

# DISTRICT COURT OF QUEENSLAND

CITATION: *Corowa v Winner & Anor* [2019] QDC 135

PARTIES: **ISAIAH SHEM COROWA**  
**(Plaintiff)**  
**v**  
**BRENTON JOHN WINNER**  
**(First Defendant)**  
**and**  
**ALIANCE AUSTRALIA INSURANCE LTD (ABN 15000122850)**  
**(Second Defendant)**

FILE NO/S: 82/2012

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: District Court at Mackay

DELIVERED ON: 6 August 2019

DELIVERED AT: Mackay

HEARING DATE: 11, 12 and 13 March 2019

JUDGE: Richards DCJ

ORDER: **Plaintiff's claim is dismissed.**  
**The plaintiff is ordered to pay the Second defendant's costs of and incidental to this action to be assessed unless otherwise agreed.**

CATCHWORDS: DAMAGES – PERSONAL INJURY – TORTS – measure of – consequential loss of earnings and earning capacity – where the plaintiff suffered permanent injury from a motor vehicle operated by the first defendant – – assault and battery – where there is contribution and provocation by plaintiff – whether the defendant used reasonable force in self-defence

*Civil Liability Act* 2003 (Qld)  
*Civil Liability Regulation* 2014 (Qld), sch 4  
*Evidence Act* 1977 (Qld), s 93B

*Poole v Piggott* [2000] QDC 254  
*Fontin v Katapodis* (1962) 108 CLR 177

-COUNSEL: P E Clark (solicitor) for the plaintiff  
 A Arnold counsel for the defendant

SOLICITORS: Strutynski Law for the plaintiff  
 Moray & Agnew for the defendant

- [1] The plaintiff's claim seeks damages for personal injuries and consequential loss as a result of injuries sustained when he was struck by a motor vehicle driven by the first defendant, Brenton John Winner. The motor vehicle was insured by the second defendant. The plaintiff also claimed aggravated and exemplary damages for unlawful battery.
- [2] The statement of claim alleges that on 14 December 2009 at approximately 7.00 pm the first defendant drove deliberately at the plaintiff by driving his vehicle onto the footpath and over the plaintiff's right foot. There were resulting significant injuries.
- [3] The plaintiff initially claimed general damages in the sum of \$45,000 together with loss of income of approximately \$600 net per week until a retirement age of 65, medication in the sum of \$500 as special damages, a claim for future expenses of \$20,000 for the possibility of an amputation, a *Griffiths v Kerkemeyer*<sup>1</sup> claim of \$7,800 for past assistance and \$5,000 for future assistance, together with exemplary damages of \$20,000 and aggravated damages of \$25,000.
- [4] At the trial of this action the claim for negligence was abandoned,<sup>2</sup> as was the *Griffiths v Kerkemeyer* claim and the claim for a possible future amputation. The first defendant has now deceased therefore the claims for aggravated and exemplary damages were also abandoned.

#### **FACTS NOT IN DISPUTE**

- [5] There is no dispute that on 14 September 2009 at or about 18 Blackwood Street Slade Point Mackay, the first defendant deliberately drove his motor vehicle at the plaintiff and in doing so drove over the foot of the plaintiff causing him injury, namely:
1. A severe crush injury to the right foot resulting in an extensive soft tissue degloving injury requiring extensive plastic surgery/skin grafts.
  2. A fractured dislocation right mid foot region treated surgically with multiple joint arthrodesis or fusion.
  3. An avulsion fracture of the medium aspect of the right navicular and
  4. A fracture of the base of the right fifth metatarsal bone.
- [6] The plaintiff was transported by ambulance on that night to Mackay Base Hospital. He was taken to the operating theatre the next day for cleaning and fixing his right foot and pins were inserted. He had further operations on 17 September 2009, 19

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<sup>1</sup> [1977] HCA 45

<sup>2</sup> T3-19 L45

September 2009 and 20 September 2009. He was then transferred to the Royal Brisbane and Women's Hospital where he underwent further operations on 7 October 2009 and 9 October 2009 involving skin grafts and a muscle being taken from his right thigh and put in his right foot. He was transferred back to Mackay Hospital on 29 October 2009 and was then gradually mobilised in a wheelchair and discharged home in early November of 2009.

## EVIDENCE

### The plaintiff's case

- [7] The plaintiff gave evidence and called two witnesses on the issue of liability: his two friends Lama Fred and Scott McPherson.

#### *The plaintiff*

- [8] The plaintiff swore that on 14 September 2009, having been released from jail a couple of days earlier, he went to visit his friend, Scott McPherson. He was there for a short time when he, McPherson and Lama Fred decided to walk to the shops to get some soft drinks. He said as they were walking around the corner he could hear ranting and carrying on. Initially he didn't know who was yelling but then he realised that the defendant was on the veranda yelling out at the three of them, making racist remarks. At that stage McPherson was a couple metres in front of himself and Fred and he thought that Winner tried to reverse out onto McPherson.
- [9] He said by the time he and Fred got near 18 Blackwood Street, the first defendant had run into the house and back out with a pistol, waving it at them. He grabbed Mr Winner and shook him to loosen the gun, he did not punch him, and Lama Fred picked up the pistol and threw it away. There was some yelling backwards and forwards and then they continued on their way. He said there was a lady with an infant who was screaming and yelling racial taunts as well.
- [10] They were at the shops for a short time and while there noticed the first defendant drive past at speed in his Commodore. They walked back to the bike path and stopped there. After a time the plaintiff said he was going to visit his cousin. He walked back down Blackwood Street towards number 5. His cousin was not at home so he began to walk back down the street towards number 18. He noticed cars drive out of 18 Blackwood Street. He was asked to tell the court what happened from that point on:<sup>3</sup>

“Well I think he's spotted me, come reversing out, tried to come forward at me. I've tried to jump out of the way, and I noticed the second car. And by this time it was – the night had fell dark. The second car was trying to block me in too so that the white car could get at me, and I was trying to dodge both cars and get to the – through the driver's windows. And by the time I'd – the second car

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<sup>3</sup> T1-25 L6

had come back at me, he's pinched me – pinned me to the fence after I tried – I thought if I run by the fence, I'd be safe, but he just revved the car straight at the fence towards me and crashed me into the fence.”

He said he then started to go across the street and someone rang an ambulance and police, and he was taken to the hospital. He said at no stage did he abuse or assault any of the people nor was he armed.

- [11] In cross-examination he agreed that he couldn't see who was yelling initially. He agreed that he told police that nothing had happened before he started having an argument with the first defendant. He denied going onto the veranda and abusing Erin Jenke, the girlfriend of the first defendant, and said that he was walking by himself with nobody else and that he did not assault anyone on that day. He agreed in cross-examination that in his police record of interview in December of 2009 he indicated that rather than walking out the front of Blackwood Street that he was walking through the neighbour's backyard.<sup>4</sup> He agreed that when the car was backing out he jumped out of the way and ran up on the grassy pavement area. When he was spoken to by police he agreed that he said that he was trying to “fucking get at them” because he was spinning out and didn't know which way to go or “what the fuck was going on”<sup>5</sup>. He agreed that he told police he was trying to get at the driver of the yellow car [Joy Winner]. When asked what that meant he said “well it was trying to do the same thing that the white Commodore was doing” so he ran at it.<sup>6</sup> He agreed that he said the driver of the yellow car must have been frightened and that she wound her window up quickly.

*Lama Fred*

- [12] Lama Fred gave evidence that he was with the plaintiff that day. He said they were walking down Blackwood Street and a fellow sort of backed out on them and nearly hit them so they had an argument with him.<sup>7</sup> During the argument there were racial slurs and profanity. He didn't remember details of the car but he said the fellow who nearly ran them over ran inside and grabbed a gun. He said the plaintiff got into a bit of a scuffle with the defendant and that was when the gun was knocked out of his hand. He said he picked up the gun, noticed it was a replica and he threw it out of the way. He was asked how it came to an end and he said “all I can remember is they locked themselves inside and we took off”<sup>8</sup>
- [13] He said they continued on to the shop, purchased some things and then went back to the bridge that went over the drain at the rear of the Cathy Freeman Oval. He said the plaintiff took off by himself to go and see his cousin and he and McPherson stayed at the bridge. Later he heard cars and the ambulance.

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<sup>4</sup> T2-52 L10

<sup>5</sup> T2-56 to 57

<sup>6</sup> T2-57 L40

<sup>7</sup> T2-66 L5

<sup>8</sup> T2-68 L42

- [14] In cross-examination he was asked if he had been drinking that day and he said a couple of cups of wine out of a cask and Isaiah probably bought some Cruisers and he would have had one.
- [15] He said he didn't have a particularly strong recollection of the day. He was asked: "...what first draws your attention to number 18?---"Only thing that drew my attention is him backing out and nearly hitting my mate that's the only thing that drew attention to me".<sup>9</sup> He agreed that he was swearing and others would have been. He couldn't remember if they ended up on or near the veranda of the house. He said he can remember there were some women there yelling out abuse but couldn't recall specifics about them.

*Scott McPherson*

- [16] Mr McPherson gave evidence that he has an acquired brain injury which affects his ability to recall events but he could remember a car reversing out of a driveway too quickly and nearly hitting him and that there was a bit of shouting and arguing. He said "I think I arced up at him about it".<sup>10</sup> There were racial slurs being thrown at them by the first defendant. He said the first defendant then jumped out of the car and ran inside and came out with a gun. Isaiah grabbed him and shook him till he dropped it. They then went to the shop and then went back to the bridge area. After Isiah left them he heard tyres screeching and a bit of carrying on. They went to look for him but they couldn't find him.
- [17] In cross-examination Mr McPherson indicated that he moved to Yeppoon after getting out of jail and he was no longer particularly close to Mr Corowa. He said he wasn't particularly angry that day, he didn't hit the car and he certainly was not out to look for a fight. He stated that if Mr Winner, the first defendant, had upset him he would have stabbed him. He agreed there was a chance he would have had a knife on him that day. He denied making threats to the first defendant claiming that he doesn't make idle threats. He agreed that he was a man capable of violence but he was not violent on this particular day.

**The defendant's case**

- [18] The first defendant is deceased and his statement was tendered pursuant to s 93B of the *Evidence Act* 1977.

*Statement of Brenton Winner*

- [19] A police statement was taken from Brenton Winner, on the night of the incident. He said at around 4 – 4.30 pm he reversed his Commodore out of the driveway to go to the service station. There were three males standing near the power pole to the right of the vehicle. As he reversed out the three of them approached the car and started knocking on the boot. He opened the car door and said "What the fuck do

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<sup>9</sup> T2-73 L10

<sup>10</sup> T2-80 L20

you think you are doing hitting my car?" All of them said "You tried to run us over" and "Do you want a fight lad?" He replied, "I wasn't trying to run you over, you're just trying to pick a fight".

- [20] At that stage his girlfriend Erin said "Stop picking on him you always have to fight in a pack, leave him alone". There was yelling between them and Erin. Erin was holding their daughter Lacy at the time. They started to make threats that they would bash him and kill him so he drove off and then did a U-turn to make sure his girlfriend was okay. When he got back they were approaching the veranda and again more threats were made and punches were thrown. They left saying that they were going to bash and kill them and that they would be back that night. As they were leaving they threw rocks at the house after trying to get into the house through the back door. The police were called and arrived around 10 minutes after they left.
- [21] He said that at about 6.30 - 7pm he went for a drive to the mini-mart and they were all standing at the back of the shop with a girl, they threatened him and threw a bottle of alcohol at his car breaking the driver's side mirror and putting a dint in the driver's side door. He went home and rang the police.
- [22] About 15 or 20 minutes after this his grandmother and girlfriend were outside putting the rubbish out when he heard screaming and he saw that they were back. At that stage the plaintiff was holding his grandmother with his left hand and pushing her forward. He had something in his right hand swinging it towards her head and the first defendant thought he was hitting his grandmother over the head. He reversed his car onto the road, spun the wheels a bit, beeped the horn, put the headlights on and revved the car to scare them but the plaintiff kept hitting his grandmother so he drove his car towards him, trying to get him to move. He did in fact move so he reversed his car back. He looked up and saw the plaintiff was going for his girlfriend. He reversed his car up and drove forwards again, towards him, so that he would let go of Erin. He then saw him grab his grandmother again, he thought the plaintiff was hitting her over the head and that he had an axe in his hand.
- [23] The two other guys were walking up with fence palings and started coming towards the car swinging them at the car and one of them walked up to Erin with the fence paling raised up in the air in his right hand going to hit her. He then drove towards him. While the other 2 men were hassling Erin, the plaintiff was still harassing his grandmother. He thought he was hitting her over the head. At that stage, he drove up the gutter and onto the footpath and went to try and get the plaintiff because he thought he was beating up his grandmother. He reversed back again and drove at the plaintiff who let go of his grandmother as he swerved towards him. He hit him up against the fence because the plaintiff started to walk back to his grandmother and Erin. He reversed his car back and saw he was limping.

[24] He then drove his car up towards the two guys who were harassing Erin and Mrs Winner and the two guys took off. He could not remember seeing Mrs Winner drive the car at all. He said:<sup>11</sup>

“It all happened so quickly and there was a lot of yelling and screaming. It would have all happened in about two or three minutes. I thought they were beating up my grandma and my girlfriend and I thought the teardrop guy [the plaintiff] had an axe and was hitting them with the axe. My only intentions were to protect my family who were being assaulted.”

[25] The second defendant called Joy Winner, Erin Jenke and Petria Jenkins.

*Joy Winner*

[26] Joy Winner was the grandmother of the first defendant and had lived at 18 Blackwood Street for 40 years. The first defendant, his fiancée Erin Jenke, and their baby were living at the house at the time. On the day in question she was out until about 7.30 pm. When she came home she was told that there had been trouble and that the people who caused the trouble were coming back. She said they decided that they would get in the car and leave and they were organising that when the people came back.

[27] She was putting the rubbish bins out when she saw the plaintiff and his friends running towards her. They were pulling the palings off the fence. She said she knew they were planning to use them. She was approached by the plaintiff and she started to walk backwards towards her car door. He started to grab at her shirt and when she got to the car she opened the door, slid into it and shut the door. She was sitting in the car when she saw that the two others had gone over towards Erin Jenke and were hitting or attempting to hit her with the fence palings. Brenton Winner was in his car and was racing it backwards out of the yard. The plaintiff at that stage was banging on her car window. She reversed her car and he was standing in front of her. She then looked over and saw what was happening with Erin and she was screaming to Erin to go upstairs.

[28] She noticed that Mr Corowa was carrying a gun and he was using that to bang on the window. She said she then reversed the car back, drove it forward, did a U-turn and came along the fence. She couldn't see the first defendant or the plaintiff but she saw that Erin was still in trouble so she aimed the car thinking if she hit one of the men attacking Erin she could save her. She said the man who came into the yard and had the gun was saying “I've come to kill youse all, I'm going to finish you all” and he was very, very angry. She said when she drove towards the two men they ran off through the backyard and she ran after them.

[29] She said she had never seen the first defendant with a handgun and he didn't own one as far as she was aware. She was adamant the plaintiff was not by himself and

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<sup>11</sup> At para 95

that he did have a pistol. She agreed she drove at the man with the handgun and she did that because he was threatening her with a weapon and banging on the window and even when she reversed the car he was still in front of her. She said she was very fearful of being struck by the gun.

*Erin Jenke*

- [30] Erin Jenke said when Brenton Winner went to pull out of the driveway he didn't make it all the way onto the road before there three people appeared around the car banging, shouting, making loud noises and abusing him saying he was trying to run them over. Whilst they were arguing and kicking the car, the plaintiff leant in the window and grabbed a cigarette out of Brenton's hand and spat on his face. Brenton then drove off but came back immediately.
- [31] After he left the three men came up onto the veranda where Ms Jenke was and they were calling her names such as "slut", "whore", "bitch". She told them to "fuck off and leave the property". She thought they were on drugs because of the way they were behaving. When the first defendant came back he came straight onto the veranda and punches were thrown. She had a baby in her arms so she was trying to get inside. She said at that stage she was scared and fearful for her life.
- [32] She said once they got inside and closed the door they started yelling out "we'll be back" and said "we're going to attack your family, we're going to hurt you and your family, we'll be back for you". As they were walking away they started throwing rocks on the roof of the house.
- [33] At some stage later in the day she said Brenton went up to the shops in his car for a packet of cigarettes, when he came back she noticed the side mirror was smashed. She was looking at that when Mrs Winner came back. She started to help Mrs Winner take the bins out and she noticed that the men were coming back. It was dark by this time.
- [34] She said five people came back. They came back through the next door neighbours' backyard and Isaiah was the first one she saw. She said she thought he was "really high as a kite" because he smelt of petrol. She said two had fence palings in their hands, another two were across the road and Isaiah had in his hand something that she later learned was a gun.<sup>12</sup> They were around her and Joy initially pretending to hit or "whack" them over the head. She said the plaintiff was the main instigator. She said the first defendant and Mrs Winner got in their cars and were driving slowly trying to give them a warning to "leave our property, leave our house".<sup>13</sup> The two guys with the fence palings backed off a bit once Joy and Brenton got into their cars but Mr Corowa stayed near her and was still trying to get her. She managed to get away. She said Brenton was trying to block him off to get him to leave the property. She said he was against the fence and he should have left but he

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<sup>12</sup> T2-113 L38

<sup>13</sup> T2-114 L23



was coming back again. She was extremely terrified and her daughter was screaming in her cot.

- [35] In cross-examination she said that in relation to the earlier incident, the first defendant was never in danger of running over any of the three but he did start yelling at them once they started kicking and hitting his car. She said they didn't have any weapons, and Brenton didn't have a gun licence. He did not own a replica pistol. She said she had no doubt their lives were in danger. Initially they were trying to get inside the house but they were prevented from doing so.
- [36] In relation to what the plaintiff had in his hand, she said initially she thought it was a camping tool or something like a mini-axe and it wasn't until he was really close that she noticed it was a gun. She said she was able to dodge the hits because they were so high they didn't know what they were doing. She was asked:<sup>14</sup>

“... did you see the plaintiff trying to run away from or dodge the two vehicles? --- No.

Sorry the plaintiff. Why not? --- Because he was that – as I was saying he was high as a kite and he wasn't trying to dodge the vehicles. He was just trying to get back into the yard to get towards me. By that stage the cars have shooed him off towards the front and he was still trying to come back. You think that would have been enough of a hint – leave.”

*Petrina Jenkins*

- [37] Petrina Jenkins was living at 16 Blackwood St at this time. She said she was about to get into her car to head to the shops when she saw Mr Winner coming out of his front door and three men coming up near number 12 Blackwood Street. She said they walked past her and said hello. She said by this stage BJ [Winner] had come down to the car and the men were walking towards number 18. There is a power pole just before the driveway where they stopped and then she heard a bang and heard someone yell out “you nearly ran me over” or “you almost hit me” accompanied by swearing. She said then there was a bit of a scuffle. She said one of the guys hit the back of the car and was swearing at the first defendant, they hit it again and then two of the three guys went up to the car and were swinging hits in. She said Mr Winner reversed out and the guys continued to walk past heading towards number 20.
- [38] As they were walking away Ms Jenke was yelling at them to “fuck off” and they turned around and came back towards the house. She got out of her car and ran over to Ms Jenke saying “stop they don't care about you or the baby” and they came up the stairs starting to abuse her saying things like “I'll come in there and kill you, I'll kill you”.<sup>15</sup>

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<sup>14</sup> T2-122 L35

<sup>15</sup> T2-127 L1

- [39] At that stage BJ returned. He pushed past the taller one and stood between him and Erin. There was a bit of a punch up and the two other guys were coming up. Ms Jenkins turned around and said “That’s a bit unfair how about one on one” and the shorter one told her to go back to her house and to “fuck off home” so she did that and rang the police. She said she could see one of them had the butt of a gun hanging out of the back of his pants.<sup>16</sup>
- [40] Later that night she was in the shower when her son called out to her. She came out with a towel wrapped around her, looked out the window and the first defendant was just pulling his car up. There were two other guys at the side of the fence, one had a fence paling. She didn’t actually see any hitting. She saw the fellow hobbling across the road with blood coming from his foot.
- [41] In cross-examination she said they were all pretty much walking side by side initially. She said Mr Winner did not have a gun at any stage. She said there were threats and they did go onto the verandah.

### **Discussion**

- [42] There is no doubt that whatever happened on that day happened under very heightened circumstances and almost a decade ago. In the circumstances it is unsurprising that the witnesses have imperfect memories of the day. Ms Jenke in particular was clearly terrified and still traumatised by the events of that day. The only records of the event that were recorded close to time were the statement of Brenton Winner and the record of interview of Isiah Corowa, both of which are exhibits in the trial and both of whom had a clear interest in the outcome of proceedings. Sadly Mr Winner has since passed away. His statement was received into evidence but cross-examination was impossible.
- [43] The record of interview between the plaintiff and the police took place in December 2009 and there were significant discrepancies between his version in court and that interview. In his police interview he did not mention the first incident involving the car backing out or racial abuse being yelled out by the defendant, he merely says that the others started an argument with the first defendant and then the fellow ran inside and grabbed the gun and he disarmed him. In his interview he does not mention seeing the defendant drive past at the shops and says he started to go to his cousins by coming up from the bike path from the drain beside the defendants house, through the neighbours yard. Further, none of the other witnesses for the plaintiff hear racial abuse before the car is reversed out by Mr Winner.
- [44] The plaintiff has a long criminal history involving numerous convictions for dishonesty and violence. At the time of the hearing of this trial he was on parole for an offence of violence which involved him going into a shop with a machete and threatening a female who owed money to someone. It is of significance that despite being sentenced to 30 months imprisonment for this offence that when asked about

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<sup>16</sup> T2-127 L41

the circumstances of the offence he maintained that the complainant lied about the circumstances of the offence implying he merely went for a walk with a machete and asked her for his money.

- [45] He also has a significant history of drug use although he indicated that he is no longer using drugs.
- [46] Further, his version of events makes little sense. He has the first defendant yelling racist remarks before he even sees the first defendant. It stretches credulity to suggest that the first defendant, having abused the men, then hops in his car where further arguments take place, then he runs back in the house to get a gun which is wrestled off him, then he drives off.
- [47] Further, for his evidence to be credible, he must have the first defendant and his grandmother essentially lying in wait for him on the off chance that he would walk past their house so that they can attack him in their vehicles. I do not accept the evidence of the plaintiff where he differs from the defendant's witnesses.
- [48] His two witnesses were similarly unimpressive. They give a version of events of the earlier encounter which tallies in part with the defence witnesses but differs from the plaintiff. They insist that Brenton Winner has a gun apparently readily obtained in the house such that he can access it quickly before they leave the area so that he can threaten them with it. Despite McPherson and the plaintiff having criminal histories for violence and an inclination to use weapons, they simply walk away after disarming Winner. Further, their suggestion that they only returned to Blackwood Street after Corowa was injured is not consistent with the evidence that I accept. They both have an interest in distancing themselves from this second encounter. Their presence at the scene on the second occasion would likely have implicated them in serious criminal offences.
- [49] By contrast, the witnesses called for the second defendant have little interest in the outcome of proceedings. Although Joy Winner and Erin Jenke were attached to Brenton Winner, with his unfortunate demise there is no longer any temptation for them to colour their evidence to protect him. Whilst their evidence had some significant differences, I accept that this was a product of a terrifying experience coupled with the effluxion of time affecting the accuracy of their recall. They were, however, essentially consistent in the overall outline of events of the day. Ms Jenkins, the neighbour who had recently arrived in the street was an independent witness who I accept as giving honest and reliable evidence.
- [50] The version of events which seems to be supported by most of the witnesses is that Mr Winner backed out of his driveway and at that stage the plaintiff and his two friends were walking down Blackwood Street. I accept from Ms Jenkins' evidence that they were likely walking from Lama Fred's house at 4 Blackwood Street. They walked past her house as Mr Winner backed out. He either nearly hit them by accident or came near enough to them that they felt he was close to hitting them. In

any event the act of reversing was the catalyst for the confrontation. The likely scenario in my view is that the three men became angry and hit the car and abused the driver who in turn abused them back. I do not accept the evidence that he ran in and retrieved a gun. I accept the evidence of the defence witnesses that he did not own a gun.

### **Findings of Fact**

- [51] I find that on 14 September 2009 at about 18 Blackwood Street Slade Point Mackay, Brenton Winner backed out of his house in his motor vehicle at a time when the plaintiff and his two friends, Fred and McPherson were walking down the street. He did not hit those three people but came in close proximity to them whereupon they began to abuse him in his car. An argument followed and Winner ended up driving off towards a service station. The three men began to walk off when Winner's partner, Ms Jenke, yelled at them to "Fuck off" and they turned around and proceeded to approach her as she was standing on the veranda of 18 Blackwood Street. In the meantime Mr Winner returned to check on his fiancé and found the three men on the veranda of the house. He alighted from his car and approached them and a physical altercation took place. Ms Jenke locked herself in the house with Mr Winner and the men proceeded to abuse the pair, indicating they would come back later that night and they would kill them. The trio walked off.
- [52] I do not accept that during this altercation Mr Winner went in to get a gun. I do not accept that he owned a gun of any description.
- [53] Later that day Mr Winner drove past some shops where the three men were and they threw an object, likely to be a bottle, at the car and the vehicle was damaged.
- [54] Later that day the men returned. At that stage Joy Winner, the resident of 18 Blackwood Street and grandmother of Brenton Winner, was putting the bins out on the footpath with the assistance of Ms Jenke. They noticed the men arriving from the back of the house and two of them pulled palings from the fence to be used as weapons. Mr Corowa was in possession of a replica pistol. He advanced on Ms Winner and brandished the gun by hitting the window of her car once she had managed to get inside the car. Mr Winner approached the three in his car and Fred and McPherson desisted from the attack but Mr Corowa did not. Both Ms Jenke and Ms Winner were in fear of their lives. Mr Winner was aware that Mr Corowa had a weapon, although he thought it was an axe. Mr Winner acted to defend his fiancé and his grandmother from the attack.

### **LIABILITY**

- [55] There can be no doubt that Mr Corowa was assaulted by the first defendant driving the vehicle at him. The question is whether that assault was justified. The defence rely on the fact that he said he was acting in defence of his wife and his grandmother, and he was in fear of those people being assaulted by people who were aggressive and were armed with fence palings and other weapons. Mr Winner

says his conduct was in response to life-threatening conduct from the three men. Ms Jenke and Ms Winner both gave evidence that they were in fear of their lives.

[56] I accept the submissions of the plaintiff that there must be a reasonably proportionate response to the force offered for self-defence to succeed against a deliberate assault or battery. The onus of establishing the defence is on the defendant. In this case the first defendant was in charge of a significant weapon, namely a motor vehicle, and the actions of the defendant, namely driving deliberately at the plaintiff, were likely to cause grievous bodily harm or even death. It was therefore necessary for the defendant to prove that the actions of the first defendant were reasonably necessary to protect his partner and his grandmother from grievous bodily harm or death. In considering this it is important to bear in mind that this was a volatile situation, which was unfolding both unexpectedly and quickly. The first defendant did not have the luxury of leisurely consideration.

[57] In the course of argument by the plaintiff, I was referred to the decision of *Poole v Piggott* where His Honour Judge Forde (as he then was) outlined the law of assault and battery.<sup>17</sup> He identified battery as a species of assault, incorporating any actual intended use of unlawful force to another person without his consent and that it was a defence to show that the person was acting to protect the person of another, as long as the force used is reasonable.

[58] In *Fontin v Katapodis*, the court noted that the test of whether the force used is reasonably necessary is the question to be asked if self-defence is raised:

“It is clear that Fontin had a right to defend himself against being beaten by Katapodis. The question is whether, in the circumstances, it was reasonably necessary for him to throw the piece of glass at Katapodis in order to protect his right of personal safety. The piece of glass which he threw at Katapodis was capable of causing him serious injury. Aimed at the face it is clearly a very dangerous weapon. Apparently, Fontin realised this because he attempted to pitch it so that none of its edges would strike Katapodis. Katapodis had done only trifling harm to Fontin by hitting with the T square. Perhaps, Katapodis may have struck more severe blows if Fontin had not prevented him, but to throw the piece of glass at Katapodis as a means of self-defence was out of all reasonable proportion to the emergency confronting Fontin. No other weapon was available to Fontin but instead of throwing the piece of glass at Katapodis he could easily have moved away from him and thus have avoided further blows from the T square.”<sup>18</sup>

[59] Mr Winner was in charge of a very dangerous weapon, namely a vehicle. However, on the night in question, he was confronted with an angry group of three men who threatened earlier in the day to come back and kill him and his family. They did in

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<sup>17</sup> *Poole v Piggott* [2000] QDC 254 at para 26

<sup>18</sup> *Fontin v Katapodis* (1962) 108 CLR 177 per McTiernan J at 178 [3]

fact return. One of them was armed with a gun and the other two were armed with fence palings. He was in a car and capable of driving away, however, his fiancée and young child were at the house. His fiancé was out of the house in the front yard and his grandmother was also out of the house in the front yard although in a vehicle herself. Given the fact that he was facing three armed men it was not practical for him to leave nor was it practical for him to exit the car and try and fight these men by himself.

- [60] In the unusual circumstances of this case I find that his actions were reasonably necessary to protect his fiancée and his grandmother and accordingly, I find that the defence of self-defence has been established on the evidence.

### QUANTUM

- [61] However, if I am incorrect in relation to that assessment, I shall consider the matter of quantum.

### General damages

- [62] General damages are governed by *Civil Liability Act 2003* and as such I must assess an injury scale value (**ISV**). I accept that Mr Corowa has been left with a significant disability within his right ankle and foot. He has no control over his toes and has limited movement within the joints of his foot and ankle. I accept that he is in significant constant pain. It was submitted that an ISV of 30 should be applied by the plaintiff.
- [63] Dr Cook in his report of 20 March 2011 assessed a level of whole person impairment of 17 per cent resulting from all the injuries sustained. Comments for Item 134 of the *Civil Liability Regulation 2014* (**the Regulation**) indicate that an ISV near the bottom of the range is appropriate where there is a whole person impairment of 16%. In this case the plaintiff was young at the time of injury. I accept that he was able to survive on his own in the bush while evading the police however I do not accept that this is necessarily indicative of a recovery rather than a strong desire to remain at large and avoid incarceration. I accept that this injury causes him significant pain and interferes with the quality of his life significantly. I accept that it limits his social life and his ability to work in any area where he may be qualified. While I accept Mr Corowa is experiencing significant pain as a result of the injury he nonetheless has been able to do some work whilst in jail and has also been able to drive, albeit illegally, and commit further offences. He gave evidence and I accept that he is on regular pain killers. However, he does not pay for those pain killers.
- [64] Taking into account the matters in Section 4 of the Regulations I assess an ISV of 25 in this case. This equates to general damages of \$35,000.

### Past economic loss

- [65] The plaintiff has given evidence of work that he performed. However, there is little by way of documentation to support his evidence. He gave evidence that he was born in 1980 and his first job was fruit picking. He completed year 9 at school but did not finish year 10. He had done some skills training in construction work. He thought he might have done three seasons of fruit picking. He said he worked at Boral Masonry on a casual basis from 2004 on and off for three years and in that employment he laid bricks for a tumble machine, and stacked pallets.
- [66] His next job was as a handyman for Blacks Real Estate. That employment was for about six to 12 months and he earned \$900 per week. Then in 2008 he joined Insight Restorations cutting walls out after the floods. That employment was for three months and he earned a \$1,000 after tax per week. Since that time he has been unemployed.
- [67] He has also spent long periods in jail. His longest period was from 2015 to 2018. He was injured in 2006 after being hit by a car on a motorcycle but he said there was no permanent injury as a result. There were no details given as to how much he earned fruit picking.
- [68] In cross-examination he said the Boral job was early 2000s or late 1990s. He said his work for Blacks Real Estate was six to 12 months up to February 2008 earning roughly \$900 a week and then he worked for Insight Restorations.
- [69] His tax returns indicate that he earned \$3,000 gross and \$2,545 net income other than his government payments in 2007/2008 tax year and in 2007 there was no salary other than government allowances. His Centrelink record for 2008 shows earnings of slightly over \$2,000 for the 2008 financial year and about \$1,600 for the 2009 financial year. Coupled with that, Mr Corowa was in and out of prison for offences of violence and he was drug addicted during the period leading up to this trial so his employability would have been significantly reduced.
- [70] A loss of \$10,000 net per annum is claimed for past economic loss with a deduction for periods spent in custody of five years over the period between the accident and the trial. There is little to support in my view a claim of \$10,000 net per annum. The evidence would suggest that Mr Corowa has never earned more than \$3,000 per annum. His evidence in relation to his earnings is not supported by documentary evidence and I do not accept it as being accurate. It is impossible to accurately estimate lost wages but I will make a global assessment of \$15,000 for loss of income together with interest and superannuation.
- [71] **Economic loss – future**

Accepting that the plaintiff is unemployable in the commercial labour markets, given his education, his poor work history, his criminal history and periods of incarceration his future economic loss in my view is not significant. He is 38 years of age and his impact on the labour market was minimal. His future employability

even without injury was low. It is impossible to make an exact calculation. Accordingly, I would award a global sum of \$40,000 for future economic loss.

### **Special Damages**

In relation to his pharmaceutical expenses both past and present again very little was given by way assistance in terms of what he has actually spent. I accept he would be someone who would need constant pain relief and as such I have allowed \$2,000 for past and future medical expenses.

### **Contribution**

- [72] Mr Corowa was particularly aggressive on this day. He returned to harass and menace Mr Winner and his family in their home without justification. Even if Mr Winner's actions were excessive in the circumstances, I find that Mr Corowa contributed substantially to his own injuries. Given his actions on the night in question any award should be discounted by 70 per cent to allow for that contribution.

### **ORDER**

**The plaintiffs claim is dismissed. The plaintiff is ordered to pay the Second defendants costs of and incidental to this action to be assessed unless otherwise agreed.**