Lee drove to the scene.

[55] Dr Lee's initial observations were of the second defendant sitting in the front passenger seat of the Tarago and of the plaintiff on the ground beside the Tarago with a woman sitting or squatting beside him. Dr Lee spoke to the plaintiff. The plaintiff told him he could not feel anything below his chest. Dr Lee observed a shallow wound on the plaintiff's face. There was "very tiny … very minimal" blood in that area.[10]

[56] Dr Lee observed the plaintiff's brother, James, had a very significant facial laceration and bleeding. Dr Lee was concerned about a significant head injury due to muttering and irritability. Dr Lee assessed the second defendant. She told him she was experiencing back pain and abdominal pain. Dr Lee did not pay much attention to the first defendant. He simply made sure the first defendant did not have any significant injuries. Dr Lee observed blood stains on the palms of both hands of the first defendant.

[57] Dr Lee remained at the scene. When emergency services arrived, Dr Lee gave a handover. He later assisted in intubation and ventilation of the plaintiff's brother, James. Dr Lee spoke briefly to police when they arrived at the scene. Dr Lee asked one of the police officers for contact details. He was given a card. Dr Lee said he subsequently lost that card. Dr Lee was not contacted by police any time thereafter for his recollection of events.

[58] Dr Lee said he was first asked to recollect the events of that day in early April 2016, when he was contacted by telephone by the plaintiff's solicitors. He subsequently met with those solicitors on 10 May 2016. Dr Lee could remember little of his initial telephone contact with those solicitors. The solicitor's note of the conversation recorded Dr Lee as saying, in response to a question whether he "heard anyone talking about the driver or about how the accident happened", that he "is a doctor, so he only worried about treating, didn't ask how accident happened".[11] He was recorded as later saying the first defendant "would" have been driving the Tarago because he is a professional driver and would not have let anyone else drive his car.

[59] Senior Constable Cade Pepper, of the Forensic Crash Unit, attended the scene of the collision at about 4.45pm on 25 September 2013. The only other police officer at the scene was Jarrod Bruce. None of the occupants of the vehicles involved in the collision were present. Bruce gave Pepper a brief rundown of how many people were involved and what had happened to them. Pepper also received brief details of conversations from people who had been spoken to at the scene. Pepper recorded those limited details but understood there were communications issues between the officers and the occupants of the vehicle.

[60] Pepper said when he arrived at the scene the vehicles were still together on the side of the road. He understood they had not been moved from their initial resting place. Pepper undertook his investigation relying on the physical evidence. In addition to physical evidence, Pepper is interested in obtaining eye witness accounts of the collision. They are informative of what to be looking for in respect of physical evidence. However, he does not rely on the accounts of witnesses, as even independent witnesses get it wrong a lot of the time. His examination of the Tarago revealed the front airbags had been deployed and there was what appeared to be blood

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[10] T3-42/15.

[11] T3-49/38.

on the driver's airbag. The driver's seatbelt was also still latched in place. He believed the driver's seat was reclined slightly.

[61] Pepper said at the time he finished at the scene he had not formed a view as to who was driving the Tarago. When he returned from the scene he spoke to one of the first people on the scene, a volunteer fireman. He provided some information as to where people were positioned when he arrived at the scene. There appeared to be some confusion as to the driver. There had been some conversation where no information was forthcoming when questions were asked as to who was driving the vehicle.

[62] Pepper made a request to have a DNA sample taken from the vehicle in order to determine who was driving it. He arranged to obtain DNA samples from the persons suspected to be potential drivers of the vehicle. Both the plaintiff and the second defendant voluntarily provided mouth swabs. He was subsequently advised the DNA profile matched one person, the plaintiff. Pepper sought to undertake further investigations to establish the driver of the vehicle. There were language barriers.

[63] Pepper sought to formally interview the plaintiff. He was advised by a solicitor that all questions were to be put through him. Pepper visited the plaintiff's home to see if the plaintiff wished to be interviewed. The plaintiff refused to undergo an interview. Pepper subsequently determined, having regard to the nature of the plaintiff's catastrophic injuries, that there was no public interest in pursuing any charges in relation to the plaintiff's driving of the Tarago without a licence.

[64] Pepper prepared a report for his officer-in-charge in which he recommended that no further action be taken against any person involved in the collision. In that report, Pepper proffered the version that the collision occurred when the Tarago "presumably driven by an unlicensed driver" has crossed onto the incorrect side of the road colliding head on with a Nissan Patrol travelling in the opposite direction. The report noted the second defendant had provided a statement in relation to the crash which contradicted the DNA evidence and placed the first defendant in the driver's seat at the time of the collision. The report also noted a statement had not been taken from the first defendant as he had been overseas for an extended period of time and it was likely his statement would coincide with the version given by the second defendant.

[65] Pepper also prepared part of a forensic crash unit incident summary sheet. It recorded the driver of the Tarago was unknown as the occupants were refusing to state who was driving the vehicle but that inquiries to date indicated it was an unlicensed 16 year old male who may have been the driver. It further recorded that the driver was not wearing a seatbelt and the seatbelt appeared to be clipped in place behind the driver to eliminate the warning beep. The report recorded that on 8 October 2013 the plaintiff was spoken to by police whilst in hospital. The plaintiff did not recall much about the collision but stated the first defendant was driving at the time of the collision. Pepper also contributed to an activities log which recorded the plaintiff as the driver of the Tarago.

[66] Pepper agreed that when he returned from the scene it was his understanding that the driver of the Tarago was unknown because the occupants of that vehicle were refusing to state who was driving the vehicle. He received this information from the single officer who remained at the scene as well as an off duty volunteer fire fighter. His understanding was that the occupants were unco-operative. He did not know that one of the officers at the scene had obtained a version at the scene from the first defendant that described himself as the driver. He did not

agree that had he been aware of that version he would have carried out his investigation in a different way.

[67] Pepper agreed that photographs of the interior of the Tarago revealed what appeared to be blood on the inside of the driver's door and on the driver's seat. Pepper said he took a number of photographs of the vehicle to assist the Forensic Crash Unit. He could not recall particular reasons for taking particular photographs.

Emergency response

[68] The first ambulance officers to arrive at the scene were John Bradbury and Nick Moss. Bradbury received notification of the collision at 1.24pm. He and Moss travelled in separate vehicles from Dunwich. They arrived at the scene at 1.37pm. They were the first emergency services personnel to arrive at the scene. They remained there until 4.00pm. Three helicopters attended the scene. Records suggest one of those helicopters arrived at 3.00pm.

[69] Bradbury gave evidence that when he arrived at the scene there were several people "milling around".[12] He observed an adult female in the front passenger seat of the Tarago. There were two people lying on the ground near the Tarago. Bradbury was directed to these people by a person at the scene who said he was a doctor. Bradbury undertook a triage of those people. Thereafter, he concerned himself mainly with the care of the second defendant who remained trapped in the Tarago. Moss undertook the primary care of the two other people who had been identified to them as having sustained injuries. Bradbury recalled one was a child who appeared to be younger than the other. That person had a significant amount of facial injuries and a head injury. The other was also a fairly young person but older than the head injured person. That other person did not have any obvious injuries but Bradbury suspected he had a significant spinal injury.

[70] Bradbury's assessment of the second defendant was that she had a possible spinal issue with neck pain and chest pain. She was in a fair bit of pain. Bradbury subsequently extricated her from the vehicle using spinal immobilisation. As he was only able to open the front passenger door of the vehicle a small amount, fire officers assisted in reefing it back so that he had room to remove the second defendant. In order to do so he recalled laying the passenger seat to its full extent. He may have laid down the driver's seat to allow the use of the extrication jacket and backboard. She was extricated from the then open passenger side front door. At that stage, she was quite stable. Bradbury placed an IV into the second defendant, gave her pain relief and then moved to assist Moss.

[71] Bradbury was taken to a photograph of the front passenger seat. It indicated the seat was twisted. Bradbury did not believe the ambulance officers had twisted the seat in order to extricate the second defendant. His recollection was the seat was simply laid back. It may be if the mechanism was not working they had to physically pull back the seat to loosen it up to remove the second defendant. He accepted that if there had been an obstruction in undertaking that process by the position of the driver's seat then they would have laid the driver's seat back as shown in the photograph.

[72] Bradbury said the second defendant was extricated from the vehicle by first tilting back the front seat to its full extent. Bradbury thought it was the front passenger seat but after being

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[12] T4-46/40.

shown photographs said it may have been the driver's seat that was tilted back to its full extent. The seat was dropped back flat to enable the extrication equipment to be used to remove the second defendant. Bradbury's recollection was that there was minimal damage to the inside of the vehicle, with most of the damage on the outside.

[73] Bradbury said that after each patient had been stabilised they were moved from the site of the collision into an area set aside for treatment and triage. Each received an IV and pain relief. As the two ambulances only had two monitors Bradbury and Moss would use the monitors on a rotational basis to take observations of those patients. This was undertaken until they were evacuated by helicopter.

[74] Bradbury said he did not recall any person entering the driver's compartment of the Tarago whilst he was caring for the second defendant. At one stage, Moss stuck his head into that compartment to see how Bradbury was going with the second defendant. Bradbury did not observe anything unusual about the condition of the driver's side of the vehicle. He recalled the driver's seat was empty and that the airbag was deployed. He thought there was blood, from memory, on the airbag.[13]

[75] Bradbury said during the extrication of the second defendant it was established there were two other people who had been in the collision. One was an older man who was walking around. The other was a small boy. Both from memory had relatively minor injuries, although the older man was subsequently treated for potential spinal injuries. The older man did not have any visible injuries. He also did not have any visible bleeding or blood as far as Bradbury could recall.[14]

[76] Bradbury said the two other children who were cared for by Moss were positioned on the driver's side of the Tarago. Bradbury believed the driver's door of the Tarago was open. The child with the significant head injury was positioned about even with the sliding door on the driver's side. The other child with the suspected spinal injury was positioned further forward towards the front of the Tarago. That child did not appear to have any external injuries of any significance.

[77] Bradbury said the male child with the suspected spinal injuries was being assisted by a young woman. That child did not speak English very well. They had to use other people to interpret at times as it was difficult to understand him. The second defendant was able to communicate with them in English but Bradbury said there were significant language problems at the scene that afternoon.

[78] Bradbury had worked for the Queensland Ambulance Service on Stradbroke Island for over 12 years prior to the collision. The time of the collision, the September school holidays, was one of the busiest times on the island. There was often a significant amount of traffic using Tazi Road at that time of year. He would expect to encounter quite a few cars during the middle of the day at the time of the collision.

[79] Moss primarily attended to the plaintiff's treatment whilst at the scene. He also assisted James. Moss said both were positioned on the driver's side of the Toyota Tarago. They were close to each other, four to five feet apart. The plaintiff was positioned closest to the driver's door

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[13] T4-53/30.

[14] T4-48/45.

which was open. James was just back next to the sliding door, which was also open. Both had females assisting them when Moss commenced his assessment.

[80] Moss said there were significant language barriers in communicating with the plaintiff. The plaintiff indicated there was not a great deal of pain. There was no response on Moss's spinal assessment in both his arms and feet. The plaintiff was conscious throughout and fully alert with no breathing problems. His vital signs remained stable. Moss did not observe any physical injuries on the exterior of the plaintiff's body.

[81] Moss said initially, the plaintiff was able to say things which Moss understood in English. They related to an indication that there was no pain and no ability to wiggle his toes. Moss's observation was of no exterior signs of physical injury to the plaintiff. However, the plaintiff had no feeling from the nipple line down. At one point, Moss inserted a cannula into the side of the plaintiff's right elbow. The plaintiff did not flinch at all with pain. James, who was younger, had an obvious head injury. He believed it was to the right side of his face – eye. James was agitated and restless, consistent with a head injury.

[82] Moss also identified three other injured people. One was the driver of the Patrol who had some injuries. Another was a smaller child who was walking around the scene with no obvious injuries. The third was a male person who identified himself as being in the Tarago. That person complained of neck and chest pain but did not have any obvious physical injuries. He was walking around the scene. Moss did not know he was a patient until he identified himself. The person did not have any blood on him that Moss could remember.

[83] Moss said that when he entered the driver's side of the Tarago to check on Bradbury he put his knees on the driver's seat. He could remember nothing unusual about the compartment. He could not recall how the back of the driver's seat was placed and nothing stood out about the steering wheel or the seatbelt in the front driver's side area. He could not recall if the driver's airbag had deployed but their records noted the airbags had been deployed. The second defendant was extricated from the front passenger seat through the passenger side door.

[84] Moss later entered various details into the computer system. Most was from memory. It was a chaotic scene with limited patient details, language barriers and multiple patients. The times would have been recorded by reference to the pager through which he had received initial notification of the collision.

[85] Jarrard Bruce was the first police officer to arrive at the scene. He could not recall the time of his arrival or the time he was advised of the collision. His recollection was that there were "quite a few" people at the scene on his arrival.[15] Both the ambulance and the fire brigade were already at the scene. Bruce observed two vehicles nose to nose on the side of the road. He had some recollection of a person seated behind the driver's seat of the Tarago but did not specifically recall any person being in either vehicle at the time of his arrival at the scene.

[86] At one point, Bruce undertook a cursory examination of the interior of the Tarago. The driver's airbag had deployed and there was "a deal of blood" on the airbag.[16] He photographed the blood on the deployed driver's airbag. He undertook no other examination of the interior of the

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[15] T4-33/42.

[16] T4-34/25.

Tarago for blood. He accepted that other photographs taken by him of the interior suggested the presence of blood on the floor and on the top of the front passenger seat.

[87] Bruce spoke briefly to Hannan who told him the collision occurred around 1.30pm. Bruce undertook a roadside breath test of Hannan. The result was negative. Bruce did not speak to any occupant of the Tarago. Bruce was told they did not speak very good English. He believed another officer was going to speak to them. Bruce agreed he did not observe any other police officer attempting to speak to the occupants of the Tarago at the scene.

[88] Bruce made some notes at the scene. They were very brief. They commenced with the date and a time "14.28". They recorded Hannan's name and the time of the collision and the negative breath test result. They were the only notes made by Bruce.

[89] Jeffery Harvey was another police officer who attended the scene that afternoon. At the time of his arrival other police were there, including Bruce. Harvey undertook some observations of the scene. The Tarago looked to be on the wrong side of the road. He recalled debris from the crash under the Tarago. He could not recall the position of the driver's seat. His recollection was of blood on the deployed driver's side airbag in the Tarago. The driver's seatbelt was clipped in at the time of his observations.

[90] Harvey started writing notes at 14.22. He thought that time was soon after his arrival. He spoke to a number of people at the scene, including Hannan. Harvey also spoke to the first defendant, who he believed was called Jeff. Harvey thought the first defendant had identified himself as the driver of the Tarago. He did not observe any obvious injuries or quantity of blood on him. Harvey recalled speaking to another Asian male in his 30s or 40s who was on a stretcher.

[91] Harvey's notes recorded that the first defendant was the driver with the second defendant the front seat passenger. Those notes recorded the three children as being situated with the plaintiff behind the driver, his brother James behind the passenger and his brother Adam in the middle of second row of seats. Harvey's recollection was that he obtained that information at the scene from a person in another vehicle who was able to translate. Every conversation with the occupants of the Tarago needed an interpreter.

Investigation

[92] Simon Major, an experienced Level 1 Transport Inspector, inspected the Tarago and the Patrol in late September 2013. He was requested to undertake a "bare bones" general mechanical inspection. Major's inspection revealed no mechanical defects with either vehicle which would have contributed to the collision. The steering and brakes of both vehicles were operational.

[93] Major's investigation did not involve an inspection of the seatbelt buckle of the driver's seat of the Tarago. If he had been requested to do so, he would have inspected it. However, with all of his inspections he has never once found a seatbelt buckle that had seized as a result of a collision. About 10% of his inspections might include a request to inspect seatbelts. Such a request required him generally to look at the condition of the seatbelts and whether they were working. In none of the incidents he had been asked to inspect and assess seatbelts were the seatbelts done up.

[94] Major did not believe he had ever been asked to inspect seatbelts where there was a concern about the the seatbelt being able to be undone. He had inspected vehicles where the seatbelts had been cut as part of occupant recovery or where the belt had failed as a result of age and

fraying to the seatbelt. The difference is obvious. He has also in the past removed retractor assemblies from seatbelts for further testing.

[95] Major did not agree that from a mechanical point of view it was understandable how in a high impact collision seatbelts could become jammed in the buckle. The design of the seatbelt is such that the clasp and buckle is not its weakest link. A seatbelt itself will lock from the retractor end in the pillar of the vehicle. The buckle part is one of the strongest components. It is designed to withstand massive impact damage and massive forces. Major has inspected vehicles in terrible condition and those seatbelts will release.

[96] Kenneth Kee, a police officer, was requested to perform a forensic examination of the Tarago to attempt to identify the driver of the vehicle. There was no other specific task designated to him. His role was to do whatever he deemed appropriate as a Scenes of Crime Officer. Kee attended a holding yard at Fairfield early in the morning of 26 September 2013, accompanied by Constable Dalgliesh.

[97] Kee said after he located the Tarago he considered the most appropriate form of obtaining evidence to identify the potential driver was to take a blood sample from the deployed driver's airbag. Kee took blood samples from three locations on the driver's airbag. He photographed and barcoded the airbag as he undertook this task.

[98] Kee said that when he examined the vehicle he saw the driver's airbag was deployed and potentially had blood on it. It was logical when a driver's airbag deployed and there was blood on it that that blood had come from whoever was sitting in the driver's seat at the time of the deployment. He therefore considered it to be the logical place to sample when he had been tasked to determine who was the driver of the vehicle. Kee did not investigate where else there may be blood in the vehicle.[17]

[99] Kee's notes recorded he was at the site for a total of 20 minutes. He agreed he walked in, saw the blood on the airbag, tested it and left the scene. The requirements of Scenes of Crime procedures were that he photograph the relevant areas. The photographs taken by him depicted one barcode for the airbag. He did not individually tag where each sample had been taken by him. If he had been sampling a blood trail he would have individually tagged each blood droplet. However, because he took only one swab he put only one tag on the airbag. The location of that tag provided no assistance in identifying the areas he had taken samples from on the airbag.

[100] In doing so, Kee first undertook a test to see whether what was apparently blood, was in fact blood. Those tests indicated the substance was blood. He then obtained a swab from the airbag which he placed straight into a tube which was barcoded and placed in a sealed envelope. Kee believed he took the samples from three different locations on the airbag. He used the one swab. He chose the locations because they were areas with the largest concentration of blood.[18]

[101] Kee could not recall precisely what areas of the airbag had been sampled by him. However, Kee identified three areas he believed he had taken samples from on that day.[19] He did not

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[17] T5-18/42.

[18] T5-5/25.

[19] T5-11/6.

deem it necessary to use more than one swab for the three samples. He was not concerned that there may have been more than one contributor. If the samples revealed more than one person's DNA it would have shown up in the results as a mixture.

[102] Kee completed a Q Prime Summary Sheet at the scene. He completed the examination notes section afterwards. This was the only record he had of his examination. He had no documentation recording where he had taken blood samples from in respect of the deployed airbag. He accepted he now could not remember precisely how many locations he sampled on that day. He accepted he could not be sure he had taken the samples from the areas he had identified in his evidence.[20]

[103] Kee did not accept that it was important for him to have used a separate swab on each location. He accepted that by using the single swab on more than one location he ran the risk of picking up one person's DNA from one site and another person's DNA from another site and that in that event he would not be able to determine which site had which person's DNA. Kee said when he was designated the task he was not given any information about how many people were in the Tarago and where each person was located at the time of the collision.

[104] Lisa Dalgliesh accompanied Kee when he undertook the examination of the Tarago at Fairfield on 26 September 2013. She visually observed his work but was not looking carefully as he was an experienced Scenes of Crime officer. She recalled Kee took one sample from the deployed driver's airbag of the Tarago. She could not recall watching him take the sample and could not recall from where the sample was taken. She subsequently lodged that sample into the exhibits property area.

[105] Dalgliesh said it was her understanding there were two possible drivers suspected in the case. She believed she received that information from a conversation she had with the Princess Alexandra Hospital Police Beat. She was told no blood swab had been taken from either person as both possible drivers were seriously injured and likely to be in hospital for a while.

Expert evidence

[106] Dr Frank Grigg, an engineer, undertook an assessment of the safety devices in the Tarago, to determine their likely effectiveness in a collision of this nature and whether the injuries sustained by the plaintiff and the first defendant were consistent or inconsistent with either being the driver of the Tarago at the time of the collision. His assessment of a driver's airbag obtained from a similar model Tarago revealed the airbag was made of nylon and contained flaps which minimised the risk of the driver being struck by hard plastic pieces of the assembly upon deployment of the airbag.

[107] In his opinion, the fact the driver's airbag deployed in the collision reduced the likelihood the driver of the Tarago would suffer facial injuries of the nature sustained by the plaintiff. Whilst deployment of the airbag could itself inflict injuries to a driver in certain circumstances, the airbag primarily acted as a cushion. The ANCAP tests of the Tarago suggested head/neck injuries were unlikely in the event of a collision which resulted in deployment of the driver's airbag.

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[20] T5-5/38.

[108] Dr Grigg accepted that in proffering that opinion he was equating facial injuries to head/neck injuries. Dr Grigg accepted he had no medical qualifications and had no basis in the material he examined to equate head/neck injury with facial injuries. However, Dr Grigg could not see why it excluded facial injuries. The face was part of a person's head. Dr Grigg accepted that the more severe the collision, the greater the variability of the injury suffered by an occupant of the vehicle. He also accepted that his opinion was premised on the front compartment of the Tarago being largely undeformed by the impact.

[109] Dr Grigg further opined that the leg and abdominal injuries sustained by the first defendant were very similar to those expected of a driver of a vehicle fitted with the Tarago's safety devices. Dr Grigg noted that the seatbelt buckle of the driver's seat was found to be jammed and unable to be opened following the collision. That was an unusual finding, although it could occur on occasions.

[110] Dr Grigg opined that although the severity of injuries sustained by a driver could be affected by how snugly the driver had fitted the seatbelt prior to the collision, the firing of the pretensioners upon deployment of the airbag would have had the effect of pulling the driver back into the seat, thereby minimising the risk of the driver moving forward and suffering facial injuries. The pretensioner is an explosive devise triggered by the airbag sensing system. Once triggered it produced a powerful force.[21]

[111] Dr Scott Campbell, neurosurgeon, provided a report in 2014 primarily concerning the plaintiff's injuries for an assessment of the quantum of damages. In a subsequent file note, Dr Campbell proffered the opinion that the plaintiff's injuries, whilst consistent with being suffered in a high impact collision, were equally consistent with the plaintiff having sustained those injuries either as a driver or a backseat passenger of the Tarago. This opinion was not affected by whether the plaintiff was found to be wearing a seatbelt.

[112] Dr Campbell accepted that in his experience the severity of injury generally corresponded with the severity of the impact suffered in a collision. Facial and dental injuries can be suffered in various ways. A person can be struck by unsecured objects within the motor vehicle's cabin as a consequence of the impact. Individuals may also place their hands to their face before sustaining an impact from the airbag, thereby suffering an injury, although you would expect some friction burns to the hands or at a minimum some bruising or soft tissue injury to the hand. The wearing of glasses may also cause a potential injury, although in that event it is more likely the glasses would be forced into the face unless they were dislodged by the force of the impact.

[113] Dr Campbell opined it was more likely free objects being thrown around on impact would cause soft tissue injuries or dental injuries. A cervical spine injury is more likely to be cause by the body being thrown either forwards, backwards or sidewards violently as a consequence of the impact.

[114] Dr Francis Monsour, an oral and maxillofacial surgeon, opined that the facial injuries sustained by the plaintiff in the collision were consistent with injuries suffered by impact with an airbag. Those injuries could also be caused by other means in the course of a collision. The facial injuries of the kind suffered by the plaintiff were not consistent with being struck by a hard object moving through the cabin of the vehicle unless the object was to a greater extent

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[21] T2-91/20.

cushioned and had a moderate level of force.[22] Whilst a chipped front incisor tooth was unusual for an airbag injury it is not impossible, particularly if the person was holding something or wearing glasses.

[115] Dr Monsour said the force from coming into contact with the deployed airbag is properly to be described as a moderate force. It is intended to protect the occupant, not to damage them. It is not comparable to a punch in the face. The airbag delivers a blunt, somewhat cushioned impact injury, whereas the surface area of a fist is markedly different and a more discreet impact zone.

[116] Dr Monsour agreed the plaintiff's area of injury was particularly focused to the left hand side of the face, just left of centre, which suggested the left side took the brunt of the injury. Such an injury could occur as a consequence of the driver placing a hand or wrist in front of the face in an attempt at some form of protection. However, in that event, you would normally expect to see some bruising to the impact area of the hand. If it was the wrist, the wrist does not necessarily sustain significant injury. He agreed there was a considerable degree of speculation involved in that scenario.

[117] Dr Monsour agreed that rear seat passengers in a collision do suffer significant injuries. Again, those injuries would be described as blunt, moderate-level impact trauma with a degree of cushioning.[23] In that sense, that mechanism of injury would be consistent with the plaintiff's facial injuries in isolation. Facial injuries could also be sustained by the face of one passenger striking the back of the head of another passenger.

[118] Dr Monsour accepted that when a person had contact with an airbag to the face, abrasion injuries to the face were common, particularly if it was a frontal airbag. However, by design, the combination of appropriate seatbelt restraints and frontal airbags mitigated against significant facial injuries. Whilst they still occurred, they did not occur to the degree of frequency or intensity. The position of the head at the time it struck the airbag also bears upon any facial injuries, assuming there is no intervening object that concentrated that injury.

[119] Dr Monsour's opinions were based on his experience in treating patients with facial injuries and his review of literature as to the facial injuries suffered in motor vehicle accidents. He accepted that as he would encounter only few individuals who had not suffered facial injuries as a consequence of the deployment of an airbag, there may well be a significant number of drivers of motor vehicles involved in collisions whose airbags deployed who either suffered no facial injury or no significant facial injury.

[120] Dr Michael Weidmann, a Neurosurgeon, opined that the hyperextension injury to the cervical spine sustained by the plaintiff is likely to have resulted from an impact to his head from the driver's airbag. If it was accepted the plaintiff was not wearing a seatbelt at the time he was in the driver's seat, such an injury becomes far more likely. In that case the upper torso, head and neck have a chance to move forwards before deployment of the airbag in which case hyperextension of the cervical spine would be much more likely. Whilst it could have occurred if he was a restrained passenger in the right rear seat of the Tarago, it would be unlikely. A striking of the head to the rear driver's seat would be unlikely to result in a hyperextension injury to the cervical spine.

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[22] T3-14/20.

[23] T3-15/35.

[121] Dr Weidmann said the literature revealed that airbags, when used in conjunction with a seatbelt, result in a marked reduction in the incidence of chest and head injuries. However, in some cases the airbag may be responsible for a specific injury. This is more likely to occur if the person involved is not wearing a seatbelt. Dr Weidmann accepted that his review of the literature revealed that drivers can sustain upper limb injuries where airbags are deployed. However, 96% of those cases were minor injuries usually involving superficial abrasions, lacerations and sprains. In the vast proportion of cases there was no injury at all.

[122] In his opinion it is reasonable to conclude the plaintiff's injuries are consistent with having been struck in the face by an airbag. The photographs showed significant blood on the driver's airbag. The blood has obviously come from someone with facial injuries or a similar sort of bleeding. The plaintiff's well documented facial lacerations and bleeding would be a likely source of the blood. The fact that there was a DNA match to the plaintiff's blood makes this proposition highly likely. The first defendant did not have any facial injuries. It would therefore be unlikely the blood came from him. Dr Weidmann noted that the available photographs did not allow him to determine whether there was significant blood within the right rear passenger seat that may have been consistent with the plaintiff's facial injuries.

[123] Dr Weidmann, in a subsequent report, said the fact that the plaintiff was of average height and slim build did not impact on his opinion about the likely causation of the plaintiff's cervical spine injury. From a medical point of view, the important facts were that the blood on the airbag was likely to have come from the plaintiff because of his dental injuries rather than from the first defendant who did not have similar injuries. The fact that the plaintiff's DNA was identified on the driver's airbag blood makes it highly likely he was in fact the driver. Further, the driver's seatbelt being done up suggested the driver was not wearing it at the time. It is well recognised that an airbag on its own without a seat belt can actually increase cervical spine injuries. Airbags are not meant to be used on their own, they are supplementary to a seatbelt.

[124] Dr Weidmann did not agree that the neurological and facial injuries sustained by the plaintiff could have been sustained no matter which seat he was occupying in the Tarago. Whilst that remained possible, it was significant the injury to the spine was a hyperextension injury. Dr Weidmann accepted one possibility was that if the plaintiff was seated in the rear seat without a seatbelt he could have been thrown forwards, causing his face to hit the rear of the driver's seat. That was the only possibility he could think of that might result in the same type of injury.

[125] Dr Weidmann did not accept the plaintiff's injury was consistent with a severe whiplash injury. This was more than just a whiplash injury. It was a severe, hyperextension injury. The fact the plaintiff had lower facial injuries also suggested there was impact of the lower face, causing the neck to hyperextend. Dr Weidmann accepted that depending upon the forces involved in the collision it is possible the plaintiff collided with other objects within the vehicle. There was also the possibility that even with the seatbelt on if the plaintiff was asleep he could have moved more freely about the Tarago.

[126] Dr Weidmann agreed that one of the reasons for reaching his opinion was that the plaintiff's DNA was found on the airbag. That was a very relevant factor but was one factor. Another relevant factor was that the seatbelt on the driver's seat remained connected after the collision. This added to the likelihood of his conclusion as neck injuries from airbags are more likely to occur when a seatbelt is not being worn. This allows the whole trunk to be thrown forwards from the collision, with the face being impacted upon by the airbag resulting in the hyperextension injury.

[127] Dr Shelley Diane Robertson, a specialist in forensic medicine and pathology, was asked to provide an expert opinion on the likely source of the blood staining on the deployed driver's airbag. In forming to that opinion, Dr Robertson noted that the driver's airbag appeared to have considerable blood staining, which was patchy, and that sampling had been taken from three locations of thicker blood staining with one swab. The resultant DNA profile of that swab indicated the presence of DNA from a single contributor which matched the profile of the plaintiff.

[128] Dr Robertson also noted that whilst it was not clear who was driving the Tarago, it was known the second defendant was the front seat passenger and James and Adam were rear seat passengers. Dr Robertson noted that of the plaintiff and the first defendant, only the plaintiff was recorded as having received dental and facial injuries. The first defendant was recorded as having received fractures and bruising with contusions and a bruise to the nose, superficial abrasions on the legs and abdominal pain.

[129] Dr Robertson opined that the blood stained pattern analysis indicated the apparent bloodstaining on the driver's deployed airbag suggested close contact with an individual who had heavily bleeding facial injuries. Her interpretation of these injury patterns indicated they were likely to have been associated with considerable blood loss. The facial injuries sustained by the plaintiff were entirely consistent with having caused the staining to the deployed airbag. The injuries identified as having been sustained by the first defendant were unlikely to have been associated with considerable blood loss and the resultant staining of the deployed airbag had he been seated in the driver's seat at the time the airbag deployed.

[130] Dr Robertson noted that although only three areas of blood staining of the airbag were sampled, the results of the DNA comparison studies indicated those samples matched the DNA profile of the plaintiff. Dr Robertson opined that the injuries sustained by the plaintiff were entirely consistent with having been sustained by contact with a suddenly deployed airbag in the context of a relatively high velocity "head on" collision between two vehicles. Those two features suggested that at the time of the collision the driver's seat of the Tarago was occupied by the plaintiff rather than the second defendant. It was therefore highly likely the plaintiff was the driver of the vehicle involved in the head on collision rather than the first defendant. Dr Robertson accepted the injuries sustained by the plaintiff were also consistent with his sitting in any other position in the vehicle.

[131] Dr Robertson further opined that the patterning of the blood on the airbag was consistent with it being due to close contact between the source of the bleeding. The blood was not from dripping or from splatter. Whilst it was possible blood on a surface could have resulted from a transfer from contact with another surface, this type of contact was likely to result in the pattern of the object, such as a fingerprint.

[132] Dr Robertson accepted that as she had not had the benefit of inspecting the airbags and had only been provided with photographs, she could not exclude that the blood on the airbags may have been deposited from something other than a bleeding source, but opined that the evidence was more consistent with it being from a bleeding source and that it was more probable than not that the blood from the airbag came from the bleeding source. The photographs of the blood on the airbag were entirely consistent with direct contact from a bleeding source.

[133] Dr Robertson noted the photographs she had reviewed did not show evidence of blood splatter and there was no evidence of any fingerprints implying transfer from a bloodied hand. There was nothing in the photographs to suggest that one way the blood came onto the airbag was that

someone who had blood on their hands had tried to wipe it off using the airbag. There was no pattern on the airbag that would suggest a particular object had been used to transfer the blood. Dr Robertson accepted she could not exclude beyond all doubt the possibility that it came from another source but opined there was nothing in the material she had reviewed to indicate it had come from another source.

[134] Dr Robertson subsequently had the opportunity to examine further photographs of the airbag. Those photographs did not change her opinion. The stains on the airbags still looked like they were from direct contact with a bleeding source. There was nothing to indicate a blood transfer from a secondary source. There was nothing suggestive of a fingerprint, handprint or direct transfer of blood from another source. The photographs were more consistent with contact from a direct bleeding source. Dr Robertson noted there was a large stain on the left side of the collapsed driver's airbag and that the plaintiff's dental injuries were on the left side of his mouth.

[135] Dr Robertson accepted she was not an expert in the deployment of airbags and that blood patterning analysis was not her primary area of expertise. Notwithstanding those limitations, Dr Robertson opined that the blood staining observed by her in the photographs was more consistent with the blood having been deposited by direct contact with a bleeding object touching the airbag itself rather than by the transfer of blood from another object. Facial injuries were renowned for their considerable bleeding. For that reason, Dr Robertson considered the staining on the airbag was consistent with facial injuries. The contact between the face and the airbag would be more than instantaneous, although it is probably unlikely it would be as long as 10 minutes.

[136] Dr Robertson accepted the science of blood stain pattern analysis was a notoriously inexact science, with considerable scope for subjective judgment and a reasonably high error rate in any assessment. Dr Robertson also accepted that blood staining analysis was influenced by a variety of considerations, including the nature of the scene and of the event, the materials involved, the conditions in which the event occurred and the nature of the pattern under examination. It would be preferable to have had the opportunity to view the scene of the incident, which provided a number of advantages over an analysis of the photographs including the ability to look around the whole of the scene and identify places where there is blood. Being able to see with your own eyes is also superior to looking at a photograph. Access to collateral information is also useful.

[137] Notwithstanding the lack of availability of that information in the present case, Dr Robertson opined that she discounted the prospect of the blood seen on the airbag being deposited from something other than a bleeding source because of the absence of splatter or direct contact indications such as a bloodied fingerprint. There was nothing of that nature in the photographs observed by her. If the blood had been deposited by a hand wiping blood on the airbag there would normally be evidence of transfer by a swipe or smearing of blood. There was no such evidence in the present case.

[138] Dr Robertson accepted that blood smear is a term used to describe a nondescript transfer stain on a surface that has been produced by contact with a bloodied object. Such a stain contains no recognisable features to indicate the object that produced it. Dr Robertson also accepted there was a category of contacts where there was no particular trace of the shape of the object that caused the transfer. However, Dr Robertson said there is a difference in the pattern. There are particular swipe or wipe patterns. Dr Robertson accepted she has never been involved in a case

for blood pattern analysis concerning an airbag and she had no understanding of how airbags deployed in a collision.

[139] Dr Robertson accepted that the substrate upon which blood is identified as being present is significant in any analysis. Substrates can be divided into a variety of categories. One is porous surfaces verses non-porous surfaces. The behaviour of blood patterns and of blood when it comes into contact with those different substrates can be different Differences also depend upon the nature of the material, including the fibre composition. Blood stains deposited on synthetic fabrics can be dramatically altered in their physical appearance.

[140] Dr Robertson acknowledged that the airbag was made from a synthetic material with a coating on it. That type of material was potentially relevant. It could affect the spread of the blood to some extent. Dr Robertson accepted that as a consequence, the shape of a secondary object that caused the transfer of the blood onto the surface may be at least partially obliterated but said you would still expect to see some traces of it. Dr Robertson accepted the timing of the blood staining can be problematic, particularly in the nature of a blood splatter which occurs on top of a transfer pattern.

[141] Dr Robertson accepted the fact the plaintiff had dental injuries on the left side of his mouth was a factor in her reasoning when considering the large blood stain on the left side of the collapsed driver's airbag. It was consistent with the plaintiff's facial injuries. If that staining was predominantly on the part of the airbag that faces away from the driver, that was a relevant factor but Dr Robertson opined it did not exclude contact with the face when the bag was deployed. Such a scenario was not inconsistent with the assumption she made when expressing her original opinion. Dr Robertson had not discounted there could be some small movement of the face following initial contact with the airbag.

[142] Dr Robertson accepted that where the face strikes the airbag was a relevant factor in determining where staining would occur. However, the staining pattern was not dependent upon the position of the source of the blood as much as being dependent upon where the contact subsequently ended up and where the contact with the surface was longest. Dr Robertson accepted the airbag may move so two sides of the surface may come into contact with each other, transferring blood from one side to the other.

[143] Dr Robertson accepted that other photographs indicated there may have been blood in other areas of the Tarago's driver compartment. Those areas of blood may be relevant depending on whether the blood was from the same individual responsible for producing the pattern on the airbag. It would also be necessary to know the relevant movements after the occurrence of the incident of the various parties with respect to their potential to transfer blood. However, Dr Robertson could discount that the blood on the airbag came as a result of a transfer from a person's hands. Dr Robertson said given the nature of the material, the pattern of the stains and the appearance of the stains it was extremely unlikely the source of the blood staining was a transfer from a person's hands.[24]

[144] Dr Robertson agreed that if the contact between the bleeding source such as the face occurred when the airbag was being deflated it may well be that there would be deposition of blood underneath the steering wheel and airbag assembly. It would depend on the volume of bleeding and when natural coagulation occurred following the injury. Dr Robertson did not consider that

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[24] T5-50/1.

the presence of blood on other surfaces, even if it matched the blood on the airbag, would be decisive in reaching a concluded opinion. Relevant factors would be the relevant movement of various parties and other potential sources following the collision.

[145] Dr Robertson said it would, however, be relevant if one of those parties was in fact paralysed such that they were not able to move their arms or limbs. There would also have to be consideration of what was a reasonable explanation for how the blood got there. Absent that evidence, it would be inconclusive. Even allowing for that fact, Dr Robertson did not depart from her opinions that the most likely source of the blood on the deployed airbag was direct contact with the bloodied face of the plaintiff whilst he was in the driver's seat.

[146] Finally, Dr Robertson said her examination of the photographs of the airbag had not revealed a scintilla of a suggestion of swipe or wipe patterns on the airbag. Dr Robertson emphasised that she had not personally examined the airbag. Dr Robertson accepted that if the person who was originally positioned in the driver's seat was removed from that section into the passenger section of the vehicle by reclining the driver's seat back, that would be a relevant factor to have regard to in consideration of any blood staining that existed away from the airbag, particularly if it came from the same blood source.

[147] Dr Paula Hallam, a DNA Forensic Biology Consultant, opined that on her assessment of the evidence it was not possible to determine whether the testing performed by Kee was performed correctly to allow reliance upon the results. There was a possibility a positive result incorrectly suggested the staining was blood. Confirmatory testing specific for blood was not undertaken by Kee. Accordingly, the subsequent successful production of a DNA profile should not be interpreted as confirmation of the presence of human blood.

[148] Dr Hallam opined that photographs of the interior of the vehicle showed other areas of staining which were not the subject of sampling by Kee. Kee also did not identify the specific areas from which samples were taken as a consequence of which it was not possible to draw any conclusions as to the significance of the findings.

[149] Dr Hallam observed that whilst the process of analysing the DNA profiles appeared to have been complete and error free, the calculations did not account for the presence of other close blood relatives such as the plaintiff's siblings who had a greater chance of sharing similarities in their DNA profiles. A more meaningful approach would be to compare the DNA profiles of those close relatives to the DNA profile recovered from the swab. As that had not occurred it was not possible to exclude as possible sources of the biological material recovered from the driver's airbag swab those two male siblings.

[150] Dr Hallam accepted that the DNA profile identified on analysis was human DNA but said you could not assume the DNA came from blood. It was probable the DNA recovered did come from the plaintiff's blood, although you could not exclude other close relatives as a match for that DNA. If the plaintiff's brothers were full siblings their DNA profile will be substantially more similar than with other people in the general population. That fact would bring the statistics downwards. The DNA profiles of the brothers could in fact be identical to the plaintiff's DNA profile. Whilst that was possible, it was probable the blood was the plaintiff's blood.

[151] Dr Hallam opined that if somebody put their hand on the airbag of the vehicle after touching the plaintiff and his blood, it was possible that only the plaintiff's DNA would be found on the airbag and not the actual person's DNA who transferred the blood because there is such a high

concentration of DNA in blood. Further, you cannot assume that just because there is DNA of one individual found on the airbag that all areas of blood on the airbag are from one individual. Kee's approach of sampling more than one area with the one swab was not ideal. The fact that one swab was used rendered it possible the DNA from one of the areas sampled overwhelmed the DNA from the other one or two sites given that blood has a higher concentration than other forms of DNA. This was particularly so as Kee referred to the areas he tested being visibly thicker in blood. It would have been appropriate to have tested all areas where blood appeared in order to determine the seating position of the occupants of the Tarago.

[152] Adriano Pippia, Forensic Scientist, gave evidence as to the significance of the finding that the DNA located on the blood on the airbag was most probably that of the plaintiff. DNA profiles are obtained from biological material. The generation of a DNA profile will depend on many factors. The absence of a DNA profile from a touched surface does not necessarily mean a person has not come into contact with that surface. If there is no indication of a contribution by more than one person, the DNA profile will be described as single source. If there are indications of two or more contributors the DNA profile will be described as mixed. In the case of DNA profiles assumed to originate from a single source, the likelihood ratio represents a comparison between two opposing propositions, namely that the DNA originated from the person of interest or that it originated from some other unrelated person of interest.

[153] Having considered the reference samples, Mr Pippia opined that the DNA profile obtained from the swab from the driver's airbag indicated the presence of DNA from a single contributor, namely, the plaintiff. Based on a statistical analysis it is estimated the DNA profile obtained is greater than 100 billion times more likely to have occurred if the plaintiff contributed the DNA rather than if he had not.

[154] Mr Pippia noted that the sample from the driver's airbag was not tested for the presence of blood in the laboratory and that there had been no testing of the contributor of the DNA profile from any reference sample provided by either of the plaintiff's siblings. He also noted there had been no comparison of likelihood ratio calculations using the South Eastern Asian subpopulation data set. However, the procedure adopted for undertaking an analysis of the DNA profile was in accordance with the departmental procedures.

Other evidence

[155] Jason Ostrofski, a licensed private investigator, was tasked with interviewing the first defendant as part of the third defendant's investigations. He took a statement from the first defendant on 15 January 2014. He arranged for a Mandarin interpreter to attend the first defendant's home for that purpose.

[156] In that statement, the first defendant was recorded as saying he was the holder of an open class licence and had been living and driving in Australia for five years. He had obtained his licence when he was 18 years of age. He estimated he drove more than 10,000 kilometres per year. The first defendant was not currently employed but was not receiving unemployment benefits. He was living on his savings from Taiwan. The first defendant said he was very familiar with the workings of the Tarago, which was in a good mechanical condition at the time of the collision having been last serviced less than one month prior to the collision.

[157] The first defendant was recorded as saying he recalled the day of the incident. The weather was fine and clear. The section of roadway was a narrow bitumen surface that was straight, flat and

in good condition. The road, whilst narrow, was wide enough for two cars to pass each other safety. Nothing obstructed his vision. There was not much traffic around.

[158] The first defendant said he was the driver of the Tarago. The second defendant was his front seat passenger. The plaintiff was seated behind the first defendant. James was seated behind the second defendant. His son Adam was seated in the middle between the plaintiff and James. The first defendant had his seatbelt on at the time of the collision as did the second defendant. His three children also had their seatbelts on as he had unbuckled all three seatbelts after the collision.

[159] The first defendant said that prior to the collision he had become lost on the way to Blue Lake. At one point, he had stopped on the side of the road to have a discussion with the second defendant about which way to go. He estimated that was about 20 minutes prior to the collision. The second defendant retrieved a map from the rear of the vehicle to assist them.

[160] The first defendant was recorded as saying he was travelling at about 60 kilometres per hour when he noticed the Patrol coming towards them in the opposite direction, travelling at roughly the same speed. He estimated it would have been more than 50 metres away. He said as the Patrol approached he saw it was slightly over towards his lane. The second defendant told him to move over. The first defendant said he tried to steer to the left but was having trouble steering. The steering was still working but he could not explain why it would not steer to the left. He did not apply the brakes prior to the collision. He did not believe the driver of the other vehicle steered to avoid the collision. He described the Patrol as closer to the middle of the road and going straight ahead.

[161] The first defendant said the front passenger side of the Tarago struck the front passenger side of the Patrol. The vehicles then came to rest on the other side of the road. The driver's airbag deployed, as did the front passenger airbag. The first defendant said he did not lose consciousness and immediately tried to get out of the Tarago. He could not remove his seatbelt as it was locked in place. He managed to move his seat backwards which allowed him to get out of the seat and seatbelt.

[162] The first defendant said he went out of his seat straight to the children. He exited out of the driver's door and opened the rear sliding door on the driver's side. The plaintiff was sitting beside that door. The first defendant said the plaintiff was conscious but had been asleep at the time of the collision. The plaintiff still had his seatbelt on when the first defendant went to him. The first defendant could not see any injuries or blood on the plaintiff. He pulled him out of the Tarago and laid him flat on the ground just away from the Tarago. He had to carry the plaintiff as he could not walk. When he laid the plaintiff down, the plaintiff said he could not move.

[163] The first defendant said he then went back into the vehicle to retrieve Adam who was conscious and sitting still. He still had his seatbelt on. He observed some bruises on Adam's leg. Once he had taken Adam from the car he returned to James. He had injuries above his right eye. There was a hole and it was bleeding and he was in pain. James was conscious and he still had his seatbelt on at that time. He could see that James had hit the back of the passenger seat causing cuts to his head. He took James out of the car.

[164] The first defendant said he then went to the second defendant. She was conscious. He could not see any injuries on her but when he tried to remove her she told him to leave her alone as she was suffering pain around the waist. Other vehicles then stopped to assist them. The occupants of those vehicles also told him to leave the second defendant. The second defendant

was later found to have had a hole in her bowel. She also had four broken ribs on the right hand side. The second defendant underwent two operations.

[165] The first defendant said that both sides of his hips hit the steering wheel and were bruised in the collision. His left shoulder also hit the dashboard. He was subsequently found to have one broken rib on the right hand side. The first defendant said the last two fingers on his left hand and the last three fingers on his right hand were bleeding as they had hit the glass.

[166] The first defendant said some time after the collision police contacted the second defendant who had to travel to the police station because she had not been interviewed at the scene. The plaintiff and the first defendant were also asked to give DNA samples to police as police found blood on the driver's seat and wanted to confirm if it was the plaintiff's blood or the first defendant's blood to confirm who was driving. The first defendant was recorded as saying:

> "I was definitely driving the car. Mason was not driving the car at the time of the accident. Mason's blood was not on the driver's seat as he was not bleeding. That would be my blood as I was bleeding from my hands".

Reopening

[167] Subsequent to the evidence having closed the plaintiff successfully applied to reopen his case to tender a number of photographs that had been taken by a friend of his parents at the scene of the collision. The plaintiff explained he was not previously aware of the existence of these photographs. He only became aware when the second defendant informed him of a conversation she had had with a friend during a church lunch on 30 October 2016. The second defendant had explained to that friend that one of the issues at trial was that there was little explanation for the plaintiff's blood on the airbag.

[168] As a consequence of that conversation the second defendant was informed by the friend that her husband had located a number of photographs he had taken on the day in question. Relevantly, those photographs depict the first defendant lying on the ground receiving medical treatment. The photographs depicting the first defendant show blood on the first defendant's hands.

Plaintiff's submissions

[169] The plaintiff submits a consideration of the whole of the evidence supports a finding that the driver of the Tarago at the time of the collision was the first defendant. The plaintiff gave evidence he was not driving at the time of the collision. Both the plaintiff and the second defendant gave evidence the first defendant was driving the Tarago. The first defendant also gave a statement to the third defendant's investigators in which he swore he was driving the Tarago at the time of the collision. In addition to that evidence, there is evidence from the plaintiff's two brothers that, at the time they went to sleep prior to the collision, the first defendant was driving the Tarago. The plaintiff submits it is doubtful they would have slept through the plaintiff exiting the rear passenger seat to enter the driver's.

[170] The plaintiff further submits that the other driver Hannan was quickly to the side of the Tarago. Whilst he initially took his dog some distance from the scene of the collision, he estimated he was away no more than 30 to 60 seconds, with an earlier estimate of no more than 90 seconds. When Hannan arrived at the side of the Tarago no person was in the driver's seat. The plaintiff was in the rear compartment with his brothers. The first defendant was standing in the well between the front and rear seats. Hannan, in a statement to the third defendant's investigator, proffered his impression was that the first defendant had been the driver of the Tarago.

[171] The plaintiff submits that any case suggestive of the plaintiff being the driver of the Tarago is entirely circumstantial. The only substantial evidence supportive of the plaintiff being anywhere near the driver compartment is the DNA evidence indicating the presence of the plaintiff's blood on the deployed driver's airbag. Whilst expert evidence was led to the effect that the plaintiff's injuries are more consistent with the plaintiff having been located in the driver's seat, the medical experts accepted the plaintiff's injuries could have occurred whilst he was situated in the rear passenger seat.

[172] The plaintiff submits there is a reasonable explanation for the plaintiff's blood on the deployed airbag. The first defendant, in endeavouring to remove the other occupants from the vehicle, wiped his hands on the deployed airbag after he had been in contact with the plaintiff and obtained the plaintiff's blood on his own hands. There is photographic and other evidence that the first defendant did have blood-stained hands. There is evidence the first defendant was cradling the plaintiff, touching his face, the predominant source of bleeding for the plaintiff. There was evidence the first defendant re-entered the driver's seat after having that physical contact with the plaintiff. There is also evidence the plaintiff's sibling, James, was bleeding profusely and that the first defendant removed him from the vehicle also. There is evidence of blood in other parts of the driver's compartment, which was not the subject of any forensic testing by police.

[173] In respect of the evidence of how the blood was likely to have been deposited on the deployed airbag, the plaintiff submits that Dr Robertson's evidence had serious deficiencies in its reliability due to a lack of ability to examine the deployed airbag and the actual scene of the collision. There was evidence the type of material used to construct the deployed airbag may significantly alter the nature of any blood patterns. There was also evidence the blood was predominantly on the underside of what would have been the inflated airbag. Those matters rendered Dr Robertson's evidence of limited use. A reasonable hypothesis not excluded by the evidence was that the plaintiff's blood was deposited on the driver's airbag as a consequence of the first defendant wiping the plaintiff's blood from his hands onto the airbag. The Court could therefore not be satisfied the blood was deposited on the deployed airbag by reason of the plaintiff striking it in the collision.

[174] The plaintiff further submits that the fact the driver's seatbelt was buckled up is not supportive of a finding the plaintiff was driving the Tarago at the time of the collision. There is an explanation for that evidence, namely that the first defendant was not able to undo the seatbelt buckle after the accident. Whilst Major gave evidence that is a scenario he has never witnessed before, Major only examines seatbelts in a small proportion of cases. Further, the driver's seat being laid back was supportive of the scenario that the first defendant, being unable to undo the seatbelt, was only able to extricate himself from the driver's compartment by lowering the back of the driver's seat.

[175] Even if the first defendant's statement to the investigator about being unable to undo the seatbelt and laying the seat back to extricate himself from the driver's seat is not accepted, the preponderance of evidence favours a conclusion the first defendant was the driver of the Tarago at the time of the collision. In support of this conclusion the plaintiff relies on there being no evidence of blood below the driver's airbag. If the plaintiff had been bleeding profusely onto the airbag, it is inexplicable there would be no blood in that area. Further, the plaintiff was paralysed at the point of the collision. There is no explanation for blood on the door and seat other than it was put there by some other source, namely, the first defendant entering the driver's compartment to assist the second defendant.

[176] Finally, the plaintiff relies on the inherent unlikelihood that in the space of 90 seconds after a collision which caused catastrophic injuries to the plaintiff, the first defendant would have had the foresight to remove the plaintiff from the driver's seat into the rear compartment, so as to avoid anyone observing the plaintiff as the driver of the vehicle. There is also the unlikelihood that the plaintiff, who had never previously driven a vehicle, would be entrusted by his parents to drive the vehicle on Stradbroke Island at one of its busiest times of the year, along a narrow road which he and the parents were unfamiliar with and which contained blind corners.

Third defendant's submissions

[177] The third defendant submits the preponderance of the evidence strongly supports the conclusion the plaintiff was the driver of the Tarago at the time of the collision. First, the plaintiff was of an age to drive, had an interest in driving and was intending shortly to obtain his learner's permit. Both the first and second defendants had an interest in the plaintiff obtaining his licence. Stradbroke Island was a convenient and suitable place to practice driving on isolated roads.

[178] Second, there is a lengthy unexplained gap in time between leaving Brown Lake and the collision. That gap is explained by the plaintiff being allowed to practice driving, including the time necessary for a change of seating after leaving Brown Lake. There is also evidence of opportunity of a change of driver, namely, when the car parked on the side of the road near Dunwich.

[179] Third, the nature of the collision is consistent with the driver of the Tarago being an inexperienced driver. The road was sufficiently wide to allow two vehicles to pass safely. Further, the Tarago driver took evasive action in the same direction as Hannan causing the collision. Whilst the second defendant and the first defendant in his statement to the insurer, said the collision occurred more in the middle of the road. Hannan placed the Tarago wholly on the incorrect side of the road. The resting point of the vehicles supported acceptance of Hannan's version.

[180] Fourth, the plaintiff suffered significant facial and cervical spine injuries. The medical and biomechanical evidence supported a conclusion that the facial and dental injuries, together with the spinal injuries, were wholly consistent with the plaintiff's face having struck a deployed airbag whilst unrestrained by a seatbelt. There were no airbags in the rear seats.

[181] Fifth, the blood on the airbag was the plaintiff's blood. The quantity was consistent with significant bleeding. The facial and dental injuries sustained by the plaintiff were likely to result in significant bleeding. The blood on the airbag was consistent with blood being deposited by direct contact with the source. It was inconsistent with splattering and there were no swipe or wipe marks or other evidence of transfer from another source. Sixth, the first defendant did not suffer injuries which would have resulted in significant bleeding consistent with the blood found on the driver's airbag.

[182] Seventh, the driver's seat was laid back shortly after the collision, whilst the driver's seatbelt remained engaged in a locked position. The medical evidence supported a finding that the plaintiff, whilst driving the vehicle, was unrestrained by a seatbelt, as a consequence of which he sustained a hyper-extension injury to his spine when his unrestrained body moved forward at the time of impact and his face struck the deployed airbag. The buckled seatbelt was consistent with it being secured behind the plaintiff to disengage any warning alert. The lowering of the

seat is consistent with the removal of the plaintiff from the driver's seat backwards into the rear seat before exiting out the rear door.

[183] Eighth, the evidence of the plaintiff and of the second defendant that the first defendant was driving the Tarago at the time of the collision lacked credibility. The plaintiff and the second defendant were unimpressive in their evidence, which was replete with evasiveness and prevarication. The plaintiff declined to be interviewed by the police in relation to the collision.

[184] Ninth, the plaintiff called the second defendant in his case but did not call the first defendant, despite the first defendant being present throughout the trial and residing with the plaintiff. The only explanation for the failure to call the first defendant in such circumstances is that the first defendant's truthful evidence would not have assisted the plaintiff's case.

[185] Tenth, the first defendant's statement to the insurer as to the circumstances of the collision are inconsistent with the evidence. The first defendant suggested the collision occurred because the vehicle would not steer; a contention not supported by Major's mechanical examination. The first defendant positions the vehicle on the correct side of the road at all times. The first defendant positively asserted blood on the driver's seat was his blood due to cuts to his own hands. The first defendant did not suggest the blood on the airbag was the plaintiff's blood which had been wiped from his own hands. The first defendant's contention that he had to lay the seat back as he could not unclip the seatbelt is inconsistent with the expert evidence as to the unlikelihood the seatbelt buckle would jam as a result of the collision. There was also the inherent unlikelihood that an adult would have been able to pass himself back into the passenger seat whilst being restrained by the seatbelt.

[186] The third defendant submits that once a finding is made that the plaintiff was the driver of the Tarago at the time of the collision, the plaintiff must fail in his claim and the third defendant must succeed in its counterclaim. The plaintiff, the first defendant and the second defendant made false relevant representations, as a consequence of which payments were made by the third defendant, to which those parties were not entitled.

First and Second Defendant's Submissions

[187] Neither the first nor second defendant made any submissions.

Findings

[188] I accept the collision between the Tarago and the Patrol, on the afternoon of 25 September 2013, occurred when the Tarago travelled onto the incorrect side of the road into the path of the oncoming Patrol. I accept Hannan's evidence that he attempted to avoid the collision and that the driver of the Tarago steered in the same direction as Hannan. Hannan's evidence was consistent with the positioning of the vehicles subsequent to the collision. I accept Hannan's evidence in relation to the circumstances of the collision as accurate and reliable.

[189] I accept the blood found on the driver's deployed airbag of the Tarago was the plaintiff's blood. The likelihood of the blood being the plaintiff's is overwhelmingly high. Whilst neither of the plaintiff's siblings' blood was the subject of analysis, there is no evidence to suggest a basis for a conclusion that James' blood could have been the blood located on the deployed driver's airbag. Dr Hallam accepted it was probable the blood found on the airbag was the plaintiff's blood, even allowing for that possibility.

[190] Whilst Kee did not adopt an ideal process in using the one swab to sample blood from three separate locations on that airbag, the DNA analysis of that swab revealed only one contributor to the DNA profile, namely, the plaintiff. The fact there was only one contributor satisfies me there is no material risk of contamination of the sample by reason of one swab being used on three separate locations.

[191] That conclusion raises the question of how the plaintiff's blood came to be on the driver's airbag of the Tarago. There are two scenarios. First, it was deposited there by direct contact between the plaintiff's bleeding face and the airbag. Second, the blood was deposited there by another source. The first scenario can only arise if the plaintiff was driving the Tarago at the time of the collision.

[192] In determining whether the plaintiff was the driver of the Tarago at the time of the collision, I have not found the fact the plaintiff was intending to obtain his learner's permit shortly after the date of the collision or the circumstances of the collision itself of practical utility. The first fact, whilst providing an explanation for why the plaintiff would be in the driver's seat whilst unlicensed, is not of itself supportive of a conclusion that the plaintiff was driving the Tarago at the time of the collision. The second fact is also not itself supportive of such a conclusion. Whilst an inexperienced driver is likely to react as the Tarago's driver did, turning further into the path of the Patrol, so may a very experienced driver, as a result of momentary inattention or other circumstances.

[193] Both the plaintiff and the second defendant gave evidence that the first defendant was driving the Tarago at the time of the collision. In the case of the second defendant, that evidence was specific; she observed the collision and warned the first defendant of the closeness of the Patrol. The plaintiff's evidence was that he was not driving and was asleep at the time of the collision in the rear seat of the vehicle. Further, at the time he last went to sleep, after the first and second defendants had stopped the vehicle on the side of the road near Dunwich, the first defendant was driving the Tarago.

[194] I did not find either the plaintiff or the second defendant reliable and credible witnesses. Both were evasive in giving evidence. The plaintiff was particularly guarded in his responses. Further, the second defendant's evidence as to the first defendant having exited from the Tarago through the driver's door immediately after the collision was inherently improbable having regard to the finding of the driver's seat belt being locked into position after the collision.

[195] Significantly, neither the plaintiff's nor the second defendant's evidence provides an explanation for the presence of the plaintiff's blood on the deployed driver's airbag of the Tarago. Whilst the second defendant gave evidence that she observed blood on the first defendant's hands, she did not observe any blood on the driver's airbag. Further, nowhere in her evidence did she suggest she had witnessed the first defendant wiping his bloodied hands on the deployed driver's airbag.

[196] I do not accept the evidence of the plaintiff or of the second defendant that the first defendant was driving the Tarago at the time of the collision. In making that assessment, I have given due regard to the language difficulties associated with both the plaintiff and the second defendant having to give evidence with the assistance of an interpreter. I have also had regard to the fact that their sworn evidence is consistent with evidence that there was an assertion made by the first defendant at the scene that he was the driver.

[197] I have also had regard to the evidence of the plaintiff's siblings that the first defendant was driving the Tarago when they left Brown Lake. That evidence does not assist in determining who was driving at the time of the collision. Both siblings fell asleep shortly after leaving Brown Lake. Neither could say who was driving the Tarago at the time of the collision. I do not accept that a change of drivers could not have occurred without their knowledge. On the second defendant's evidence, the Tarago stopped on the roadside for a period and the second defendant alighted from the vehicle and retrieved a map from its rear compartment. Neither sibling awoke at that time. It is not, in those circumstances, improbable the plaintiff at that time entered the driver's compartment with the first defendant entering the rear compartment without the knowledge of either sibling.

[198] There is another source of direct evidence that the first defendant was driving the Tarago at the time of the collision. That comes from the first defendant's sworn statement to the third defendant's investigator. I do not, however, accept the contents of that statement are reliable or credible. The version given by the first defendant as to the circumstances of the collision is wholly inconsistent with Hannan's evidence and Major's findings on mechanical inspection.

[199] On the first defendant's version, the collision occurred because the Patrol came onto his side of the road, and the Tarago, for some unexplained reason, would not steer out of its path. That version is inconsistent with Hannan's evidence, which I accept, and with Major's finding that there was no mechanical problem with the Tarago's steering. I accept Major's evidence in relation to the results of that mechanical inspection.

[200] In any event, the first defendant's sworn statement to the third defendant's investigator does not provide any explanation for the presence of the plaintiff's blood on the deployed driver's airbag. In that statement, the first defendant asserted the blood observed on the driver's seat of the Tarago was his own blood, from cuts to his hands from glass in the collision. The first defendant did not assert he ever wiped his hands on the driver's airbag.

[201] If the first defendant's version in that statement is accepted as truthful, any wiping of blood from his hands onto the deployed airbag would have included his own blood. He expressly said his fingers on both hands were bleeding as a consequence of the collision. In those circumstances, the blood transferred to the deployed driver's airbag should have produced a DNA profile consistent with two contributors. No such result was achieved from the DNA sampling of the swab taken by Kee.

[202] The lack of two contributors is not explained by evidence a transfer of blood can occur without the DNA of the person transferring that blood to a surface. As was observed in evidence, blood is a high contributor of DNA. The first defendant, on his version, was not merely transferring the blood of the plaintiff from his clean hands. He was transferring that blood in circumstances where he was himself bleeding from his hands.

[203] Once it is accepted the blood located on the deployed driver's airbag was the plaintiff's blood, consideration must be given to how the plaintiff's blood could be found on that deployed driver's airbag. The primary means would be by reason of the plaintiff being the driver of the Tarago at the time of the collision. The plaintiff had sustained facial injuries which resulted in significant bleeding initially. Direct contact between the deployed airbag and the plaintiff's face would be a probable reason for the presence of the plaintiff's blood on the deployed airbag if he was in fact driving the Tarago.

[204] The only other possible explanation for the plaintiff's blood on the deployed airbag would be that it was deposited there from another source. There is no direct evidence as to the existence of such a source. A source is said to be the first defendant wiping his bloodied hands onto the airbag after he had been in contact with the bleeding plaintiff. That scenario does not, however, arise from any direct evidence. No witness gave evidence of observing blood being wiped onto the deployed driver's airbag.

[205] That scenario has been put forward as reasonably arising from the evidence. The first defendant was seen to be cradling the plaintiff on the ground outside the Tarago, touching the plaintiff's face, the source of the plaintiff's primary bleeding. There is also evidence the first defendant thereafter entered the driver's compartment of the Tarago in an effort to assist the second defendant. It is submitted those circumstances give rise to a reasonable, rational inference that the plaintiff's blood was located on the deployed driver's airbag by reason of the first defendant wiping his bloodied hands on that airbag.

[206] Having considered the evidence as a whole, I do not accept such a scenario arises as a reasonable, rational inference. First, the first defendant in his statement to the third defendant's investigator proffered no version consistent with such a scenario. The first defendant expressly said blood observed on the driver's seat was his own, as a consequence of cuts to his hands by contact with glass following the collision. There was no suggestion he wiped his hands on the airbag.

[207] Second, Dr Robertson's evidence discounted that scenario due to the absence of swipe or wipe markings in the blood patterns located on the deployed driver's airbag and the absence of any evidence of a transfer pattern from another source. Whilst Dr Robertson accepted it was possible blood could be transferred onto the airbag from another source without evidence of such marks, Dr Robertson opined it was more probable the blood on the airbag came from direct contact with a bleeding source.

[208] I found Dr Robertson's evidence as to the probable source of the plaintiff's blood on the driver's airbag highly persuasive. I accept that evidence. Dr Robertson gave cogent, compelling reasons why the blood patterning observed by her was not consistent with a swiping, wiping or transfer of blood. She gave a reasoned, rational explanation for the presence of significant blood on the airbag, namely, that it was deposited as a result of direct contact with the bleeding source. That contact could only occur as a consequence of the plaintiff being the driver of the Tarago at the time of the collision.

[209] In accepting Dr Robertson's evidence, I have had regard to the deficiencies presented by Dr Robertson not having the opportunity to observe the scene or the airbag itself. I have also had regard to the changes that may result to blood patterning as a consequence of the nylon material used to create the deployed driver's airbag. Those deficiencies do not cause me to doubt the reliability of Dr Robertson's opinion that the plaintiff's blood was most likely deposited on the deployed driver's airbag by direct contact between the plaintiff's face and the deployed driver's airbag at the time of the collision.

[210] I have also had regard to the positioning of the blood stains on the driver's airbag. Whilst the stains were not in the centre of the inflated airbag, and were heaviest towards the underside, Dr Robertson gave a reasoned rational explanation for those matters, namely, the position of the head on contact with the deployed airbag. I accept that explanation. It is not improbable. Movement in the collision would be variable having regard to the forces on impact.

[211] In finding that the plaintiff's blood was deposited on the deployed driver's airbag by direct contact with that airbag, I have given due regard to the photographic evidence of the first defendant's hands with blood on them subsequent to the collision and Dr Lee's evidence. Neither supports a finding the blood on those hands was the plaintiff's blood. In any event, neither is supportive of a conclusion that the plaintiff's blood, found on the deployed driver's airbag, came to be on that airbag by reason of the first defendant wiping his hands on that airbag. Such a scenario is implausible. If the first defendant was to wipe his hands of blood he had his own clothes or the seats of the Tarago. A suggestion he would use the strong nylon material of the deployed airbag defies logic. It lacks credibility. I do not accept the first defendant wiped his hands on the deployed driver's airbag.

[212] In reaching this conclusion, I have had regard to the likelihood of what would be a very rapid removal of a seriously injured plaintiff from the driver's seat by the first defendant. That circumstance does not cause me to alter my conclusions. Whilst Hannan estimated he took no more than 90 seconds from the collision to be at the Tarago, by that time no person was in the driver's seat. The first defendant and the plaintiff were both in the rear compartment. If the first defendant could extricate himself from the driver's seat in that time so could the first defendant extricate the injured plaintiff into the back seat. It does not follow his intention in doing so was to prevent anyone from seeing the plaintiff in the driver's seat. It may well be his intention was to extricate the plaintiff from the Tarago as quickly as possible.

[213] In reaching this conclusion, I have also had regard to the inadequacies in the police investigation, particularly the failure of the forensic officers to swab other apparent blood sites in the driver's compartment. That blood, if it is blood, is explicable by reason of the first defendant re-entering the driver's compartment with blood on his hands. Significantly, none of these apparent blood sites were large. I have also had regard to the lack of apparent blood on the floor directly below the airbag. The large stains on the airbag suggest the blood remained on the airbag, explaining any lack of blood on the floor below. Similarly, any blood in the rear compartment is explained by the removal of the plaintiff into that area after the collision or the removal of a bleeding James through that area.

[214] Those matters do not cause me to alter my finding that the blood on the deployed driver's airbag was the plaintiff's blood, deposited by direct contact between the plaintiff's bleeding face and the airbag on deployment at the time of the collision. They do not detract from the compelling evidence which supports that finding.

[215] A consideration of the personal injuries sustained by the plaintiff as a consequence of the collision also supports the conclusion that the plaintiff was the driver of the Tarago at the time of the collision. The catastrophic cervical spine injury sustained by the plaintiff was a hyperextension injury. In Dr Weidmann's opinion, such an injury is more likely to have been sustained by contact at force with a deployed airbag. Dr Weidmann considered it unlikely that type of injury would be sustained by a passenger striking the head rest of the seat in front.

[216] I accept Dr Weidmann's opinion that the plaintiff's injuries were most likely occasioned by the plaintiff having been the driver of the Tarago at the time of the collision. I accept the hyperextension injury more probably than not occurred when the plaintiff, whilst driving the Tarago, was forced into the deployed driver's airbag upon the Tarago colliding with the Patrol.

[217] In proffering this opinion, Dr Weidmann observed that such a scenario was particularly likely if the driver was not restrained by a seatbelt. It is significant that following the collision the driver's seatbelt of the Tarago was found to be still in its latched position. That finding could be

consistent with the seatbelt having been connected so as to disengage any warning signal whilst the plaintiff drove the vehicle without the benefit of a restraining seatbelt.

[218] It was submitted the seatbelt being found in a latched position was consistent with the forces of the collision preventing it from being unlatched after the collision. That scenario was discounted by Major. Whilst Major did not undertake an examination of the driver's seatbelt of the Tarago, he observed that in his extensive experience he was not aware of any occasion when he had been asked to examine a seatbelt of a vehicle involved in a collision that the clasp was found to have been locked into position as a consequence of the collision. Major observed that the locking mechanism of the seatbelt is designed to withstand the forces of a collision. It is not the weakest link. I accept that evidence.

[219] The plaintiff's facial injuries were also consistent with the plaintiff being the driver of the Tarago. Whilst Dr Monsour accepted the plaintiff's facial injuries could have occurred if positioned in the rear seat, Dr Monsour gave evidence that those injuries, in his extensive experience, were consistent with contact between the plaintiff's face and a cushioned surface at force, such as a deployed airbag. I accept Dr Monsour's evidence. Dr Monsour was not merely relying upon a review of the literature. He was having regard to his own experience over many years.

[220] I do not accept Dr Campbell's evidence that all of the plaintiff's injuries could be sustained by a passenger in the rear seat. The type of cervical injury sustained by the plaintiff is, for the reasons advanced by Dr Weidmann, more consistent with the plaintiff being located in the driver's seat at the time of the collision.

[221] I do not accept Dr Grigg's evidence to the contrary. Dr Griggs based his opinion on an assessment of the literature in relation to head and neck injuries suffered by drivers of motor vehicles containing safety features such as driver's airbags. He conceded his evidence was based on an assumption that head and neck injuries included facial injuries. That assumption is a poor substitute for the experience which forms the basis for Dr Monsour's evidence.

Jones v Dunkel

[222] Both the plaintiff and the third defendant submitted that the failure of the other to call the first defendant in each other's case was capable of giving rise to an adverse inference pursuant to the principle in *Jones v Dunkel*. That principle provides that in certain circumstances, the unexplained failure by a party to call a particular witness may lead to an inference that the uncalled evidence would not have assisted that party's case.[25]

[223] The appropriate circumstances in which such inferences are to be drawn are strictly framed as disputes of fact are properly to be determined according to the evidence adduced at trial not on the basis of speculation as to what other evidence might possibly have been led.[26] Central to such appropriate circumstances is a requirement that the case be one where "the missing witness would be expected to be called by one party rather than the other" or where it was known that the witness's evidence "would elucidate a particular matter".[27]

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[25] *RHG Mortgage Corporation Ltd v Ianni* [2015] NSWCA 56 at [75].

[26] *ASIC v Hellicar* [2012] 247 CLR 345 at 412 [165].

[27] *ASIC v Hellicar* at [169].

[224] The plaintiff submits those conditions are not met as the third defendant had an obligation to call the first defendant as one of its insured persons. I do not accept there is such an obligation in the present case. I am satisfied there is a reasonable explanation for the third defendant's failure to call that witness. The third defendant, on reasonable grounds, believed the first defendant had given an untruthful account to its investigator. It is not reasonable to expect, in such circumstances, that an insurer would call in its case a witness whose account was untruthful. That conclusion is not altered by the insurer's statutory right to apply to cross-examine the first defendant. The calling of an untruthful witness is not made appropriate by the existence of a right to then cross-examine that witness.

[225] The conclusion that the plaintiff was the driver of the Tarago at the time of the collision could be fortified by the plaintiff's failure to call the first defendant as a witness in the plaintiff's case. The first defendant could give relevant evidence, directly supportive of the plaintiff's case. The first defendant was present in Court each day. He lives with the plaintiff. No satisfactory explanation was given for the failure of the plaintiff to call that witness.

[226] One explanation proffered was that the first defendant is an insured person and therefore a witness to be called by the third defendant. That consideration also applied to the second defendant. The plaintiff had no hesitation in calling the second defendant in his case. In the circumstances, a reasonable explanation for the plaintiff's failure to call the first defendant in his case is that the first defendant's truthful evidence would not have assisted the plaintiff's case. However, the first defendant had already given a version on oath to the insurer's investigator. That version was tendered in evidence. That version provides another explanation for the plaintiff's failure to call the first defendant as a witness.

[227] In the circumstances, I decline to draw any such adverse inference against the plaintiff. The conclusion that the plaintiff was the driver of the Tarago at the time of the collision is reached without any reliance upon the drawing of any adverse inference from the failure of the plaintiff to call the first defendant in his case.

Counterclaim

[228] The third defendant counterclaims for sums paid by it to the plaintiff, the first defendant and the second defendant in response to notices of claim lodged by them following the collision. The claim is based on deceit. The third defendant alleges each made the claim representing that the driver of the Tarago was the first defendant when each knew the plaintiff was the driver of the Tarago at the time of the collision. The third defendant alleges it made the payments in reliance upon these representations which it would not have done but for those false representations.

[229] The plaintiff and the first and second defendants admit lodgement of the relevant notices of claim and that each was lodged on the basis the first defendant was the driver of the Tarago at the time of the collision but deny those representations were false.

[230] Having regard to the finding that the plaintiff was the driver of the Tarago at the time of the collision, the third defendant is entitled to succeed in its counterclaim. The plaintiff could only have been driving the Tarago at the time of the collision with the knowledge and consent of the first and second defendants. All three knew the plaintiff was not the holder of a driver's licence or learner's permit at that time.

[231] Each of the claim forms lodged by or on behalf of the plaintiff, first defendant and second defendant dishonestly claimed that the first defendant was driving the Tarago at the time of the

collision. That claim was known to be dishonest by the plaintiff, the first defendant and the second defendants. That deceit was engaged in with the intention of having the third defendant, in reliance upon and induced by that dishonest representation, pay monies in compensation for loss and damage occasioned in the collision. Those monies were not properly due and payable if the plaintiff was the driver.

[232] I accept the third defendant would not have paid the monies claimed by way of counterclaim had the third defendant known the plaintiff was the driver of the Tarago at the time of the collision. I accept the third defendant paid those monies in reliance upon the dishonest representations made by each of the plaintiff, first defendant and second defendant in the respective notices of claim.

Conclusions

[233] A consideration of the evidence as a whole satisfies me, on the balance of probabilities, that the driver of the Tarago at the time of the collision was the plaintiff.

[234] That conclusion entitles the third defendant to judgment in its favour on both the plaintiff's claim and its counterclaim.

[235] I shall hear the parties as to the form of orders, and costs.