DISTRICT COURT OF QUEENSLAND

CITATION:	*Swainson v Carruthers & Anor* [2010] QDC 543
PARTIES:	**GLENN SWAINSON** (Plaintiff) **V** **SCOTT CARRUTHERS** (First defendant) and **ALLIANZ AUSTRALIA INSURANCE LIMITED** **ACN 094 802 525** (Second defendant)
FILE NO/S:	No D199 of 09
PROCEEDING:	Trial
ORIGINATING COURT:	District Court Southport
DELIVERED ON:	5 October 2010
DELIVERED AT:	District Court Southport
HEARING DATE:	3 March – 5 March 2010; 16 April 2010.
JUDGE:	McGinness DCJ
ORDER:	**Judgment for the plaintiff for $160,103.34**
CATCHWORDS:	NEGLIGENCE – PERSONAL INJURIES - MOTOR VEHICLE ACCIDENT – where the plaintiff was walking and claims he was outside the fog line – where the first defendant was driving and claims he hit the plaintiff who was standing in his lane – whether the first defendant's negligence caused the injuries of the plaintiff – whether contributory negligence DAMAGES – PERSONAL INJURIES - MEASURE OF DAMAGES – where damages assessed under the *Civil Liability Act* 2003 (Qld) *Anikin v Sierra* [2004] HCA 64 *Derrick v Cheung* (2001) 181 ALJR 301 *Evans v Lindsay* [2006] NSWCA 354 *Hawthorn v Hillcoat* [2008] NSWCA 340 *Manley v Alexander* (2005) 80 ALJR 413 *Pennington v Norris* [1956] 96 CLR 10 *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59

ALJR 529
South Tweed Heads Rugby League Club v Coles 55 NSWLR 113
Teubner v Humble (1962-3) 108 CLR 491
Vale v Eggins (2006) Aust Torts Reports 81-869

Civil Liability Act 2003 (Qld), s47, s51, s61(a), schedule 2
Civil Liability Regulation 2003

COUNSEL: R Trotter, for the plaintiff

P Feely, for the defendants

A Luchich, for the defendants

SOLICITORS: Shine Lawyers, for the plaintiff

McInnes Wilson Lawyers, for the defendants

Introduction

[1] On Springbrook Road, Mudgeeraba at approximately 9:30pm on 5 December 2006, the first defendant, driving a 1985 Toyota Cressida sedan, collided with the plaintiff who was on foot. The plaintiff claims damages for personal injury resulting from the alleged negligence of the first defendant.

LIABILITY

What happened

[2] On 5 December 2006 the plaintiff rode his bike to a property, where he did gardening work from 7am until just before 12pm.[1] He then rode his bike to a hotel, Wallaby Bobs.[2] He said he was playing pool all afternoon and would have consumed about eight full strength schooners of beer.[3] At approximately 9pm he purchased 3 bottles of beer which he placed in his backpack, left his bike locked up behind the hotel and started walking 6km to his home south along Springbrook Road.[4] He was wearing light blue thongs, floral board shorts with blue and white flowers on them, a black t-shirt and a sky blue backpack.[5]

[3] The plaintiff says it was a clear night, the moon was up, the lighting was good and he could see the fog lines,[6] and he had no trouble walking from the hotel to the accident scene.[7] He was very familiar with the road because he had done the same walk approximately 20-30 times before.[8] He did concede that the accident occurred

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1 T1.15.1
2 T1.15.20
3 T1.16.7. See also T1.16.7
4 T1.16.5
5 T1.17.55; T1.18.12; That the backpack was light blue was supported by the evidence of Ms Siltenan: T1.95.42
6 T1.18.22
7 T1.18.20
8 T1.66.25

on one of the darker stretches of Springbrook Road.[9] He also acknowledged that Springbrook Road is, at times, a busy stretch of road.[10]

[4] The plaintiff had walked roughly two kilometres up to the Armco railing.[11] He was aware that there was a dedicated concrete footpath on the other side of the road, but he said he was trying to hitchhike and cars wouldn't see him on the footpath.[12] There was a streetlight 70 metres before the plaintiff at the point of impact and a second streetlight 30 metres after. [13]

[5] He said his last memory was standing at the beginning of the second panel of Armco railing (within the first ten or twelve feet) and seeing headlights, coming from behind, lighting up the trees in front of him.[14] He remembers looking down to make sure he was off the road and outside the fog line.[15] He put out his hand to hitchhike and started to turn around to face the traffic. That is the last thing he remembers.[16]

[6] He says he would have been standing outside the fog line because when he heard the car approaching he said he was walking to the left of the fog line, about three or four inches to the left, and he was standing in that position when he was struck by the first defendant.[17] He says he would not have taken a step out as he turned around because he knew a car was coming.[18]

[7] The first defendant, a truck driver by occupation, said he was on his way to visit a friend who lived a couple of kilometres from the accident site.[19] He was driving his car, a 1985 model Toyota Cressida sedan. It was in good working condition. His windscreen was not dirty to the extent it obstructed his view.[20] He denied having consumed any alcohol or medication, or feeling fatigued that night.[21] He was very familiar with Springbrook Road and the surrounds because he has lived in the area.[22] He said it was overcast and the lighting on the corner where the accident took place was very poor. His lights were on low beam.[23]

[8] The first defendant said he was coasting into the corner at approximately 50km/hr when he registered in his headlights a figure standing on the left side of the road to the right of the Armco railing.[24] He didn't see the plaintiff until his car was under the shade of the tree seen in Photo 9, Exhibit 2.[25] He said the plaintiff must have been on or slightly to the left of the fog line when he first saw him. He thought the

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9 T1.67.20
10 T1.67.30
11 T1.19.38
12 T1.66-67, 50-10
13 Exhibit 2, photographs 5 & 14
14 T1.19.1
15 T1.19.10
16 T1.19.5
17 T1.84.1-20
18 T1.84.40-60
19 T2.46.15
20 Exhibit 23
21 T2.46.30-40
22 T2.46.35
23 T2.46.25
24 T2.50.50; T2.49.50
25 T2.51.50-52.10

plaintiff was waiting for him to pass so he could cross the road,[26] but then he took a step into his lane and into the path of his vehicle.[27] The plaintiff was about 15 metres ahead when he saw him and he had no chance to brake.[28] He denied the skid marks seen in Exhibit 21 were caused by his car.[29] He said he couldn't swerve because he saw oncoming headlights in his peripheral vision and he didn't want to cause a head on collision.[30]

[9] The first defendant was shown Photographs 8, 9, 10, 11 and 12 of Exhibit 2, and it was put to him that he should have seen the plaintiff from these points on the road.[31] He denied seeing the plaintiff from this distance because his headlights did not reach that far, because it was dark and because of the plaintiff's dark clothing.[32]

[10] He pulled up further down the road and called the ambulance and police immediately. He went to check on the plaintiff's condition.[33] He said that the plaintiff was wearing a black shirt, blue shorts, black cap and had a black backpack with him.[34] He said the plaintiff was semi conscious when he got to him. One of the first things he noticed was the strong smell of alcohol coming from him.[35] He said he could smell it from several metres away.

[11] The plaintiff was taken by ambulance to the Gold Coast Hospital where he was seen by a doctor who thought he was quite intoxicated. The ambulance paramedics also identified the plaintiff as intoxicated when they saw him. There was no evidence of a history taken from the plaintiff.

[12] On 13 February 2007 the plaintiff, while still in hospital and on medication, was interviewed by a solicitor over the phone. The solicitor gave evidence of the interview, and his notes of the interview were tendered.[36] At that time he spoke to the solicitor, the plaintiff had little recollection of how much alcohol he had consumed,[37] and he could only recall the road being lit up and hearing a car before he woke up in the hospital. One thing he apparently said to the solicitor, about drinking with the person for whom he was doing the gardening that day before he went to the pub, could not have been true as that person was in fact, overseas in Dubai on the day of the accident.[38]

[13] At trial, the plaintiff conceded his memory of how much he drank that day was partly memory and partly reconstructed from his memory that he was drinking slowly whilst playing pool that day and from how much money he had left over.[39]

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26 T1.60.30
27 T2.52.30-50
28 T2.53.5
29 Exhibit 21; T2.65.1-10. The investigating police officer formed the view the skid marks were not related to this accident: T3.14.25
30 T2.54.20-35
31 These photos were taken between 60-80 metres north of the point of impact representing the view of the first defendant as he approached the point of impact. The green wheelie bin in the photographs represents the approximate position of the plaintiff prior to impact
32 T2,83.20-60
33 T2.55.10
34 T2.55.20
35 T.2.55.30
36 Exhibit 27
37 He could say he had spent $44 on beer and one packet of cigarettes: Exhibit 27
38 T1.71
39 T1.71.30-50

Issues in dispute

[14] The first significant factual issue in dispute is whether the plaintiff stepped onto the road in front of the first defendant's vehicle and, if so, at what point in time. The plaintiff maintained at trial he did not take a step onto the roadway. I have grave doubts about his reliability and credibility on this issue for a number of reasons.

[15] First, the plaintiff displayed a very poor memory of how the accident occurred when he spoke to various professionals including Mr Munro, solicitor, 2 months after the accident. The information the plaintiff gave to Mr Munro was inconsistent on some issues with the version he gave in oral evidence. When these inconsistencies were put to him, he either denied or did not recall giving Mr Munro the inconsistent information. The plaintiff, conveniently in my view, remembered giving Mr Munro information consistent with his oral evidence.[40]

[16] Dr Cameron, Consultant Neurologist gave evidence that it was possible the plaintiff may have suffered retrograde amnesia for some months after the accident. He said it was possible the plaintiff's memory could have improved over time.

[17] Yet even 17 months after the accident the plaintiff had little memory of the accident when he spoke to Mr Zietek, occupational therapist[41] and Dr Gillett, orthopaedic specialist[42]. This is totally inconsistent with the plaintiff's unconvincing attempt at trial to maintain he had a detailed and accurate memory of everything that occurred on the day of the accident.

[18] Second, the plaintiff gave evasive and inconsistent answers when questioned about his prior drug, alcohol, medical, employment and criminal histories. The plaintiff tried to minimise his history of alcohol and drug abuse. He denied the truthfulness and accuracy of numerous references to his drug and alcohol use recorded by hospital medical staff and detailed in other medical records.[43] At one stage the plaintiff admitted to lying in a written application he made to health authorities in order to be accepted on a methadone programme.[44] During cross-examination he justified his dishonesty by saying his doctor, Dr Watt, had told him to lie. Dr Watt gave evidence that the plaintiff's assertions were untrue. I prefer Dr Watt's evidence and the evidence of the plaintiff's documented drug and alcohol history to the plaintiff's evidence. I conclude that the plaintiff tailored his evidence either consciously or subconsciously to portray himself in a favourable light.

[19] Third, the plaintiff admitted to partial reconstruction of the events the day of the accident.[45] Dr Cameron said it is common for a person's recovered memory of an event to be contaminated by what others suggest occurred. He said it is also common for a person with retrograde amnesia to reconstruct an event either subconsciously, for example, when revisiting the site of the accident, or consciously, for example, in order to gain a benefit[46].

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40 T1.70-79
41 Exhibit 9; p 1, [1.2]
42 Exhibit 8; the plaintiff told Dr Gillett he was walking his bike along the road at the time of the accident which is incorrect
43 Exhibits 12 and 13
44 Exhibit 12, pages 15-24
45 T1.68.20-35
46 T.2.107

[20] I consider the plaintiff's evidence of what occurred just prior to the collision is based on conscious or subconscious reconstruction rather than actual memory. I accept some aspects of the plaintiff's evidence where it is supported by, or is consistent with other evidence.

[21] I do not regard the first defendant as a particularly reliable witness; however I think he is more reliable than the plaintiff.

[22] The first defendant gave evidence the plaintiff stepped onto the road with his right leg. This is inconsistent with the first defendant's pleadings which allege the plaintiff "jumped" or "stumbled" onto the road. Mr Trotter submits this is a material inconsistency. He submits the first defendant's evidence that the plaintiff stepped onto the road should not be accepted.

[23] The first defendant provided a statement to a loss assessor on 22 September 2007, approximately 18 months before the defence pleadings were filed. The statement was tendered without objection.[47] Relevantly, the first defendant said:

> "20. This section of road is an S bend and I would have been maintaining my speed of 50-55km/h around these bends. I was not distracted in any way prior to the accident.
> 21. I had travelled around the left hand bend in the road, and the road dipped and continued in a right hand bend. As I was at about the apex of the right hand bend I saw a person on the left hand side of the road. **I saw this person take a step with his right leg onto the road and into the path of my car.** The front passenger side of my car hit his leg and he was thrown up. His head then hit the passenger side of the windscreen and the windscreen smashed.
> 22. I did not have time to brake, as I didn't see the person until he actually stepped in front of the car." (**my emphasis**)

[24] The version provided by the first defendant in this statement is consistent with his evidence in court that the plaintiff took one step onto the road prior to the collision. I am satisfied this is the more probable version of what occurred.

[25] The first defendant was, however, somewhat vague, inconsistent and unconvincing in his evidence concerning other relevant issues including:

- The moment when he first saw the plaintiff;
- The distance of the approaching car; and
- The plaintiff's clothing.

[26] In his statement to the loss assessor the first defendant stated he did not have time to brake because he didn't see the plaintiff until he actually stepped in front of the car.[48] At trial the first defendant's evidence changed. He said he saw the plaintiff at an earlier point in time before the plaintiff stepped out on the road and that the plaintiff appeared to be waiting for him to pass by in his car.[49] At one point the first defendant's evidence seemed to be that he would have swerved when he saw the plaintiff but for an approaching car.[50] On another occasion the first defendant said he registered someone being there as he came around the corner and he came into his lights but "I didn't have time to do anything once he moved".[51]

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47 Exhibit 22
48 Exhibit 22; [22]
49 T2.52.1-10; T2.60.15-40; T2.60.42-60; T2.61.30-40; see also [8] above
50 T2.54.20
51 T.2.57.20-30

[27] The first defendant's evidence changed regarding when he first saw the headlights of the approaching vehicle and how far away it was from the point of the collision. When Mr Feely opened the defence case, the first defendant's version was that "as he approached or got to the corner, he recalled seeing the headlights of an oncoming vehicle which was quite some distance down, further to the west".[52] The first defendant gave evidence that he saw a car approaching which was in the approximate position of a white car seen in photograph 15, still some distance away.[53] Later he said that the car travelling in the opposite direction passed them at the same time as the accident occurred.[54] He said he was concerned if he swerved he would have a head on collision.[55] At another stage the first defendant conceded he could not say how far away the approaching car was and he would just be guessing.[56]

[28] The first defendant appeared uncertain as to what colour pants the plaintiff wore. Initially he said he thought they were dark, however, he eventually agreed he couldn't say one way or the other whether the plaintiff was wearing floral board shorts.[57] That the plaintiff was wearing floral board shorts is confirmed by Mrs Siltenan and Ms Plum. The first defendant appeared uncertain when he was asked to describe the colour of the backpack, although he maintained it was either black or blue. Mrs Siltenan described the plaintiff's backpack as light blue[58]. The first defendant was the only witness who said the plaintiff wore a black cap that evening. Whether or not the plaintiff was wearing one is not of any significance because he has dark hair.

Findings

[29] Based on the evidence I accept as reliable I make the following findings:

- The road where the collision occurred was in an urban/residential setting. The roadway was marked with double centre lines with spacing to allow access to driveways. There was one lane going in each direction. "Fog lines" marked the boundary of each lane.
- The traffic lanes in the area of the collision were 3.3 metres in width.[59]
- There was a concrete footpath on the other side of the road. There was no footpath on the left side of the road.
- The plaintiff was walking slightly to the left of the fog line on the left hand side of the road.
- The plaintiff was affected by alcohol but not to the extent that he could not walk properly.
- As the first defendant approached, the plaintiff turned to his right and took one step onto the road of about half a metre in length.

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52 T2.26.5-10;
53 Exhibit 2
54 T2.61
55 T2.54.8-20
56 T2.52.1-10
57 T2.76.45
58 T1.95.35
59 Exhibit 5

- The first defendant did not see the plaintiff until he was approximately 15 metres from him.
- The plaintiff was wearing a black top, floral board shorts, and a pale blue backpack.
- The first defendant's lights were on low beam. There were two streetlights. One 70 metres before the point of impact and one streetlight 30 metres past where the plaintiff was hit.[60]
- The oncoming headlights of the approaching vehicle were in the first defendant's peripheral vision, therefore not in the vicinity of the point of collision. He was not dazzled by the approaching headlights.
- There was nothing to prevent the first defendant from seeing the plaintiff significantly earlier than he did.
- The first defendant should have seen the plaintiff significantly earlier than he did.
- The first defendant could have moved his vehicle to the right and past the plaintiff even after the plaintiff took one step, without crossing the double lines in the centre of the road.
- The first defendant did not do anything to react to the presence of the plaintiff, until the plaintiff took the step to the right by which time it was too late to do anything.
- If the first defendant had seen the plaintiff earlier and moved his vehicle to the right hand side of his lane and/or slowed down, then the collision would not have happened.

The Law

[30] The High Court in *Manley v Alexander* (2005) 80 ALJR 413 refers to useful statements of general principles concerning a driver's duties to take reasonable care and keep a proper lookout. The majority stated at [11]-[13]:

> "[11]No doubt the appellant's attention was drawn to the figure of Mr Turner standing at the side of the road and behaving in a way that suggested that he might act in some way that would require the appellant to respond. But recognising one possible source of danger does not mean that a driver can or must give exclusive attention to that danger. Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger. And much more often than not, that will require simultaneous attention to and consideration of, a number of different features of what is already, or may later come to be, ahead of the vehicle's path.
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> [12] It may readily be accepted that someone would be found lying on a roadway like Middleton Beach Road at 4.00am is properly to be described as remote. But the reasonable care that a driver must exercise when driving a vehicle on the road requires that the driver control the speed and direction of the vehicle in such a way that the driver may know what is happening in the vicinity of the vehicle in time to take reasonable steps to react to those events.
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> [13] When driving at night, the driver must take account of how well the road is illuminated; both by the vehicle's lights and by any street or other lighting. In the present case, there was a streetlight close to where the respondent lay on the

[60] I note in the agreed facts the streetlight distances appear to be around the wrong way when one looks at the photographs in Exhibit 2.

> road. Its light illuminated the area where the respondent was. Of course it is important to remember that the respondent was wearing dark clothing and lying down, generally parallel with the direction the appellant's truck was travelling. The contour of the road gave the appellant an uninterrupted view of the road ahead for a distance considerably greater than the light cast by his low beam headlights. The light cast by those headlights extended about 60 metres ahead of his vehicle. The respondent, even clad in dark clothing and lying parallel to the direction of travel, could have been seen as some form of obstruction to be avoided at least by the time the headlight beams illuminated where he was. But the appellant did not see him. For 2 to 3 seconds the appellant continued to look to the side of the road rather than to the roadway over which his vehicle would travel and he maintained his vehicle speed while veering towards the centre of the road."

[31] The plaintiff relied on a number of cases to support the submission the first defendant was negligent.

[32] In *Teubner v Humble* (1962-3) 108 CLR 491 the plaintiff was crossing the road to get into a taxi when he was hit by the defendant's vehicle at night time. There were street lights in the area and it was raining. The plaintiff was wearing a dark overcoat and hat pulled down against the weather. The driver did not see him until it was too late to avoid hitting him. The High Court allowed an appeal against a judgment of 50% contributory negligence and replaced it with a finding of 35% contributory negligence. Windeyer J at page 501 stated:

> "The case is not at all like one in which a pedestrian walks from among vehicles onto a busy street into the path of an oncoming car. In a case of that sort, if nothing more is known, the pedestrian may sometimes fail in an action, either because he has not proved his case or because, his own negligence was the sole cause, in a legal sense of the accident. But here, whatever the explanation of the respondent's failure to see the appellant in time to avoid hitting him – a blurred windscreen, driving too fast, in weather conditions that imposed a special need for caution, or mere inattention – it is, I think more probable than not that he was not keeping a proper lookout in the circumstances and that this negligence was a cause of the accident."

[33] In *Pennington v Norris* [1956] 96 CLR 10 the High Court considered issues of negligence and contributory negligence. The plaintiff was struck by a car whilst crossing the street with a friend. The accident occurred in the evening. It was not raining at the time but had been shortly before. It was a misty night. The plaintiff had been drinking but showed no signs of intoxication. He recalled nothing of the accident. The defendant was travelling with his left wheels close to the edge of the bitumen. He did not see the plaintiff until it was too late to avoid him. The High Court had regard to the conduct of the defendant and plaintiff respectively. They determined that the plaintiff's conduct was careless and unreasonable however the defendant's negligence by failing to keep a proper lookout was of a higher degree.

[34] Although *Pennington v Norris* has some age to it, the majority of the Court in *Anikin v Sierra* [2004] HCA 64 referred to *Pennington v Norris* with approval. In *Anikin v Sierra* the plaintiff was wearing dark clothing apart from a one inch white stripe on his shoes. He was struck by a bus whilst walking along the left side of the road. It was common ground the low beam headlights of the approaching bus afforded illumination of 50 to 60 metres. The High Court upheld the plaintiff's appeal and found the defendant was negligent. The following passages from the majority judgment are relevant:

> "[25]… If it were true that the bus driver only saw the appellant for 10 to 15 metres before impact, the inference drawn by the primary judge was that this was

> because the bus driver had failed to keep a proper lookout that would have taken full advantage of the illumination cast over 50 to 60 metres by the headlights and caused him to notice the appellant.
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> [44] …The bus did not swerve or brake. It did not sound its horn. Yet according to Mr Fatches, there was no impediment to its moving to the right. Having regard to the damage to the bus, and the injuries to the appellant's left upper extremities, the degree of movement required was but slight.
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> [46] This was not, therefore, a case like *Luxton v Vines* (1952) 85 CLR 352 where the possibilities were equally open and neither could be said to be the more likely. Nor was it a case like *Derrick v Cheung* (2000) 181 ALR 301 where the defendant came upon the infant victim emerging from two parked cars onto the road into the path of the defendant's vehicle, driving within the prescribed speed limit. Here there was a range of visibility available to the bus driver, a professional motorist, if he were keeping a proper lookout. Most importantly, there was an unimpeded capacity to move the vehicle to the right. Had that been done, even at a late stage, the serious injury to the appellant would have been avoided. True the appellant was obliged to keep a proper lookout for his own safety. However, the bus driver who was in charge of a powerful vehicle had obligations to exercise care for pedestrians in the position of the plaintiff."

[35] The defendants, by way of comparison with the present case, referred to a number of NSW decisions and the High Court decision of *Derrick v Cheung* (2001) 181 ALJR 301. In that case a pedestrian child emerged suddenly from between two parked cars onto the road, into the path of the driver. The Court upheld the defendant's appeal and determined he was not negligent. The majority of the court confirmed that "the test remains whether the plaintiff has proved that the defendant, who owed a duty of care, has not acted in accordance with reasonable care". *Derrick v Cheung* is clearly distinguishable. In that case the driver had no range of visibility prior to the child running onto the road from between cars.

[36] In *South Tweed Heads Rugby League Club v Coles* 55 NSWLR 113 the defendant was driving her vehicle along a road at night. She had her lights on low beam and was travelling at about 70 kilometres an hour in an 80 kilometre zone. The plaintiff was on the road when she was struck by the vehicle. She was wearing dark clothing. There was no street lighting and no houses in the area of the collision. The area was described as "pitch black". The pedestrian was "grossly intoxicated" with a blood alcohol concentration of .238%. It was impossible, on the evidence, to establish where the pedestrian was until just 20 metres before she was hit.[61] The collision occurred on an expressway where pedestrians would not be expected.

[37] The Court concluded the "pitch black" area, the black road, dark clothing and hair, the veiling effect of lights of the club behind her, all combined to set up an acceptable explanation, consistent with the defendant keeping a proper lookout and seeing the plaintiff at the last moment. The pedestrian did not give evidence to show that this explanation should not be accepted.[62]

[38] The pedestrian cases of *Derrick v Cheung* and *Coles* referred to above were decided prior to *Manley v Alexander*. They are both factually significantly different to the present case. Here the plaintiff was not wearing solely dark clothing, there was street lighting and houses in the area, and the speed limit was lower. The

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[61] Paragraphs 57-58 of the Judgment

[62] Paragraph 59 of Judgment

photographic evidence[63] reveals the clear and unimpeded view the first defendant should have had when approaching the area where the plaintiff was standing. The plaintiff was not grossly intoxicated and was clearly walking along the side of the road before he took the single step.

[39] The Court of Appeal in *Evans v Lindsay* [2006] NSWCA 354 considered issues of liability and contributory negligence. The plaintiff was walking along the middle of the road in an intoxicated condition. He was hit by the defendant at night and sustained severe brain injuries. The conditions were dark and wet. There were street lights illuminating the area. The defendant was driving within the speed limit. The Court confirmed the trial judge's finding that the defendant had acted negligently by failing to keep a proper look out.

[40] In *Vale v Eggins* (2006) Aust Torts Reports 81-869 the Court of Appeal considered issues of liability, contributory negligence and intoxication. On the night of the collision, the plaintiff had been stumbling back and forth across the lane in which the defendant was driving. The defendant first saw the plaintiff at a distance of 90 metres. The plaintiff then stumbled off the road, however, just moments before impact, the plaintiff stumbled back onto the road and he was struck by the defendant. The plaintiff's case at trial was that the defendant had sufficient time to stop or take other action so as to avoid colliding with him. The plaintiff claimed the defendant should have slowed down when he first saw the pedestrian, even when the pedestrian had moved off the roadway. The plaintiff's claim was dismissed at first instance. On appeal a majority of the Court overturned the decision and found the driver negligent. Beazley JA with whom McColl JA agreed, followed *Manley v Alexander*. He concluded it was incumbent upon the driver, having observed a danger on the roadway, to take such reasonable steps as were necessary to react to any danger. The time for him to do so was when the driver first saw the pedestrian at a distance of 90 metres.[64] Beazley JA stated:

> "[16] It was apparent at that point that the respondent needed to take care because the appellant was 'stumbling' when the respondent first saw him. The need to take care did not dissipate at the point where the plaintiff turned and commenced moving from lane 3. …It also ought to have been apparent to a driver exercising reasonable care that the appellant's actions were, in any event, so apparently irresponsible, requiring a driver to remain alert to the possibility that the person on the roadway might continue to engage in unpredictable behaviour.
>
> [17] In those circumstances it was incumbent upon the respondent, having observed a danger on the roadway, to take such reasonable steps as were necessary to react to the danger. The time for him to do that was when the respondent first saw the appellant. Whilst it is correct that the respondent took some action at that point, he needed to continue to drive in a manner that enabled him "*to take reasonable steps to react to [the] events*" that were occurring before him: *Manley v Alexander* at [12]. In my opinion, the respondent's decision to increase his speed again up to the speed limit when the appellant turned and commenced moving out of lane 3, was not only an error of judgment, it was negligent, as it meant that the respondent was not able to thereafter react to the presence of the appellant on the roadway.
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> [18] Had the respondent continued to slow down, a number of responses would have been open to him. In the first place, it was not disputed that had he continued to brake from the time that he first saw the appellant, he could have come to a complete stop well in advance of the position where the appellant was (Appeal transcript 20). His failure to stop so as to avoid the collision was, in my opinion,

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[63] Exhibit 2

[64] At [17]

> negligent. But in any event, by slowing the speed of his vehicle from the point where he first saw the appellant, even if he decided not to stop completely, the respondent could have responded so as to avoid a collision…
>
> [20] Reference was made during the course of the submissions of both parties to a number of decisions in which this Court had either upheld or reversed a finding of negligence. At the end of the day, it must be recognised that each case has to be considered on its own facts. I do not find it helpful in this case to review each of those decisions, as none has a direct bearing on the matter under consideration here. In my opinion, the statement of principle is that to be found in *Manley v Alexander* and I have concluded that her Honour erred in dissecting the circumstances in which the accident happened into a number of separate and independent sequences. In the circumstances, I consider that her Honour erred in finding that the respondent was not negligent."

[41] *Hawthorn v Hillcoat* [2008] NSWCA 340 was a decision where the Court of Appeal dismissed the plaintiff's appeal against a finding of no negligence. The plaintiff was struck by the defendant's vehicle as he walked along a road at night. The plaintiff had a blood alcohol concentration of .226%. He was walking near the centre line of the roadway. The street lights in the vicinity of where the collision occurred were not functioning. The pedestrian was struck when the driver came around a bend in the road. The court confirmed it was reasonable for the trial judge to find that the plaintiff would not have been visible to the defendant until he was 25-30 metres away.

[42] The relevant factual dissimilarities between that case and the present case include the non-functioning street lights near the point of impact, the likelihood of "disability glare" from an approaching car and the fact that the plaintiff was walking in the middle of the road outside the range of the headlights. The Court confirmed it was reasonable for the Trial Judge to conclude that the pedestrian would have first been visible to the defendant when he was only 25 to 35 metres away.

Present Case

[43] Returning to the present case, based on the damage to the first defendant's car on the left hand side, the first defendant's evidence that the plaintiff took one step only onto the road, the first defendant's evidence that the plaintiff was standing on or to the left of the fog line prior to the accident, it can be inferred that the first defendant hit the plaintiff just inside the fog line. A minor deviation in the path of travel by the driver would have avoided the impact. I reject the first defendant's evidence that his capacity to deviate was curtailed by oncoming traffic. I have regard to the width of the road and the inconsistencies in his evidence concerning the approaching vehicle.

[44] It is true that in this case there is no independent evidence as to what distance ahead of the defendant's vehicle someone like the plaintiff would have been visible in low beam headlights. That does not prevent a finding being made that the plaintiff ought to have been seen by the defendant earlier than he was. In most of the decisions I have referred to there was no such evidence. In the absence of evidence, I am entitled to rely on my own experience of life, and on the evidence of the plaintiff as to the fact that he was aware of the defendant's lights illuminating the area in front of him before he began to turn. I accept that the plaintiff's step to the right, which I have found occurred, was in response to his becoming aware of the approach of the defendant's vehicle in this way. From that time, or very soon after it, the defendant should have been aware of the presence of the plaintiff ahead.

[45] On the basis of my findings and the applicable law, I conclude the plaintiff has established on the balance of probabilities that the first defendant was negligent by:

- failing to keep a proper lookout; and
- failing to slow down and steer clear of the plaintiff.

[46] I conclude that negligence was a cause of the collision.

Contributory negligence

[47] The defendants submit that, in the event there is a finding the first defendant breached his duty of care to the plaintiff; there should also be a finding the plaintiff was guilty of contributory negligence resulting from:

(a) the operation of s47 *Civil Liability Act* 2003 (Qld) ("CLA"); and

(b) the plaintiff's common law duty to act reasonably.

[48] S47 CLA provides:

> **"s47 Presumption of contributory negligence if person who suffers harm is intoxicated**
> (1) This section applies if a person who suffered harm was intoxicated at the time of the breach of duty giving rise to a claim for damages and contributory negligence is alleged by the defendant.
> (2) Contributory negligence will, subject to this section, be presumed.
> (3) The person may only rebut the presumption by establishing on the balance of probabilities—
> (a) that the intoxication did not contribute to the breach of duty; or
> (b) that the intoxication was not self-induced.
> (4) Unless the person rebuts the presumption of contributory negligence, the court must assess damages on the basis that the damages to which the person would be entitled in the absence of contributory negligence are to be reduced, on account of contributory negligence, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
> (5) If, in the case of a motor vehicle accident, the person who suffered harm was the driver of a motor vehicle involved in the accident and the evidence establishes—
> (a) that the concentration of alcohol in the driver's blood was 150mg or more of alcohol in 100mL of blood; or
> (b) that the driver was so much under the influence of alcohol or a drug as to be incapable of exercising effective control of the vehicle;
> the minimum reduction prescribed by subsection (4) is increased to 50%."

[49] The term "intoxicated" is defined in the CLA for the purposes of s47 CLA to mean, in relation to a person, that 'the person is under the influence of alcohol or a drug to the extent that the person's capacity to exercise proper care and skill is impaired'.[65] The plaintiff's evidence of how much he drank was, at best, an estimate. No testing was conducted at the hospital to determine the plaintiff's blood alcohol content.

[50] Dr Swain provided two reports calculating the plaintiff's likely blood alcohol content at the time of the collision, and the likely cognitive capacities and indicia of a person with those blood alcohol contents.[66] The reports were based on assumptions, not fact, including the period of time over which the plaintiff consumed alcohol, the amount of alcohol he consumed, the plaintiff's level of alcohol tolerance and his rate of metabolism. Because it is not known exactly how

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[65] Schedule 2, CLA
[66] Exhibits 17 & 18

much alcohol the plaintiff drank, over what time period and because no blood test was taken from the plaintiff that night, it is not surprising Dr Swain's calculations do not assist at all to estimate the plaintiff's level of intoxication that night.

[51] The usefulness of her evidence is limited to her opinion that a person with a blood alcohol content of .1% would most likely suffer a significant impairment of cognitive functioning in terms of being uninhibited and perhaps reckless.[67] She stated, that in most cases, drowsiness begins to develop in a person with a blood alcohol concentration of above .09%.

[52] Dr Ireland who examined the plaintiff at the hospital that night noted "alcohol on board ++" which he would normally record to mean the patient was very drunk. Dr Ireland had no independent recollection of examining the plaintiff. He agreed that if the plaintiff was suffering a head injury at the time of examination he could have appeared intoxicated.[68] Ambulance Officers Fackersley and Carrie noted the plaintiff was intoxicated in that he smelt heavily of alcohol.[69]

[53] What is clear is that the plaintiff drank for a number of hours before he embarked on his walk home. The plaintiff's act of taking one step onto the road confirms his reduced ability to look after himself properly. It is enough to say that the plaintiff took the step onto the road and there is no rational justification for such a move unless his judgment was impaired. The step must have been the result of misjudgement due to the alcohol he had earlier consumed. I conclude this is the most probable and only plausible explanation for the plaintiff to move onto the road as he did.

[54] I am satisfied, on the whole of the evidence, that the plaintiff's capacity to exercise proper care and skill was impaired at the time of the collision. I find that the plaintiff was intoxicated within the definition of that term in the CLA and that the plaintiff has failed to establish on the balance of probabilities that his intoxication was not self induced and did not contribute to the first defendant's breach of duty.[70] It follows that, pursuant to s47(4) CLA, the starting point for assessment is a reduction, on account of contributory negligence, of a minimum of 25 per cent.

[55] The defendants have also satisfied me the plaintiff is guilty of contributory negligence because he exposed himself to the risk of personal injury which might reasonably have been foreseen or avoided. The matters to be considered in assessing the extent to which the plaintiff failed to take reasonable care for his own safety are that he:

- did not walk on the footpath provided;
- did not walk on the right hand side of the road facing oncoming traffic; and
- took a step into the path of the first defendant's vehicle when he knew it was approaching.

[56] I am not persuaded that any other matters of contributory negligence as pleaded by the defendants are made out.

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67 T.2.6.50-T3.10
68 T.2.34-50
69 T.2.38.15; T.2.43.10
70 S47(2) &(3) CLA

Apportionment

[57] The principles to apply when considering the question of apportionment were considered in the judgment of the Court in *Podrebersek v Australian Iron & Steel Pty Ltd*:[71]

> "A finding on a question of apportionment is a finding upon a "question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds": *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197 at 201. Such a finding, if made by a judge, is not lightly reviewed."

[58] The judgment continues to explain the factors involved in an apportionment of responsibility as follows:[72]

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682; *Smith v McIntyre* [1958] Tas SR 36 at 42–49 and *Broadhurst v Millman* [1976] VR 208 at 219, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination."

[59] In a number of High Court decisions, observations have been made that the driver of a motor vehicle has greater capacity to cause damage than a pedestrian walking on the roadway. The driver should therefore bear greater responsibility where the driver causes injury to a pedestrian.[73] The cases referred to by the plaintiff provide examples where contributory negligence was assessed between 15 % and 33⅓%.

[60] The defendants referred to a number of NSW Court of Appeal decisions including *Hawthorne v Hillcoat (*80 per cent*)* and *Vale v Eggins* (75 per cent) as comparable to the present case regarding apportionment of liability. I do not intend to repeat the factual dissimilarities between those cases and the present case.

[61] In *Evans v Lindsay* the court concluded that contributory negligence should be assessed at 75 per cent. They determined that the pedestrian's departure from the standard of care, as compared to that of the driver, was such that he should bear the major portion of responsibility for the accident because he was walking towards, oncoming traffic near the centre of a badly lit road. The Court could find no apparent reason for him doing so, and his behaviour could only be explained by a high level of intoxication and a high level of failure to have regard to his own personal safety.

[62] In the present case, the plaintiff made a conscious and logically sound choice to walk on the left side of the road in the same direction as the traffic and on the side without a footpath when one was available on the other side. The plaintiff chose to do so, not because he was intoxicated but because he wished to hitchhike home. He made a decision not to ride his bicycle because he had been drinking. He did not want to spend money on a taxi. He had a 6 kilometre distance to walk late at night.

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71 (1985) 59 ALJR 529 at 532

72 At 532-533

73 *Edwards v Nominal defendant* [2006] QCA, 475 @ [18]; *Teubner v Humble* 108 CLR 491; *Pennington v Norris* (1956) 96 CLR 10

He was not so intoxicated that he could not walk. He had already walked approximately two kilometres in good time. He kept to the side of the road except for the one step. This does not involve the grave degree of culpability seen in the cases referred to by Mr Feely.

[63] The step to the right by the plaintiff was either inadvertent, or a momentary misjudgement of where in relation to the fog line he was standing when he turned to face the first defendant's vehicle. This reduces somewhat the significance of his contributory negligence.

[64] I apportion a total of 40 per cent contributory negligence to the plaintiff.

QUANTUM

Plaintiff's Background

[65] The plaintiff was born on 14 October 1953.[74] He was aged 53 at the time of the accident. He is divorced with two daughters. After leaving school aged 17, he completed 2½ years of a fitter and turner apprenticeship,[75] then worked in various jobs including as a trades assistant, farmhand, landscaper and painter. The plaintiff was unemployed for lengthy periods. He was in receipt of unemployment benefits from the 1970s until the day of the accident,[76] except for a period in 1999/2000 when the plaintiff was employed as a construction worker on the Olympics site 7 days a week.[77] Otherwise he did cash in hand work.

[66] The plaintiff has a lengthy history of drug and alcohol abuse[78]. The plaintiff denied using heroin until 2001[79]. The plaintiff maintained he only used cannabis socially at parties.[80] He denied ever overdosing on heroin.[81]

[67] His evidence is contradicted by information he provided to health professionals over the years which indicates he used heroin and morphine from approximately 15 years of age and alcohol from about 13 years of age. For example, in an application to take part in a methadone program in August of 2001[82] he included a history of regular drug use from the age of 15 including heroin twice weekly, 16 "bongs" of cannabis each day and morphine. He denied the truthfulness of his methadone application.[83] Centrelink referred the plaintiff to a drug rehabilitation program at Mirikai Lodge in 2005/2006 for alcoholism. The plaintiff attended although he denies being an alcoholic.[84]

[68] The plaintiff conceded that, prior to the accident, he drank on average 4 "tallies", 4 to 5 days a week and occasionally more.[85] He denied suffering memory,

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74 T.1.14
75 T.1.21
76 T.1.47-48
77 T.1.21
78 Exhibit 12, Medical Records
79 T.1.39.20-35
80 T.1.42
81 T.1.47
82 Exhibit 12, Coffs Harbour Hospital records
83 T.1.43
84 T.1.49-50
85 T.1.59

organisational or concentration difficulties due to excessive consumption of alcohol and cannabis.[86] This is inconsistent with entries in his medical records. For example, he told medical staff on 22 March 2007 he had some memory impairment from alcohol, drugs and the motor vehicle accident in which he was injured 12 years earlier.[87] Centrelink and medical records reveal the plaintiff was found to be unfit for work for substantial periods between 1995 and the time of the accident due to alcohol dependence and abuse, anxiety and post traumatic stress disorder.[88]

[69] The plaintiff travelled to the Gold Coast at the end of 2005 to try to start afresh and find permanent work.[89] He commenced living with a friend, Victoria Lane. The plaintiff worked as a handyman and gardener for Ms Lane in exchange for free rent, electricity and cleaning. He did this over a period of 9-12 months prior to the accident.[90] The plaintiff said he worked 15-20 hours per week for Ms Lane. Ms Lane estimated the plaintiff worked 10-20 hours per week.[91] He was signed up on the Centrelink Personal Support Program. He was seeing a counsellor monthly.[92]

[70] The plaintiff commenced working for Mr Siltenan approximately 10 days prior to the accident. He carried out landscaping and gardening on Mr Siltenan's property at $10 an hour. [93] He did "cash in hand" work.[94] The plaintiff said he had done landscaping on and off over a period of 11 years.[95]

[71] The plaintiff walked and rode his bicycle as his means of transport. He was fit and active.[96] The plaintiff's hobbies included fishing, surfing and woodcarving.[97]

Injuries

[72] The plaintiff arrived by ambulance at the Gold Coast Hospital emergency department at 10:16 pm on 5 December 2006. He suffered numerous injuries including a compound dislocation of his right knee associated with vascular damage, fractures to the right elbow, forehand and wrist, and fractures to the pelvis. The compound dislocation was treated by means of external fixation. His fractured pelvis was treated by an external fixation. Fractures to both bones of his right forearm were treated by means of open reduction and internal fixation. The plaintiff also suffered a mild to moderate head injury.[98]

[73] After the accident the plaintiff said he remained in hospital for approximately 7½ months.[99] The plaintiff underwent intensive physiotherapy as an inpatient at Robina Rehabilitation hospital for about 2 months and as an outpatient for another 3½ months.[100] He moved in with a friend near the hospital to continue outpatient

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86 T.1.59.50-60
87 T.1.60.10-20; Exhibit 12, Hospital records
88 Exhibit 12, Medical records and Centrelink records
89 T.1.25; Exhibit 12, Centrelink records
90 T.1.22
91 T.1.100.50
92 T.22
93 T.1.25.10-30
94 T.1.47-48
95 T.1.15.1-10
96 T.1.22
97 T.1.23
98 Exhibit 12
99 T.1.25
100 T.1.29

treatment. The plaintiff eventually moved back to live as a tenant with Victoria Lane and commenced paying rent.[101] Ms Lane estimates he moved back in approximately two and a half years prior to trial.[102] The plaintiff is unable to work so he now has to pay rent.

[74] During rehabilitation the plaintiff progressed to crutches and was using a walking stick at the time of trial. Since the accident the plaintiff is unable to participate in any physical activities except minimal walking.[103] He suffers pain to his knee area if he walks too far. He is unable to walk to his fishing spots on uneven ground.

[75] His knee aches 24 hours a day.[104] He is unable to stand for more than 5 to 10 minutes before his knee becomes worse.[105] He falls regularly because he has no muscle strength and loses balance.[106] The plaintiff has bumped his knee on a number of occasions and knocked the skin off the knee joint which has taken months to heal.[107] His knee locks up when he sits too long in the one position.[108] The plaintiff bought a car 2 years prior to the trial. He has difficulty using public transport because of problems bending his knee.[109]

[76] The plaintiff's right shoulder aches if he uses his right arm.[110]

[77] The plaintiff has suffered memory loss since the accident, for example, he forgets he has put things on the stove or what he needs to buy at the shop.[111] He forgets to shower, his medical appointments and what he reads and watches on television.[112] He finds it difficult to concentrate doing woodwork.[113]

[78] Since the accident the plaintiff feels useless and hopeless, like "an old cripple".[114] He regularly suffers panic attacks.[115]

Medical evidence

[79] The plaintiff and defendants have obtained a number of detailed reports to assist me in reaching a decision regarding quantum.

Knee injury

[80] Dr Greg Gillett, Orthopaedic Surgeon, produced a report in relation to the plaintiff dated 18 July 2008.[116] Dr Gillett offers his opinion on the necessity of surgery to the plaintiff's right knee to which he suffered a compound dislocation in the accident.

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[101] T.1.25
[102] T.1.101; approximately late 2007
[103] T.1.24
[104] T.1.26.20
[105] T.1.25
[106] T.1.26.20-30
[107] T.1.28
[108] T.1.28.20
[109] T.1.30
[110] T.1.29
[111] T.1.29
[112] T.1.29-30
[113] T.1.24
[114] T1.31.
[115] T.1.31.33-40
[116] Exhibit 8

Dr Gillett noted that it aches all the time and the plaintiff's sleep is affected. The knee is tender to touch, difficult to move, stiff and feels unstable. The plaintiff has difficulty using stairs. He can't squat, kneel or run.

[81] In his report, Dr Gillett suggests that the plaintiff is best suited to a sedentary lifestyle with regard to domestic pursuits, recreation and employment.[117] He says in the future the plaintiff will develop degenerative osteoarthritis in his right knee. Dr Gillett reports that, while the plaintiff would theoretically benefit from a knee replacement, in view of the soft tissue and previous vascular damage, living with the condition rather than surgical intervention would be appropriate treatment because the loss of the plaintiff's lower limb is a risk associated with surgical intervention.

[82] With reference to the AMA 5 methodology, Dr Gillett assesses the plaintiff's right knee injury at 40% impairment of lower limb function which equates to 16% loss of whole person function.[118]

[83] In evidence, Dr Gillett commented on what would happen if the plaintiff's pain got to a stage where he required further surgery. He said the surgical solution would be to stiffen his knee by an arthrodesis, or to attempt to maintain movement by an artificial knee replacement. These are the two major types of surgery available to him.[119] Dr Gillett does not recommend the knee replacement due to his popliteal arterial damage.[120] Dr Gillett said he might recommend one of the procedures once he got to know the plaintiff over a period of time and, if his pain was uncontrollable, then he would assess him for surgery. There would be a risk that the plaintiff could lose his leg.[121] Dr Gillett says an arthrodesis would be a safer procedure because it can be performed without dealing with the posterior aspect of his knee which is where the risk is, in relation to his blood supply. Dr Gillett said an arthrodesis is essentially a stiff knee which would cause significant disability to a normal life.[122] The cost of surgery is in the order of about $8,000 for an arthrodesis. It may be a little higher depending on what implant is used. Under cross examination, Dr Gillett agreed that really neither of those surgery options is ideal due to risk of amputation.[123]

[84] In his report, Dr Gillett estimated the plaintiff would require 7 hours assistance per week. Under cross-examination he agreed that, if the plaintiff was able to dress himself, shower, attend to his own cooking and cleaning, and drive himself around, then, excluding external activities, he may require no assistance.[124] In re-examination Dr Gillett says that the plaintiff will need more assistance as his knee gets worse.[125]

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[117] Report of Dr Greg Gillett dated 18 July 2008, Exhibit 8 at p 7
[118] Report of Dr Greg Gillett dated 18 July 2008, Exhibit 8 at p 7
[119] T2.123.1
[120] T2.123.10
[121] T2.124.20-30
[122] T2.125.1-10
[123] T2.125.30
[124] T2.127.25
[125] T2.128.40 – T2.131.40

Scar revision

[85] Dr Trevor Harris, plastic and reconstructive surgeon, examined the plaintiff on 4 November 2008. Dr Harris' report, dated 5 November 2008, relates to the scarring sustained by the plaintiff as a result of the accident, in particular the scarring the plaintiff suffered to his right knee and upper calf.[126] Dr Harris observed that the skin cover on the right knee is thin and if significant trauma is applied to it, one would expect the skin graft to break down and the skin may not heal. Dr Harris gave evidence at trial that significant trauma could occur if the plaintiff had a fall or, for example, knocked his knee severely on a piece of furniture.[127]

[86] According to Dr Harris, if there is any breakdown to the medial area of the right knee, more definitive cover would need to be instituted.[128] The grafted area would be excised and some form of soft tissue flap brought to the area to give good quality skin and fatty or muscular cover to the knee joint. Dr Harris estimates that this would cost up to $19,000.[129] Dr Harris said in evidence that, if the plaintiff did suffer trauma to his knee, conservative treatment would be tried before surgery.[130] In Dr Harris' opinion, he wouldn't treat the plaintiff's knee for cosmetic reasons.[131]

[87] In accordance with the AMA Guides to the Evaluation of Permanent Impairment 5th Edition, Table 8-2, Class 2, Dr Harris estimates the impairment of the plaintiff due to scarring at 15%. He makes this assessment at the middle of the Class 2 range given the extensive scarring to the right knee and the associated limited performance of some daily activities, although he acknowledges this is in part due to his orthopaedic injuries.

Occupational capacity

[88] The plaintiff was examined by Mr Xavier Zietek, Occupational therapist, on 26 May 2008. He said the plaintiff's injuries restrict his physical and psychological capacity for work. Mr Zietek concluded that the likelihood of the plaintiff returning to work was quite low. He considers that the plaintiff would only be able to access work from a sympathetic employer or acquaintance offering him work performing sedentary tasks such as telephone answering or clerical type duties. He says that the plaintiff is not physically suited to the type of work he was performing before the accident such as garden and household maintenance and landscaping tasks. Mr Zietek suggests that the plaintiff, with improvement to his right leg condition, may be able to manage work in occupations such as a taxi driver, ticket seller, parking inspector or security officer.[132]

[89] Dr Nicholas Burke, occupational physician, also offered an opinion on the plaintiff's occupational capacity in his report dated 17 March 2008. Dr Burke concurred with the opinion of Mr Zietek that the plaintiff is unable, since the accident, to perform his former duties as landscaper/gardener, and is suited to work

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126 Exhibit 16
127 T2.134.50
128 Report of Dr Trevor Harris dated 5 November 2008, Exhibit 6 at p 5
129 Exhibit 6 at p5 [6]
130 T2.135.10
131 T2.134.45
132 Report of Mr Xavier Zietek dated 26 May 2008, Exhibit 9 at p 7

on a part time basis in a sedentary occupation.[133] Dr Burke suggests that, given the plaintiff's limited training, education and experience, he could source unskilled positions along the lines of a car park attendant.[134] Dr Burke agreed the report was purely with respect to the plaintiff's physical capacity to work. He agreed that, in addition, the plaintiff's mental capacity and short term memory were also relevant considerations to take into account.[135] He agreed that a person's short term memory, namely their ability to remember instructions and what they had to do, are also relevant to the type of work the plaintiff could perform.[136] In Dr Burke's opinion, the plaintiff's knee will deteriorate rather than may deteriorate.[137]

Psychological injury

[90] Dr Andrew Byth, Psychiatrist, interviewed the plaintiff on 20 October 2008 for the purposes of his report dated 31 October 2008. Dr Byth reports that the plaintiff had no memory for four days after the accident, he was subsequently confused and anxious, and his memory was very poor. The plaintiff complained of sleeping poorly and being distressed by severe pain from his fractures after the accident. He had trouble organising himself to get to doctors appointments and would go to the supermarket and forget why he was there. The plaintiff said his moods became increasingly depressed and he had low self esteem and felt insecure.

[91] Dr Byth identified the plaintiff's psychological symptoms, at the time of the report, as continuing depressed mood and panic attacks, without feeling suicidal. The plaintiff described continual flashbacks of the accident. His libido is reduced. At times he is forgetful, and lacks interest in going out and seeing friends. The plaintiff reported he is very anxious about using public transport. The plaintiff is short tempered and impatient with his flatmate. His concentration and memory remain poor.

[92] The plaintiff disclosed a past history of anxiety attacks after his divorce, occasional claustrophobia, Hepatitis C, limited drug use around 1998/2000 and drug rehabilitation in 2005/2006. He admitted to alcohol abuse prior to the accidents, drinking 8 standard drinks a day which he regarded as a problem. His alcohol intake had decreased to 1-2 glasses of beer per week. The plaintiff reported there was no history of mental illness in his family. Dr Byth's impression was of some dependent premorbid personality traits reflected in his previous dependence on heroin and alcohol.[138] Dr Byth was unaware of the extent of the plaintiff's drug history and the motor vehicle accident the plaintiff suffered in 1995.[139]

[93] Dr Byth diagnoses the plaintiff with an *Adjustment Disorder with anxiety and depressed mood*, in the moderate range of severity and requiring trials of antidepressants. Dr Byth says the plaintiff's adjustment disorder arose from his difficulty coping with the long period of treatment and rehabilitation, and with the pain, insomnia and restriction of physical activity from his injuries after the

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133 Report of Dr Nicholas Burke dated 17 March 2008, Exhibit 15 at p 9
134 Report of Dr Nicholas Burke dated 17 March 2008, Exhibit 15 at p 9
135 T3.8.20
136 T3.8.50
137 T3.11.40
138 Exhibit 7 at [9]
139 Exhibit 12, Coffs Harbour Hospital Records

accident. The plaintiff was upset that he was dependent on other people and couldn't do odd jobs for people.

[94] The plaintiff developed a psychological reaction of anxious and depressed mood, accompanied by social withdrawal, low energy levels and hopelessness.[140]

[95] Dr Byth notes evidence of subarachnoid haemorrhage and frontal lobe contusions on his CT scan which he said are likely to cause ongoing problems with memory, planning and organisation. He opines the plaintiff's poor memory and concentration, recurrent headaches, lethargy and emotional outbursts justify the additional diagnosis of *Postconcussional Disorder*.

[96] Dr Byth comments that the plaintiff's history of heroin and alcohol addiction would have justified the past diagnosis of *Substance Abuse Disorder,* having regard to the drug rehabilitation counselling he undertook in 2005/2006.

[97] With limited information about the plaintiff's past history of anxiety, Dr Byth states the plaintiff may have suffered previous independent episodes of *Adjustment Disorder* in response to stressors at the time. Relevantly, Dr Byth noted the plaintiff did not describe problems with chronic or relapsing pre-existing anxiety or depression.[141]

[98] Dr Byth notes the plaintiff had dependent premorbid personality traits and possibly some mildly socially avoidant personality traits, but felt there was insufficient evidence to indicate a pre-existing personality disorder.

[99] The plaintiff's psychological treatment since the accident has included trials of antidepressants and some counselling with a psychologist.

[100] Dr Byth recommends that the plaintiff be referred to a specialist psychiatrist for treatment over 12 months and trial different antidepressants. Dr Byth estimates this specialist treatment will cost $3000.00, and the plaintiff will need follow-up support and antidepressant medication with his General Practitioner for 3-5 years costing between $3000.00 and $5000.00.

[101] Dr Byth concludes that the plaintiff suffers moderate psychological impairment with regard to self care and personal hygiene, cannot live independently without regular support and needs prompting to shower, wear clean clothes, to cook and to eat.[142]

[102] Dr Byth diagnoses the plaintiff as totally impaired under [Class 5][143] and cannot work at all.

[103] Dr Byth reports that, even with treatment, the plaintiff is likely to make only a partial improvement and will be left with chronic, moderately severe anxiety and depression.[144] Dr Byth's assesses the plaintiff's whole person impairment arising from the accident in 2006 at 18% (24% minus 6% for pre-existing impairment).[145]

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[140] Report of Dr Andrew Byth dated 31 October 2008, Exhibit 7 at p 9
[141] Exhibit 7 at [12.9]
[142] Exhibit 7 at [16.3]
[143] PIRS
[144] Report of Dr Andrew Byth dated 31 October 2008, Exhibit 7 at p 11
[145] Report of Dr Andrew Byth dated 31 October 2008, Exhibit 7 at p 12

[104] When cross-examined, Dr Byth confirmed his diagnosis was based only on the information supplied to him,[146] regarding the plaintiff's psychiatric history prior to the accident.[147] He agreed it would be very important to have an accurate history of any prior psychiatric conditions and disorders.[148] He admitted to being unaware that the plaintiff, prior to this motor vehicle accident, had been taking anti-anxiety medication for panic attacks and anxiety over the years. The plaintiff didn't tell him about it.[149] Dr Byth said it would be standard protocol for him to ask the plaintiff whether he had any counselling or anti-depressant medication or tranquillisers prior to the accident. Dr Byth said it was hard to quantify exactly the pre-existing psychiatric impairment, but had estimated it to be a mild psychiatric impairment.

[105] During re-examination Mr Trotter confirmed with Dr Byth that he assessed the plaintiff's present condition as being "PRS 24", of which a quarter is due to pre-existing conditions. Dr Byth said he thought his pre-existing psychiatric problems would have had a mild pre-existing effect on his capacity to work. He was aware the plaintiff had not worked for many years.[150]

[106] Dr Alcorn, psychiatrist examined the plaintiff in August 2008. He diagnoses the plaintiff with a *Cognitive Disorder – Not Otherwise Specified* and an *Adjustment Disorder with Depressed Mood.*

[107] Dr Alcorn bases his diagnoses on the plaintiff's mild traumatic brain injury with attention and concentration difficulties, and the plaintiff's depressed mood, diminished libido and degree of social withdrawal.

[108] Dr Alcorn says it is reasonable to suggest the plaintiff suffered from a *Panic Disorder,* which pre-dated the accident,[151] as a result of the accident the plaintiff was involved in 12 years earlier. Dr Alcorn also concludes that at the time of the accident the plaintiff suffered from *Alcohol Abuse* due to adverse developmental experiences.[152] Dr Alcorn says it was not possible to definitively determine the percentage impairment relating to the plaintiff's pre-existing condition. Dr Alcorn appears to have forgotten to record his estimate of pre existing impairment in his report.[153]

[109] Dr Alcorn concludes the plaintiff suffered minor deficit for self-care and personal hygiene, and moderate impairment with regard to ability to work on a part time basis.

[110] Dr Alcorn states that the plaintiff's condition is now stable and stationary. His assessment of the plaintiff in accordance with the AMA6 guidelines to the evaluation of permanent injury is 10% whole person impairment.[154] He recommends the plaintiff would benefit from treatment by a psychologist or general practitioner for one hour once per month at a cost of approximately $100.00 for at least 2-3 years. The plaintiff has an ongoing requirement for psychotropic

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[146] Exhibit 7 at p 1
[147] T2.112.1
[148] T2.112.35
[149] T2.114.40
[150] T2.113.50
[151] Report of Dr David Alcorn dated 11 November 2008, Exhibit 14 at p 2
[152] Report of Dr David Alcorn dated 11 November 2008, Exhibit 14 at p 2
[153] Exhibit 14 at p 4 and p 28
[154] Report of Dr David Alcorn dated 11 November 2008, Exhibit 14 at p 3

medication at a cost of $30 per month for at least the next five years. Dr Alcorn was not cross-examined.

ASSESSMENT OF DAMAGES

General damages

[111] The calculation of general damages is made in accordance with the *Civil Liability Act* 2003 ("the Act") and the *Civil Liability Regulation* 2003 ("the regulation").

[112] "General damages" is defined in the Act as damages for pain and suffering, loss of amenities of life, loss of expectation of life or disfigurement.[155] The Act dictates that an injured person's total general damages must be given a numerical value (injury scale value – ISV) on a scale of 1 to 100.[156] The parties in this matter have reached agreement that the plaintiff be assessed at an injury scale value of 35, which equates to an award of $56,000.00 for general damages.

Past Special damages

[113] The following special damages are agreed between the parties:[157]

Pharmaceuticals	$461.42
Travel	$1,194.60
HIC (Medicare)	$2,102.70
TOTAL	**$3,758.72**

[114] In addition to the agreed special damages, the plaintiff submits that he is entitled to claim motor vehicle expenses and interest. He does not claim the cost of purchasing the motor vehicle. The plaintiff submits that, prior to the accident, he was happy walking and riding his bicycle as his means of transport. Since the accident the plaintiff has purchased a motor car because he can no longer walk long distances and cannot ride his bike. The plaintiff said in his evidence he has difficulty using public transport because he can't bend his knee enough to sit in normal bus or train seats and his leg extends out into the passageway, obstructing other passengers.[158]

[115] The plaintiff claims registration at $600.00 per year, servicing fees at $500.00 per year and fuel at approximately $40.00 per week. The plaintiff provided these estimates in his evidence.[159] There was no documentary evidence tendered at trial to support the plaintiff's claim.

[116] The plaintiff calculates these costs at $68.85 per week, and claims $65.00 per week for 18 months from the defendant totalling $5,070.00.

[117] The defendants submit that the plaintiff is able to use public transport and, because the plaintiff intended to purchase a car at some stage irrespective of the accident, he

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155 *Civil Liability Act* 2003, s 51
156 *Civil Liability Act* 2003, s 61(a)
157 See Exhibit 5
158 T1.30.30
159 T.1.31.1-10

is not entitled to these costs.[160] The effect of the plaintiff's evidence was that once he had earned enough money from working he may have purchased a car. The plaintiff used to ride and walk everywhere. He needs transport for medical appointments, shopping and recreation. It is unreasonable to expect him to rely solely on public transport considering the area where he resides and the problems with his leg. I accept the estimates made by the plaintiff as reasonable.

[118] I award the plaintiff $5,070.00.

Interest

[119] The plaintiff claims interest on special damages. The appropriate calculation of interest is set out in s 60(2) of the Act. The parties have agreed in this case that the appropriate interest rate is half of 5.76% (2.88%), and the HIC (Medicare) expense is not to be included in the calculation of interest. Interest should be allowed for 3.75 years since the accident, an amount of $726.41.[161]

Continuing expenses

Knee Injury

[120] The plaintiff claims the cost of knee surgery. The plaintiff relies on his evidence at trial that he wants to have surgery on his knee to reduce his pain.[162] The plaintiff concedes he initially told hospital staff he had decided against having a knee operation, however, since then the pain in his knee has worsened and he says, "I just can't put up with the pain anymore. I kept hoping it would get better".[163]

[121] The plaintiff relies on Dr Gillett's evidence that the safest, appropriate treatment of the knee would be a fusion or arthrodesis, to control the pain; also Dr Gillett's evidence that a plastic surgeon would be required to reconstruct the soft tissues particularly around the grafted area in the upper medial tibia, and there would still be a risk that the plaintiff would lose his leg.[164] This would leave the plaintiff with a stiff leg and significant disability to a normal life.

[122] The plaintiff submits that the evidence indicates he will undergo surgery in the near future in order to reduce his pain and therefore is entitled to claim the cost of the surgery. The cost estimate of the surgery provided by Dr Gillett in evidence is $8000.00.[165] The plaintiff concedes that this can be discounted by 10% to allow 24 months in which time the surgery would take place. The claimed sum for knee surgery is $7,200.00.

[123] The defendants argue that the plaintiff's evidence at trial that he would accept surgery if it was offered to him should not be accepted by the court, because the plaintiff's medical records indicate he was given the option of both a knee fusion and knee replacement by the Orthopaedics Department at the Gold Coast Hospital and he decided against surgery due to the risks. The defendants also submit that the

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[160] T.1.89.10-15
[161] Calculated $6726.02 x 2.88% x 3.75
[162] T.1.64
[163] T.1.64.20-30
[164] T.2.124.30
[165] T1.25.25

plaintiff's evidence that he has changed his mind about surgery due to the pain in his knee is not supported by any expert medical evidence that his knee has deteriorated since November 2008.

[124] The defendants also submit that while the plaintiff is able to put up with the pain and function in a way that allows him to be domestically independent, it is unlikely that the fusion surgery will be performed.

[125] I have considered Dr Gillett's report and evidence at trial that if the plaintiff's pain got to a point where he required further surgery, the surgical solution would be to stiffen his knee (an arthrodesis).[166] In Dr Gillett's opinion, the plaintiff is not a suitable candidate for a knee replacement due to his popliteal arterial damage. Dr Gillett says an arthrodesis would be a safer procedure because it can be done without dealing with the posterior aspect of his knee which is where the risk is in relation to his blood supply. Dr Gillett says he might recommend one of the procedures once he got to know the plaintiff over a period of time and, if the plaintiff's pain was uncontrollable, then he would assess him for surgery. There would be a risk that the plaintiff could lose his leg.[167] Dr Gillett says an arthrodesis would be a safer procedure because it can be performed without dealing with the posterior aspect of his knee which is where the risk is in relation to his blood supply.

[126] In view of the medical evidence that the plaintiff's knee is likely to get worse with the development of arthritis and the plaintiff's evidence that the pain is unbearable, I am satisfied the plaintiff is likely to undergo surgery to reduce his pain in the future. This will probably be to stiffen the knee; there may be complications and further problems as a result. If there are complications, I expect that will increase the cost; however that would balance out to some extent the possibility, which I assess as being relatively small, that the plaintiff will not have the operation. In the circumstances, I award the plaintiff the sum of $8,000 discounted by 10% to allow 24 months as an appropriate time frame for future knee surgery reduced by 20% for the possibility that, due to the risk mentioned by Dr Gillett, the plaintiff may never avail himself of the surgery. I award the sum of $5,760.00.

Scar revision

[127] The plaintiff claims damages for scar revision based on Dr Harris's report. The relevant scar is to the plaintiff's right knee. The plaintiff submits the scarring to the right knee and upper calf is extensive[168]. The plaintiff relies on Dr Harris's evidence that the scar is unstable and if significant trauma is applied to the region the skin graft could break down, exposing underlying tendons and the upper end of the tibia.[169] Plastic surgery would be required to provide good quality skin and fatty or muscular cover to the relevant area of the knee joint.[170] Dr Harris estimated the surgery cost to be $19,000. Plastic surgery would be necessary if the plaintiff underwent knee surgery.

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166 T2.123.1
167 T2.124.20-30
168 Exhibit 6; Exhibit 16
169 Exhibit 6, p 4
170 Exhibit 6, p 5

[128] The plaintiff submits it is reasonable to allow the entire cost of scar revision surgery for several reasons, including cosmetic reasons, to prevent wounds caused by inevitable knocks to the knee during day to day activity, and in the certain event knee surgery will be required. The plaintiff said he is self conscious about the scarring on his knee.[171] The plaintiff has bumped and knocked skin off his knee joint, which has taken months to heal because of the bad blood supply to the area.[172] The plaintiff concedes Dr Harris said conservative treatment would be tried first, but if that failed then something further would need to be done. Dr Harris advised that orthopaedic reports indicate that if the plaintiff undertakes knee surgery, an orthopaedic surgeon would require good skin recovery over the area before such surgery could be performed.[173]

[129] The plaintiff claims $19,000 reduced by 5%, to allow 12 months for initial surgery and a further 12 months for knee surgery. He therefore claims $18,050 discounted by 10% to allow 24 months for surgery to take place.

[130] The defendants submit that any allowance for the cost of scar revision must take into account the prospect that revision surgery will never occur either because the plaintiff is careful with his leg and avoids further trauma to it or because any wound breakdown in the future will heal with conservative treatment. The defendants submit any award must also take into account the prospect that the liability to incur the expenditure is in the future. The defendants submit, pursuant to s 57 CLA, the future liability must be discounted on the 5% tables.

[131] The defendants submit, adopting a conservative future period of 10 years from the present (deferral multiplier 0.614) and allowing for the prospect that the expenditure is never incurred, $5,000 would be a reasonable sum. That overlooks the medical opinion that this surgery will be required prior to knee surgery. Also if the skin breaks because of trauma, such as a knock on furniture, and fails to heal, then surgical reconstruction will as "a matter of necessity" be required.[174] The timing will depend on what happens to the knee, and what suits best in view of any surgery on the knee. I allow the current cost of $19,000 for future reconstructive surgery to the knee, deferred for say, two years and reduced by 20% for the possibility the plaintiff may never have it. I allow $13,680.

Psychiatric injury

[132] The plaintiff submits, contrary to the defendant's submission, that Dr Byth did appropriately take into account the plaintiff's pre-existing condition when calculating his level of psychiatric impairment. Dr Byth estimated that the plaintiff had a present impairment of 24% which should be reduced by 6% to 18% to take into account his past condition. In his report, Dr Byth recommended the plaintiff undergo 12 months of counselling at a cost of $3000.00, then a period of specialist treatment at a cost of between $3000.00 and $5000.00.[175] The plaintiff said in his evidence that he would undergo the psychiatric treatment recommended by Dr Byth

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[171] T1.27.12
[172] T1.28.1-10
[173] T2.136.20-30
[174] T1.136.10-12
[175] Exhibit 14

if he could afford it.[176] The plaintiff does not refer to the report of Dr Alcorn dated 11 November 2008 tendered by the defendants in their submissions.

[133] The defendants submit that because no objection was made by the plaintiff to Dr Alcorn's report going into evidence, his opinion should be accepted. In Dr Alcorn's opinion, the plaintiff suffered from two psychiatric conditions prior to the accident, being a panic disorder and alcohol abuse. The defendants rely on Dr Alcorn's recommendation that the plaintiff undergo treatment with a psychologist for one hour per month at a cost of approximately $100.00 per session. Dr Alcorn also recommends ongoing treatment with psychotropic medications, which the defendants submit has been taken into account in the figure agreed for future medications.

[134] The defendants acknowledge that Dr Alcorn's diagnosis coincides with the diagnosis of Dr Byth, however submit that Dr Byth did not have the benefit of the plaintiff's true pre-existing psychiatric history when reaching his ultimate conclusion.[177] The defendants submit that when Dr Byth was provided with a summary of the plaintiff's true psychiatric history at trial, he agreed that the plaintiff had a fairly serious pre-existing psychiatric condition and had he not had such a serious pre-existing condition he would not require the same level of treatment.[178] Given this evidence the defendants submit no allowance should be made for any treatment in respect of pre-existing conditions, and Dr Alcorn's opinion as to the requirement for psychiatric treatment should be preferred. Dr Alcorn estimated the sum of $3,346.00 is sufficient for future psychiatric treatment.

[135] I am of the opinion that Dr Byth's assessment of the percentage attributable to pre-existing injury was based on insufficient information about the plaintiff's prior history of anxiety. However, Dr Alcorn provides no estimate as to the plaintiff's pre-existing psychiatric injury at all. Both doctors formed the opinion that the plaintiff suffers from Adjustment Disorder with Anxiety and Depressed mood and a mild Post-concussional Disorder. These are significant psychiatric injuries which both Doctors agree require treatment, even having regard to any pre-existing conditions the plaintiff had. In all the circumstances, I allow $5,000 for future counselling and psychiatric care, which takes into account any discounting for the fact that the cost will be incurred in the future.

Past economic loss

[136] The plaintiff has a poor work history prior to the accident. He has been unemployed for the majority of his working life.[179] He is recorded with Centrelink as receiving benefits since 1999, including disability support benefits on occasion due to anxiety and musculoskeletal disorder. I am also satisfied the plaintiff's lengthy past history of drug and alcohol abuse is relevant to his poor work history.

[137] The plaintiff received cash in hand from Mr Siltenan for gardening and landscape work on his property in the 10 days prior to the accident. Mrs Siltenan describes the plaintiff as a good worker and would have recommended him to others in the district. Mrs Siltenan, however, also said that after a further one to two weeks

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[176] T1.32.35
[177] T2.112.35
[178] T2.119.1-10
[179] T1.48.1-30; Exhibit 12, Centrelink Records

getting the property back in order, work would be limited to irregular maintenance of the property once or twice a month.[180] The plaintiff submits his fitness and health were improving, and he looked forward to more work from Mr Siltenan and hoped to find further gardening or maintenance work of up to 30 hours a week in the future. The plaintiff submits that it is not unreasonable that he may have achieved these goals. The plaintiff claims $200 a week for 3.3 years since the accident, an amount of $34,320.

[138] The defendants submit the plaintiff would have only worked a further two weeks for the Siltenans full time plus $50 a month for maintenance for some period thereafter. The defendants submit the loss of that component would amount to approximately $2,500. The defendants submit the plaintiff was merely supplementing Centrelink benefits with some cash in hand work and there was no prospect he was going to declare that to Centrelink. Overall I consider that, had the accident not occurred, either of these could have occurred but that the greater probability is that something in between would have occurred. Taking into account my assessment of the plaintiff, I consider that a realistic allowance for past economic loss should be based on a figure of only 10 hours per week at $10 per hour, which for 3.75 years amounts to $19,500.

[139] The plaintiff also claims past economic loss for payment of rent, electricity and cleaning. Prior to the accident the plaintiff carried out gardening and maintenance and other duties for his landlord, Ms Lane, in exchange for rent, electricity and cleaning. It is accepted he has lost the ability to work for his rent. Kylie Stook, real estate agent, stated the market value of a bedroom in the circumstances in which the plaintiff lived was $180-$190 per week. The plaintiff submits a reasonable assessment is $200 a week for rent, electricity and cleaning. The plaintiff returned to live with Victoria Lane some time in the second half of 2007. The plaintiff claims the inability to work for his rent from 1 January 2008 to date, namely $200 per week. The defendants submit an amount of $4,000 is an appropriate sum to allow for this component for past economic loss.

[140] Ms Lane's evidence was the plaintiff at present pays $77 per week for rent and electricity. I accept that, since the accident, the plaintiff has been totally unable to work, and that as a result he had paid this amount as rent, and that but for the accident, he would have avoided this payment by doing work for Ms Lane. This is therefore an additional cost the plaintiff has been put to as a direct result of the accident and his injuries. I allow approximately $77 per week from 1 January 2008, namely $10,780.

Interest

[141] The plaintiff claims interest at 2.88% reduced by 50% to allow for receipt of pension benefits. The defendants submit that the plaintiff is not entitled to any interest on his past economic loss because, since the accident, he has been in receipt of disability support pension which is in excess of his damages. The defendant's argument is correct because the plaintiff has received a disability support pension in excess of the amount awarded. I award no interest for past economic loss.

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[180] T1.96-98.

Future economic loss

[142] There is no dispute that the plaintiff's leg injury will prevent him from carrying out duties such as labouring or gardening in the future. The defendants submit the plaintiff is not unemployable, yet he has made no attempt to find sedentary work. The defendants submit that because of the plaintiff's age, his extensive history of drug and alcohol abuse, his substantial criminal history, his pre-existing medical conditions and his extremely poor work history, any global sum for future economic loss should be very modest.

[143] The plaintiff submits the plaintiff has lost both his capacity to work and his capacity to "earn" his rent. I accept that, and find that there is no real possibility of the plaintiff being employed in any capacity in the future. He may have continued working for rent with either Ms Lane or another landlord indefinitely, but may not have. The plaintiff claims $200 per week to age 65 on the 5% discount tables for future lost wages, namely $76,000 discounted by 15% for contingencies, a figure of $64,600. The plaintiff claims a further $200 a week to age 70 for lost capacity to earn income for rent.

[144] The defendants submit that given the plaintiff's claim for future economic loss is based on the same matters as past economic loss, no future superannuation should be awarded even if there is a small global award for future economic loss. The defendants submit the plaintiff did not demonstrate that he was ever likely to have been employed in a position which required an employer to make compulsory superannuation contribution on his behalf. I accept that.

[145] In the present case s 55 CLA applies because the plaintiff's loss of earnings are unable to be precisely calculated by reference to a defined weekly loss.[181] There is great uncertainty as to what employment the plaintiff would have undertaken in the event the accident had not occurred. I think it likely he would have undertaken some part-time employment for irregular periods for the next 10 years. I also think it likely this employment would be cash in hand and the plaintiff would continue to claim Centrelink benefits. All realistic possibilities must be taken into account.[182] In all the circumstances, I will allow $100 per week for 7 years as an allowance, taking into account all the possibilities, for future cash earnings had the accident not occurred. This figure and period already allow for contingencies, so no further discount should be allowed, apart from discounting to a present value of $30,900. The plaintiff's ability to keep paying off rent with work would probably last longer, but may not have been available to him, and he was saving only $77 in this way prior to trial. In this respect I will allow $77 per week for say, 12 years (multiplier 474) but discounted heavily for the prospect that his current living arrangement (rent reduction for labour) may not prevail. The discount I apply is 50% which in effect recognizes an even chance that his accommodation arrangement could have changed for a variety of reasons. I therefore allow $18,000. That produces a total of $48,900.

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[181] Section 55(1) CLA

[182] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332

Gratuitous care

[146] The plaintiff makes no claim for past gratuitous care.[183] The plaintiff's evidence was that up until trial he had looked after himself. For future care the plaintiff claims one hour per day at $25 per hour for 24 years (his life expectancy), namely $129,150, discounted by 15% for contingencies to $109,000. The plaintiff relies on Dr Gillett's estimate that the plaintiff will require seven hours assistance per week for orthopaedic reasons alone. The plaintiff submits the claim of one hour per week assistance is conservative. It has been agreed by the parties that $25 per hour is the appropriate rate for future care.[184] The plaintiff submits that in the future there is a high probability he will have a fused leg, which means he will require considerably more assistance; alternatively, there is a distinct possibility of his leg being amputated and he would require even greater care, including the possibility he may need to reside in a nursing home.

[147] The defendants submit the plaintiff has not met the threshold requirement for an award of damages for gratuitous care and assistance because, up until the time of trial, the plaintiff has not received assistance to meet the statutory threshold and, for reasons advanced earlier, it is doubtful he will undergo surgery to his leg. The latter argument I reject; I think he will probably undergo knee surgery, and in any case will undergo scar revision.

[148] Damages for gratuitous services are restricted under s 59 of the Act. Relevantly s 59 provides that:

- damages for gratuitous services are not to be awarded for services that are unnecessary;
- the need for the services must arise solely out of the injury in relation to which damages are awarded; and
- damages will not be awarded unless services are to be provided for at least six hours per week and for at least six months.

[149] There is no reason to assume that future care of this kind will be gratuitous care; the plaintiff has no obvious gratuitous care-giver available, although Ms Lane has been providing some care in the past. In any case, I am satisfied that at some stage in the near future the plaintiff will require care and assistance for at least six hours per week over a period of at least six months for necessary services. I am also satisfied the need for services arise solely out of the relevant injuries. I must therefore consider what damages to award. Although the plaintiff said he was able to dress himself, shower, attend to some cooking and cleaning, Dr Gillett says that the plaintiff will need more assistance as his condition inevitably deteriorates. I think it likely his condition will deteriorate and correspondingly his ability to care for himself. The plaintiff will need help in the future with things such as cleaning, transport, washing, shopping and other household tasks. Apart from the strong likelihood of deterioration, he is also at risk of falling and injuring himself because of his unstable knee. If he has knee surgery he will require considerably more assistance.[185] Ms Lane described the plaintiff as clumsy, withdrawn and immobile. She said he is extremely forgetful, has difficulty shopping and she does not think he

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[183] T1.63.60
[184] Exhibit 5
[185] T2.128

could safely live alone. I think it highly likely Ms Lane has been assisting the plaintiff significantly more than he acknowledged in evidence.

[150] In the future the plaintiff may require extensive care during some periods extending to several hours per day. It is also likely that Ms Lane will not always be able to provide future gratuitous care to the plaintiff, so that he requires paid care, which is not subject to the restrictions under s 59 CLA.

[151] Given the plaintiff's resilience and his ability to work around his problems I consider that his need for care will not be activated immediately, but rather, say, in 18 months when surgery is imminent and/or there is further deterioration in his knee. The period of calculation I fix at 20 years (when the plaintiff turns 76-77). At that age the plaintiff may well have needed considerable assistance anyway because of advancing years and because of his pre-existing health problems. I therefore calculate as follows: one hour per day at $25 per hour ($175 per week) deferred for 1.5 years for 18.5 years (multiplier 591) yielding $103,425. Because of the contingencies applicable in this case I further discount this amount by 25% to arrive at a final award of $77,500.

Other matters

Medication

[152] Medication has been agreed at $2.50 per week. The plaintiff submits his life expectancy is slightly over 24 years. On the 5% discount tables the award would amount to $1,845. The plaintiff submits no discount should be applied, as his medication is almost certain to increase with the passage of time. Dr Alcorn stated the plaintiff's anti-depressant medication alone will cost approximately $30 per month. The defendants submit the plaintiff's life expectancy would ordinarily be 26 years, at a discount rate of 5%.[186] The 5% multiplier for 26 years is $768, which amounts to $1,920. I accept that approach; the effect of s 57 is that there must be a discounting of this future loss. The defendants submit a further discount for contingencies should be applied, taking into account the plaintiff's past medical history, in particular his long history of alcohol and drug abuse, his positive Hepatitis C status, his pre-existing psychiatric illness and chronic smoking. The defendants submit, on this basis, it would be reasonable to apply a 30% discount for contingencies, leaving a sum of $1,344 for future medications. I consider a discount of 15% is appropriate. I allow $1,632.[187]

Travel

[153] The plaintiff makes a global claim for $2,000 for future travel to doctors, pharmacies, etc, for scripts, medication and treatment. That, in my opinion, is reasonable and I allow it.

Additional medical expenses

[154] Finally, the plaintiff claims additional medical expenses of $2,000 globally, as he will need to see doctors on an interim basis for scripts, referrals and treatment.

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[186] Section 57 CLA

[187] $2.50 x 768 x 8.5

There will be some additional GP costs because of his injuries, although they are necessarily very hard to quantify. I will allow $1,000.

Motor vehicle expenses

[155] The claim for motor vehicle expenses is also taken into the future, but I think it probable that in any case the plaintiff would have obtained a motor vehicle at some stage as he aged, so I will allow this, on the same basis as past loss, but only for a further 5 years.[188] I award $15,047.50.

[156] In summary the plaintiff's damages are assessed as follows:

No.	Item	Award
1.	General damages (agreed)	**$56,000.00**
2.	Past special damages: a) Pharmaceuticals (agreed) $461.42 b) Travel (agreed) $1,194.60 c) HIC (Medicare) $2,102.70 d) Past motor car expenses $5,070.00 e) Interest on $6726.02 $726.41	**$9,555.13**
3.	Continuing expenses: a) Knee surgery $5,760.00 b) Scar revision $13,680.00 c) Psychiatric injury $5,000.00	**$24,440.00**
4.	Past economic loss: a) Lost ability to work for rent, electricity & cleaning $10,780.00 b) Lost wages $19,500.00	**$30,280.00**
5.	Future economic loss: a) Inability to work for rent $18,000.00 b) Inability to work $30,900.00	**$48,900.00**
6.	Gratuitous care	**$77,500.00**

[188] $65.00 x 231.5 (5% multiplier)

<table>
<tr><td>7.</td><td>Other future matters:<table><tr><td>a)</td><td>Medication</td><td>$1,632.00</td></tr><tr><td>b)</td><td>Travel</td><td>$2,000.00</td></tr><tr><td>c)</td><td>Additional medical expenses</td><td>$1,000.00</td></tr><tr><td>d)</td><td>Motor vehicle expenses</td><td>$15,047.50</td></tr></table></td><td>$19,679.50</td></tr>
<tr><td colspan="2">TOTAL</td><td>$266,354.63
(inclusive of interest)</td></tr>
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Conclusion

[157] As I have found, the plaintiff was 40% responsible for the collision. There will therefore be judgment that the second defendant pay the plaintiff $160,103.34, which includes $726.41 by way of interest. I will hear submissions on the question of costs when these reasons are published, but unless another order is appropriate the second defendant should pay the plaintiff's costs of and incidental to the action to be assessed.