SUPREME COURT OF QUEENSLAND

CITATION:	*Rogers v Interpacific Resorts (Australia) Pty Ltd* [2007] QSC 239
PARTIES:	**Andrew Ian Rogers** Plaintiff v **Interpacific Resorts (Australia) Pty Ltd ACN 010 976 422** Defendant
FILE NO/S:	BS10137 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	18, 19 and 20 April 2007
JUDGE:	White J
ORDER:	**Judgment for the plaintiff in the sum of $593,708.46**
CATCHWORDS:	TORTS - NEGLIGENCE - DUTY OF CARE - REASONABLE FORESEEABILITY OF DAMAGE - PARTICULAR CASE - where the plaintiff was a passenger on a jet ski operated by the plaintiff's son - where both the plaintiff and their son were inexperienced jet ski operators - where the jet ski was owned and operated by the defendant resort - where the plaintiff was required to sign a form entitled "Jet Ski Rules" - where the defendant was aware the plaintiff and his son were inexperienced jet ski users - where the plaintiff and his son were provided with minimal instructions - where the plaintiff and son were thrown off - where the plaintiff suffered injury - whether the plaintiff was owed a duty of care TORTS - NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - PARTICULAR CASES - OTHER CASES - where the plaintiff received minimal instructions on how to use a jet ski - where the plaintiff was an inexperienced jet ski user - whether the failure to seek further instructions amounted to contributory negligence - whether permitting inexperienced son to drive amounted to contributory negligence

TORTS - NEGLIGENCE - MISCELLANEOUS DEFENCES - OTHER DEFENCES - whether there was a risk of serious personal injury arising from the use of the jet ski - whether the plaintiff accepted the risk - whether the defence of volenti non fit injuria applied

TORTS - MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - MEASURE OF DAMAGES - PERSONAL INJURIES - LOSS OF EARNINGS AND EARNING CAPACITY – whether factual basis underpinning expert accountants' reports established - approach

Law Reform Act 1995 (Qld), s 10(1)
Transport Operations (Marine Safety) Act 1994 (Qld)
Transport Operations (Marine Safety - Hire and Drive Ships) Standard 2000 (Qld), s 12
Transport Operations (Marine Safety) Regulations 2005 (Qld)

Blunden v Solomon [2005] NSWCA 52, considered
Fry v McGutticke FCA AG 32 of 1998; BC 9806297 cited
Green v Hanson Constructions Pty Ltd [2007] QCA 260, applied
Murchie v Big Kart Track Pty Ltd [2002] QCA 339, cited
Nelson v John Lysaght (Australia) Ltd (1975) 132 CLR 201, cited
Todorovic v Waller (1981) 150 CLR 402, cited

COUNSEL: Mr RI Myers for the plaintiff
Mr D McMeekin SC and Mr S Farrell for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
McCullough Robertson for the defendant

[1] The plaintiff ("Mr Rogers") sustained an injury to his left eye when he was riding as a pillion passenger on a jet ski driven by his son at Couran Cove Resort operated by the defendant on South Stradbroke Island on 29 December 2001. Mr Rogers is a solicitor who has his own law practice in South Australia. He contends that one of the consequences of the eye injury has been fatigue due to double vision such that he has been unable to work to the extent that he would have worked had he not been injured and this has been productive of loss of income.

[2] Mr Rogers brings his claim for damages for breach of contract and negligence for breach of the defendant's duty of care to him. Neither the pleadings nor submissions make a claim of breach of the *Transport Operations (Marine Safety – Hire and Drive Ships) Standard* 2000, the relevant statutory standard, made under the *Transport Operations (Marine Safety) Act 1994* although Mr Myers, who appeared for Mr Rogers, referred to it. Liability is contested, although not strenuously, both for breach of contract and tort, but contributory negligence is urged against Mr Rogers on a number of bases. The defendant strongly challenges the amount of Mr Rogers' claimed losses as a legal practitioner.

The circumstances of the injury

[3] Mr Rogers, who was born on 11 October 1955, was at the time he sustained his injuries, aged 46. He had travelled with his wife and 16 year old son, Alex, and 12 year old daughter to Couran Cove Resort on South Stradbroke Island on 24 December 2001 for a family Christmas holiday for about a week. The family stayed with Mr Rogers' sister and her family in a villa at the resort.

[4] Mr Rogers found the resort management to be very safety conscious. He noted that his son was not permitted to use the gymnasium because he was not 18; that the surf beach was patrolled and entry to the water precluded if those in charge thought the surf too rough; the swimming pool was patrolled; apart from walking, transport around the resort tracks was by bicycle for which safety helmets were required. When Mr Rogers, an experienced windsurfer, attempted to hire a windsurfer and wanted to teach his son, a beginner, the person in charge declined to permit him to do so because Alex had not had a lesson from one of the resort instructors and because the wind was more than 10 kilometres per hour. This was a wind speed which Mr Rogers described as "fine".

[5] Mr Rogers and his son thought they would try jet skiing, having noticed throughout the holiday that it was a much-used recreational activity at the resort. On the morning of 29 December 2001, towards the end of their visit, Mr Rogers made a booking to use a jet ski in the afternoon and signed a sheet of paper (but was not given a copy) headed "Jet Ski Rules" (exhibit 15). It had apparently been signed by those people on 28 and 29 December 2001 intending to hire a jet ski. Above the signatures appeared the following

> "• Read, understand and obey all rules and directions from your instructor
> • Attach Kill Switch to Life Jacket Belt
> • Ride within the Jet Ski course. Do not leave the Jet Ski area for any reason
> • Be aware of all vessels and their intentions in your area
> • Be aware and Give way 'early' to all vessels approaching the Jet Ski course
> • Identify both ends of the Jet Ski course and insure course is free from traffic before leaving rescue boat
> • Familiarise yourself with the jet ski's turning and stopping abilities before full throttle operation
> • Slow to idle when picking up a swimmer and never point Jet Ski at a swimmers head
> • To prevent the Jet Ski overturning let go of the Jet Ski before it tips over. Tipping the Jet Ski can forfeit the remainder of the hire. This is particularly important
> • If the Jet Ski is tipped over right the ski immediately. Instructions to 'right' an overturned Jet Ski are written on the rear of the Jet Ski
> • Mount the Jet Ski from the rear one person at a time.
> • If you run aground turn off the jet ski immediately, and push the ski to deeper water.
> • If you experience starting problems, don't flatten the battery, wait for staff to assist."

[6] Alex did not read or sign the form. Mr Rogers said he read it through quickly and explained when booking that he and his son were novices. He did this in light of their windsurfing experience when Alex was not permitted to ride the windsurfer even under his father's supervision without having had a lesson from the resort's instructor. Mr Rogers was told that training in the operation of the jet ski would be given when they arrived for their session in the afternoon. When they did, the instructor was particularly concerned to identify the course on the other side of the channel of water, about 500 metres away, to which they would be taken by an inflatable craft to the jet ski to avoid the necessity of crossing the path of water-borne traffic. The instructor drew the course in the sand. She was told by Mr Rogers that he and his son were beginners and had not been on a jet ski previously. Mr Rogers wore soft contact lenses and to protect them in the water he wore swimming goggles which he had on as they went out to the jet ski course in the inflatable boat. When they reached the jet ski, in response to Mr Rogers' statement that they had not been on a jet ski before, the instructor said she would show them what to do. Alex said he would like to get on first. In response to Mr Rogers query, the instructor said that it was "alright" for that to occur. She did not enquire if Alex had read the Jet Ski Rules or was aware of them and understood them.

[7] The instructor explained about the key which was attached to the driver's life vest and which operated the ignition so that if the driver came off, the jet ski would stop. She told them if that occurred they should remount the jet ski from behind. They were shown the throttle and that the jet ski was steered by the handle bars. Mr Rogers was told to hold Alex around the waist before setting off. The instruction was over in a few seconds and the instructor returned immediately in the boat to the beach.

[8] The above is a summary of Mr Rogers' evidence which was not contradicted in cross-examination although he was asked a great many questions about what was in his mind at the time particularly about his anticipation of falling in the water. However, the flavour is best obtained from Mr Rogers' own words at t/s 64-65

> "… and then it came time for Alex and I to have our go and I am saying – when it was a question of who to hop on first or whatever, we had this discussion about we haven't done this before, you know.
>
> Just tell us who said what and to whom and what any response was. Who said, that 'we haven't done this before'? -- I said it.
>
> And was there – who if anybody responded? -- It was this lass that had taken us out there and she said 'I will show you what to do' and Alex wanted to hop on first and I said, 'Is that okay?', and she said, 'Yes', and I wanted Alex to go on first so that he would get the instruction so that she could show him what to do, and up to this point I am thinking there has got to be more to it than this, but she is going -- like I have not driven a power boat or anything so I was expecting to be told just generally how you go. Do you go on the left? Do you go on the right? What do you do? And she said, 'I will show him', and she – we had the handlebars to steer with, the throttle to accelerate or to decelerate. We had the key which you had to plug in so that if you came off the machine would stop, instead of pottering off into the distance, and she also mentioned about getting

> back on again and if you have to get on you get on from the back, you don't try and do it from the sides. Presumably that is to do with the buoyancy.
>
> Alright, perhaps it goes without saying but was anything said about the method of operating it, the speed of operating it, the speed at which it should be operated when you first use it? -- It was all over in a matter of seconds.
>
> Was anything said about the way the machine was to corner, the power that should or shouldn't be on when you enter a corner? -- No. It was 'you hop on', and she was sort of a similar attitude to the people earlier on. It is that simple and basic. You hop on. Here is your throttle. Here is your key. You drive it.
>
> Were you told anything about how you should position yourself or what you should do as the person behind Alex? -- Yes. She said that I had to hang onto him around the waist. I was expecting that I would have hand grips or something like on a banana boat. I was expecting to be sitting like that, but it was hug him around the waist."

[9] What they were not told, despite the pleading in the amended defence, was how to turn – by accelerating into the curve – or to carry out a slow practice run under the watchful eye of the instructor.

[10] According to Mr Rogers the conditions were pleasant and they started off at a speed he considered appropriate although, with hindsight, he thought that it must have been too fast. Mr Rogers described what happened as the jet ski approached the end of the course "at the point of the corner" at t/s 65

> "I was aware that we were at that point of the change of direction, but instead of it being a gradual change of direction or a turn or whatever, we came flying off, and when I say flying off I mean it is not one of those occasions where you go 'Will I hang on or won't I", or 'What am I going to do here?' We just came flying off. We just shot off, and because I had been hanging on to him and because we are both going like that, we went off together and when his head hit the water my head hit the back of his head, and as I said, I had a life jacket on. I went underwater."

Mr Rogers' face rammed into the back of Alex's head, smashing his goggles. He sustained injury to his left eye and surrounding face with cuts and bruising and in due course, swelling.

[11] Alex, who by the time of the trial was almost 22, had very little, if any, recollection of the circumstances of hiring the jet ski and any instructions in its operation over five years earlier. He had never been on a jet ski before or, indeed, had never operated machinery with a throttle. He did recall that the jet ski felt stable when he and his father got on it and that the speed the jet ski was driven by him along the course seemed appropriate for the conditions. He described what he could recall of the accident at t/s 172-3

> "Okay. I remember going straight and then it was on a, like a creek that we were in. I don't know how to describe it, but I remember getting to a point where I thought it was appropriate to turn and that is when I remember slowing down a bit and attempting to turn, and that's when we crashed."

[12] Mr Rogers' and Alex's cross-examination explored their understanding that they were likely to fall into the water at some time when using the jet ski based, for the most part, on them wearing life vests. This was rejected by both. They wore the life vests, they said, because they were on water as they did when in a boat in the unlikely event that something occurred to put them into the water. They did not anticipate that as a matter of course they were at any risk of falling off the jet ski.

[13] Mr McMeekin SC for the defendant took Mr Rogers through each of the jet ski rules to seek to establish that the activity in which he was engaged was a risky one, the risks of which he understood and accepted. Mr Rogers contended that his understanding of the rules which he had read quickly was, in effect, that if the jet ski was operated prudently within the operator's limits all would be well. Had he understood the risks that were put to him he would not have let his son drive.

[14] The defendant called no witnesses to contradict the Rogers' evidence about the level of instruction that they received or, indeed, to contradict their evidence on liability.

[15] After they came off the jet ski, it was clear that Mr Rogers had sustained serious injury to his eye and surrounding areas of his face when he collided with the back of his son's head as they struck the water. They attempted, fruitlessly, to attract the attention of their instructor who had returned to shore and was not looking towards them. After some time, they concluded that they would not be rescued and climbed aboard the jet ski and returned to the base where Mr Rogers received medical attention and was taken by ambulance to the Southport Hospital.

Preliminary points – admission of liability, contributory negligence and voluntary assumption of risk

[16] In correspondence dated 3 May 2003 the defendant admitted liability to the extent of 1 percent in pre-proceedings negotiations. Mr Myers sought to hold the defendant to that admission of liability submitting that only contributory negligence would be an issue unless a formal application to withdraw the admission was made. The plaintiff had prepared for trial on the basis that liability was in issue. Mr McMeekin contended that the admission was impliedly withdrawn by the defence putting liability in issue. I accepted that submission and gave a ruling which appears in the transcript at page 9.

[17] Although discussed by the lawyers for the parties on earlier occasions, the defence did not plead contributory negligence or voluntary assumption of risk until just before the trial. An amended defence to plead those matters was not opposed by the plaintiff. Accordingly, the trial proceeded on the basis that liability was in issue involving both voluntary assumption of risk and contributory negligence.

Liability

[18] The plaintiff pleads that terms are to be implied into the contract of hire that the jet ski facilities would be safe and not expose Mr Rogers to the risk of injury and that the defendant would take reasonable care for his safety. The breach pleaded is the same as for the particulars of negligence. It is, accordingly, convenient to consider the facts and circumstances of the injury as encompassing both the contract and the tort claims.

[19] The incident was investigated by officers of Queensland Maritime Safety in the Department of Transport. As a consequence, a review of the defendant's jet ski hiring procedures and safety briefings pursuant to the *Transport Operations (Marine Safety - Hire and Drive Ships) Standard* 2000 and *Transport Operations (Marine Safety) Regulations 2004* was carried out and revised safety measures implemented. The evidentiary basis for the tender of the Departmental documents by consent as exhibit 5 was as a record of the investigation carried out by the authority. The directly relevant provision in the *Standard* is s 12 which provides that the provider of the hired vessel must not allow the user to operate it unless satisfied he had sufficient skill to operate and navigate the vessel properly. It was common ground that a jet ski was covered by the legislation. Of relevance to the issue of liability was the direction issued for future jet ski briefing by Queensland Maritime Safety to the defendant which included the operator asking the hirer whether the hirer had ever ridden a jet ski before; informing the hirer that the jet ski did not possess brakes so the stopping distance was greatly increased with increased speed; and that to change direction the handlebars had to be turned in the intended direction and the power increased. The coxswain was advised to demonstrate the manoeuvrability of the craft during briefing "e.g. turning & stopping abilities".

[20] This is not a true change of system case, and was not sought to be so characterised by Mr Myers, which often provides *prima facie* evidence of what could and should have been done beforehand to avoid an obvious risk as in *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201. What the Maritime Safety jet ski briefing notes do is to re-state what was already known to the defendant but neither implemented nor enforced. This knowledge is found in the Yamaha WaveRunner XL Owner's/Operator's Manual (two volumes), exhibit 4A and 4B which pertained to the jet ski hired by Mr Rogers. There was no suggestion from the defence that this Manual was not available to the resort operator at the time the jet ski was hired to Mr Rogers.

[21] On the front cover of the Manual in a box are the words "Read this manual carefully before operation!" At page 1-3 is the following, apparently to be attached as a warning label on the craft. No evidence was given that it had been so attached and, if it were, it was not drawn to Alex's or Mr Rogers' attention

> "! WARNING
> Severe injury or death may result if you ignore any of the following.
>
> - Read the Owner's Manual, the Riding Practice Handbook and all labels before operating.
> - This Vehicle is recommended only for operators 16 and older with valid motor vehicle license. Adults must supervise use

by minors. Check all applicable laws for minimum age requirements.

- Vehicle capacity: 1 operator and 2 passengers. Do not exceed 530 lb (240 kg), including any cargo. Overloading can make the vehicle more difficult to control, which can lead to an accident.
- Wear an approved personal flotation device.
- Wear a wetsuit to protect against injuries to orifices (rectum and vagina) from strong streams of water from the jet nozzle, or from impact with the water surface. A wetsuit also helps protect against hypothermia and abrasions.
- Attach the engine stop switch lanyard to your left wrist before operating.
- You must know and follow all applicable and local boating laws.
- Pulling a skier can effect steering and handling. Do not attempt maneuvers that exceed the skill of the operator or skier.
- Never ride after drinking alcohol or taking drugs.
- You need engine power to turn. Releasing throttle lever or shutting off engine can cause you to hit an obstacle you are attempting to avoid.
- Check throttle and steering for proper operation before starting the engine. Malfunctioning controls can cause accidents.
- Open the front seat and the front storage compartment to ventilate fuel vapors from the engine compartment before starting the engine. Do not start the engine if there is a fuel leak or loose electrical connection.
- Do not operate in less than 2 ft (60 cm) of water.
- Keep a safe distance from swimmers, other watercraft, and obstructions.
- Never attempt jumps with this water vehicle.
- Do not travel far away without another watercraft or boat with you.
- Stop engine before removing debris from jet intake on bottom of hull. Keep hands, feet, hair and all other parts of your body and clothing away from jet intake while engine is running.
- Passengers should firmly hold on to the person in front of them and place feet on the footrest floor. Otherwise, passengers could lose balance and fall.

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[22] At page 1-7 the owner/operator is advised

"Never allow anyone to operate this water vehicle until they too have read this Owner's Manual, the Riding Practice Hand Book and all warning labels."

Under the heading *Limitations on Who May Operate the Vehicle* appears the following

> "This vehicle is recommended only for operators 16 and older with a valid motor vehicle licence.
>
> Even though a motor vehicle operator's license is not required for water vehicle operation in most countries, it is one indicator that the operator has previously demonstrated a reasonable degree of maturity, responsibility, and good judgment."

It continues several paragraphs later

> "Do not try to ride with passengers until you have considerable practice riding alone. Operating with passengers requires more skill. Take the time to become accustomed to the handling characteristics of the vehicle with passengers before trying any difficult maneuvers."

[23] In chapter 3, which is concerned with the operation and riding of the jet ski safely, the Manual emphasises that it requires practice to learn the basic techniques. Under the heading *Riding with Passengers* the Manual states that when two or three persons, including the operator, are on board the vehicle handles differently and is not as easy to manoeuvre so operating it in that circumstance requires a higher degree of skill. It continues

> "Before attempting to operate the water vehicle with passengers aboard, the operator must practice enough riding alone to be able to acquire the necessary skills."

[24] The section on "turning" makes clear that there are skills to be acquired before the jet ski can be operated safely. At page 3-22 the following appears

> "Throttle produces thrust from the jet pump. Directional control is provided by opening the throttle and turning the handlebars.
>
> To make a turn at higher than trolling speed: Reduce your speed, then turn the handlebars and shift your weight in the desired direction, and apply enough throttle to make your turn. High thrust turns the vehicle sharply; low thrust turns less sharply. Releasing the throttle completely the causes the vehicle to go straight. TURNS CANNOT BE MADE WITHOUT APPLYING THROTTLE!
>
> ! WARNING
>
> - You need engine power to turn. Do not release the throttle completely. Releasing the throttle level can cause you to hit an obstacle you are attempting to avoid. A collision could result in severe injury or death.
>
> - Make gradual turns at higher speeds or slow down before turning. Sharp turns at higher speeds may cause the vehicle to slide sideways or spin. The passenger(s) and operator could be thrown off suddenly and be injured."

[25] Mr Paul Leven, the owner of the Australian Jet Ski Academy, with considerable expertise in jet skiing, provided a report dated 18 November 2004 about the incident which had been given by Mr Rogers' lawyers to the defence. Mr Leven travelled

from New South Wales to give evidence. His report was tendered. He was asked no questions in cross-examination. In effect, and relevantly, he endorsed what has been set out above from the Manual and particularly emphasised the need to explain turning techniques, to supervise novices carefully and not to allow two people on the jet ski when insufficiently experienced.

Voluntary assumption of risk

[26] Voluntary assumption of risk (*volenti non fit injuria*) does not apply to the claim in contract. Nonetheless, Mr McMeekin contends, I think correctly, that if a finding in favour of the defendant about this defence were made on the tort claim it would tend to go against the implication of a term in the contract of the kind contended for by Mr Rogers.

[27] In order to succeed, the defendant must prove to the requisite standard that Mr Rogers fully appreciated that there was a real risk of sustaining serious personal injury and accepted (volunteered) running that risk, that is, he absolved the defendant from liability for injury from the identified risk if the risk eventuated. There was, of course, no express term in the contract of hire disclaiming liability unlike, for example, in *Murchie v Big Kart Track Pty Ltd* [2002] QCA 339 or *Blunden v Solomon* [2005] NSWCA 52. The assumption of the risk must be inferred, if it can, from the circumstances. As Mr McMeekin acknowledged, it is a defence which rarely succeeds in the absence of an express waiver of liability.

[28] The facts simply do not support the defendant's contention. Mr Rogers knew next to nothing about the operation of a jet ski and was told little by the instructor to add to his stock of knowledge. He had good reason to expect and to be able to rely on the defendant's concern for his safety based on his experience about the resort's attitude to safety for those who used its facilities. He believed, understandably, that the course of instruction he and his son were receiving from the instructor was appropriate for operating the particular jet ski in that environment, having explained, on several occasions, their novice status and questioned whether Alex should drive first. That Mr McMeekin had Mr Rogers agree that if he and Alex came off whilst in motion on the jet ski they might come into contact with each other in no way establishes an appreciation of the risk of the kind that eventuated and an acceptance of it.

[29] The defence of voluntary assumption of risk to the claim in negligence is not made out by the defendant.

Conclusion on liability generally

[30] The defendant owed a duty of care to Mr Rogers to protect him from risk of injury associated with the operation of the jet ski as far as was reasonably able to be done. This arises both in tort and by virtue of a term which should be implied into the contract of hire. Relevantly for these proceedings, the defendant could discharge this obligation by providing adequate instruction in the safe operation of the jet ski with the knowledge of the Rogers' complete inexperience. The defendant breached its duty by

- not explaining adequately the use of the throttle and the necessity for increased power in order to turn safely when travelling at a moderate speed;

- permitting Alex to drive first or at all without careful practical instruction;
- permitting Alex to drive with a pillion passenger who was also a novice in the operation of the a ski;
- failing to demonstrate or supervise the operation of the jet ski including how to turn it.

[31] There is no suggestion that the failure to have the Rogers' wear headgear, a pleaded breach, was an operating cause of Mr Rogers' injury – indeed both the Manual and Mr Leven were ambivalent about the safety of such equipment.

[32] It does not matter whether the breach arose through the particular instructor failing to implement safe practices laid down for staff by the defendant or whether the failure was systemic although it is likely to have been systemic failure in light of the investigation report by Maritime Safety.

[33] There was nothing to suggest that had Mr Rogers and Alex been given appropriate instructions about the operation of the jet ski they would not have adhered to them.

Contributory negligence

[34] The *Law Reform Act 1995* as amended in 2001 applies to the wrong which occurred to Mr Rogers in as much as concurrent claims in contract and tort will not defeat a finding of contributory negligence. In *Green v Hanson Construction Material Pty Ltd* [2007] QCA 260 the court quoted with approval Professor Fleming's definition of contributory negligence at para 29 of the reasons for judgment as the plaintiff's failure to meet the standard of care to which he or she is required to conform for his or her own protection and which is a legally contributing cause, together with the defendant's default in bringing about the plaintiff's injury.

[35] It is trite to observe that the defendant carries the burden of proving contributory negligence.

[36] In Queensland s 10(1) of the *Law Reform Act 1995* provides in statutory form the approach which this court must take. It provides

> "(1) If a person (the claimant) suffers damage partly because of the claimant's failure to take reasonable care (contributory negligence) and partly because of the wrong of someone else –
>
> (a) a claim in relation to the damage is not defeated because of the claimant's contributory negligence; and
>
> (b) the damages recoverable for the wrong are to be reduced to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage."

[37] Mr McMeekin submitted that because Mr Rogers was aware of his own and his son's inexperience in operating a jet ski and said he was somewhat surprised that the instructions were so simple, he should have demanded more from the instructor. Furthermore, knowing of Alex's inexperience with any machinery, not just a jet ski,

Mr Rogers ought not to have nominated him as the first driver, but rather should have tested the jet ski by driving first. Mr McMeekin submitted that Mr Rogers ought to have exercised more supervision and control over his son by instructing him to slow down/start off slowly until he developed a feel for the jet ski and/or passed the advice on to Alex contained in the document he signed earlier in the day. There was no evidence that Mr Rogers thought they were going too fast at the time even though he thought, in hindsight, they must have been to have come off. There was no suggestion that speed caused them to come off, rather it was a lack of understanding about how to execute a turn.

[38] Mr Myers referred to *Blunden v Solomon* in the New South Wales Court of Appeal which has some parallels with the present facts. In that case, the injured person was a boy of 15 years whose parents had hired jet skis for the members of their family group to use in the surf. He had no previous experience of a jet ski, a boat or any other engine driven craft. He was given some basic instructions about operating the jet ski but not about safe riding into waves. When riding into a wave, he lost control and collided with another jet ski and sustained serious injuries. Some passages in the judgment of Beasley JA with whom Mason P and McColl JA agreed are instructive

> "16 In my opinion, the trial judge was correct in finding that the particular instructions to which I have referred were instructions that should have been given to a person who was known to be a first time user of a jet ski. Some of those instructions were contained in the owner operator manual for the jet ski as well as in the riding practice handbook. Not every instruction in those documents was necessary to be given in order for the appellant to satisfy the duty of care that he owed to the respondent. However, account had to be taken of the particular circumstances of this hiring which included that the respondent was of a young age and was completely inexperienced, not only in the use of a jet ski but in the use of mechanically propelled vehicles.
>
> 17 It was well known that novice operators of jet skis tended to react in particular ways when confronted with either an emergency or a danger. The manual specifically warned about this. On two separate occasions, the manual stated that it was important to watch for the fact that beginners tended to release the throttle lever when turning or trying to avoid an object, and that it was necessary to always use the throttle when turning. …
>
> 18 Although the appellant had not read all of the material in the manual and the handbook, the evidence in those books demonstrates that these were specific dangers to parties who are not experienced in the use of the jet ski. These were dangers of which the appellant was well aware. In the circumstances of this case, the appellant's failure to give instructions in relation to those matters, to the respondent, constituted a breach of his duty of care."

The court found no contributory negligence.

[39] As a complete novice with his son whose status was several times drawn to the attention of the instructor, together with his experience of the defendant's positive

attitude to safety, Mr Rogers did not fail to have proper regard for his own safety by not seeking better instructions or letting Alex drive the jet ski or in any other way such as to attract apportionment under s 10 of the *Law Reform Act*.

Summary of conclusion on liability

[40] In summary, the defendant breached the duty of care which it owed to Mr Rogers both in negligence and of an implied term in the contract of hire in failing to instruct him and his son adequately about the operation of the jet ski, the need for which was well known to the defendant. No issue was raised about causation. If a finding be necessary, I conclude that if the instruction had been adequate more likely than not the turn would have been completed successfully without incident.

[41] Mr Rogers did not voluntarily assume the risk of injury occurring as a consequence of riding the jet ski in the circumstances prevailing. Neither did Mr Rogers contribute to his injury by failing to take proper care for his own safety.

Quantum

[42] Mr Rogers was conveyed by ambulance to the Southport Hospital and underwent numerous tests to ascertain the extent of his facial injuries. The blow caused what was described by the medical specialists as a "serious" or "significant" fracture of three walls of his left orbit – a blowout of the floor with entrapment of his inferior rectus muscle and fractures of the medial and lateral walls as well as an intra-orbital haemorrhage. Associated with the fractures was some numbness of the left cheek and forehead and double vision on attempted up-gaze in particular.

[43] Mr Rogers was advised not to fly for a time and stayed on at South Stradbroke Island for a few days and then in Brisbane. He was there alarmed at the amount of blood behind his eye and attended a hospital as an outpatient.

Medical assessment of Mr Rogers' condition

[44] When Mr Rogers returned to South Australia about a week later he consulted with Dr Gary Davis, a specialist ophthalmologist on 7 January 2002. Mr Rogers continued to complain of double vision and reduced sensation around his eyes. He underwent surgery to repair the eye damage on 15 January 2002. Dr Davis recorded his post-operative recovery as slow. A further CT scan revealed continuing damage. Dr Davis undertook revision surgery on 26 January 2002 and a subsequent CT scan confirmed a satisfactory reduction of the fracture. According to Dr Davis it also showed considerable contusion in and around the inferior rectus muscle on the left side.

[45] Mr Rogers continued to experience persistent double vision with the left eye being higher than the right and as a consequence Dr Davis referred him to his colleague Dr John Crompton whose ophthalmic specialisation included eye muscle surgery. Dr Crompton undertook surgery on four muscles between Mr Rogers' eyes in an attempt to reduce the effects of his double vision on 17 June 2003.

[46] According to Dr Davis in his report of 10 April 2007 and in his oral evidence, no further surgery was indicated. This was the opinion of Dr Crompton whose report was tendered and who gave evidence in the defendant's case.

[47] Mrs Prue Hall conducted an orthoptic assessment on 2 April 2007 which showed Mr Rogers with a "persistent limitation of up-gaze of the left eye with a compensatory over-action of the right eye on up-gaze, resulting in a right hypotropia increasing on up-gaze and gaze on the right", in her report of 7 April 2007, exhibit 10. Dr Davis opined that Mr Rogers' double vision was no worse when the latest test was administered than it was after the 2003 surgery and may have slightly improved. Dr Davis assessed Mr Rogers' whole person impairment rating for the fracture to the left eye socket as 12 percent, a percentage which was confirmed by Dr Crompton.

[48] As will be discussed later, Mr Rogers complains of fatigue to an extent that he had not experienced prior to his injury which he attributes to the efforts to adjust to and deal with his double vision. Dr Davis was confident that limitations on his capacity to work involving particularly a large amount of reading or computer work directly related to the impact of the accident. This was based on Dr Davis' experience with other patients who had suffered serious orbital fractures associated with persistent limitation of ocular movements. On the other hand, Dr Crompton was somewhat mystified as to why Mr Rogers should experience persistent and debilitating fatigue as a consequence of his double vision. I accept Mr Rogers' evidence about his fatigue due to his double vision and its impact on his ability to work with the same level of enthusiasm and application in his legal practice as was the case prior to his eye injury. Indeed the defence readily conceded that this was so.

[49] It is this debilitating fatigue which is the basis for Mr Rogers' claim that he has been unable to grow his practice in the way he anticipated he would had he been uninjured and has reduced his own billable hours. This is a difficult claim to prove in the circumstances of Mr Rogers' law practice particularly because he had reached something of a turning point at the time of the injury. The defence does not dispute that the consequences of the double vision have included a slowing down for Mr Rogers but contends that this was his intention anyway and that a lump sum in the vicinity of $150,000 for the future would be adequate compensation. Mr Rogers' case is that his loss of future income related to reduced personal billings and practice growth is approximately $1,200,000. This disparity between the parties is reflected in the estimated past loss of income. The defence submits for $55,000 as being appropriate whilst Mr Rogers claims approximately $354,000.

[50] The court has been assisted by two expert accountants, Mr Mark Thompson a chartered account of Vincents retained by Mr Rogers and Mr Paul Green a chartered accountant of Pitcher Partners retained by the defence. Each accountant produced two reports and together they have produced a joint statement in which issues have been narrowed between them. Mr Thompson produced a third report based on an alternate basis of assessment dated 12 April 2007. Those reports are extensive with supporting analyses in the form of appendices but are dependent upon findings by the court. The experts agree that in order to establish losses related to Mr Rogers' reduced personal billings in his legal practice, there must be a finding about the extent to which he has been able to replace his services with those of paid employees. To that end, the experts have prepared calculations based on three scenarios. In order to calculate the losses related to the alleged reduced growth in Mr Rogers' legal practice the experts agree that Mr Rogers needs to establish

- that he is currently unable to undertake sufficient levels of marketing (in conjunction with his other important practice management roles) to generate additional revenues to grow the practice to his intended level;

- that he could have sourced sufficient additional work/clients to enable to the expansion of the practice;

- that he could have sourced and trained staff to levels required to grow the practice;

- that he could have supervised and managed the additional employees to maintain the quality of legal work produced by the practice.

[51] The experts agree on the calculation methodology set out in Mr Thompson's report dated 8 February 2007 (exhibit 7). They do not agree about the quantum but they do agree about the arithmetic.

[52] The parties do not disagree with the factual questions raised by the experts. The problem is whether the evidence adduced permits such an exercise to be carried out. Mr Myers submitted that the evidence supported the mathematical calculations prepared by the experts while Mr McMeekin contended that pre-accident writings by Mr Rogers, together with a paucity of evidence, meant that the claim as an exercise in mathematical modelling was speculative and that a global figure was appropriate.

Mr Rogers' legal practice history

[53] Mr Rogers gave extensive evidence about his practice as a lawyer. It is also summarised in the "Background" section of Mr Thompson's two reports. Mr Rogers graduated in law from the University of Adelaide in 1977, obtained his Graduate Diploma in Legal Practice in 1978 and was admitted to practice at the end of 1978. He initially worked in the State Crown Solicitor's Office and then the Commonwealth Crown Solicitor's Office in Adelaide. He left after he purchased what was a branch office of a city firm at Morphett Vale on the southern outskirts of Adelaide towards McLaren Vale. The office then had one solicitor and a secretary with a general practice of personal injury, family law, estate work and local Magistrates Court litigation.

[54] Mr Rogers employed a solicitor for a few years before reverting to sole practice. In 1987 he acquired a partner, Mr Alan Branch with whom he remained in partnership until 1997 when the partnership was dissolved acrimoniously.

[55] The partnership had employed two salaried solicitors, a paralegal, a conveyancer and a number of secretaries. The practice had evolved to have a more commercial focus although one of the solicitors did family law work and Mr Rogers' secretary assisted with leases. When the partnership was dissolved Mr Rogers continued to practice from the same address as "Andrew Rogers Lawyers" but in reduced premises with himself as sole practitioner, a paralegal, a practice manager and two secretaries. Each partner took his own clients and Mr Branch moved into the city. Mr Rogers said the break-up of the partnership led to a disruption in the proper running of the practice but he worked very long hours in an effort to re-establish it. Mr Rogers spent time building up his commercial clients. He moved widely in the

business community in and around Morphett Vale. One important client retained Mr Rogers to advise in relation to the dissolution and valuation of a lucrative transport partnership ("the Booth matter"). This produced significant fees involving, as it did, dealing with valuers and tax experts. Mr Rogers cited this client as an example of the kind of work he was prepared to do and was doing which was, he thought, unusual in a suburban practice. But see the later discussion on this.

[56] He estimated that he worked 55 to 60 hours per week generally starting at 9.00 to 9.30 am, getting home to share an evening meal with his family and working at home until midnight or later. Typically he went to the office one day of the weekend. Mr Rogers said he was frustrated with his practice in as much as he was making a good income such that he could take his family on overseas holidays but was crushed by the long hours.

[57] By 2000 Mr Rogers decided that he would change the style of his firm whilst remaining in Morphett Vale by "leveraging" off employed junior solicitors and other salaried staff to make a greater income on reduced hours. To that end he enrolled externally in a course – Gateway to Best Practice run by Quality in Law in the NSW College of Law at the end of 2001. This involved training and mentoring in practice management. This course covered such components as practice analysis and planning, business planning, goal setting, human resource management and risk management. Mr Rogers completed the course following his accident. He maintained that he was one of the few, if not the only, South Australian lawyers to have done so.

[58] Mr Rogers had earlier attended an Australian Legal Practice Managers' Association Conference at the Gold Coast in Queensland at which he determined to do the Gateway course.

[59] During 2001 Mr Rogers increased the physical space of his office and replaced much of his equipment. He employed a second solicitor and changed his system of costing from what seems to have been a rather ad hoc unit rate based on the Supreme Court Scale to an hourly rate; his personal secretary described his system as "erratic".

[60] In November 2001 Mr Rogers and his secretary went to Sydney to meet with Dr Rosemary Howell, an expert in legal practice management, to whom he had spoken at a sole practitioner's conference earlier in Adelaide. Dr Howell gave evidence of Mr Rogers' commitment, enthusiasm and competence about growing his practice which she said was not apparent when she spoke with him in follow-up conversations after his accident.

[61] Mr Rogers employed an outside consultant to advise on running the practice on a regular basis – Mr Murray Goode – whom he still retains. The practice was progressing according to Mr Rogers' plan to reduce his hours and grow the fees when he went to Couran Cove for his holiday.

[62] Post-operatively, as Dr Davis noted, Mr Rogers' recovery was slow. He described feeling very dopey and having trouble dealing with his double vision and was generally unable to run his practice for some time. He "dropped in" to his office but had transport difficulties because of his vision disabilities and fatigue problems. He returned to work towards the end of February 2002. Mr Rogers experimented

with a false contact lens to block out the damaged eye and to eliminate the double vision and also tried using prisms with little beneficial effect. He eventually settled on a method of tilting his head backwards and up which gave and gives him his best single vision range. If he looks down or sideways, this brings on double vision with the concomitant destabilising effect. The greatest problem has, however, been a sense of extreme tiredness. He said of this at t/s 73

> "Just as I kept on expecting to recover my vision in my eyes to get better, I also expected that the tiredness would get better as well, and in terms of impact on my life, what has a far bigger impact on my eye is the tiredness aspect and what it does to me, which I still suffer from since the accident, and my way of expressing it is to say that somebody could do my job wearing a pair of very dark glasses. I mean you could read the screen, you could read the work in front of you but, boy, you would be working hard at it all day long to do it and it is tiring. I mean, it tires you out, and I mean every – I can't look from the top of an A4 page to the bottom of an A4 page without going through double. I can venture a little bit out of my sphere if I take it slowly but I will go through double. If I turn too quickly I go double, if I look down I go double. I don't look to my bottom left because it makes me look [sic] ill. It is just too far out of whack."

[63] Mr Rogers contrasted how he was at his work previously to how he managed after the accident and the operative procedures by the specialists at t/s 73-74

> "… I used to take a pride in being able to do anything, being able to stick at it, being able to do things overnight or whatever. There are many examples and I was sort of not really alpha male, but I was leader of the pack at the firm, you know, I was somebody who could, you know, go in there, get into it, come up with a solution, sort things out, yeah, get stuck into it. If I had a day where the day had passed in phone calls or the local land agent dropping in or a problem with a computer or something like that, you know, that was okay because I could then get my real work done at night when things were quiet or the family was in bed or whatever or on the weekend, not that it was daytime, to spend on the other things and night-time was spent on work, but, you know, I had a way of getting everything done. I could work on the practice. I could write the computer packages that we were using. I could stay up to date with the latest changes in tax laws and things like that. I could look after my clients, you know, I felt I could do anything. I was, you know, feeling pretty good about what I was doing with the practice in terms of I knew what I wanted and I was going after it and, you know, from starting out me and a paralegal and changing my mind it was now me and two lawyers, and I got the premises, and things were going on, and then I suffered the injury. The start was the absolute worst on those days when I went in. Apparently I saw clients and I can't even remember them. I run into them later on and they would say, 'I saw you then.'"

[64] Mr Rogers discerned a reduction in the quality of work as well as the length of time it took him to carry out a task. He found, unlike his previous capacity for a full day's concentrated work, he needed several complete breaks. Whereas previously he involved himself in local commercial business associations, attending and

organising marketing events such as breakfasts, lunches and lectures, he no longer had the energy levels to do so. He estimated that post-accident to the time of giving evidence he operated at about two-thirds of his previous capacity. What he now lacks he describes as the drive and the passion which he had previously. He said at t/s 83

> "Before the accident I was enjoying it. I was having a good time. I was getting the practice I wanted, I was getting the rewards I wanted. I was feeling very proud of my practice. I'm well regarded as practice manager. People think I am better than what I am. I have spoken on practice management and I have been asked to do it again. The reality is not matching the way that I was before or the perception of it."

[65] Former clients who gave evidence spoke of a reduction in the promptness and thoroughness of his services compared to that which they received from him previously. Some did not like being "fobbed off" to other solicitors in the firm. His personal secretary, Mrs Kathy Wheatland (formerly Halliday) spoke of his energy prior to the accident, his dedication to his clients, his marketing capacity, the development of a bank of precedents for use in the firm and his skills in "fixing" computers. She noted a significant drop away in all these areas after he returned to work. He spoke to her of his medication for depression and her encouragement of his use of meditation to deal with some of his problems. This he embraced with some enthusiasm. There is no claim that Mr Rogers' depression was exacerbated by the injury sustained in the accident. Mrs Wheatland noted that Mr Rogers' capacity for work improved after a couple of years. For the past two years Mrs Wheatland has worked only one day a week so she was in no real position to evaluate whether the improvement which she observed was sustained.

[66] Mr Rogers bases his claim for loss of income on a sustained performance of 30 billable hours per week. As Mr McMeekin pointed out in cross-examination, the only year in which Mr Rogers actually achieved or exceeded 30 billable hours was to 30 June 2001 with 31 billable hours. The previous two years to June 2000 and June 1999 were 24 and 22 hours respectively. In the following year including six months after the accident to June 2002 he achieved 28 billable hours although it should be noted, as Mr Thompson has done in his report, that this included some work billed then but completed prior to the accident. The next years showed 22 then 19, 15 and 13 billable hours to June 2006. The year to June 2001 included the large fees for the Booth matter. Another factor was Mr Rogers' changed method of costing which is dealt with by Mr Thompson in his report and which Mr Thompson opines makes a true before/after comparison very difficult.

[67] Mr Rogers was clearly determined to work "differently" in the year before the accident as a result of his own reflections, the extraordinary hours he had to devote to the Booth file and the stimulation of the Gateway program and small practice conferences. This is reflected in his own writings in 2001 where he wrote of "killing himself working on the [Booth] file" (exhibit 14 page 13 of document included in the bundle *Meeting with Rosemary Howell 28 November 2001*).

[68] Mr Rogers also noted that "any statistics would be skewed by one large file [Booth] in the 2001-11-22 financial year where fees were $140,000". He wrote of the difficulty in obtaining good solicitors to work in the firm, noting one exception and the growth of other competitive firms.

[69] When challenged about the "one-off" nature of the Booth work, Mr Rogers said that he would have had other work to take its place but his own observations in exhibit 14 "we would like more of these files", referring to the Booth work, seems a concession that the big files, that is, high fee earning files, were still to come.

[70] There can be no doubt that Mr Rogers wanted to reduce his working hours which necessarily would include his billable hours. He wanted the practice to work for him. He hand wrote after the accident in 2002 and later against his *Characteristics of a Successful Business* (exhibit 14 pp 52-5) which had been typed prior to the accident that he had managed to reduce his work time and described it as "a success". Further documents in the bundle show that his goal was four billable hours per day with other solicitors carrying out work he would otherwise do.

[71] Mr Rogers' goals were set out in documents drawn up by him in late 2001: to have a turnover of up to $1,000,000, more time for other interests, flexibility of working hours and an ability to take holidays and sick days. Mr Rogers wanted a "life balance" and a successful legal practice. He was also interested in developing other business interests apart from the law. To do this, he was seeking to run his practice in a more business-like way. He accepted that a normal legal firm generates about one-third profit from its turnover.

[72] Mr Rogers maintained a range of interests after his accident including developing various computer practices for his firm and other lawyers and a non-related small business which did not generate profit. He is the Chairman of the Southern Success Brisbane Enterprise Centre and Chairman of Disability Works Australia, although he denied that his working hours had fallen away because of his engagement in these other interests. His real complaint is that he no longer has the necessary zest which is an essential component of marketing his firm if it is to attract good local commercial work.

[73] Mr Rogers had a number of health problems not related to the 2001 accident. He has suffered from and been treated for depression from time to time with Prozac. He suffers from recurring migraines moderated, it seems, by the depression medication. The frequency of migraines is approximately three in every five days with debilitating symptoms of visual disturbance, headaches and sometimes nausea. Mr McMeekin put to Mr Rogers a range of lesser ailments which need not be particularised here.

[74] The conclusion must be that Mr Rogers was working towards reducing his personal billable hours significantly prior to the accident. He wanted the practice to work for him. I am not persuaded that that aspect of the claim is established, namely, that he has been deprived of the opportunity to average 30 billable hours personally in his practice by virtue of the consequences of his eye injury and its sequelae. Mr McMeekin has submitted that Mr Rogers' falling level of productivity over the past few years might be explained by his devotion to non-fee (at least not identifiably so) producing activities and that this activity is not consistent with someone struggling to get through his day. Or, alternatively, he submitted, this time could be devoted to billable work. Those observations may seem rather harsh. Mr Rogers may find such activities less demanding than close concentrated legal work. He did not, however, give evidence to this effect.

[75] Mr McMeekin has submitted that the reduction in personal billable hours might also be explained by Mr Rogers' continuing depression (although apparently contained with medication) and his migraines. These conditions may be in the mix but an operative cause of his fatigue has been coping with his double vision and that, in part at least, explains the lack of energy for the level of work he previously experienced.

[76] The second limb of the claim for economic loss concerns the growth of the practice. The facts that the expert accountants agreed needed to be established are set out above. The first concerns marketing – it may be accepted that Mr Rogers' fatigue leaves him unable to market to a satisfactory level in addition to his need to supervise the solicitors in the firm as well as see and nurture important clients. It may also be accepted that this kind of marketing of the practice and what it can offer is essential not just for growth but to maintain the practice in a competitive environment. That much was recognised by all who gave relevant evidence and Mrs Wheatland said that Mr Rogers engaged in considerably reduced marketing after the accident.

[77] The second matter was that Mr Rogers could have sourced sufficient additional work for the growth of the practice. As has been mentioned, Mr Rogers was energetic and offered, according to his former clients, a good service. But Mr Rogers himself recognised in his analysis in November 2001 that there was a very long way to go before achieving the aspirations. Other firms were attracted to the area and at least one large city firm was promoting itself in the area with the wineries. I am not satisfied that the evidence has demonstrated that additional work could have been sourced to grow the practice.

[78] The third matter of significant importance was attracting good solicitors and other staff to do the better as well as the standard work. Mr Rogers spoke and wrote of the difficulties of getting good solicitors particularly in the outer suburbs and retaining them. A further difficulty was the desire of the "good" clients to have Mr Rogers attend personally to their work. The employed solicitors therefore needed to be as good as he was to retain them as clients. The evidence does not support this and demonstrated that the clients would leave if they could not have the level of care and attention that Mr Rogers formerly offered.

[79] The final matter is linked to the third, namely, that Mr Rogers could have supervised and managed these additional employees to maintain the quality of the work. It may very well have been the case that Mr Rogers would have been in much the same situation as he was previously of working long hours to keep the output at a quality necessary to ensure profitability. My conclusion is that the evidence does not support the precise mathematical analysis and calculation in which the expert accountants engaged most assiduously and carefully.

[80] Mr Thompson prepared a third report calculating Mr Rogers' loss based on an assumed annual practice fee level of $1,000,000 and a profit of one-third of that amount which was supported by independent statistical studies. He then compared that net profit of $330,000 with Mr Rogers' actual profit for 2005 and 2006 of $152,647 giving a loss of $177,353 to which he applied the appropriate tax scale which resulted in a weekly loss of $1,824.69. This gave a future loss to age 65, Mr Rogers's expected retiring age, of $947,689, a figure very broadly within the

range for losses assessed in the very detailed methodologies in the two earlier reports.

[81] It is worth noting that Mr Thompson referred to the FMRC Law Firm Performance Benchmark Survey Report 2004 *The Special Case of the Single Principal Practice* which suggested that 30 billable hours was about the median in such a practice.

[82] The annualised total billing result for 2007 for the practice was $736,500. Calculations of loss were made on a number of scenarios but these are necessarily speculative and the evidence does not, in my opinion, permit of any precise calculation even of the more general kind.

[83] The question then is, how should the issue of Mr Rogers' economic loss, past and future, be approached? Mr McMeekin contends for a "global" figure, that is, a lump sum not referable to any exact weekly loss, generally the preferred method for calculating damages of this kind. This method is sometimes described as "intuitive", *Fry v McGutticke* FCA AG 32 of 1998 BC 9806297. The court there quoted the cautionary dictum of Stephen J (about discounting) in *Todorovic v Waller* (1981) 150 CLR 402 at 431

> "The concern of courts should not be, as is often said, lest processes of assessment bear an illusory air of precise accuracy but rather lest their outcomes bear the all too real appearance of gross inaccuracy in attaining anything like a proper measure of compensation."

[84] There are so many speculative elements involved here – Mr Rogers' clear determination to work fewer hours prior to the accident so that the comparison before and after is unreliable as a measure of loss is one problem. This must also be coupled with a change for the better in Mr Rogers' approach to costing files which would lead to a higher figure of fees for the same file than he had previously employed. For the firm to grow as Mr Rogers wished without him working long hours was very much for the future. I have discussed those factors. Whilst the total billings for the practice have increased over the years since the accident, Mr Rogers' billable hours have significantly decreased between 22 and 13 hours and decreasing and just why has not been adequately explained as he has remained physically much the same since 2003.

[85] The closest I am able to come to a principled approach to the assessment of Mr Rogers' losses is derived as a guide from paragraph 8 of the joint expert report in scenario one which is calculated on a 100 percent replacement of Mr Rogers' billings based on 15 hours giving a figure of $128,968 for the past and a retirement at 65 figure of $355,312 with no amount allowed for growth in the practice. These figures can be rounded to emphasise that they are not precise calculations and to take account of the period since the accountants did the calculations. They are loosely based on Mr Rogers' assertion that he operates at two-thirds of his previous rate and to take account of his choice to do no fee earning activities in working time. I propose a figure of $130,000 for past economic loss and $350,000 for the future.

General damages

[86] Mr Rogers' enjoyment of his professional life has been seriously interfered with as a result of his injury. Other conditions such as the migraines were and are a constant problem which will not sound in damages. The loss of the zest and passion

for his work which is attributable to his injury is deserving of recompense in some significant way. There was no evidence of note that his private pleasures have been diminished although his double vision problem will necessarily impact on all that he does. Mr Myers contends for $70,000 and Mr McMeekin for $50,000. There may be some future development of the prism technology which will give better relief than is able at present to reduce the symptoms of double vision, but on the whole, Mr Rogers has a permanent disability and, accordingly, for the loss of enjoyment of life, past and future, I would compensate him at $60,000.

Special damages

[87] These damages are for pharmacy, travel and medical expenses in a total amount of $3,745.48 which is not disputed.

[88] Interest on special damages is allowed at five percent per annum for 5.75 years amounting to $1,076.83.

Refunds

[89] The refunds to Medicare Australia in the amount of $4,377 and HBA Health Insurance in the sum of $3,184.15 are agreed, making a total refund amount of $7,561.15.

Future expenses

[90] Mr Rogers makes a claim for $5,000 as "nominal damages" for any future needs. These seem only to relate to prismed spectacles which may assist him in the future. Dr Davis spoke of new spectacles at $100 every few years. I accept Mr McMeekin's submission that $500 is an appropriate figure for compensation for the likelihood of this expense.

Conclusion

General damages -	$ 60,000.00
Interest on general damages being 2 percent per annum on $30,000 over 5.75 years -	$ 3,450.00
Past economic loss -	$ 130,000.00
Interest on past economic loss being 5 percent per annum for 5.75 years -	$ 37,375.00
Future economic loss -	$ 350,000.00
Special damages -	$ 3,745.48
Interest on special damages being 5 percent per annum for 5.75 years -	$ 1,076.83
Refunds -	$ 7,561.15
Future expenses -	$ 500.00
TOTAL -	$ 593,708.46

[91] I give judgment for the plaintiff against the defendant in the sum of $593,708.46.

[92] The parties may agree on the question of costs or make submissions in writing.