SUPREME COURT OF QUEENSLAND

CITATION:	*Brown v Holzberger & AAI Limited* [2017] QSC 54
PARTIES:	**ASHLEY DAVID BROWN** **(**plaintiff) **v** **ROBERT WILLIAM HOLZBERGER** (first defendant) **And** **AAI LIMITED ABN 48 005 297 807 TRADING AS SUNCORP INSURANCE** (second defendant)
FILE NO/S:	S5 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland at Bundaberg
DELIVERED ON:	12 April 2017
DELIVERED AT:	Rockhampton
HEARING DATE:	20, 21, 22, 23 and 31 March 2017
JUDGE:	McMeekin J
ORDER:	**Judgment for the second defendant**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT – LIABILITY OF DRIVERS OF VEHICLES – INTERSECTIONS AND JUNCTIONS – where plaintiff's motorcycle collided with defendant's car causing plaintiff to suffer serious injuries resulting in below knee amputation – where plaintiff alleges defendant's negligence caused the accident – whether plaintiff has discharged onus of demonstrating that the accident occurred because of negligence on the part of the first defendant. DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – MULTIPLE INJURIES – GENERAL PRINCIPLES – assessment of damages pursuant to the Civil Liability Act (2003) — where the assessment of general damages is in issue – where the assessment of past and future economic loss is in issue –

where the assessment of past and future care is in issue.

Civil Liability Act 2003 (Qld) s 55, s 57(2), s 59, s 62

Civil Liability Regulation 2014(Qld)

AAI Limited v McQuitty [2016] QCA 326, cited

AAI Limited & Anor v Marinkovic [2017] QCA 54, cited

Adelaide Chemical and Fertilizer Co Ltd v Carlyle (1940) 64 CLR 514, cited

Allianz Australia Insurance Ltd v McCarthy [2012] QCA 312, cited

Allwood v Wilson & Anor [2011] QSC 180, applied

Ballesteros v Chidlow & Anor [2006] QCA 323, cited

CSR v Eddy (2005) 226 CLR 1, cited

Eaton v Nominal Defendant [1995] QCA 435, considered

Graham v Baker (1961) 106 CLR 340, considered

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, applied

Medlin v State Government Insurance Commission (1995) 182 CLR 1, cited

Nucifora & Another v AAI Limited [2013] QSC 338, considered

Paul v Rendell (1981) 55 ALJR 371, cited

Pollitt v The Queen (1992) 174 CLR 558, followed

Ratten v The Queen [1972] AC 378, cited

Reardon-Smith v Allianz Australia Insurance Ltd [2007] QCA 211, cited

Ross v Hamilton [1997] QSC 170, cited

Shaw v Menzies & Anor [2011] QCA 197, considered

Sydney Electricity Authority v Giles (1993) NSW CCR 700, considered

The Queen v Andrews [1987] AC 281, cited

Vocisano v Vocisano (1974) 130 CLR 267, cited

Walton v The Queen (1989) 166 CLR, considered

COUNSEL:	T Matthews QC with A Williams for the plaintiff
	GF Crow QC for the second defendant
SOLICITORS:	Baker O'Brien & Toll for the plaintiff
	Quinlan Miller & Treston for the second defendant

[1] **McMEEKIN J:** Ashley David Brown suffered serious injuries, and eventually suffered a below knee amputation of his left leg, as a result of his motorcycle colliding with a motor vehicle driven by the first defendant, Robert William Holzberger. Mr Brown claims damages. He alleges that Mr Holzberger's negligence caused the accident. Mr Holzberger, represented by his insurer, denies that is so. Quantum of damages is also in issue.

[2] Mr Brown was born on the 30th November 1993. He was 19 years old at the time of the accident and is now aged 23 years.

LIABILITY

[3] Some facts are not contested.

[4] The accident occurred at about 9.30 am on 15 June 2013. It occurred at the intersection of FE Walker St and Reddan St, Bundaberg. There were no obstructions to vision on the road. It was a fine clear day.

[5] Mr Holzberger was driving a four wheel drive vehicle. He was travelling in a more or less westerly direction on FE Walker St intending to turn right into Reddan St, across the lane of any oncoming traffic.

[6] Mr Brown was approaching him travelling in a more or less easterly direction. Mr Brown's motorcycle was a Kawasaki Ninja 650cc. The headlight of Mr Brown's motorcycle was illuminated.

[7] Just before the intersection of Reddan and FE Walker Streets, from Mr Holzberger's direction of travel and so to the east of the intersection, there is a slight dip in the road. While the dip impacts on the view one has of oncoming traffic in whichever direction you travel the impact is not significant. Oncoming vehicles remain in sight despite the dip, albeit partially obscured. This was my observation. I record that at the request of the parties I attended at the scene and drove through the intersection on a number of occasions from both directions. The police officer called, Senior Constable Powis, who was very familiar with the intersection, gave evidence that there had been no alteration

to the scene since the incident. His view of the effect on forward vision caused by the dip accorded with my own.[1] Mr Holzberger's evidence on this point I reject.

[8] The impact occurred on or about the line marking the northern boundary of FE Walker St, referred to through the trial as the "fog line". The impact on Mr Holzberger's vehicle was on the panel behind the rear passenger wheel. So the impact between the vehicles occurred when Mr Holzberger's vehicle had almost passed completely into Reddan St.

[9] Mr Holzberger did not see the motorcycle before the impact.

[10] The indicator on Mr Holzberger's vehicle was activated indicating an intention to turn to the right. There is conflicting evidence as to the distance prior to the Reddan St intersection at which it was activated. Mr Brown saw no indicator.

[11] There are two principal issues between the parties. The first concerns the location of Mr Brown's motorcycle at the time that Mr Holzberger commenced his turn. Allied with that is the second issue – the speed at which Mr Brown was travelling.

Mr Brown's Version

[12] The subject accident occurred in the course of a journey from a friend's home, where he had spent the night, to his parent's home where he usually resided. It was his first outing that day. That puts into context Mr Brown's repeated claim under cross examination that the top speed that he reached on the day of the accident was 60kph, sometimes qualified as "about" or "around" that speed.[2]

[13] FE Walker St intersects with Elliott Heads Rd about 300 meters prior to the Reddan/FE Walker St intersection. The Elliott Heads intersection is controlled by traffic lights. Mr Brown halted there at a red light. He was in the left hand of two lanes. The left lane ends as a merging lane. He followed the left lane until it merged with the right lane, about where a white painted line island ended. [That is about 150m from the Reddan St intersection[3]]. He recalled a green Hilux four-wheel drive beside him and in the right lane towards the end of the merging lane. He merged in front of the green four-wheel drive from the left-hand side of the merging lane into the single lane. He said that the point where he merged was not further east than the point where the white painted island had finished. This point was marked "M" on Exhibit 5. He was then travelling at about 60 kph, as he said "the speed limit along there".

[14] Mr Brown's account of the accident was as follows:

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[1] T3-19/40-20/8.
[2] T1-59/1-31.
[3] See Ex 23.

"And having come in front of him [a reference to the Hilux], what did you do? --- Checked both my mirrors to see what was behind me and then looked back forward.

Okay. Did you accelerate? --- I don't think I did constant to keep up to the speed, but nothing drastic.

Okay. And when you looked down at your mirrors, having come in front of the four-wheel drive, and looked back up, what did you observe? --- I observed there was cars going around the Terracan [a reference to the first defendant's vehicle] that had started to slow down or – there was cars going around him, so like, two wheels on the dirt, two wheels on the – on the road surface. And, like, the – and I could see the dust that was coming from the cars going around the Terracan.[4]

Was the Terracan stopped or moving when you first saw it and the cars coming behind it and around with puffs of dust in the gravel? It was – it was still moving.

Okay? I never seen the car stopped at all.

Okay. And when you'd looked up and saw it and the inbound traffic coming around it – behind it, how far back from the intersection where Reddan Street joins FE Walker Street were you, roughly? …[5]

Probably two or three houses back to – to when I first took notice of him – seen him and seen the cars going around.

You saw the cars going around him, he was still moving, two or three houses back from Reddan Street? Yeah, I believe so.[6]

…

When you say two or three houses back, back from where?---Back from the Reddan Street – the entry of Reddan Street.[7]

…

What do you recall happening next, Mr Brown? Next, I remember the Terracan pulling in front of me, headed down Reddan Street. And next, the – the next thing, like, split second and I was – he was across my path. I then hit the car – I then hit the car, shut my eyes and opened my eyes when I was in the air and then blinked

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[4] T1-31/36-47.
[5] T1-32/22-29.
[6] T1-32/34-38.
[7] T1-33/17-18.

and I was – as I opened my eyes again, I was rolling down the incoming traffic line of FE Walker.

Okay. When you saw him turn in front of you, what did you do, if anything? I hit the brakes.

Do you specifically recall hitting the brakes? I remember tapping the front ones, but it just happened so quick that I – there's no time to react, it was just split second thinking and split second thinking, like

Did you recall thinking where you were – whether you were going to hit the vehicle and where? Yes, I remember trying to pick an – pick an option out of it, but there was nothing that I could do in the time."[8]

[15] Mr Brown told the investigating constable some four months later that when he hit his brakes the bike started pulling up, and the brakes did not lock up.[9] He said that the vehicle turned in front of him when he was only a car length or two away.[10]

[16] If this account is accurate then Mr Brown's motorcycle should have been in plain view of Mr Holzberger before he commenced his turn. There was no opportunity for Mr Brown to avoid the accident.

The Defendant's Witnesses

[17] Several witnesses were called by the defendant. They observed aspects of the lead-up to the accident and the accident itself. I will detail their evidence. If accepted their testimony throws considerable doubt on the accuracy of Mr Brown's account.

Ms Leesa Smith

[18] Ms Smith is a very experienced motorcyclist having ridden motorcycles from a very young age. On the morning of the accident she was travelling along Walker St, which becomes FE Walker St, in the same direction as Mr Brown. She first observed his motorcycle at a set of traffic lights at the corner of Maryborough Street and Walker Street at Barber Park – about 1.8 kms and several blocks back from the Reddan St intersection. Mr Brown was not known to her.

[19] She said that the motorcycle pulled up on the left side of her at those lights. She said that the motorcycle then "took off" from the lights "fairly quickly" but not exceeding the speed limit.[11] The rider then commenced to zig zag using most of his lane, but within the lane markings, for some distance to about the Griffith and Walker St

[8] T1-35/15-31.
[9] T3-25/25.
[10] T3-24/46.
[11] T4-34/44.

intersection. She said: "It was like if you ever watch the MotoGP and they're warming up their tyres when they first take off. That kind of manoeuvre."[12] Unsurprisingly, she rejected the proposition that it was normal behaviour for motorcyclists to zigzag on a public road as she had observed Mr Brown to do.[13]

[20] The rider then drove normally until they reached another set of lights at the Barolin St intersection where they both stopped. She observed the motorcycle then to accelerate away quickly. She estimated the speed of the motorcycle to be 80kph. Her vehicle reached 60 kph. She lost sight of the motorcycle in the traffic but said that irrespective of the traffic she would have lost sight of the motorcycle given the speed of the motorcycle.[14]

[21] Ms Smith lost sight of the motorcycle when it was about 800m from the eventual point of impact.

[22] Ms Smith was a very impressive witness. She gave every indication of being careful in her statements and observant. She was in a good position to observe the behaviour and speed of the motorcycle. She had a great interest in motorcycles, so adding to the likelihood that she would note and recall the behaviour she described. As well she was not challenged. That she herself accelerated to the speed limit but lost the motorcyclist in the distance of course provides the most cogent proof that Mr Brown exceeded the speed limit at that point in his journey and by a considerable margin.

Mr Holzberger – the first defendant

[23] Mr Holzberger was heading west on FE Walker St to his daughter's home in Reddan St. He had done this journey "thousands" of times before.[15] As he approached the intersection he activated his traffic indicator about 20 feet before the intersection. He saw an approaching dark green vehicle about three houses down FE Walker St. He saw no motorcycle. He thought that he had ample time to turn – "plenty of room".[16] One view of his evidence is that he saw the dark green car after he started his turn.[17] He estimated his speed at 10 mph.[18] When his vehicle had about a foot to go to clear the intersection the motorcycle struck his vehicle. He saw no car in Reddan St prior to commencing his turn.[19]

[24] Mr Matthews of Queens Counsel, who appeared for the plaintiff, stressed the lateness of the indication at 20 feet before the intersection. That assumes the veracity of the

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[12] T4-35/32-33.
[13] T4-40/23-37.
[14] T4-38/43-44.
[15] T4-59/40.
[16] T5-60/35.
[17] T4-62/13.
[18] T4-60/34.
[19] T4-62/47.

estimate. Some idea of the reliability of Mr Holzberger's estimates can be gained from his conversation with the investigating officer on the day after the accident. He then said that he observed the distance of the oncoming car from him before he turned at "five car lengths, about 300 yards".[20] Five car lengths is a very different distance to 300 yards. Five car lengths is about 20 meters. Three hundred yards would put the approaching car at about the Elliot Heads intersection.[21] It is evident from other evidence that I accept that the approaching vehicle was not so far back and I do not think Mr Holzberger meant that the vehicles were that far back. Mr Holzberger clearly meant to indicate to the officer that he had ample time in which to execute his turn.[22] No-one sought to explore with him what distance he thought 20 feet might be by comparison to something that he could relate to.

[25] My impression of Mr Holzberger was that while he was obviously honest he was somewhat uncertain in his manner, whether through habit or because of finding himself in an unfamiliar environment giving evidence. His estimates of distance were plainly unreliable. As mentioned I reject his recollection of the effect on forward visibility of the dip that he passed through just before entering the Reddan St intersection as well.

Gavan Wills

[26] Mr Wills is a retired police officer. He was traveling as a front seat passenger in his daughter's vehicle. They were traveling along Reddan St towards the intersection with FE Walker St. His account was as follows:

> "We were travelling just around town, we came up along Reddan Street, we were just having a bit of a Bow Peep around town, just having a look, and as we came to the intersection of FE Walker Street, a car was slowed and we came to a point in Reddan Street prior to going on to FE Walker Street proper. At that time, I saw a gold coloured Hyundai Terracan four-wheel drive type vehicle beginning to make a right-hand turn into Reddan Street from FE Walker Street. He'd come from the east, sort of travelling west and turning right into Reddan Street. At the same time – as my daughter was driving – I've done it with everybody, and I do it all the time – I look to the right prior to the Terracan car turning right. I looked down the road and I could see that there was no traffic coming, and I assumed at the time that the Terracan had ample time to make the right-hand turn."[23]

[27] An objection was taken to the answer as involving an assumption which he was not entitled to make – in the nature of a guess. But I don't think that was what Mr Wills meant. Rather he was saying that given the traffic that he could see coming there was

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[20] T3-17/1.
[21] See Ex 26.
[22] T3-19/9.
[23] T3-61/16-27.

ample time to turn safely but that obviously proved to be wrong given the occurrence of the accident. In that sense he had made an assumption and was relating it.

[28] Mr Wills thought that when he looked to his right he could see to about the entry to a Tri-care nursing home – a distance of about 80 meters from the Reddan St intersection.[24] Where precisely his car was at that point in time is not so clear. Evidently the vehicle was not yet stopped at the intersection and so a little distance back but with a view down FE Walker St to about the 80m point. He thought that he first saw the defendant's vehicle when his vehicle may have been about a car length behind a vehicle shown in Exhibit 30 as stationary at the intersection waiting to turn. It is quite plain that he could not be precise. He marked on a photograph where he thought that his vehicle eventually stopped – to the left side of Reddan St as if positioned to turn left[25] although that is not how he described it.[26]

[29] He continued his account:

> "And when you say you turned back, where did you turn back to? --- To the front and I looked again to the left, and I – at that time, the gold coloured Terracan made its right-hand turn to the front of the vehicle was in line with the gutter, with the rear of the vehicle being on the dirt verge of Fe Walker Street. The front of our vehicle, the silver coloured Falcon, would have been in line with the back right-hand panel, or back of the Terracan four-wheel drive, and it was at that time – I didn't see it, but I heard a massive explosion and I saw a body fly through the air, come down, bounced, rolled a couple of times and stopped, and at the same time, your Honour, there was debris went everywhere and I saw the motorbike also slide across the road."[27]

[30] In response to questioning he said that the speed of the Terracan as it turned was "generally very slow"[28], "five to ten k's".[29] He wasn't sure whether the Terracan was stopped or turning when he first saw it.[30] He said that the Terracan did not have to go around his vehicle but just "made the turn as a right hand turn".[31]

[31] There are three significant points. The first is that immediately prior to Mr Holzberger commencing his turn or as he commenced his turn Mr Wills looked and saw no motorcycle or headlight approaching within a distance of 80 meters or thereabouts. At the latest the turn commenced as he looked back from making that observation.

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[24] Perhaps 78m – see Ex 24.
[25] Ex 29.
[26] T3-68/42.
[27] T3-62/42-63/4.
[28] T3-66/17.
[29] T3-70/7.
[30] T3-70/4-5.
[31] T3-70/24.

Secondly he thought that there was ample time to allow the vehicle to turn across the road. Thirdly, the turn by the defendant seemed to him to be done in the normal way.

[32] Mr Wills was an impressive witness. I had no reason to doubt either his honesty or reliability.

Kathleen Mary Stolzenberg

[33] Ms Stolzenberg is the daughter of Mr Wills. She was the driver of the car in which he travelled as a passenger.

[34] Her account was that as her vehicle approached the intersection with FE Walker St – "[n]ot all the way to the front" – she saw a "gold car" coming from an easterly direction "across Walker Street, turning".[32] In response to a non-leading question from me she said that the gold car was "in front of her" when she first saw it.[33] When she pulled up at the intersection she looked to her right and saw traffic further down the road, east bound and near the Tri-care nursing home. She then "looked back to left and looked back to the right and that's when [she] heard the collision".[34] When she looked to her right initially she saw no motorcycle or headlight of a motorcycle. Indeed she did not see it at any stage.

[35] Ms Stolzenberg marked the position of the approaching traffic that she saw when she first looked right on an exhibit (see "A" on Exhibit 31). That point appears to me to be a little further east (and so closer to the eventual impact point) of the driveway to No 31 FE Walker St which was measured to be 47m from the estimated impact point (see Exhibit 24). By then she thought that the gold car was "parked" in Reddan St.[35] Her car, she said, was positioned to the left of the vehicle shown in Exhibit 32, more or less where one would expect her car to be if turning left onto FE Walker St as she said was her intention. She said that she did not see the gold car make its turn.

[36] Ms Stolzenberg was not as impressive a witness as her father. I do not mean to question her honesty, but she appeared at times to be a little uncertain. She said in cross examination that she had not been asked to recollect these events until only a few weeks before trial. That observation does not affect the reliability of the general thrust of her evidence but her estimates of the precise positions of things nearly four years before and in a dynamic situation must be treated with some caution.

Evelyn Margaret Leslie Turner

[37] Mrs Turner turned 66 years a few days before the day of the subject accident. Because of her recent birthday she and her husband, Phillip Kerridge, had travelled into

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[32] T3-73/1-17.
[33] T3-82/2.
[34] T3-73/34-35.
[35] T3-74/40-41.

Bundaberg on the morning of 15 June 2013 to celebrate the occasion. Their journey took them along FE Walker St. Mr Kerridge was driving and Mrs Turner a front seat passenger in their green Hilux. Mrs Turner was particularly conscious of her husband not exceeding the speed limit as they lived in the bush, she did not hold a drivers' license and so they were completely dependent on Mr Kerridge retaining his license to get about. Mrs Turner recounted her observations after stopping at a red light at what I take to be the Elliott Heads intersection:

> "…and there are two lanes on the left-hand side of that, and those two lanes merge into one. We had merged into the one. There was virtually no cars around. We had merged into one, and we were driving along at 60, because that's the speed limit in that area, and we'd – there was a car turning in front of us, plenty of room to turn in front of us, and I got an unholy fright, because this motorbike came whizzing past me so fast, I yelled out, "Fuck, what was that?" because I got such a hell of a fright. And then he crossed over in front of the car, and then hit the back of the car which had already turned.
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> You told us that the green Toyota was being driven at approximately 60 kilometres per hour? That's correct.
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> The – are you able to tell the court your best estimation of the speed of the motorcycle that passed you? Well, like I said before, it was just like a bullet out of a gun. And he would have been doing at least 80, plus. At least. At least 80 to 90, it could have been. It was so fast you could not even see it. And the noise, as it whizzed past, and then he, sort of – I think they call it dropping back a cog, to make it go a bit faster; I think he was trying to attempt to get round the back of the vehicle, by the sound of it.
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> Are you able to give us your best estimate of the amount of time between when the motorcycle frightened you, and you swore, and the time that the motorcycle collided with the other vehicle? It probably would have been barely two seconds, I think. It was – like I said, it was so quick. Like, he crossed in front of us; Phillip braked sharply, because he, obviously, got a fright too; and he hit the back. So it probably would have only been a couple of seconds.
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> With respect to the vehicle that was turning, had you seen that earlier up – earlier on? Yes, we had seen it back further, where the road had merged into one. You could see straight into the distance, because it is a straight stretch up that road, very clear, and he indicated – there's a slight – if I remember rightly, there's a slight incline – decline, I suppose you'd call it. And you could see him indicating.
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> And which way was he indicating? Indicating to turn right, into that street."[36]

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[36] T4-47/18-48/4.

[38] Mrs Turner indicted that her vehicle was about opposite No 25 FE Walker St when she first saw ahead of her the gold coloured vehicle that was then indicating to turn[37] – so at a distance greater than 78m from the estimated impact point.[38] She saw the vehicle commence to turn when she was still about opposite approximately No 29 FE Walker St[39] – so about 60m away from the eventual estimated impact point.[40] The motorcycle passed her vehicle at about opposite No 31 FE Walker St – some distance less than 47m from the estimated impact point.[41] She positioned the gold car as well over the fog line at the time of impact.[42] These various positions are shown on Exhibit 36.

[39] Mrs Turner was obviously honest and I considered her generally reliable. I saw no reason not to. I will return to that issue. She gave every appearance of attempting to be careful. She appeared to have a good recollection of events, events which she had every reason to think were notable at the time. I treat all references to distances and times as estimates of course, as I do with each witness, but the general thrust of her evidence I accept.

Other Evidence

[40] The second defendant advanced three further pieces of evidence. One were entries on Mr Brown's Facebook page. The second was his traffic history. The third was what was claimed to be an inconsistent version given to the police officer the following October.

[41] The entries on the Facebook page consisted of boasts to friends about driving inappropriately on the road and a short statement post-accident that he had "hit a car". The latter statement does not take the matter very far. It was literally true whatever one's view of the cause. As to the former, Mr Brown denied that he had actually behaved as he there represented. I have no way of knowing whether he had in fact done so. The entries do not assist in the fact finding necessary here. At most the boasts display an immaturity in keeping with his traffic history to which I now turn.

[42] The traffic history[43] shows a disregard for the road rules. There were four speeding offences in less than two years and three suspensions. The history is as follows:

(a) 22 February 2011 when aged 17 and on either red "P" plates or a learners permit: a fine for exceeding the speed limit by more than 20kph but less than 30 kph;

(b) 20 May 2011 license suspended for three months;

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37 T4-49/34-50/4.
38 Adopting Ex 24 measurements.
39 T4-50/17-18.
40 Again see Ex 24 – 66m being from the driveway of No 29 not the mid-point of the block.
41 Again see Ex 24 – 47m being the distance from the driveway of No 31.
42 T4-49/5-6.
43 See Ex 14.

(c) 29 April 2012 when aged 18: a fine for exceeding the speed limit by less than 13 kph;
(d) 12 October 2012 when aged 18 but nearly 19 a fine for exceeding the speed limit by at least 13 kph but not more than 20 kph;
(e) 15 November 2012 again just short of his 19th birthday: exceeding a 50kph limit by more than 20kph but less than 30 kph;
(f) 26 December 2012 – license suspended for accumulated demerit points;
(g) 13 February 2013: license again suspended for accumulated demerit points.

[43] Ms Smith's evidence shows that Mr Brown had not changed his ways by the day of the subject accident.

[44] There were inconsistencies between Mr Brown's evidence and his conversation with the officer. I am not persuaded that they have much impact on the assessment of credibility. Much depends on what was asked and the impression made on the interviewee as to the information being sought. However, the timing of the conversation, four months after the event, and the fact that there are inconsistencies, means that the conversation cannot provide much support to Mr Brown.

The *Res Gestae* exception

[45] Finally the plaintiff seeks the admission of an out of court statement made by him to Mrs Turner. The defence objects to the admission of the evidence as being a hearsay statement and not within any recognised exception. The plaintiff supports its reception as coming within the *res gestae* exception.

[46] The statement was made by Mr Brown to Mrs Turner as he lay on the road after the accident. The time that had elapsed between the occurrence of the accident and the making of the statement cannot be precisely known but it was not long. The plaintiff submits it was about a minute. I accept that it could not have been much longer than that. Mrs Turner reported that Mr Brown said to her: "I thought he'd stop".[44]

[47] In my opinion the statement is inadmissible for two reasons. First it is not shown to be relevant. Secondly, it is not within the *res gestae* exception.

[48] The evidence goes to the plaintiff's state of mind. That is not a relevant fact in the case. It might possibly have been relevant if Mr Brown wished to relate his state of mind to some action or inaction of his. So, for example, if he had said I veered left when I saw the vehicle commence its turn then he might have been asked why and he could have answered because I thought that he would stop. His actual evidence was, effectively, that he had no time in which to act. Or he might have said I thought it safe to overtake

[44] T4-55/29.

at the point I did and then accelerate because I thought that he would stop. But unrelated to any action or decision not to act I fail to see what Mr Brown thought at some indeterminate point in time is relevant.

[49] If I am wrong in that I would still not allow the evidence.

[50] The plaintiff relied on the dicta of Kirby P (as his Honour then was) in *Sydney Electricity Authority v Giles*[45] and Muir J's decision in *Ross v Hamilton*[46] as authorizing the receipt of the evidence here.

[51] In *Giles,* after an extensive review of authorities, Kirby P said:

> "The foregoing authorities make clear the preconditions for the admissibility of hearsay evidence under the res gestae Rules. An out-of-court statement will be admissible as part of the res gestae, and hence admissible as capable of proof of that which it asserts, if the statement was made in circumstances:
>
> > (1) which are approximately, if not exactly, contemporaneous with the event or transaction the subject of the Court's inquiry; and
> >
> > (2) which provide an assurance of the reliability and veracity of the statement. Such an assurance will ordinarily arise where:
> >
> > > (a) the statement is spontaneous or contemporaneous with the event or transaction the subject of a Court's inquiry; or
> > >
> > > (b) the statement is made by the maker while involved in the event or transaction the subject of the Court's inquiry."

[52] In *Ross* Muir J accepted Kirby P's analysis in *Giles* as accurately stating the law.

[53] While I think the statement here comes close to being a narrative after the event it is probably sufficiently contemporaneous to come within the rule – at least there are other cases where greater intervals have been held not to destroy that essential element of substantial contemporaneity. It is the second condition that presents the problem.

[54] What is evident from the cases is that the onus lies on the party seeking admission to show that the possibility of concoction or distortion can be disregarded: *Ratten v The Queen* [1972] AC 378 per Lord Wilberforce at 391 cited with approval in *Pollitt v The Queen*[47] by Mason CJ[48] and Brennan J[49] and the effect of which was adopted in *Walton*

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[45] (1993) NSW CCR 700.
[46] [1997] QSC 170.
[47] (1992) 174 CLR 558.
[48] At 567.
[49] At 581.

v The Queen.[50] The relevant principle I take to be as follows from the majority judgment in *Walton*:

> "An assertion may be admitted to prove the facts asserted if it is part of the *res gestae*, but it is then an exception to the rule against hearsay: see *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* (1940) 64 CLR 514. The justification for that exception is now said to lie in the spontaneity or contemporaneity of assertions forming part of the *res gestae* **which tends to exclude the possibility of concoction or distortion**: *Ratten* at 389–90; *The Queen v Andrews* [1987] AC 281 at 300–1: see also *Adelaide Chemical and Fertilizer Co Ltd v Carlyle* at 531. Of course, the discussion in *Ratten* and *Andrews* was in the context of the *res gestae* rule. The unlikelihood of concoction or distortion is not sufficient of itself to render a hearsay statement admissible: see *Vocisano v Vocisano* (1974) 130 CLR 267 at 273; 3 ALR 97. But if sometimes there is an element of hearsay in evidence which is led of statements made by a person other than a witness for the purpose of founding an inference concerning that person's state of mind, the justification for disregarding that element of hearsay may be thought to be of a similar kind. Such statements will rarely be purely assertive. Ordinarily they are reactive and are uttered in a context which makes their reliability the more probable. On the other hand, if a statement by a person about his state of mind is a bare assertion not amounting also to conduct from which a relevant inference can be drawn, then it ought to be excluded as hearsay."[51]

[55] In *Eaton v Nominal Defendant,*[52] a case not so different to this one, Pincus JA explained the difficulties facing a plaintiff in meeting the test of excluding possibilities of concoction or distortion:

> "Excluding mere possibilities is always a difficult task and one must take it that what the judge meant was that the circumstances must be such as to make concoction very unlikely. That condition is not satisfied here. The plaintiff's case was that his motorcycle left the road while he was overtaking another vehicle. Assuming that to be so, it is not absurd to suppose that when explaining what happened to others fairly shortly after the event, the plaintiff might have given an exaggerated or untrue version which placed the entire blame for the incident on the driver of the other vehicle. That might have been done, not with a view to bringing proceedings, but because of the tendency which people sometimes have to justify themselves in the eyes of others."

[56] As senior counsel for the second defendant submits there is a further reason to be concerned here about the risk of self-justification – given his traffic history Mr Brown

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[50] (1989) 166 CLR 283 per Mason CJ at 295; per Wilson, Dawson and Toohey JJ at 304.
[51] Per Wilson, Dawson and Toohey JJ at 304 – my emphasis.
[52] [1995] QCA 435.

faced the almost certain loss of his license if he was thought to have breached the road rules in an egregious manner. There is no suggestion here that Mr Brown was not thinking quite clearly when he spoke to Mrs Turner and so possibly mindful to blame the other driver or protect his license.

[57] *Ross* does not really assist the plaintiff as it is plainly distinguishable on its facts. There an injured man was heard to say, within minutes of being struck by a motor vehicle as he crossed a road at traffic lights, "little green man" repeatedly. The statement was taken to be proof that at the time he crossed the road and was struck he had a green pedestrian sign entitling him to cross and conversely that the motorist had run a red light. Muir J held the statement to fall within the exception principally because at the time that it was made the injured man was "incapable of lucid conversation" and that "the utterances were instinctive in nature and were made without any realistic possibility of the plaintiff's having arrived at his state of mind concerning the status of the pedestrian sign by application of thought processes which could have amounted to a reconstruction of events…" That essential element of a lack of lucidity is not present here.

[58] Before leaving the point I should say that it does not seem to me to affect the matter greatly whether the statement be admitted or not. Unless tied to a particular point in time and a particular decision of Mr Brown's the statement leads nowhere.

Discussion

[59] It is trite to observe that the onus of proof of a breach of duty by the first defendant rests on the plaintiff. Acceptance of what he says then depends on his account being accepted as a credible one despite the account of every witness called by the second defendant being inconsistent with his version. It requires that the apparent consistency between those various witnesses be explained away. In my view there are several reasons to have reservations about Mr Brown's testimony. And the consistency between the second defendant's witnesses has not been explained away.

[60] The first problem for Mr Brown is that his evidence, to put it charitably, is not accurate. His claim that he had not exceeded the speed limit that day is wrong and in my view probably well known to him to be wrong. I refer at this point to Ms Smith's evidence. I do not accept that Ms Smith's observations are unreliable, as was submitted, because she failed to bring into account the greater rate of acceleration of a motorcycle compared to her vehicle. She was well acquainted with motorcycle characteristics and more familiar than most with that acceleration. I have no doubt that her account that Mr Brown accelerated away from her at a speed well in excess of the speed limit was a reliable one. The warming up of the tyres beforehand is consistent with the conduct observed and not in dispute.

[61] This creates a difficulty for Mr Brown. His traffic history shows that he was not averse to exceeding the speed limit. I accept that he was doing so as he left a set of traffic lights a few blocks back from the Elliott Heads intersection. It would not be out of character for him to have again done so again when leaving the Elliott Heads intersection. This evidence does not prove one way or another what he did do then, but it would be consistent with his manner of driving as observed by Ms Smith only a minute or two before for him to have behaved as Mrs Turner reported.

[62] The second difficulty with Mr Brown's evidence that he did not exceed the speed limit that day is that he had to have exceeded the speed limit when overtaking the Mrs Turner's vehicle. Senior counsel for Mr Brown conceded so much in his submissions. Mrs Turner was not challenged when she put the speed of her vehicle at 60 kph before being overtaken by the motorcycle. As senior counsel submitted Mr Brown had to be going faster to get past them. The key question is how much faster? I am not persuaded that there is any good reason to treat Mr Browns' evidence on the subject as of any assistance. He was plainly not doing "about 60 kph" as he claimed.

[63] A third problem is that Mr Brown's version requires that Mr Holzberger's lookout was not just poor but quite improbably nonexistent. There are two obvious points to make if Mr Brown's version be accepted. The first is that he had to have been in Mr Holzberger's clear view over about 150m yet was not seen. The second is that Mr Holzberger had to commence his turn when the motorcycle was only meters from him. It is common ground that the headlight of the motorcycle was illuminated and so easily visible. I note that Mr Brown's version was that the vehicle turned in front of him when it was too late for him to avoid the collision despite his claim that he "hit" his brakes and that the distance separating him from the Terracan when the vehicle suddenly turned was only a car length or two (ie 8 to 10 meters). For this to be so Mr Holzberger's lack of lookout would had to have been on a staggeringly incompetent scale.

[64] A fourth problem is that on Mr Brown's version not only did Mr Holzberger fail to see the motorcycle as it crossed the distance from the end of the merging lane to the intersection but so did Ms Stolzenberg. On Mr Brown's version he must have been in her view when she looked but he was not. It will be recalled that Ms Stolzenberg looked after she reached the intersection. Ms Stolzenberg saw traffic approaching but did not see the motorcycle. Ms Stolzenberg thought that the approaching traffic she saw was only about 40 - 50 meters from the impact point when she first saw it (see my analysis above). The precise distance is not particularly significant. Whatever the distance Mr Brown's motorcycle had to be in the lead position at that point in time if his account is accurate. Ms Stolzenberg would need to be out in her estimate by at least 100 meters to falsify that proposition. There is no reason to think that she is.

[65] A fifth problem for Mr Brown is Mr Wills' evidence. Whatever the distance that Mr Wills could see along FE Walker St it is plain there was no traffic in view. Because of that absence of approaching traffic he formed the opinion that the Terracan had ample time to make its turn. Mr Holzberger commenced his turn at about that time. So there is independent support from an observant witness for Mr Holzberger's view that it was safe to turn when he did. Wherever the motorcycle was at that point it was not in a position to cause any concern.

[66] Finally there is Mrs Turner's evidence. Mrs Turner's evidence is the crucial testimony. For Mr Brown's version to be accepted she must be wrong in her estimate of his speed, in her positioning of the place where he overtook, and in her estimate of the time that elapsed between him overtaking and the accident. I see no reason to think that she was wrong in any aspect. As the second defendant's calculations of relative speeds[53] shows her version is internally consistent. Her account is consistent with the versions of the other witnesses. Significantly her account is in complete accord with both Mr Holzberger and Ms Stolzenberg – that is, when well advanced along FE Walker St her vehicle was the lead vehicle. As well she is in accord with Mr Wills - she thought that the gold car had ample time to make its turn when that turn commenced. And importantly her evidence explains the observations of the others. They did not see the motorcycle because it was not there to be seen. It remained hidden behind her vehicle until effectively a moment before the collision.

[67] Against this the plaintiff argues that his account should be preferred. Mrs Turner, it was submitted, should be found to be unreliable. The hypothesis advanced by senior counsel for the plaintiff is that Mr Holzberger missed seeing the oncoming motorcycle as he was distracted by the emerging presence of the vehicle driven by Ms Stolzenberg in Reddan St, that as a result his attention was at all relevant times directed into Reddan St and so not along FE Walker St, and that he swung wide to get around Ms Stolzenberg's vehicle. Because the road is a busy one Mr Holzberger hurried his turn, executing it without stopping to look at approaching traffic.

[68] There are several difficulties with the hypothesis. One is that it requires the rejection of Mr Wills' evidence, and I thought he was a reliable witness. Secondly, if Ms Stolzenberg placed her car as she has shown it and as Mr Wills thought then there was no need to swing wide as an avoiding manoeuvre. Thirdly, this approach requires a finding that Mr Holzberger is lying in his claim not to have seen Ms Stolzenberg's vehicle. He is also lying when he says that he saw a green car as the lead vehicle about three houses down the road just before he turned. I see no justification for so finding.

[69] I appreciate that Mr Wills drew a picture of the first defendant's car as located fairly wide on the turn[54] but his oral evidence contradicted the inference. In any case the

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[53] See Ex 40 at para 2.37-2.38.
[54] See Ex 28.

mouth of the intersection there is very wide – Mr Ruller's scale plan indicated a width of about 25m at the fog line of FE Walker St. So even if a vehicle did position itself to the right that doesn't necessarily justify any adverse inference being drawn.

[70] It was submitted Mrs Turner should be found to be unreliable for these reasons:

(a) Mr Holzberger said that he activated his indicator only 20 feet before the place where he turned whereas Mrs Turner thought that it was much sooner;

(b) Mrs Turner was misled into thinking that the speed of the motorcycle was much greater than it in fact was because she was startled and misled by the noise of the motorcycle and by Mr Kerridge braking heavily after the motorcycle overtook them;

(c) Her capacity to make accurate observations should be doubted because she did not see the vehicle driven by Ms Stolzenberg which was stationary at the intersection or very close to the fog line and so in her clear view as she approached the intersection.

[71] In my view these matters are of little moment in assessing Mrs Turner's credibility. My responses are:

(a) I have commented above on my views as to the accuracy of Mr Holzberger's estimates of distance. I have no confidence that he was precise in this one and it impacts not at all on Mrs Turner's credibility;

(b) Mrs Turner's observations and her manner of relaying them was compelling. She said that the motorcycle came "whizzing" past her vehicle "like a bullet". She was quite evidently not relating a sedate overtaking manoeuvre of the motorcycle travelling at a roughly comparable speed albeit slightly higher. Her husband's braking could have had little impact on her observations as the accident occurred moments later. As well Mr Kerridge had every reason to brake on her account – a collision was unfolding in front of him.

(c) That a witness has no recollection of seeing something years after an event does not render unreliable their evidence of what they say they did see. There was no particular reason for Mrs Turner to note or recall the presence of the slowly moving vehicle in a side road ahead and off to her left. And the submission ignores the fact that she had very limited opportunity, only a second or two, to register the presence of that vehicle before two things occurred – she was startled by the overtaking motorcycle and the first defendant's vehicle moved in front of the Stolzenberg vehicle.

[72] In my view while there were relatively minor inconsistencies they were no more than is to be expected with witnesses trying to recall events that happened rapidly over a very

few seconds more than three years ago. As well the claimed inconsistencies depended on when precisely people looked and made relevant observations that they now can recall in a situation where relative positions were changing by the moment.

[73] Senior counsel for the plaintiff urged that I should find Mr Brown to have been a credible witness. It is true that he gave his evidence well. I am confident that he is a very different person to the immature 19 year old he once was. I accept that he is hard working and stoic as was submitted. But for the reasons that I have set out I cannot accept that his testimony as to his driving behaviour leading up to the accident was accurate.

Conclusion

[74] Mr Brown has not discharged his onus of demonstrating that the accident occurred because of any negligence on the part of Mr Holzberger. I conclude that the subject accident occurred because of Mr Brown's negligence. That negligence consisted of overtaking the vehicle being driven by Mr Kerridge on its left hand side and in contravention of the road rules, when only a short distance from the intersection with Reddan St, and at a great speed, as Mrs Turner related. By then Mr Holzberger had commenced his turn to the right and was no longer looking down FE Walker St. That is why he did not see the motorcycle. There was no action reasonably open to Mr Holzberger to then avoid the accident.

[75] While that finding means that there must be judgment for the second defendant I am required to assess damages to which task I now turn.

QUANTUM

The Civil Liability Act

[76] The assessment is governed by the provisions of the *Civil Liability Act 2003* (*CLA*) and the *Civil Liability Regulation 2014* ("the *Regulations*").

[77] There are five areas of dispute, with several items of damage agreed. Those five areas are general damages, past and future economic loss, and past and future care.

General Damages

[78] I have set out my understanding of the methodology required under the *CLA* to assess damages where multiple injuries have been suffered in *Allwood v Wilson & Anor* [2011] QSC 180. I will not repeat myself.

The Injuries

[79] Mr Brown suffered multiple physical injuries as follows:

(a) Compound comminuted fractures of the left tibia and fibula resulting in a below knee amputation;
(b) A fracture of the distal right ulna;
(c) Deep laceration of the left forearm; and
(d) Cuts and abrasions.

The Aftermath

[80] Mr Brown was hospitalized in Bundaberg where he underwent debridement, was then flown to Brisbane and again hospitalized. He there underwent some 23 surgical procedures on his injured leg. He underwent skin grafting with resultant scarring.[55] He developed an infection, was released home, but returned to hospital and eventually underwent an amputation due to sepsis. His convalescence was complicated. He initially required a wheelchair and crutches to get about. Eventually a trial prosthesis was fitted on 13 December 2013. He has had several prostheses or, more accurately, several replacement sockets and one further prosthesis since.[56] A significant problem has been recurrent breakdowns of the skin of the stump. Those breakdowns are becoming less frequent but much depends on how active he is. As well there are recurring problems of stump inflammation and soreness as well as some phantom pains.

[81] Mr Brown eventually returned to work in August 2014. He has made commendable efforts to maintain employment. I will detail those efforts later.

[82] Dr Morgan, orthopaedic surgeon, assessed the permanent impairment within his specialty as a 31% whole Person Impairment with the breakdown as follows:

(a) Left below knee amputation - 28%;
(b) Left knee joint chondromalacia patellae syndrome - 2%;
(c) Left wrist joint - 1%;
(d) Scarring - 2%.

[83] Dr Lockwood, a consultant psychiatrist, diagnosed a chronic adjustment disorder with mixed anxiety and depressed mood of mild to moderate severity. She assessed a 6% whole person impairment based on a PIRS assessment. It is likely that Mr Brown will need treatment for this condition from time to time.

The Assessment

[84] It is necessary to identify the dominant injury as defined – obviously the below the knee amputation. Item 132 of Schedule 4 of the Regulations applies. The range of ISVs is 31 to 45. The plaintiff contends for an ISV of 60, the second defendant for an ISV of 40.

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[55] See Ex 8.
[56] See Ex 9.

[85] The commentary for Item 132 is:

> An ISV at or near the bottom of the range will be appropriate in a straightforward case of a below-knee amputation with no complications.
> An ISV at or near the top of the range will be appropriate if there is an amputation close to the knee joint, leaving little or no stump for use with a prosthesis.

[86] The submission that an ISV of 60 applies is an ambitious one. Mr Brown has about 20cm of stump below the knee and can ably use a prosthesis well enough to hold down manual work. The commentary suggests that he falls well short of the top of the range for Item 132. By way of comparison an ISV of 60 is applicable to Item 3.1 – complete or nearly complete paralysis. While there are multiple injuries and it is necessary to give full effect to them in the assessment Mr Brown is nowhere near that level.

[87] I do not think it right to say that there are no relevant complications here so justifying an assessment at the bottom of the range. It might be said that Mr Brown's complaints are typical of a below knee amputee and so already catered for in the ISV of 31, at the bottom of the range. However he is young, he will bear his disabilities for perhaps 60 or more years, he is a manual worker by and large, and because of that he will have more than the usual skin eruptions and breakdowns. This will or may cause him to become more depressed and anxious. He will need treatment of various modalities from time to time. All this impacts on his quality of life.

[88] I assess an ISV of 38 under Item 132.

[89] The impairments, apart from the below knee amputation, are relatively modest. I assess the relevant ISVs as follows:

(a) Left knee - Item 136 - range of ISVs: 0-10. The commentary on Item 136 states that: "[a]n ISV at or near the top of the range will also be appropriate if there is whole person impairment for the injury of 9%". Here it is 2%. The injury and impairment here falls at the bottom of the range. I asses an ISV of 3;

(b) Left wrist joint - Item 108 - range of ISVs: 0-5. Mr Brown reports minor discomfort with lifting heaving objects. I assess an ISV of 1;

(c) The scarring is not only due to the below knee amputation (for which account is taken in setting the ISV range under Item 132) but also due to the skin grafting attempted earlier. It is between moderate (Item 155.3) and serious (Item 155.2). I assess an ISV of 8.

(d) The psychiatric injury – Item 12 – moderate mental disorder – range of ISVs: 2-10. The example given in the item is: "[a] mental disorder with a PIRS rating between 4% and 10%. Dr Lockwood assessed a PIRS rating of 6%. The condition in s 6(3) of Schedule 3 of the Regulations is satisfied. As well I think that injury goes beyond an "adverse psychological reaction to a physical injury" which is to be ignored: see s 5(2) of Schedule 3 of the Regulations. Such a reaction can be contrasted with a "mental disorder" dealt with in s 6. I note

> that *AAI Limited & Anor v Marinkovic*[57] is authority for the proposition that even if it is not permissible to treat the psychiatric injury as a separate injury with a separate and assessable ISV it may, and indeed must, be brought into account in the overall assessment. I assess an ISV of 5.

[90] The "maximum dominant ISV" as defined in Schedule 3 of the Regulations is 45. In my view that maximum dominant ISV adequately reflects the adverse impact of all the injuries. It is not appropriate or necessary to apply an uplift. I assess an ISV of 45.

[91] I assess general damages at $103,600 pursuant to s 62 of the CLA and Table 4 Item 9 of Schedule 7 of the *Regulations*.

Past Economic Loss

[92] The plaintiff contends for an amount of $65,000. The second defendant concedes $44,917.75. The difference between the parties turns on the plaintiff's claim that his claim ought not to be restricted to his immediate pre-accident average earnings – he asserts that he had the potential to earn greater sums. He is a qualified sandblaster and spray painter with ambitions to work in the mining industry. Prior to his accident he had secured various tickets to better qualify him for such employment.[58]

[93] The opinions of the occupational therapists are consistent at least in the view that Mr Brown is unsuited to working in his trade, and unsuited to prolonged or repetitive crouching, kneeling or working in confined or awkward spaces. His safety is compromised in working at heights. Heavy labouring is excluded. He has a grade 10 education. It is unlikely that he could complete tertiary level studies successfully.

[94] After the accident Mr Brown was off work until 14 August 2014. He then gained employment at Caneland Engineering in his trade and suffered no apparent loss of income. He lost that employment along with others because of a downturn in work in September 2014. He was only out of work for two weeks before obtaining employment at the East End Hotel in the bottle shop. His employment ended there due to a disagreement with management. It is not shown that his disability was a causal factor. He then obtained employment at Enmach Industries as a labourer on 12 October 2015. He is paid above the award for his work there although he works extensive overtime to achieve that. The work is reasonably demanding physical work. At times he has suffered from problems with his stump and needed time off. Better matching of the prosthesis with the stump has resulted in fewer problems and less time off.[59] Mr Brown's income in the current financial year is at an average of around $1,006 net per week[60] albeit that his ordinary wage before overtime is only $840 gross per week. The

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[57] [2017] QCA 54.
[58] See Ex 2.
[59] T2-23/6.
[60] Ex 11.

ABS statistics show average earnings for a sandblaster of his age at about that level - $1,008.[61]

[95] Thus while it might be said that in the immediate post-accident period Mr Brown's loss can be calculated by reference to his immediate pre-accident earnings it is difficult to take that approach once he lost his employment in September 2014 through economic factors. Section 55 of the *CLA* applies in these circumstances. It relevantly provides:

> **"When earnings cannot be precisely calculated**
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
> (2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award."

[96] Senior counsel for the plaintiff referred me to my own decision in *Nucifora & Another v AAI Limited*[62] where I examined the relevant principles applicable under s 55 in the context of claim for future economic loss. So far as I am aware my approach has not been disapproved. I there said:

> "It may be doubted that the provision has affected any change to the position at common law. The effect of the section has been considered in *Ballesteros v Chidlow*[63]*, Reardon-Smith v Allianz Australia Insurance Ltd*[64] and *Allianz Australia Insurance Ltd v McCarthy*.[65] The usual principles continue to apply.
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> At least since *Graham v Baker*[66] it has been well established that a plaintiff must demonstrate that his or her earning capacity has been diminished by the accident-caused injury and that that diminution "is or may be productive of financial loss". Those requirements plainly continue: *McCarthy*.[67] In determining the "may be" issue relevant in this case the principles explained in *Malec v JC Hutton Pty Ltd*[68] apply.[69] There is the "double exercise in the art of prophesying" involved – what the future would have been if the injury had not occurred and what it is now likely

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[61] See Ex 34 - $1,253.40 gross – Item 7112.
[62] [2013] QSC 338 at [29] –[30].
[63] [2006] QCA 323.
[64] [2007] QCA 211.
[65] [2012] QCA 312.
[66] (1961) 106 CLR 340 and see *Medlin v State Government Insurance Commission* (1995) 182 CLR 1.
[67] At [48] per White JA – although in the minority in the result nothing said by the majority questioned this approach.
[68] (1990) 169 CLR 638.
[69] As was done by the President and Gotterson JA in *McCarthy*.

> to be.[70] As usual the fact finder must state the factual findings underpinning the award and display the reasoning behind the award sufficiently at least for the parties, and the Court of Appeal if called on, to comprehend the result, although the methodology need not include an explicit statement of a formula: *Reardon-Smith.*[71] An "experienced guess" has been held to be a sufficient response to the facts presented: *Ballesteros*.[72]"

[97] In the circumstances here it is not possible to come up with a specific formula. It will be necessary for me to resort to an "experienced guess".

[98] The pre-conditions set out in subsections 55(1) and (2) are not in issue. As to subsection 55(3) - there is no doubt that after some initial difficulties coming to terms with his disability Mr Brown has shown commendable determination and stoicism. That drive would have stood him in good stead, and will stand him in good stead, in seeking and obtaining employment. It is not in contest that Mr Brown has more limited employment opportunities in his injured state than he had uninjured. The occupational therapists opinions plainly show that much. The second defendant's approach adopts the average pre-accident earnings and applies that figure over the near four years that have elapsed since the subject accident and then deducts monies actually earned. So no allowance is made for inflation or for Mr Brown's evident work ethic and drive. It seems to me that a modest increase is required to account for the probability that he would have done better than his average as a 19 year old. Obviously continued full time employment was not a certainty. In the absence of any evidence of employment actually available at superior wage rates the increase can only be modest.

[99] I allow $55,000 for this head of loss.

Future Economic Loss

[100] Again s 55 of the CLA applies.

[101] The second defendant submits that an award of $450,000 is appropriate. The plaintiff argues for an award of $750,000. Both reflect global assessments.

[102] Given the second defendant's concession that a substantial award is called for I see no need to explore the evidence closely. The occupational therapists differed somewhat in their opinions. I considered that Mr Cameron Fraser probably better reflected the realities of Mr Brown's disabilities and prospects but on any view he has suffered a significant loss. They were agreed that it is in his interests to pursue more sedentary employment. Dr Morgan agreed too with that opinion.

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[70] *Paul v Rendell* (1981) 55 ALJR 371 per Lord Diplock, in delivering the judgment of the Privy Council at 372.

[71] At [37] per Keane JA.

[72] At [54] per Fryberg J.

[103] The period for which compensation should be provided is in the order of 44 years – to age 67 say. The 5% discount tables must be applied in considering any future loss.[73]

[104] While the submission made by senior counsel for the plaintiff urges a finding of a 50% reduction in earning capacity the award contended for effectively assumes a loss of nearly $800 per week over that entire period of 44 years. Given that Mr Brown is earning around about the average for a sandblaster and spray painter in his present employment it is impossible to accept that he is presently suffering a loss of $800 per week compared to his prospective earnings if uninjured. The submission necessarily assumes that the plaintiff would have achieved earnings at a significantly higher level than the average and for much of his earning life had he not been injured or alternatively will now retire much earlier because of his accident caused problems. There is simply no evidence to justify the first proposition and the second is necessarily speculative although an early retirement cannot be excluded. Mr Brown certainly had ambitions but how realistic they were in the context of today's labour market (or any likely future labour market) was unexplored. On the other hand prior to the accident he was fit, he had qualified himself by undertaking extra courses, and he was not tied down and so able to travel to obtain better paid work. He could have earned greater sums in other employment such as construction labourer. He has the drive that I mentioned earlier.

[105] The second defendant argues that Mr Brown is earning more or less at a level that he would have been if uninjured and that he will more than likely maintain that level of employment for another 10 years before being significantly affected by his various disabilities mainly through wear and tear on his stump. Thereafter there should be assumed to be a 40% reduction in capacity. A mathematical calculation based on those assumptions results in an award of $200,000 which the second defendant concedes underestimates the impact of these very serious injuries. The exercise is useful in demonstrating the dramatic effect if the loss is delayed by any significant period.

[106] As best I can see the 10 year period chosen is completely arbitrary. There is nothing inherently wrong with that – the whole assessment must be arbitrary to a point. However, how long Mr Brown lasts in physically demanding employment depends on Mr Brown's stoicism and perhaps the good nature of his employer if he continues to need a week off from time to time as has happened in the past. But the point made is a good one – at present Mr Brown is not losing any significant amount and may not for some time. And it is true that it is quite unlikely that he will maintain his present level of activity indefinitely.

[107] Obviously I must assess the prospective loss on very imprecise materials.

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[73] Section 57(2) CLA.

[108] I assume a present day sustainable earning capacity if uninjured of $1008 net per week ie the average mentioned in the ABS statistics. Eventually Mr Brown will probably be driven back to sedentary employment and a much more modest sustainable income say of around $500 per week. He may retire earlier than he otherwise would have simply through weariness at coping with the problems his stump will give him. He is more vulnerable to losing employment because he will probably need time off to cope with eruptions and breakdowns of the stump. If uninjured he may have achieved his ambition of getting work in the mines and of running his own business. He might then have achieved a greater income than average wages for his trade. It is unlikely that he will achieve those goals now, even though, as Mr Fraser said, amputees have been known to obtain more senior mining positions.

[109] Doing the best I can I assess the future loss at $500,000.

Gratuitous Care

[110] Section 59 of the CLA is relevant. It provides:

> **"59 Damages for gratuitous services provided to an injured person**
> (1) Damages for gratuitous services provided to an injured person are not to be awarded unless –
> (a) the services are necessary; and
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
> (c) the services are provided, or are to be provided –
> (i) for at least 6 hours per week; and
> (ii) for at least 6 months.
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
> (3) In assessing damages for gratuitous services, a court must take into account –
> (a) any offsetting benefit the service provider obtains through providing the services; and
> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[111] The Court of Appeal in *Shaw v Menzies & Anor* [2011] QCA 197 said of this provision:

> "The *Civil Liability Act* was introduced in 2003. The requirements for any award of damages for gratuitous services provided to an injured person thereafter are clear:
> the services must be necessary;
> the need must arise solely out of the injuries;

> the services were provided for at least six hours a week for at least six months after the injury.
>
> Accordingly, a plaintiff who includes a claim for damages for gratuitous care must adduce sufficient evidence to meet each of those thresholds. It has been a long-standing practice that solicitors advise clients making a claim for damages for personal injury, particularly where the claim includes a component for gratuitous care, to keep a weekly diary recording tasks and time to perform them by family members. As this case has demonstrated, failure to have some system, because of the requirements of s 59, may mean that a deserving plaintiff may not cross those thresholds."[74]

[112] The evidence here was imprecise and at times conflicting. No weekly diary was kept despite advice along those lines apparently being given. Little regard was given in evidence in chief to dissecting what care and assistance was accident caused and what merely reflected what had pre-dated the accident, albeit rendered necessary now because of Mr Brown's disabilities.

[113] The second defendant contended that the plaintiff failed at the threshold. It was submitted that the pre-condition set out in s 59(1)(c) was not satisfied once account was taken of two factors:

(a) the time taken to provide the sort of care that the plaintiff enjoyed prior to the accident (the s 59(2) deduction); and

(b) the time taken for those services provided not to assist the plaintiff but rather to replace services that he had provided to others (the *CSR v Eddy*[75] type care).

[114] Concessions were made which narrow the debate. The second defendant's concessions are summarised in the following table. The effect of those concessions is that it is accepted that at least 6 hours of care was provided for five months and one week ending at the start of February 2014. In examining the care provided before July 2014 it is relevant to note the various changes in the plaintiff's circumstances that impact on the question:

15 June 2013	Injured and hospitalised – s 59(3)(b) - no care
23 August 2013	Discharged – not disputed that he then received an "extensive amount of care" for about 3 weeks[76]
17 September 2013	Re-admitted to RBH - s 59(3)(b) - no care
23 September 2013	Discharged – agreed that he then received 10 hours care/week for 2 weeks from aunt and uncle

[74] At [73] - citations omitted.
[75] (2005) 226 CLR 1.
[76] Para 5.27 of Ex 40.

5 October 2013	Into his parents' care
13 December 2013	First prosthesis fitted – plaintiff said that "mum's care" reduced to around 4 hours per week[77] presumably over some time but unspecified
January 2014	Plaintiff recommences driving a vehicle
February 2014	Ceased to use crutches in February. The plaintiff commenced work at the East End Hotel. The second defendant concedes that in the 4 month period to this date, ie from 5 October 2013, it is "likely that the plaintiff received care at more than 6 hours per week"[78]
11 March 2014	Second trial prosthesis fitted.[79] Plaintiff worked in the bottle shop for about 4 to 6 weeks.
15 July 2014	Replacement socket fitted[80]
March 2016	Care reduces over the period from February 2014. The plaintiff leaves his parent's home in March 2016 and moves in with his girlfriend. By that time the care provided had reduced to 4 hours per week[81]

[115] Counsel for the plaintiff submitted that the care provided could be summarised as follows:

> "On that basis his past care needs can be seen as totalling some 990 hours, comprised in the following periods:
>
> (a) Initial discharge RBWH until 18 September 2013 – 4 weeks at 18 hours per week (72 hours);
> (b) Discharge to care of Uncle and Aunt – 2 weeks at 10 hours per week (20 hours);
> (c) Discharge home from 5 October 2013 to February 2014 – 9 weeks at 12 hours per week (108 hours);
> (d) From February 2014 until July 2014 – 22 weeks at 8 hours per week (176 hours);

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[77] T1-43/28.
[78] Para 5.31 of Ex 40.
[79] I take that from counsel's submissions at para 138 of Ex 41 – I cannot see such a reference in Ex 9.
[80] See Ex 9. The plaintiff's submissions describe this as the "first fully functional prosthesis" – see para 138 of Ex 41. I cannot see any evidence that a witness so described it.
[81] T2-77/42.

(e) Thereafter, until March 2016 – 82 weeks at 4 hours per week (328 hours); and
(f) Thereafter until present while living with partner – 52 weeks at 5.5 hours per week (286 hours)."[82]

[116] That analysis shows that the necessary 6 hours/6 months pre-condition cannot be satisfied, even taking the claim at its highest, by reference to the care provided after July 2014.

[117] Given the concessions made by each side the real debate is whether the plaintiff can show that for a three week period – consecutive or not - between February 2014 and July 2014 he received at least 6 hours care per week, care that satisfies the conditions laid down in s 59. If such care was received it must have been care provided to him by his parents. His girlfriend, Jess Thomas, was not yet on the scene providing assistance. The plaintiff argues for a finding of a provision of services of 22 hours per week but I cannot see any evidence to justify that claim. The second defendant says that the evidence is that no more than 4 hours per week was provided. There is some support for that submission.

[118] The plaintiff's evidence relating to this period is as follows:

> "And wh – when you started using the prosthetic legs, did the amount of help that mum and dad were giving you – mum, particularly around the house, with everything - - -?---Yeah.
>
> - - - reduce?---Yeah, it reduced a bit, I'd say. As soon as I could try and, like, to get around the house by myself, to try and help them out, because they'd been carrying me for months, you know, so I try to help my parents out around the house, even just small journeys, but it would only be for a short period of time, because otherwise my leg would ache that much that I couldn't wear it for a long time again, so - - -
>
> Okay. Is there any activity that your dad had done that you used to do when – before the accident?---Well, my father and me used to just – just mow the lawn together, or whipper snip, do – cutting the gardens outside. It was just sort of a son – a father/son thing that we'd do together, even though it was a chore, but it was still something that we enjoyed to do together, even - - -
>
> Yeah, so you didn't – you haven't done that since?---No, not – not – I'd sometimes whipper snip, or, like, just recently, I'd sometimes whipper snip with him, but not – not straight afterwards.
>
> Righto?---I – I haven't done it for ages, so - - -

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[82] Ex 41 para 150.

> And what about things like you – that you've said that you're cleaning, cooking meals and things like that. Did that go from mum doing everything for you to reduced too?---Yeah, on my first prosthetic, I would sort of chip in and help with the vacuuming and try and wash up – just started off small, work the way up.
>
> **So do you recall what mum's care of you reduced to, after you got the first leg?---It was a lot less, but she, like, probably around four hours a week, it would be that she's giving me help, like, solid – solid help, sort of thing**."[83]

[119] Mrs Brown's evidence did not clarify matters. After establishing that the plaintiff was working three days a week at the East End Hotel bottle shop in February 2014 the questioning proceeded:

> "You see, by that time – and this is February '14 – Ashley was doing fairly well. He could pick up a carton of beer or many cartons of beer and move them, couldn't he? --- But he was only working three hours a day. Then he would come home and have to take his leg off because his stump would be sore.
>
> I suggest to you by that time of February '14, Ashely was fairly self-sufficient. He could do most things for himself, even that early? --- No. He was still in a – had fits of depression and all that sort of thing and I used to spend a lot of time just talking to him about how he felt and, you know, like one time we were sitting outside and he said to me – he opened up to me and he said, "Mum, who's going to want me like this?"
>
> If I can take you back to February '14 when he was doing this work for CRS at the East End Hotel, I'm suggesting to you that he was, then, physically capable of doing the same sorts of domestic chores that he could prior to the motor vehicle accident. That is, he could cook a barbecue? --- He could, but he would have to sit down in between checking the meat and everything.
>
> And he could? --- Because different movements, different weather affected his limb.
>
> And he could keep his own room clean, couldn't he, when he was working at the? --- But I
>
> East End Hotel in February '14? --- Yes, he used to keep his own room clean, but I used to still vacuum for him because he found that hard.
>
> In February '14 when he was at this period of time, you mentioned earlier that occasionally your husband or Ashley pre-accident would assist with the mopping and the cleaning the toilet and bathroom? --- Yes.

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[83] T1-43/1-30 – my emphasis.

> Now, if I take you to February '14, this period I'm focusing upon, in that period, February '14, did you observe Ashley doing those tasks; that is, assisting with cleaning of the toilet or the bathroom or mopping? --- He possibly cleaned the bath when he was in there because we have a brush that just hangs up on the towel rack that he could've used. I mean, I don't really know, to tell you the truth."[84]

[120] Ms Hague, the occupational therapist who first assessed the plaintiff thought that he had a need for care amounting to 4 hours per week in October 2014,[85] consistently with the plaintiff's expressed view. This assessment takes no account of the s 59(2) point.

[121] Some emphasis was placed in the plaintiff's submissions on the fitting of a "fully functional prosthesis" with an assertion that this occurred in July 2014 with Mrs Brown describing this as a "milestone",[86] the inference being that it was not until this point that the plaintiff was largely self-sufficient. While Mrs Brown maintained the correct date was in May 2014, her reference to the "milestone" was clearly in response to a question about the fitting of the first prosthesis which plainly enough occurred on 13 December 2013. There was no reference by her to a "fully functional" prosthetic leg at all. Under cross examination she did contend for some increased activity when a second leg was fitted. She could not say when that was but accepted counsel's proposition that it occurred "before he went with the CRS to the East End Hotel to do the work trial"[87] which was in the February of 2014. I am more inclined to accept the accuracy of the timing when made in conjunction with an event such as starting work. However, where counsel obtained the date of the supply of the "second leg" from I cannot work out. Senior counsel for the plaintiff referred to an "intermediate prosthesis" as being mentioned in Exhibit 9 when examining the plaintiff and as supplied in mid-2014.[88] Exhibit 9 sets out the relevant dates of the supply of replacement sockets and prostheses but there is no reference there to any "intermediate prosthesis" at any time or second prosthesis or replacement socket in February 2014.

[122] The evidence is by no means clear. I assume that for Mr Brown to have coped with his duties at the bottle shop he had become much more adept with his prosthesis by February 2014. He was evidently working some 15 to 30 hours per week. I am conscious though that starting work could have thrown more of a burden on the parents – as Mrs Brown said he would come home tired and remove his prosthesis. These generalisations however don't assist greatly with the crucial issue.

[123] I have endeavoured to consider each category of care identified by the occupational therapists.

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[84] T2-85/34-86/22.
[85] Ex 20 p 16.
[86] T2-80/15.
[87] T2-80/43-4.
[88] T1-46/5-13.

[124] The ability to drive certainly relieved Mrs Brown of one significant burden. That occurred before February 2014.

[125] Mr Brown told Mr Fraser, the occupational therapist, that while he initially needed care and assistance in showering and dressing of about 15 to 20 minutes daily this ceased after about a month following discharge[89] ie long before February 2014. I appreciate that Ms Thomas reported that she did assist with transferring Mr Brown in the bathroom because of its configuration but it seems this was not a problem in the period with which I am concerned.

[126] While one could argue for a need for help with laundry, grocery shopping, indoor cleaning such as vacuuming, and outdoor tasks, at least in the early stages, the real problem is the s 59(2) point. Mrs Brown conceded that she performed about 90% of the housework before the accident[90] and did most of the cooking. Her son chipped in with a meal, usually a BBQ once a week, and helped with cleaning the toilet and bathroom areas and mopping the floors every couple of weeks.[91] He shared the outdoor duties with his father – which was more of a service that he provided to assist his parents. The contribution that his parents made to his care prior to the accident, albeit that there was no physical need for it then, must result in a reasonably significant discounting of any accident created need.

[127] I cannot see that there is any reliable evidence of an accident created need for Mr Brown to have his meals cooked by someone on his behalf, or have his laundry done, or groceries purchased, by the time he is capable of driving and attending a workplace but, even if there was, he is not entitled to bring such services into account unless and until they exceed what he was accustomed to receiving before the accident. That was not proved.

[128] Mr Fraser's analysis was that Mr Brown would need assistance with heavy indoor cleaning and heavy outdoor maintenance tasks, his need depending on the seasons and the state of his stump.[92] I appreciate that is an assessment of his capabilities now and not in February 2014 but once Mr Brown had a functional prosthesis and had adapted to it that is more or less his position. I would add to that a need for assistance with the cleaning of the wet areas, which Mr Brown, I think quite reasonably, said he cannot cope with because of the risk of slipping. Added to that is an increased need at times of skin eruption when Mr Brown is unable to tolerate wearing a prosthesis. His need would increase considerably then.[93] But I have no evidence of such problems in the relevant period.

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89 Ex 35 p21 para 77.
90 T2-84/13.
91 T2-83/45 et al.
92 See Ex 35 p 23 para 88.
93 See Ex 35 p 23 para 89.

[129] The question then is whether there is any evidence that the performance of the tasks I have identified took six hours per week in the relevant period? Mr Brown's direct evidence was that about four hours care was provided. That was the view of an occupational therapist, albeit three to eight months after the period with which I am concerned. I cannot see any basis to be satisfied that the care in fact provided was 50% again, let alone after discounting for the two factors the legislation and authority require must be brought into account. That being so no allowance is permitted.

[130] I note that I proceed on the basis that the legislation requires that I consider what services have actually been supplied, not on the basis of the services that experts might say that the plaintiff might reasonably need even though the services were not in fact supplied. That seems to me to follow from the words in s 59(1)(c) that damages are not to be awarded unless "the services are provided, or are to be provided". The question arose in *AAI Limited v McQuitty*[94] as to the correct approach but was left unresolved.[95] In any case I am not persuaded that there is reliable opinion here that the plaintiff needed services in excess of those supplied so the question does not arise.

Summary

[131] The remaining heads of damage are agreed. In summary I assess the damages as follows:

Pain, suffering and loss of amenities of life	$103,600.00
Past economic loss	$55,000.00
Interest on past economic loss[96]	$2,187.65
Loss of Superannuation Benefits (past) @ 9.25%	$5,087.50
Future loss of earning capacity	$500,000.00
Loss of Superannuation Benefits (future) @ 11.33%	$56,650.00
Past and future gratuitous services	$0.00
Miscellaneous future expenses	$141,071.33
Special damages	$28,250.00
Interest on special damages	$0.00
Total Damages	**$891,846.48**

[94] [2016] QCA 326.
[95] At [27] per Dalton J.
[96] ($55,000 - $11,020) x 1.33% x 3.74 yrs.

Orders

[132] There will be judgment for the second defendant.

[133] I will hear from counsel as to costs.