SUPREME COURT OF QUEENSLAND

CITATION:	*Ollier v Magnetic Island Country Club Incorporated & Shanahan* [2003] QSC 263
PARTIES:	**GLENN THOMAS OLLIER** **by his litigation guardian SUSAN OLLIER** (plaintiff) v **MAGNETIC ISLAND COUNTRY CLUB INCORPORATED** (First Defendant) and **MARK ROY SHANAHAN** (Second Defendant)
FILE NO/S:	S.189 of 1996
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	15 August 2003
DELIVERED AT:	Townsville
HEARING DATE:	28 July to 1 August 2003
JUDGES:	Cullinane J
ORDER:	**1. Judgment for the first defendant against the plaintiff with costs to be assessed.** **2. Judgment for the plaintiff against the second defendant in the sum of $2,610,795.72. Parties have leave to apply in relation to costs.** **3. Dismiss the second defendant's claim for indemnity or contribution against the first defendant with costs to be assessed.** **4. Parties have leave to tender further material and make further submissions on the issue of the Public Trustee's fees.**

CATCHWORDS: TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – where plaintiff was struck in the head by a golf ball hit by the second defendant – where plaintiff suffers very serious disabilities and deficits as a result – whether second defendant owed a duty of care to the plaintiff and, if so, whether he had discharged that duty

TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – where plaintiff was struck in the head by a golf ball on the first defendant's golf course – whether first defendant owed a duty of care to the plaintiff and, if so, whether it had discharged that duty

Nagle v Rottnest Island Authority (1993) 177 CLR 423, applied
Rootes v Shelton (1967) 196 CLR 383, considered

COUNSEL: J Baulch SC for the Plaintiff
R Wensley QC for the First Defendant
N Adams for the Second Defendant

SOLICITORS: Lee Turnbull & Co for the Plaintiff
Michael Stewart Solicitors for the First Defendant
Crosby Brosnan and Creen for the Second Defendant

[1] The plaintiff who was born on 21 October 1948 was injured on 28 August 1994. He was called to the witness box but was not able to give any worthwhile evidence. He has very serious disabilities and deficits as a result of the accident. He did not seem to know why he was at Court.

[2] Proceedings have been instituted against the first defendant, which conducts a nine hole golf course at Magnetic Island, and the second defendant, who struck the golf ball which hit the plaintiff on the head, as a result of which he sustained severe head injuries.

[3] The litigation arises out of what can only be described as a tragic incident in the course of a social day's golf at the first defendant's golf course.

[4] On 28 August 1994 an Ambrose competition was held to raise funds for charity. A large number of people participated. Teams played in groups of four. It would seem that at the time the plaintiff was injured there were 72 people on the course.

[5] The plaintiff's group had commenced at the first hole and had been immediately followed at the tee by the second defendant's group. They had played in this order until they came to the eighth hole. The other three members of the plaintiff's group and the four members of the second defendant's group, including the second defendant, were called as witnesses at the trial.

[6] The course is a small one with relatively short fairways. Of the nine holes, four are par three and the remaining five, par four. The eighth hole is some 251 metres in length and is a par four. There are photographs of the eighth fairway in evidence. These are Exhibits 1(H) and 4. The latter were taken some time since the day in question and after some alterations had been made to the course, whilst the former show the fairway as it was at the time. The participants were to play 18 holes which involved traversing the course twice. The event being a social one, some alcohol was drunk in the course of the competition but on the evidence before me, it does not seem that alcohol played any role at all in the events which occurred. It was not contended otherwise in addresses.

[7] The plaintiff's group had reached the eighth hole by the early afternoon. The evidence suggests that the incident occurred at some time around 2.30 p.m.

[8] Exhibit 7 shows the layout of the course as it was in 1994. There is a tree which appears in the drawing depicting the eighth fairway. It is marked in green. It can be seen in the various photographs which are in evidence. Although there were some differences between the witnesses about this, I am satisfied the fairway of the eighth hole extended to the right of that tree by some distance as one looks down the fairway.

[9] There are some trees to the right which extend back to a point not far in front of the tee. There are two tees, the most forward of which is the social tee, and it was the social tee which was in use on this day. Both tees can be seen in the photographs which are Exhibit 4. As one progresses further down the fairway beyond the line of trees, there is further to the right a more heavily wooded area known, according to the witnesses, as Sherwood Forest.

[10] In the photographs, as will be seen, the trees throw shadow across a part of the fairway and I have no doubt that this was the case on the day in question. Indeed given the narrowness of the fairway and the trees surrounding it, it would seem that there is likely to be shade on one part or other of the fairway for most of the day.

[11] In an Ambrose competition the group plays from the point where the best stroke of the four in the group has delivered the ball. Each member of the plaintiff's team had teed off and I am satisfied from the evidence that the plaintiff was about to hit his second shot from the position that I have just referred to when he was struck.

[12] One of the members of the plaintiff's team was Alan Clifton Hurst (Hurst). He was at the time, and is still, the club patron. The plaintiff was not a member of the club but played regularly in social events.

[13] Hurst appears in a number of the photographs forming part of Exhibit 4 and 1(H). The position in which he is standing in each is said by Hurst to have been the position in which the plaintiff was standing when he was struck. There was evidence from Hurst and another member of the group, one Petersen, that another member of the group (Petersen) had played off from this position prior to the plaintiff.

[14] According to Hurst, (who provided a statement which is Exhibit 1(C)) there were in fact five in the group including his granddaughter.

[15] Hurst says that the group, having teed off, walked down the fairway, picking up two balls on the fairway which plainly would not have represented the best position achieved by the members of the group from which the second shot was to be taken. He says that he and his granddaughter picked those two balls up. He says that there was one ball which was either just in or close to Sherwood Forest which also did not represent the best stroke of the group. Hurst says that he was standing to the left of the plaintiff and fairly close to him but sufficiently apart from him to be in a safe position, and the other two playing members of the group were behind him and also out of the way.

[16] Hurst says that he saw the plaintiff turn side on to play his shot. The plaintiff lifted his head to look over towards the green and at that point was struck on the head by a ball. In evidence Hurst said that he had heard the ball strike the ground and turned and at that point saw it travel towards the plaintiff and saw it strike the plaintiff in the head.

[17] There was evidence that there were parts of the fairway which were not grassed. This is apparent from the photos. The material in those areas is decomposed granite and according to Hurst is "hard as concrete".

[18] In cross-examination Hurst estimated that the position in which he is standing in the photographs is some six to eight feet from the trees. It appears to be somewhat longer than that and there was evidence from Mr Rowlands, surveyor, (who measured the distance from the point where Hurst had indicated to him that the plaintiff was standing back to the social tee at 181 metres) that in his estimation the position was some five to ten metres away from the trees to the right.

[19] Hurst says that when he became aware that the plaintiff had been struck, he looked back to the tee area and saw a group of people on the tee.

[20] The plaintiff fell to the ground and the members of his group called the other team through. The plaintiff's group completed the first nine holes without him, however he played the second nine. It was not until later that day that the plaintiff suffered the onset of severe symptoms.

[21] Of the members of the plaintiff's group, Hurst, it seems to me, has the best recollection.

[22] The other two members, Martin Morris Power (Power) and John Alan Petersen (Petersen) were also called.

[23] Petersen says that he had played his shot, which was the first shot of the plaintiff's group and was in the process of putting his club back in his bag when he heard a loud crack. He turned around and saw the plaintiff holding his head and down on one knee. Petersen says that he had not heard anyone call "Fore" before this. In a statutory declaration Power says that when they were about two-thirds of the way down the eighth fairway preparing for their second shot, he noticed the plaintiff

holding his head after he (Power) heard a loud crack and turned around. The plaintiff was bleeding profusely at that time.

[24] In cross-examination, Petersen said that there had been no difficulty in identifying where the balls which had been struck by the plaintiff's group were lying on the fairway. He agreed with propositions put to him that the best ball was somewhere to the right hand side of the fairway near Sherwood Forest. He said it was in play but close to the trees. He acknowledged that the group "possibly" could have been in shadows presumably at the time Petersen struck his ball and when the plaintiff prepared to do so.

[25] He said that the plaintiff had selected a club and was preparing to address the ball when he (Petersen) had his attention drawn to the plaintiff by the noise of the ball striking him.

[26] It was suggested to Petersen (who seemed to accept the proposition) that after he had struck his ball, he moved to a position out of the way of the plaintiff and "near to the trees". He appeared to also accede to the proposition that the other members of the group were to the right hand side of the plaintiff further towards the trees.

[27] The four members of the second defendant's group were called. The other members were one John Kieran Rockett (Rockett), Ross Kennedy Woodger (Woodger) and the club captain, Kevin William Singleton (Singleton). In a letter which the second defendant wrote to Singleton in his capacity as captain of the club, on 1 September 1994 (Exhibit 1(I)), he said that Rockett and Woodger had teed off before him. He said that he struck a "very long shot down the right hand side of the fairway following the line of trees". He went on to say that as the ball was descending, "I became aware of a group of golfers who were playing a long way in front of us. I was unsure if my ball would carry as far as the group of four golfers, when Kevin Singleton yelled out 'four'" (sic).

[28] Rockett and Woodger, who had both teed off before the second defendant, each gave evidence that each had looked down the fairway before striking their ball and had not seen anyone on the fairway ahead. Singleton, who was to be the last of the second defendant's group to tee off, says that he had looked down the fairway and had seen nothing ahead. He was standing somewhat to the right of the second defendant.

[29] In his evidence Rockett referred to the area to the right of the tree which appears in the exhibits as being in the nature of a "pocket" protected by the trees. He had suggested that the tree I have referred to marked the edge of the fairway, but I am satisfied from the evidence of Hurst and Singleton and what appears in Exhibit 7, that in fact a significant part of the fairway extended to its right.

[30] Rockett, who had seen the team ahead moving down the fairway, expressed the strong view that at the time he hit off there was nobody anywhere in view on the fairway. Woodger also gave evidence to the effect that he had carried out, to use his term, "an observation scan" across the fairway and that nobody was visible.

[31] Singleton had not had occasion to look down the fairway for the purposes of ascertaining whether it was safe for him to hit off but says that he had looked

down the fairway whilst the second defendant was preparing to tee off and saw no-one.

[32] The second defendant said that he had looked ahead and had seen no-one on the fairway. He says that perhaps some 30 seconds passed between the time when he had looked prior to hitting off and when he saw, whilst his ball was in flight, a group of people in an area towards which the ball was heading. It was at this time that Singleton said that he too saw the group ahead and yelled "Fore". Singleton said that when he saw the group, there was nothing obstructing his view of it.

[33] The second defendant is only an occasional golfer. He had played approximately once a year for about 20 years (including 4 times on the first defendant's course) and had played the first seven holes on this day.

[34] All of the witnesses spoke of their knowledge of a rule which is described as a rule of etiquette, and which a number of them described as a rule of common sense, that a player does not hit off from a tee when there are people in a position on the fairway where there is a risk that they might be hit by a tee shot.

[35] The rules of golf, a copy of which was tendered (see Exhibit 1(G)) contain the following provisions in Section 1 – "Etiquette":

> *"Safety: Prior to playing a stroke or making a practice swing, the player should ensure that no-one is standing close by nor in a position to be hit by the club, the ball or any stones, pebbles, twigs or the like which may be moved by the stroke or swing".*

[36] It then goes on say: "*No player should play until the players in front are out of range.*"

[37] The second defendant gave evidence that he estimated the longest shot that he had played from a tee before was some 150 metres. However he acknowledged that the position where the plaintiff was struck was a position in which there was a risk of his being struck by the second defendant hitting off from the tee, and that had he seen him, he would have not struck the ball. It was not contended ultimately that had the plaintiff been seen by the second defendant prior to his striking the ball, it would have nonetheless been safe for the second defendant to hit off.

[38] I think it can be said immediately that all of the witnesses were, in my view, credit worthy and were giving an honest account of the events as they saw them.

[39] I however accept the evidence of Hurst as to where the group was at the time the plaintiff was struck. I also accept his evidence generally of their movements. I prefer his evidence as indicated by the position he has taken up in the photographs which are in evidence to the somewhat vaguer evidence elicited in cross-examination from Petersen and Power, that one or more of the group was standing close to or near the edge of the trees. I also prefer Mr Rowland's estimate of the distance between the point indicated where Hurst was from the trees to that of Hurst himself. I note that Singleton seems to have agreed that the group was in this position when he saw it.

[40] This being so and bearing in mind that Petersen had already hit off from this point, the plaintiff was, at the time he was struck, in a position where he ought to have been seen by the second defendant as he was preparing to tee off. I am satisfied that the plaintiff's group was at all times in a position where it should have been visible at any time the second defendant might have been expected to look prior to hitting off.

[41] It is not readily explicable why Rockett, Woodger and Singleton, as well as the second defendant, had not seen the group before. It can be accepted there would have been some dappling or shadow effect but, as I have said, the position of the group and certainly the plaintiff was at all times on the fairway in a position where they or he ought to have been seen.

[42] There was no suggestion that any ball had been lost which had taken the plaintiff's group into the trees. Whilst one of the balls had been hit close to or, it might be accepted, even just into the tree line, there is nothing to suggest that the group went into that area.

[43] It is worth noting that Woodger did not at any time see the group, even after Singleton called out "Fore", and if I understand his evidence, was not aware that there had been any incident at all, either during the course of playing the eighth hole or for some time thereafter. His recollection is plainly deficient. Insofar as Rockett suggests that when his attention was attracted (as he said by "a commotion" down the fairway), he thought that the people he observed were "in the trees", I think he is mistaken, if he is intending to refer to an area different to that shown in the photos as indicated by Hurst. It can be accepted that a person in that position would have trees behind and to the side of him which would be closer to him than if he was to the left of the tree which is on the fairway. But this does not, in my view, affect his visibility.

[44] It was contended on behalf of the second defendant that what occurred was one of the inherent risks in the game of golf and in accordance with the principles in *Rootes v Shelton* (1967) 196 CLR 383, the plaintiff, having voluntarily undertaken to run such risks, is not entitled to recover from the first and second defendants.

[45] I do not accept this submission.

[46] The risk to which the plaintiff was exposed was a risk that a following player would strike the ball at a time when the plaintiff was within range of being struck and was thus at risk of being injured.

[47] This is not a risk inherent in a game of golf and indeed, the rules of the game expressly provide that steps should be taken to avoid it. The second defendant was aware of that and it is, as he acknowledged, a matter of common sense that a person does not strike a ball from a tee in such circumstances. He acknowledged that had he seen the plaintiff, as in my view he ought to have, he would not have struck the ball because of the risk that the plaintiff might have been struck.

[48] In my view the second defendant was under a duty of care to the plaintiff which, in the circumstances, because of his defective lookout, he failed to discharge, as a result of which the plaintiff sustained serious injury.

[49] It was contended on behalf of the first defendant that it was under no duty of care to persons in the position of the plaintiff using the first defendant's course. I think that this is a case in which the first defendant (as the body responsible for the maintenance of the course and which invited members of the public to use it) should be regarded as being under a general duty of care at common law to take reasonable care to avoid foreseeable risks of injury to persons lawfully using the golf course. In my view the existence of a duty of care arises in the same way as it arose in *Nagle v Rottnest Island Authority* (1993) 177 CLR 423. By encouraging people to use the course the first defendant came under a duty of care to those who used it. The duty was to take reasonable care to avoid injury to them and the discharge of that duty would "naturally require that they be warned of foreseeable risks of injury associated with the activity so encouraged". See Mason CJ and Deane, Dawson and Gaudron JJ, page 430.

[50] I do not think that the duty should necessarily be limited only to the static features of the course but might extend to operational and organisational activities.

[51] Although the allegations against the first defendant are widely pleaded, ultimately as the case was presented they came down to two.

[52] Firstly, it was said that the first defendant was under an obligation to ensure that the persons using the course were properly instructed as to the risks associated with hitting a golf ball while other persons were within range of the ball which was to be struck. Evidence was called from Mr Alan Creighton, who is a golf professional at the Townsville Golf Course and has been for many years. In a report which is Exhibit 1(A), he expressed the view that where, on an occasion like the charity event being conducted on the day the plaintiff was injured, there are large numbers of people on the course and the course is likely to be crowded with persons who are likely to include novice and/or occasional golfers, "I think it would be appropriate, as the organiser of the day, to remind golfers of the rules and etiquette of golf".

[53] The precise manner in which this suggested duty might be discharged was the subject of some but relatively little evidence. It seems to me however that it is a complete answer to the claim insofar as it is based upon the alleged breach of duty that the second defendant in his evidence (as was the case with all of those playing that day) said that he was aware that it was a basic rule of safety in the game of golf that one should not strike a ball off the tee whilst players are in range on the fairway ahead. There is no suggestion that he forgot it or overlooked it when he teed up. He said that had he seen the plaintiff before he struck the ball, he would not have hit it. In these circumstances, the failure to discharge the duty relied upon, it seems to me, can have no causal relevance to what occurred as the plaintiff already knew what it is said he ought to have been told.

[54] The second basis upon which the first defendant is said to be in breach of its duty of care to the plaintiff was in failing to provide marshals to supervise play.

[55] The argument was based upon the proposition that the course was a congested one and that because of so many people (including novices and/or occasional players) being on such a small course, a risk that persons may hit balls before they could safely do so arose. The difficulty however is that there is no evidence that any of

the relevant teams were under pressure because of the number of players following them to complete their round of the course or, more specifically, to complete the eighth hole. Indeed the evidence was to the opposite effect, that play had flowed smoothly.

[56] In his statement, Mr Creighton had said that he thought it would be appropriate "perhaps to provide marshals to supervise play and to ensure that these rules were observed".

[57] In cross-examination Mr Creighton acknowledged that marshals were not used for these purposes at Townsville Golf Course. Indeed he made it clear that the purpose for which marshals are used is generally to ensure the free flow of play, particularly on championship days or where professional play is involved, and that these marshals normally travel around the course in buggies. One of the other purposes for which marshals might be used is to be on the spot to give a ruling quickly and without any delays.

[58] The evidence simply does not support the proposition that there is any practice to use marshals to ensure that safety rules such as the ones under consideration here are obeyed. It is difficult to see how such a step could in any case have probably avoided what occurred here unless there was a marshal stationed on each tee. Mr Creighton was quick to point out that he did not have this in mind.

[59] It seems to me also that the risk which the plaintiff contended arose from the substantial numbers of persons using the course at any given time was not a risk which realised itself here. I am unpersuaded that the first defendant was in breach of its duty of care to the plaintiff by failing to provide marshals as alleged.

[60] It follows that the plaintiff's claim against the first defendant must fail. It equally follows that the claim for contribution or indemnity by the second defendant against the first defendant must fail.

[61] On the day in question, the plaintiff continued to play golf after being struck and consumed some alcohol. He went to his home and told his wife that he had concussion. Because of her concern about his appearance, his slurred speech and his incoherence, she called the ambulance. He was taken on the ferry to Townsville where he was admitted to the hospital with decreased consciousness and dilated pupils on the left side. A left sided subdural haematoma and left sided cerebral oedema were apparent on a CT scan. A craniotomy was carried out and the haematoma evacuated. He spent some time in the intensive care unit and his postoperative recovery was complicated by episodes of pneumonia and plural effusion.

[62] There was some improvement in his level of consciousness, vital signs and respiratory function over the following weeks but he has been left with very significant neuro cognitive deficits including a left hemiparesis, double incontinence and pervasive cognitive deficits with labile moods.

[63] He was discharged from the hospital on 2 February 1995 and returned to Magnetic Island. His wife's statement (Exhibit 6(B)) details the difficulties which developed when she, together with her children, commenced to look after the

plaintiff. The intensive nature of the care which he required took a toll on her health and it was necessary for some other arrangements to be made for him in order for Mrs Ollier to have a break. He went to the RSL home for one day and to the Garden Settlement for two days. On each occasion his behaviour was unacceptable. At one place he had a fall, and at the other he wandered onto the roadway. In each case, he was not permitted to remain.

[64] Again, the plaintiff returned to Magnetic Island, until February 1997 when he was transferred to Penrose House, located at Baillie Henderson Hospital in Toowoomba. He was there until 8 April 1997 when he returned to Magnetic Island where his wife, together with those children who were there at the time, again had to care for him.

[65] In November 1998 he was admitted to the Townsville General Hospital for a brain scan, following which he was transferred to the Mossman Hall Special Hospital in Charters Towers. He was there for approximately three years with some relatively short breaks when he would go to his home at Magnetic Island. By this time the plaintiff's wife had the assistance of Blue Nurses to care for him when he was home.

[66] In January 2002 the plaintiff was admitted to the Acquired Brain Injury Unit at Kirwan and he has been there since.

[67] There is a report of Dr Karunakaran who is the director of the Kirwan Rehabilitation and Extended Treatment Service and who has responsibility for the Acquired Brain Injury Unit. He is a psychiatrist and has had the direct care of the plaintiff for some time. He says that the plaintiff has had some improved quality of life and improved general health since he has been at the Unit. I take from his report (which is Exhibit 5(G)) a statement of the plaintiff's disabilities and deficits:

> *" **Mobility:** Mr Ollier has a left-sided hemiparesis (weakness) with decreased mobility. He mobilises with a four point stick. His balance is not stable and he is at some risk for falls. Indeed, he had a fall and suffered a fracture of the left forearm on 3/5/99. As he does not have insight into his disability, he requires constant supervision and prompting to attend to aspects of safety. He also needs physical assistance to negotiate stairs and for getting in and out of vehicles.*
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> ***Bowel and Bladder**: Mr Ollier is incontinent of bladder and bowel. Structuring of his toilet habits and careful attention to his food and fluid intake has decreased the number of soiling episodes. However, this remains an activity requiring supervision and assistance.*
>
> ***Feeding:** Mr Ollier is able to feed himself when provided with food on a plate. However, he is not able to regulate it at an appropriate speed and often tends to choke or aspirate. Therefore he needs supervision during feeding time.*
>
> ***Dressing, grooming and bathing**: Constant supervision and assistance is needed during these activities.*

***Behaviour**: Mr Ollier tends to be intrusive and at times challenging to manage. He constantly demands cigarettes and needs to be redirected. Left to himself he is likely to smoke continuously. He displays high impulsivity and is prone to verbal aggression when frustrated. Also reported are instances of physically aggressive behaviour including pushing and striking out. As he lacks insight into his disability he requires supervision and assistance to ensure personal safety particularly during transport and in public places. I should emphasise that from a carer's perspective perhaps the most difficult problem is that of his intrusive behaviour. He seeks attention and makes requests incessantly, and is prone to anger outbursts when frustrated.*

***Cognition**: Mr Ollier has pervasive cognitive deficits. His last Mini Mental State Examination, carried out on 26 March 2003, showed a score of 15 out of 30. This is in the severely impaired range.*

Mr Ollier's attention span is poor and he remains easily distractible. He is somewhat disorientated in time and place. He has the ability to recognise his family members and long-term acquaintances.

Mr Ollier's memory is severely impaired with very limited ability for delayed recall. This means he cannot easily learn and retain new material. This has greatly hampered his rehabilitation and explains the need for constant supervision and prompting.

Mr Ollier has impaired 'frontal executive functioning'. This is reflected in his impaired ability to plan, sequence, reason and adapt. He has 'set shifting difficulty' and tends to persevere with themes. This explains, at least in part, the incessant nature of his requests and the intrusive nature of his behaviour.

The frontal lobe injury has also resulted in subtle personality changes. From what was described as a pleasant and even-tempered personality, he has become somewhat labile and irritable."

[68] The plaintiff has limited or no insight into his condition. However it is clear from the evidence of Dr James, a psychiatrist and Dr Likely, also a psychiatrist, Mr Walkley, a psychologist, as well as Ms McQueen, who is the clinical nurse consultant at the Unit, that the plaintiff is aware of his surroundings and acutely feels the loss of his home and being away from his family. He has of recent times spent some short periods at Magnetic Island and appears to enjoy this. It appears he has expressed a desire to live with his family. It seems that he is, according to Dr James, suffering from some unrealistic expectations of what a return to full time living on the island might mean to him. Nonetheless the evidence would suggest that being at home has some beneficial effect upon his moods and his behaviour. Employees of the Unit have taken him to visit a hospice recently and it appears that being amongst elderly people caused him some distress, resulting in his demanding that he be taken back to the Unit.

[69] There is evidence from witnesses, such as Professor James, Ms McQueen and Mr Walkley, expressing to a greater or lesser extent the benefits which might accrue to the plaintiff living at home. His wife and children would like to have him living with them. However, all who have spoken acknowledge the great challenge which

would be associated with this, and I think it fair to say that the opinions which have been expressed positive to this are qualified by the belief that the difficulties associated with it might be insurmountable. Particularly important in this regard are his behavioural problems.

[70] Dr Karunakaran has said that the most suitable option seems to be a nursing home placement where his care needs could be met satisfactorily. In evidence he said that he thought it was "definitely worth a try" to attempt to care for him in his home with adequate care provisions which would require, it seems to me, full time care on one or other of the bases Ms Lowrie gave evidence of. See Exhibit 6(D).

[71] Dr Likely, whose opinion on this subject I accept, was of the view that such an experiment would be inevitably doomed to failure. He thinks that the best course would be for regular visits to his home at Magnetic Island where the plaintiff would be looked after by carers and then spending the balance of his time at an institution where he could also have permanent full time care. The plaintiff's current location provides one-on-one constant care but it is apparent that he cannot stay there indefinitely. He has been there for about 18 months but the Unit is a rehabilitative facility and is not intended to be a place where people can remain indefinitely. No doubt the highly qualified personnel at the Unit provide an ideal means of delivering such care. However the case as advanced before me was that trained carers could provide such care if the plaintiff returned home.

[72] There was evidence from Ms Glaister, who is the Director of Nursing at the Good Shepherd Hospice in Townsville. It is apparent from her evidence that this institution would not be able to provide the high level of care which Dr Likely says the plaintiff currently receives and which he says is necessary. There was some evidence, which I think can be regarded as inconclusive, that a person in the plaintiff's position might be able to provide his own personal carers to ensure that the necessary level of care is provided at the hospice. This, Ms Glaister said, would be a matter for the Board of the hospice and there has not, to date, been any precedent for this.

[73] The evidence does not suggest any other institution in this region which would be suitable for the plaintiff.

[74] The assessment of damages in respect of future care, therefore, poses very significant difficulties for the Court. It seems that the most acceptable evidence of the measure of the plaintiff's need is the cost of providing carers at least from 9 am to 7 pm (which would involve two carers per day) at some institution, whether the hospice or some other as yet unidentified institution, with the plaintiff then returning to his home on Magnetic Island every second weekend, during which a similar level of care would be provided in the home. The first defendant suggested the scenario of fortnightly visits to his home and I think this is a realistic way in which to approach matters. The costs of providing such services will of necessity be substantial. It can be assumed that he will stay at the Unit until there is some other suitable place for him. If the plaintiff were to remain at the Unit for another two years (something which is by no means outside the realms of possibility), the present value of the cost of that would be $516,000.

[75] The first defendant generally adopted the second defendant's submissions on quantum.

[76] Turning then to the question of damages, the enormous destruction of the plaintiff's way of life, especially his family life, and the disabilities and deficits from which he suffers, are only too apparent. An award of general damages in this case has to be tempered by the fact that there is some significant limitation upon his insight into his condition, although it is apparent he has some insight which causes him acute distress arising out of his inability to live permanently with his family. Regular visits which have already begun might lessen this somewhat but will not overcome it.

[77] I assess general damages in the sum of $150,000.

[78] I allow interest on $85,000 representing the past at 2% for 8.9 years producing a figure of $15,130.

[79] There is a good deal of agreement about many of the other items, although there is some dispute about what ought to be allowed by way of discount for contingencies.

[80] The plaintiff, at the time he was injured, was employed at the Picnic Bay Hotel as a cleaner. He worked 5 days per week and occasionally Saturdays, having a day off during the week.

[81] The plaintiff would have continued to work at the hotel and would have been likely to do so until age 65. He would have earned some $153,419 up until the present. Given the passage of almost nine years it is appropriate I think to apply a very small discount and I discount the amount by 5% producing $145,748.

[82] Interest is to be allowed at the rate of 5% for 8.9 years on this sum less benefits received of $65,355. The figures from Pickard and Associates (Exhibit 6(C)) also include interest on loss of superannuation. Making the necessary deductions, I allow the interest on loss of earnings and past superannuation in the sum of $24,619.

[83] Loss of superannuation is allowed at $9,912.

[84] It is agreed that the plaintiff, had he worked to 65 in his position at the hotel, would have received income which, discounted by reference to the 5% tables produces a present value of $173,206. I apply a discount of some 20% for the ordinary vicissitudes and contingencies of life resulting in a figure of $138,565.

[85] I allow superannuation in the sum of $12,470.

[86] Past expenses in the sum of $228,726.21 are agreed upon, as is interest in respect of sums actually paid by the plaintiff in the sum of $441.38.

[87] I allow future expenses as claimed by the plaintiff. These are as follows:

Future medication - $33.29 per week for 25 years	$25,087.34

Future travelling expenses - $10.00 per week for 25 years	$7,536.00
Future medical expense - $19.61 per week for 25 years	$14,798.09
Bathroom/toilet renovations	$19,250.00
Future aids (shoes, pads etc.) - $160 per week	$120,576.00
Set up costs (Wheelchair etc)	$3,939.70
	$191,187.13

[88] In a number of instances the amount contended for is somewhat below that contended for by the defendant and in relation to future aids, substantially lower, but this seems to be based upon error in the application of the actuarial tables.

[89] In relation to the past *Griffiths v Kerkemeyer* claim there is agreement as to the number of hours involved and the rate. However the first defendant has applied a discount said to arise from the fact that much of the care which the plaintiff has received has been supplied by members of the family. It does not seem to me that this is an appropriate basis upon which to discount the claim since *Van Gervan v Fenton* (1992) 175 CLR 327. Accordingly I allow the claim in respect of past *Griffiths v Kerkemeyer* in the sum of $231,060 and interest of $102,937.

[90] I have already referred to the difficulties associated with future care.

[91] The plaintiff plainly needs somebody to care for him on a full time basis and it is not reasonable for the plaintiff's wife and family to do this, even on short visits.

[92] The least expensive of the options provided by Ms Lowrie involves care of 70 hours per week provided by two persons and has a total annual cost of $106,688.

[93] Doing the best I can with the imponderables involved I adopt a figure of $120,000 per annum over the balance of the plaintiff's life expectancy and before applying a discount. This is intended to allow for the first of the two alternative figures for carers (two carers per day) and accommodation. There is some evidence of the costs of the plaintiff's accommodation at an institution like the hospice. The present value of this over 25 years is about $1,700,000. I discount this figure by 20% for contingencies (including a risk of reduced life expectancy) to arrive at a figure of $1,360,000

[94] The total then of the plaintiff's damages is $2,610,795.72.

[95] The Public Trustee's fees are to be allowed. It is not clear from the material before the Court what the proper allowance for these should be. I will give the parties leave to tender further material and make further submissions on this issue.

[96] I give judgment for the first defendant against the plaintiff with costs to be assessed.

[97] I give judgment for the plaintiff against the second defendant in the sum of $2,610,795.72. I give the parties leave to apply in relation to costs.

[98] I dismiss the second defendant's claim for indemnity or contribution against the first defendant with costs to be assessed.