SUPREME COURT OF QUEENSLAND

CITATION:	*Appo v Stanley & Anor* [2010] QSC 383
PARTIES:	**BRENDON WAYNE APPO** (plaintiff) **v** **JUSTIN STANLEY** (first defendant) **DAVID SIMMONS** (second defendant)
FILE NO/S:	SC No 12 of 2007
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	13 October 2010
DELIVERED AT:	Rockhampton
HEARING DATE:	22, 23, 24 September 2010
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff against the defendants in the sum of $945,895.02.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where plaintiff worked as a jockey and suffered injury to discs in his cervical spine in a fall during a race – where plaintiff alleged that the fall was caused by the negligent riding of the respondents – where both liability and quantum in issue – where the respondents owed a duty to take reasonable care to avoid creating a foreseeable risk of injury to other riders – whether the respondents breached essential safety rules – whether the respondents breached their duty to take reasonable care – whether the restrictions on damages imposed by the *Civil Liability Act* 2003 (Qld) apply to the claim *Civil Liability Act* 2003 (Qld), s 5 *Workers' Compensation and Rehabilitation Act* 2003 (Qld), s 11, s 32(1) *Agar v Hyde* (2000) 201 CLR 552 *Flanders v Small* [2000] QDC 461 *Hill v Workcover Queensland* [2006] 1 Qd R 232; [2005] QSC 257

Kliese v Pelling [1998] QSC 112
Newberry v Suncorp Metway Insurance Limited [2006] 1 Qd R 519; [2006] QCA 48
Rootes v Shelton (1967) 116 CLR 383
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

COUNSEL: G. Crow, with B. Hartigan, for the plaintiff
M. Grant-Taylor SC, with T. Hubbard, for the defendants

SOLICITORS: Macrossan & Amiet for the plaintiff
Moray & Agnew for the defendants

[1] **McMEEKIN J:** The plaintiff, Brendon Wayne Appo, suffered injuries to discs in his cervical spine that brought his career as a professional jockey, which he had pursued for some 18 years, to an end. This case concerns the incident in which he was injured.

[2] That incident occurred in the course of the first race at Ooralea Racecourse, Mackay, on 10 February 2004. Mr Appo was thrown from his mount "Lough Key". Mr Appo says that the fall was caused by the negligent riding of two fellow jockeys in the race, David Simmons riding "Red Bay" and Justin Stanley riding "Kelso Reef".

[3] Mr Appo claims damages for personal injuries suffered in that fall. Both liability and quantum of damages are in issue.

LIABILITY

[4] It is not in issue that as the horses approached the 600m mark – that is with 600m left to run – Lough Key was positioned between Red Bay and Kelso Reef, with Kelso Reef leading on the inside, Red Bay second and on the outside, and Lough Key third. Lough Key was about a three-quarter length behind Kelso Reef. Nor is it in issue that at that point Lough Key had racing room. Nor is it in issue that Mr Appo was entitled to keep his horse so positioned – in racing parlance he had the "rightful running" in that position.

[5] It is evident that Mr Appo lost that rightful running because the horses came together at about the 570m mark. Lough Key was squeezed, and Mr Appo was forced to check his horse. Lough Key's hooves clipped those of Red Bay and suddenly checked, ejecting Mr Appo into the air.

[6] The question is why Lough Key was squeezed and, if caused by either of the defendants' horses, whether a reasonably skilful jockey in their position could have avoided it occurring?

Credit

[7] Mr Grant-Taylor of senior counsel, who appeared with Mr Hubbard for the defendants, submitted that I should take a dim view of the plaintiff's credit. He pointed to Mr Appo's admitted failure to declare amounts of cash that he had received as slings from grateful owners on his income tax returns, his failure to mention a six month suspension for smoking marijuana, and the differences between the version that he gave to stewards at an inquiry held on 6 April 2004 and his version to the Court. In the steward's inquiry Mr Appo appears uncertain about much of what occurred in the race.

[8] As to the first matter it seems that any failure to declare cash sums was in a fairly modest amount and to his credit the plaintiff did make the admission to the Court. It does not follow, of course, that a failure to make an honest declaration to the Commissioner means that the plaintiff should be necessarily disbelieved on his oath about matters pertaining to the subject incident.

[9] As to the second matter, the odd feature is that Mr Appo did mention in his evidence two other suspensions for smoking marijuana – one of which resulted in a nine month suspension. If he wished to deliberately mislead it seems unlikely that the plaintiff would choose a subject that he must have known would be the subject of racing records and so probably easily discoverable by the defendant, and would probably be known in any case to his fellow jockeys, and further that he would admit to a nine month suspension but not to a shorter period of suspension. It seemed evident to me from Mr Appo's responses that he had forgotten entirely the fact that he had a third suspension.

[10] As to the final matter it is obvious that Mr Appo was concerned not to get his fellow jockeys into trouble with the stewards. They faced a one month suspension if found guilty of a careless riding charge. It is evident from the transcript of the enquiry, which was tendered, that the Chairman believed that the jockeys had not been forthcoming in their responses. The defendants called a Mr Brian Killian who had extensive experience in racing generally and as a stipendiary steward with the AJC. He said in relation to the evidence at the steward's enquiry that he found it "hard to understand as jockeys Appo, Simmons and Stanley are unable to give a clear understanding of what happened in the fall". His point was that they were all then experienced jockeys and very likely to have a good recollection of a race held only two months before in which such a significant event had occurred. Contrary to Mr Killian's statement I find it very easy to understand – in so acting Mr Appo was following what one of the witnesses accepted as the "ethic" amongst jockeys not to put their fellow jockeys in, and so he was not being particularly helpful to the stewards.[1]

[11] Mr Crow, who appeared with Ms Hartigan for the plaintiff, was critical of the two experts called by the defendants – Mr Killian and a Mr Morrison. He was critical that the two had had a meeting without the plaintiff's expert being present and had agreed on their views. Whilst it is legitimate to query how independent the two men were of each other – and it emerged that they had known each other a very long time and that Mr Killian had been Mr Morrison's employer at one time – there was no basis for an attack on their honesty.

[12] I was satisfied that each of the witnesses was doing their best to give a truthful account in their evidence of their opinions, where relevant, and of what occurred, where relevant.

The Race – the Plaintiff's Version

[13] I heard evidence from five of the jockeys in the race, that is the three parties and two others, and have a steward's video. The video is only of limited assistance as the fall occurred after the horses had gone well past the camera and the angle does not provide the best view of the events.

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[1] T2-38/25. See also Mr Appo's remark that the jockeys are a tight knit community: T1-56/45.

[14] It was a 1050m Class 5 Handicap. It had rained as the horses came to the barriers. The track was good but plainly wet underfoot. From about the 800m mark the horses entered a sweeping bend that continued around until they straightened for home.

[15] The fall occurred when the horses had about 560m to 570m left to run and when the horses were still on the bend.

[16] Kelso Reef had barrier 1 and so the inside position. From the outset Lough Key was positioned between Red Bay and Kelso Reef, with Kelso Reef leading on the inside and Red Bay second on the outside. Mr Simmons had Red Bay two or three wide on Lough Key coming to the 850m mark and at about the 850m mark Red Bay was, according to Mr Appo, "half a length in front and probably … a horse and a-half bit off" Lough Key.

[17] At about the 800m mark Mr Stanley took Kelso Reef wider. This initially caused Mr Appo no concern as there was enough room but it forced him to "roll out" with the horse, ie. to go wider himself.

[18] Mr Appo said that he became concerned as the race progressed. He called out three times in the course of the race. He first called out to Mr Stanley at about the 700m mark, "Stay there, jockey; jockey, stay there." At this stage Kelso Reef was about three-quarters of a length in front of Lough Key and half a horse width inside. Mr Appo wished to preserve that width. He could see that Mr Stanley was going wider.

[19] As they approached the 600m mark Mr Appo again called out, on this occasion, "boys, boys". He said that at that stage neither jockey, Stanley or Simmons, was keeping a straight course. He explained that he called out because "Stanley was still on the outward course and he wasn't making any effort to come back in and it was going to get tight as we were coming to a tight corner".

[20] Mr Appo's account is that at the 600m mark "it starts to get really, really tight". He described the positions of the three horses as follows: "Justin Stanley's probably three off the fence – three and a-half off the fence. There's half a horse in between us. Um, he's a-half a horse in front. I'm racing on his girth.[2] Mr Simmons is on the outside a-half a horse wider plus a-half a horse in front of me at the time. I'm racing on his girth. I'm travelling well. I've got the favourite out wide of me … and then … They've both come out and come in."[3]

[21] Mr Appo asserts that both horses came into contact with his mount, causing him to check his horse, and "come back out". Lough Key's hooves clipped Red Bay's hooves, Lough Key "knuckled over", and Mr Appo went over its head and, as the horse tried to regain its feet, it has hit its head into his stomach and spat him up in the air.

[22] Just before the incident occurred Mr Appo said he made a third call, "Davy, help," referring to Mr David Simmons.

[23] Mr Simmons said that he heard the plaintiff call out during the race in the terms and at about the places claimed by the plaintiff.

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[2] Mr Stanley gave evidence that he was a length and a quarter or a half clear (T2-17/55) but it is evident from the video that Mr Appo's account is much more accurate.

[3] T1-20/10-25

[24] According to Mr Appo if at any time the other two jockeys had "relieved pressure" then he would have been "fine".

The View from "Soupless"

[25] Mr Leigh Attard was called. He was riding "Soupless". It appeared to me that he was in a good position to see what occurred.[4] He considered that he had a better view than that shown by the video. His account of the race was as follows:

> "When the race commenced, my horse missed the kick by about a length or so. Down the back straight I was back running last and approaching the first corner. I shifted one off the fence and commenced to follow Brendon Appo, who was up in front of me. Approaching the 600 metre mark, I was looking to get out to try and improve my position and I was concentrating on Brendon Appo in front of me and also David Simmons who was to his outside and …. And then as we got to the 600 metre mark I noticed that Brendon Appo was getting into a little bit of trouble, which I thought the pressure was coming from the outside and as we commenced a little bit further, David Simmons kept coming across and cut … Brendon Appo off, which caused him to fall."[5]

[26] Mr Attard said in the course of playing the video of the race and at a point where the video gave a reasonable view of the space between the horses that "you could see that Brendon Appo had plenty of room. They weren't shoulder to shoulder. He … always had a clear run … he's allowed to hold his ground … that was his running"[6]

[27] Mr Attard rejected the proposition that Mr Appo shifted his horse out in an attempt to go around Red Bay,[7] a proposition not put to Mr Appo.

The View from "Acquire"

[28] Mr Whitmore was also called by the plaintiff. He was on "Acquire" and positioned behind Mr Stanley's mount Kelso Reef. His account was:

> "…as we started I probably wasn't the quickest to go. Um, I had Justin Stanley in front. I was sort of two lengths back behind him on the fence. As we were coming down the side passing the 800, Justin's horse was moving away from the fence…"[8]

[29] Mr Whitmore said, and it was plain from the video, that as Kelso Reef moved off the fence it was not two lengths clear of Lough Key.

[30] As the horses approached the 600 mark he said that Kelso Reef "was still moving away from the fence"[9] and he stayed close to the fence, as he did throughout the race. Mr Whitmore saw the fall but could not say what had caused it. His account of that part of the race was:

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4 According to the evidence of the defendants' experts a jockey positioned behind the riders, and they mention behind Stanley, would be in an ideal position to see what occurred: Killian: T2-47/55; Morrison: T2-67/20.

5 T1-85/30-45.

6 T1-9/30; and see T1-97/15.

7 T1-97/20.

8 T2-3/20.

9 T2-3/40 and see T2-5/55.

> "Well, more or less the same thing was happening the whole time. The inside horse was gradually moving out, I suppose, to find better ground, and the outside horse, like I said, was still going forward. And when the accident occurred, it was right on a corner…"[10]

[31] At the time of the fall Mr Whitmore thought that his horse was about half a horse off the fence and Kelso Reef two horses wider.[11]

The Defendants' Versions

[32] Mr Stanley and Mr Simmons each gave evidence. Neither version threw much light on what occurred. Mr Stanley's account was

> "…I drew one, jumped out fairly well, um, sort of the first 100 metres I was aware where pretty much every – every rider was except for Leigh Attard 'cause he had missed the kick. But after that, I more or less went to the front. It was probably – yeah, I went to the front. Never went right to the fence.
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> …. Like I said, the water seems to lay right there, so I sort of stayed half off the fence. Approaching the first turn, it sort of seemed to roll out a fraction and then I wasn't aware of really any other runner. I was about three-quarters of a length in front and it wasn't until after the race that I was aware that there had been a fall. At that stage, when I was three-quarters of a length in front, you know I couldn't – I'm worried about going ahead forward, I can't look behind and see where the other riders are. So, it wasn't till after the race and we'd pulled up that I was aware that Brendon had come down."[12]

[33] He was asked about the possibility of his horse having changed stride at around the 600m mark. It was apparent that he had not felt that occur. He said in response to a question from me that "most of the time you can be aware" of such a change in stride. On watching the video he said that he was not 100 percent sure but his horse did seem to hop or skip at around that 600m point.[13]

[34] Mr Stanley said, whilst watching the video, that Kelso Reef had moved a horse wide at one point after the 800m mark. In cross examination he agreed that his evidence to the steward's inquiry was accurate and to the effect that he felt his horse shift wide on two occasions – at the 900m mark early in the race and at the 400m mark as he entered the home turn. His horse, he had told the stewards, may have shifted out at the 600m mark. The effect of his evidence was that he was not conscious of it. He denied a suggestion in cross examination that he had deliberately shifted out to take the field wide at the 600m mark. He denied a suggestion that he had gone three horses wide at that point – "nowhere near that".[14] In re-examination he confirmed evidence given to the stewards that any shift out between the 600m and 450m mark was only a "slight shift."[15]

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10 T2-4/10.
11 T2-6/30-40.
12 T2-11/15-12/15.
13 T2-14/20.
14 T2-21/25.
15 T2-28/1-10.

[35] Mr Stanley accepted that as the horses approached the 600m mark Mr Appo had "room" and "running" and between the 600m mark and the 570m mark that room was gone.[16] His evidence of the cause of the incident, after watching the video was:

> "What do you say to the suggestion that a combination of you moving out and Red Bay, David Simmons' horse, moving in, that Mr Appo's mount was squeezed? What do you say to that suggestion? – Um, it's – it's hard to say.
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> Are you able to tell that from the video, first of all? – Looking at the video, it would say that he seems to have received pressure from somewhere. You can't tell exactly where it is. You can't – yeah."[17]

[36] Mr Stanley conceded that Mr Appo may have called out in the course of the race but he heard no call.

[37] Mr Simmons' account was that he started a three wide run at the commencement of the race, that from the 800m mark he maintained "a four wide direction the entire trip". He meant by these remarks that there were three and four horses on his inside. He accepted in cross examination that he was five to six horses (ie. horse widths) wide as he approached the 600m mark and that Stanley's mount was three horses wide. He accepted too that as they approached the 600 metre mark there was "quite a sizeable gap, two to three horse widths for Brendon Appo's mount, Lough Key, to run," which gap disappeared by the 570m mark. He could offer no explanation for how that occurred.

[38] From the 800m mark to the 450m mark Mr Simmons denied shifting in at all and denied crossing in front of Mr Appo. His horse maintained a straight line. His only recollection of anything out of the ordinary was that at about the 600 metre mark, his horse put in "a rough strike, like he – like he lost the footing in the back."[18] He related that to his mount and Lough Key clicking heels[19] which probably occurred just prior to Mr Appo coming off Lough Key.

The Relevant Principles

[39] Jockeys, like all of us, owe a duty of care to those around them. In the course of a race they are required to take reasonable care to avoid creating a foreseeable risk of injury to other riders. It is necessary, of course, to bring into account that they are engaged in a sport, that that sport has inherent risks, and that they are obliged to use their best endeavours to win.[20]

[40] What the defendants were required to avoid doing in the circumstances here was "unreasonably exposing [Appo] to some additional risk, that is to say, a risk to which his participation in the sport could not be said, necessarily or ordinarily, to expose a participant" per Taylor J in *Rootes v Shelton*.[21] As Gleeson CJ observed in *Agar v Hyde*, citing *Rootes v Shelton*: "Voluntary participation in a sporting activity does not imply an assumption of any risk which might be associated with the activity, so as to

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[16] T2-23/1-10.
[17] T2-13/4-12.
[18] T2-31/25.
[19] T2-35/15.
[20] See rule 135 of the Rules of Racing.
[21] (1967) 116 CLR 383.

negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity."[22]

[41] It is difficult to improve on the summary of the competing considerations set out by Chesterman J (as his Honour then was) in *Kliese v Pelling* that the parties have referred me to:

> "[T]he court ought not to be too delicate in its assessment of the defendant's conduct which is said to have been negligent. Thoroughbred horse racing is a competitive business which is played for high stakes. Its participants are large animals ridden by small men at high speed in close proximity. The opportunity for injury is abundant and the choices available to jockeys to avoid or reduce risk are limited. It is, no doubt, for these reasons that claims for damages arising out of horse races have been rare and are likely to remain so. But where evidence reveals that a rider has failed to take reasonable care which could and therefore should have been taken, the court is required by law to make a finding of negligence."[23]

[42] Only one additional rule or guiding principle of racing was said to be relevant in this case. Australian Rule of Racing 136(1) provides: "If a horse… crosses another horse so as to interfere with that, or any other horse… such horse… may be disqualified for the race.[24]

[43] The evidence made plain that in the application of this rule the rule of thumb adopted by all jockeys, and it is an important safety rule, was known as the "two lengths rule" – that is that jockeys are not permitted to allow their horse to cross in front of another horse unless they are two lengths clear of that other horse.

[44] Of course breach of the rules of racing, or of any such safety rule, is not the same as breaching the duty of care owed in all the circumstances. To put the case in a more familiar context, sometimes it is perfectly reasonable to drive on the wrong side of the road. So much is clear from the judgments in *Rootes v Shelton*, for example that of Barwick CJ where he said:

> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."[25]

[45] The plaintiff's case here is that the relevant risk was that of moving across another horse when travelling at speed, with the rider of that horse being suddenly deprived of

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22 (2000) 201 CLR 552 at [14].

23 [1998] QSC 112 at p 12.

24 I do not have a copy of the Rules – I have taken the quote from Mr Rowe's report (Ex 8). It is referred to in the joint expert report (Ex 9 at para 3.26(b)) as AR 137.

25 (1967) 116 CLR 383 at 385.

room in which to run, and so causing that horse to check suddenly with the potential for the horse to throw its rider and cause possibly serious injury, even death.

[46] While it may be reasonable, in some circumstances, to ignore the two lengths rule, no-one suggested that it was so here.

[47] I note that in *Kliese v Pelling*, Chesterman J considered it clear that "before moving his horse left or right, a jockey should at least glance in that direction to ascertain that the manoeuvre will not bring him directly in front of another horse and so close that their hooves might touch or into contact with another horse."[26] Given the serious risk of injury involved and the well accepted safety rule, I have no doubt that was the duty on the defendants here – not to move left or right unless they had checked to ensure that in doing so they would not cause the horses to meet or their hooves to touch or force another horse into such a situation. No competing consideration,[27] such as the need to use best endeavours to win, has the effect of displacing that duty.

[48] I bear in mind too the evidence concerning the ability of jockeys to control a horse. A jockey's capacity to ensure that his horse runs straight is limited. Horses can engage in unexpected manoeuvres. Mr Stanley gave some examples as a horse "having trouble in the ground, change of stride, hanging out … runs away from another horse".[28] Wet conditions adversely affect the jockeys' ability to control their mounts. Ordinarily of course it is plain that a professional jockey can and does control his mount. As McGill QC DCJ observed in *Flanders v Small*, it would be difficult to conduct horse racing if that was not so.[29]

Discussion

[49] As the defendants' experts in the joint report state: "The video footage shows that after passing the 600 metre mark Appo lost rightful running".[30] That observation is consistent with all the evidence from the jockeys. There are three possibilities or some combination of them to explain the loss of that rightful running – Kelso Reef moved out, Red Bay moved in or Lough Key changed direction.

[50] As to the last of those it seems clear enough that Mr Appo did not deliberately cause Lough Key to change direction. Mr Appo denied there was any change in direction, no jockey asserted it happened so there was no evidence of it happening, and it would have made no sense for Mr Appo to have sought to do any such thing. His mount was well positioned for the run into the straight. To check his horse and to go out and around Red Bay to the outside and on such a bend would have cost him many lengths. There was no point going on the inside as his path was blocked by Acquire.

[51] As a preliminary point I indicate that the evidence of the experts was not of great assistance. Essentially they came to assert what they claim to see, or not be able to see, on the video of the race. It was self evident that the angle of the camera was far from ideal. Messrs Killian and Morrison said that they were unable to express any opinion because of that poor camera angle. They did assert that they could discern on the video a certain movement of Kelso Reef which they said indicated that it had changed strides

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26 [1998] QSC 112 at p 8-9.

27 Cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40 per Mason J at 47; [1980] HCA 12.

28 T2-15/35.

29 [2000] QDC 461 at [27].

30 Ex 9 at para 2.5.

at that point. Generally speaking, a witness cannot give evidence of what a video shows – it speaks for itself. However where a person with experience and a practised eye asserts that movements have a certain significance that would be lost on a lay person then the evidence is plainly admissible.[31] I accept that was the position here.

[52] As a further preliminary point it is worth noting that the opinion expressed by two men with very great experience in racing that it was impossible to lay blame on either of the defendants, counts for nought. Mr Grant-Taylor did not contend otherwise. First, they are swearing the issue. Second, they each only had the video whereas I have the advantage of the evidence of the jockeys. Third, it seems that they sought to be one hundred percent sure before laying blame.[32] I am required to determine matters on the considerably less onerous standard of the balance of probabilities.

[53] I turn then to the defendants' contentions. I am conscious that the persuasive onus throughout rests on the plaintiff. It is convenient however to consider the alternative hypothesis advanced by the defendants as, if it cannot be refuted, the plaintiff cannot succeed.

[54] The defendants' submission depended upon an acceptance of two propositions – first that "to the extent that Stanley's mount may have shifted in immediately prior to the … contact between Red Bay and Lough Key, the same should be held to be attributable to Kelso Reef's "changing legs" or "changing strides" shortly before the 600 metre marked, as detected by both Killian and Morrison."[33] Second, that it was Lough Key that moved out. The defendants' submission was:

> "The occurrence of the fall is explicable in terms entirely consistent with an absence of want of care on the part of both Stanley and Simmons. If indeed any "shifting out" on the part of Kelso Reef can be explained by the change of stride, that is something for which Stanley cannot be blamed. That may indeed have been the cause of the tightening or pressure which caused the plaintiff so much concern. In response, the plaintiff restrains his horse, causing it to lose ground relative to both Red Bay and Kelso Reef. But by then the horses are well into the bend at the 600. By restraining his horse in that fashion, it is logical to expect that, <u>as theorised by the plaintiff himself</u>, Lough Key would no longer be tracking through the turn and, relative to the turn, would straighten so as to give the appearance of shifting out. In the meantime though, Red Bay to its outside would have continued to track through the turn, meaning that the sudden straightening of Lough Key, combined with its losing ground to Red Bay, would have as its consequence that Lough Key would cross the heels of Red Bay, giving rise to the potential to occur of precisely what did occur, namely, the clipping of Red Bay's heels by Lough Key. That is probably what Attard saw, rather than a shifting in from Red Bay."[34]

[55] The reference to the plaintiff's theorising was a reference to evidence given by the plaintiff to the steward's inquiry and which the plaintiff said was not true. For reasons

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[31] I note that Chesterman J in *Kliese* and McGill QC DCJ in *Flanders* each took that approach.

[32] See Ex 9 at para 2.12: "They could not be 100% confident in attaching blame to Stanley or Simmons".

[33] Ex 20 at para 12.

[34] Ex 20 at para 13.

given earlier I place no great weight on the inconsistent statements made at that inquiry.

[56] As to the first point, it depends upon acceptance of the proposition that Kelso Reef did change strides and that did cause the horse to shift out. As I have mentioned Messrs Killian and Morrison gave evidence that they could detect a movement of the horse at about the 600m mark consistent with the horse changing strides at that point. The degree of any shifting out cannot be detected because of the camera angle.

[57] Whether there is a detectable movement of the horse at the 600m mark consistent with a change of stride was the subject of considerable debate. Mr Rowe, a man of great experience in horse racing as both jockey and trainer, could detect no untoward movement. Mr Morrison wrote two reports on the video and watched it many times closely yet reported no movement. It was only after speaking to Mr Killian that he said he could detect the movement. As set out above Mr Stanley was not one hundred percent sure that he could see such a movement on the video. He is a jockey of many years experience. He did not report feeling it occur in the race in his evidence, and did not report it to the stewards at the inquiry two months later, when, if he had any such recollection, it was plainly in his interests to do so.

[58] I believe that I can see a change in the movement of the horse just prior to the 600m mark. However I express that view very tentatively given the differing opinions and my own inability to see anything untoward on several previous viewings of the video. As well it seems odd that the horse would change strides as suggested. Mr Killian indicated that whilst a change in stride could happen anytime in a race it was more common at the end of a race.[35] Generally horses run around a right hand bend with the right hand foreleg (the off leg) leading.[36] The video clearly shows that Kelso Reef has his off leg leading as he enters the bend. To change strides would put him onto his wrong and less comfortable leg. Further, if a change in stride can involve a hop or skip and some quickening of the horse as Mr Stanley suggested,[37] then it is odd that he did not notice any such thing. Nor did Mr Whitmore speak of seeing any sudden shifting outward of Kelso Reef. That is not to say that these features must always be present, or that a jockey must necessarily notice them, but acceptance of the analysis requires some unusual events to have coincided.

[59] However, whether or not there was a movement and whether or not it represented a change in stride I have found not necessary to determine. The crucial point is whether any movement of the horse has caused it to shift out into Lough Key. The general thrust of the evidence was that any moving out from such a change in stride, and a shift out was not inevitable,[38] would not be great – Mr Stanley said half a horse width was possible. In re-examination he mentioned that there may have been a "slight shift" at around the point where the incident occurred.[39]

[60] The difficulty for Mr Stanley is that Mr Appo, Mr Whitmore and Mr Simmons all have his horse considerably wider than he admits too, and wider than could be explained by a slight shift in the horse caused by any change in stride. They each gave evidence to the effect that Kelso Reef was about three horses off the fence at about the time of the

35 Ex 14 at para 4.5.
36 See for example T1-54/20.
37 T2-14/10.
38 Appo: T1-54/40; Rowe: T3-10/35.
39 T2-28/5.

incident.[40] Mr Whitmore was in the best position to see. Mr Whitmore was plainly disinterested in the result. He had Kelso Reef moving away from the fence at the 600m mark, which was only moments before the incident occurred. I am satisfied that their accounts, coinciding as they do, are reliable.

[61] To get to that position, three wide, from where Kelso Reef plainly is positioned a half horse off the rail as it entered the bend required a significant move to the outside. At no stage is Kelso Reef two lengths clear of Lough Key. Mr Stanley conceded that he made no attempt to check the horses behind him during the race.

[62] I am satisfied that the pressure that came onto Lough Key was caused at least in part by the movement of Kelso Reef[41] and that movement was the result of a deliberate action by Mr Stanley. His action in so riding Kelso Reef breached an essential safety rule, was causative in the eventual fall, and was negligent.

[63] The defendants' second proposition requires a finding that the pressure that came onto Lough Key from Kelso Reef caused Mr Appo to restrain his horse with the consequence that Lough Key would no longer be tracking through the turn and, relative to the turn, would straighten. The sudden restraint would cause Lough Key to lose ground relative to Red Bay. The sudden straightening vis-à-vis Red Bay combined with that loss of ground would cause Lough Key to move out and clip the heels of Red Bay as it continued tracking through the turn.

[64] There are at least two difficulties with that hypothesis. First there is no evidence to support either the timing of these events or the suggested movements of Lough Key. Second it is not what Mr Attard says that he saw occur.

[65] I see no reason to doubt Mr Attard's evidence. Again he was in a good position to see and had no interest in the outcome. He gave his evidence confidently and I have no doubt that he was convinced of what he reported. There is no reason to think that he would be fooled by the curve in the track, a curve that he himself was taking, and so misinterpret the path taken by Red Bay. His evidence confirms that of Mr Appo.

[66] A further matter that provides significant confirmation of what occurred lies in the evidence that Mr Appo called out on three occasions. Mr Simmons' acceptance that the calls occurred shows that Mr Appo was not making up a convenient story. The fact that Mr Appo felt the need to call out as he did suggests very strongly that he appreciated that he was getting into difficulties over time and not as a result of a sudden unexpected movement of one of the horses.

[67] I note that the two earlier calls, at least, were made in sufficient time to constitute a warning to stop moving in on his running.

[68] I am satisfied that Mr Simmons' riding involved a breach of an essential safety rule. His action in causing his mount to move in resulted in Mr Appo having no way to move out and avoid Kelso Reef as it came out, as he had been able to do earlier in the race. Mr Simmons exposed Mr Appo to "a risk to which his participation in the sport

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[40] I note too that Mr Killian, working from the video, thought that Kelso Reef was "almost three off the fence": Ex 14 at p 1.

[41] A point which does not seem to be in issue although whether any movement was deliberate or not is: see Ex 9 at para 3.6(a)(i); Ex 14 at para 5.

could not be said, necessarily or ordinarily, to expose a participant."[42] Had Mr Simmons exercised reasonable care Mr Appo would not have lost his "rightful running" and in all probability would have avoided the fall.

QUANTUM

Does the *Civil Liability Act* 2003 have application to the claim?

[69] There is a preliminary issue. All civil claims for damages for personal injury are governed by the *Civil Liability Act* 2003 ("the CLA"), with consequent significant limitations on the damages that can be awarded, save those excluded by s 5 of the CLA. Here the plaintiff contends, and the defendants dispute, that the exclusion applies.

[70] As the plaintiff's injuries were caused before 6 November 2006, this proceeding is to be determined on the basis that s 5 of the CLA, as in force prior to its amendment by the *Criminal Code and Civil Liability Amendment Act* 2007, continues to apply to it.

[71] Section 5(1) of the CLA, as it was prior to the 2007 amendments, relevantly provided as follows:[43]

> "**5 Civil liability excluded from Act**
>
> This Act does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes –
>
> (a) …
> (b) an injury as defined under the *Workers' Compensation and Rehabilitation Act* 2003, other than an injury to which section 34(1)(c) or 35 of that Act applies; …"

[72] It is common ground that neither of sections 34(1)(c) or 35 of the *Workers' Compensation and Rehabilitation Act* 2003 ("the WCRA") applies here.

[73] The question then is whether the plaintiff suffered an "injury" as defined in the WCRA. Section 32(1) of the WCRA provides that definition in the following terms:

> "An ***injury*** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury."

[74] It can be seen that there are three conditions necessary for an "injury" to fall within the WCRA definition – the injury must be "personal injury", the injury must "arise out of, or in the course of, employment", and the employment must be "a significant contributing factor to the injury".

[75] In *Newberry v Suncorp Metway Insurance Limited,*[44] where the Court of Appeal considered the application of the exclusion in the context of a motor vehicle accident, Keane JA (as his Honour then was) pointed out at [19]:

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[42] Above fn 21.
[43] I have used Reprint 1B as relevant at the material time of injury.
[44] [2006] 1 Qd R 519; [2006] QCA 48.

> "It is clear from the provisions of the WCRA that, when s 32 speaks of an "injury", it is necessarily speaking of an injury to a person who is in a relationship of employment with his or her employer. That this is so sufficiently appears from the terms of s 32 itself…"

[76] After analysis of the position in *Newberry* Keane JA concluded (the Chief Justice and Muir J concurring):

> "In short, s 5(b) excludes from the scope of the CLA claims which involve the assertion that the personal injury caused by the breach of duty by a non-employer occurred in circumstances where the claimant's employment activities nevertheless also contributed to the occurrence of that injury in a way which is significant."[45]

[77] Absent that relationship of employment between the plaintiff and another, the exclusion can have no application. Here there is no argument but that the activities of Mr Appo's employment as a jockey significantly contributed to his injury. The debate centres on the nature of that employment relationship and whether it is of the type contemplated by the legislation.

[78] The defendants argue that the plaintiff was not in "employment", as that term is used in the WCRA, at the relevant time because he was self employed. That is how the plaintiff describes his status in his Quantum Statement.[46] The plaintiff argues that he was an employee – an employee of those who engaged him. The plaintiff submitted that whilst all workers were necessarily employees not all employees were necessarily workers. I reject that submission for the reasons that I will explain.

[79] "Employment" is not defined in the WCRA. However, as observed in *Newberry*, it is evident from numerous provisions in the WCRA that the Act is concerned with the relations between an "employer" as defined and a "worker" as defined. A few examples include the provisions which impose on an employer an obligation to pay compensation,[47] require an employer to hold certain insurance,[48] and regulate access to damages by a worker.[49] Hence for the relevant employment relationship to exist it necessarily follows that the plaintiff had to come within the definition of "worker", and those who engaged him within the definition of "employer". Those terms are defined in the WCRA.

[80] Before turning to the definitions it is necessary to consider the circumstances of the plaintiff's engagements. When a professional jockey rides in a race he or she is engaged by the owner or trainer of the horse. The terms of that engagement are a matter of private contract. Professional jockeys are paid, at least, a riding fee prescribed by Queensland Racing Limited and a percentage of the prize money won. Sometimes they are paid a gratuity by a grateful owner.[50] Whilst an owner or trainer can give the jockey instructions it is obvious that it is entirely up to the jockey to exercise his care and skill in determining how to achieve the best outcome in the race as it unfolds. The plaintiff worked for multiple owners, determined where and when

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45 At [24]
46 See paragraph 134 of Ex 3.
47 Section 46(1).
48 Section 48.
49 Section 46(2).
50 See the evidence of Stanley at T2-24-25.

he would ride, exercised his own judgment in the way in which he rode, and met his own expenses, or at least could not depend on his owners doing so.[51] All this confirms that the plaintiff was a self employed independent contractor.

[81] When one turns to the definitions it is evident that such self employment is not what the legislature contemplated as the employment relationship sufficient to attract the exclusionary provision in s 5(b). Those definitions show that to be an "employer" within the meaning of the WCRA one must employ a "worker" as defined and, to be a "worker" as defined, one must either work under a contract of service or be included, and not excluded, by the extended definition.

[82] Section 11 defines "worker" as follows:

> **"11 Who is a 'worker'**
>
> (1) A **'worker'** is an individual who works <u>under a contract of service</u>.
> (2) Also, a person mentioned in schedule 2, part 1 is a **'worker'**.
> (3) However, a person mentioned in schedule 2, part 2 is not a **'worker'**."
> (underlining added)

[83] No category of person nominated in schedule 2, part 1 applies.

[84] It cannot be sensibly argued that the plaintiff, when working as a jockey, worked under a contract of service. The distinguishing feature between an employee working under a contract of service and an independent contractor engaged under contracts for the provision of services is often cited as control. No doubt owners and trainers give jockeys their riding instructions but their capacity to control the jockey is very limited. And while control is a significant factor it is not the sole criteria as explained by Mason J in *Stevens v Brodribb Sawmilling Co Pty Ltd*:[52]

> "A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571; *Federal Commissioner of Taxation v Barrett* (1973) 2 ALR 65 ; 129 CLR 395 at 402; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389. In the last-mentioned case Dixon J said [at 404]:
>
> > 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible, but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.'
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> But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question:

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51 See paragraphs 43-49 of Ex 3.

52 (1986) 160 CLR 16 at 25; 63 ALR 513 at 517. See also, CLR 35, 49-50; ALR 525, 536.

Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539 at 552; *Zuijs' case*; *Federal Commissioner of Taxation v Barrett* at 401; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 218. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

[85] Here the lack of any ability to control the jockey in the riding of the horse, the need for the jockey to exercise his skill and judgement, the mode of payments, the lack of provision of any equipment, the absence of any obligation to work, the inability to delegate, and the transitory nature of the engagement all combine to point inexorably towards a contract for the provision of services and the relationship of independent contractor and not employee vis-à-vis the owners and trainers.

[86] In any case, even if I was wrong in that view, schedule 2, part 2 of the WCRA, which sets out those persons who are not workers, has the effect of excluding the plaintiff. It provides:

> "**2.** A person who performs work under a contract of service as a professional sportsperson while—
> (a) participating in a sporting or athletic activity as a contestant;
> (b) training or preparing for participation in a sporting or athletic activity as a contestant;….."

[87] Mr Crow submitted that jockeys were not contestants as they did not compete with each other, rather the horses competed. Acceptance of that submission would require an unworldly ignorance of horse racing that few would possess. As in any sport success is measured in the world of jockeys by their ability to win, and win against one another. That is reflected in the awarding of premierships for the leading jockeys – the plaintiff was leading the Mackay premiership when he suffered the subject fall. As in any sport, to be successful, a jockey needs to be fit, strong and skilful. Patrick Smith, a journalist who writes extensively on matters of interest to the racing industry, recently reflected on the attributes of a successful jockey: "Jockeys are brave men and women, the best of whom can sense a race unfold strides before it does. A gap is taken, a race is won."[53] The mind and heart of the jockey is as much a part of the contest as is the strength and speed of the horse.

[88] In my view it is plain that a jockey is a professional sportsperson and plain that jockeys are "participating in a sporting … activity as a contestant".

[89] The view I have expressed is in accord with the decision in *Hill v WorkCover Queensland*,[54] where Moynihan J held that a professional jockey injured in the course of a training run came within paragraph 2(b) of schedule 2, part 2.

[90] Because the plaintiff is not a "worker" then the owners or trainers who engage the plaintiff are not within the definition of "employer", as it is an essential requirement of

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[53] See *The Weekend Australian*, 9-10 October 2010, p 48.
[54] [2006] 1 Qd R 232; [2005] QSC 257.

that definition that the employer employ a "worker", as appears from the definition in s 30 of the WCRA which defines "employer" as follows:

> **"30 Who is an 'employer'**
>
> (1) An **'employer'** is a person who employs a worker and includes—
> (a) a government entity that employs a worker; and
> (b) a deceased employer's legal personal representative.
> (2) Also, a person mentioned in schedule 3, part 1 is an **'employer'**.
> (3) However, a person mentioned in schedule 3, part 2 is not an **'employer'**.
> (4) A reference to an employer of a worker who sustains an injury is a reference to the employer out of whose employment, or in the course of whose employment, the injury arose."

[91] I received no submission that an owner or trainer fell into any of the categories mentioned in part 1 of schedule 3 to the Act.

[92] Thus no employment relationship in the relevant sense existed between the plaintiff and another at the material time. Hence there were no employment activities in the relevant sense to make the necessary significant contribution to the subject fall that the decision in *Newberry* requires.

[93] Hence I conclude here that the injury suffered by the plaintiff did not "arise out of or in the course of employment" nor was any "employment" a significant contributor to the injury. It follows that the exclusion does not apply and the restrictions on damages imposed by the CLA do apply.

General Damages

[94] The injuries suffered in the fall are set out in the plaintiff's quantum statement.[55] They include a broken nose, and lacerations to the face with soft tissue injury to the arms. The significant injury was to his neck. Two discs in the cervical spine were damaged. He has undergone surgery on two occasions involving discectomy and fusion from the C5 to C7 vertebrae. He has obtained little or no relief of his symptoms, which consist of pain in his neck radiating into his arms. He has weakness of grip, headaches, and difficulty sleeping, He was formerly an active professional sportsman but is now a man in constant and debilitating pain. He takes narcotic pain relieving drugs as well as codeine. He has lost his capacity to ride professionally. He cannot enjoy activities with his teenage children. He can no longer enjoy his pastimes of golf and touch football. His de facto marriage has broken up.

[95] The plaintiff was educated to a grade nine standard and has no other qualifications. He has worked as a labourer and can operate heavy machinery. He essentially is unemployable in any realistic, practical sense.

[96] The plaintiff has been assessed as having a chronic adjustment disorder with depressed mood in the setting of chronic pain. Under the PIRS guidelines he has been assessed as having a 5% whole person impairment which may improve with the resolution of the litigation. I take this to be a mental disorder over and above an "adverse psychological

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[55] Ex 3 at paragraph 57.

reaction" mentioned in s 5 of Schedule 3 of the Regulations. The plaintiff contended for an ISV of 4 adopting Item 12 of Schedule 4 of the *Civil Liability Regulation* 2003 ("the Regulations"). I agree.

[97] For the facial injuries the plaintiff contended for Item 17 of Schedule 4 (minor facial injuries) and an ISV of 5 in a range of 0 to 5. I would not think that the injuries fell at the top end of the range. I assess an ISV of 3.

[98] The orthopaedic and neurological specialists are agreed that he has a 25% whole person impairment of which they apportion 5% to pre-existing but asymptomatic degeneration. There is no evidence that such degeneration would have become symptomatic had the subject injury not occurred.[56] MRI studies suggest nerve root impingement consistent with his complaints. His condition appears to be permanent but attendance at a pain management program may be of assistance in managing his pain.

[99] The plaintiff is aged 41 years having been born on 19 June 1969.

[100] Plainly the dominant injury is the neck injury. Both parties submitted that Item 86 of Schedule 4 of the Regulations was appropriate – "severe cervical spine injury". The plaintiff's submission, assuming the application of the CLA, was that an ISV of 50 was appropriate, requiring a 25% uplift from the maximum ISV of 40. The defendant submitted that an ISV of 35 was appropriate.

[101] The comment and example provided in the schedule support the selection of Item 86. While there are multiple injuries, the injuries, apart from the neck injury, are modest in their impact. They justify an assessment at the top of the range provided in Item 86 but no more, in my view. I assess an ISV of 40 as best reflecting the impact of this injury on the plaintiff.[57]

[102] I assess damages at $68,000 in accordance with schedule 6A paragraph (i) of the Regulations.

Past Economic Loss

[103] Assessment of what a professional jockey might have earned over a six and a half year period is inherently speculative. The plaintiff contends for $365,000 and the defendants $198,600 each adopting differing methodologies. Each methodology is flawed.

[104] The defendants' submission averaged the plaintiff's earnings over the three year period pre-accident, increased that average by six and a half percent each year to reflect the average increase in riding fees over the time since the accident, deducted the applicable income tax, and then discounted by 25% to allow for the claimed probability of the plaintiff testing positive to tetrahydrocannabinol (THC) with the consequent inevitable lengthy suspension that would follow.

[105] The significant fallacy in that approach is the double counting of the impact of the chance of suspension through testing positive to THC. In the 2002-03 year the plaintiff had a nine month suspension because of just such a positive test. As a result his earnings for that year were well below the year before and the year after. Hence the

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56 See s 7 of Schedule 3 of the Regulations.

57 See ss 9 and 10 of Schedule 3 of the Regulations.

average that the defendant assumes, which includes that 2002-03 year, has a lower base in the 2004-05 year ($41,272) than is conceded is appropriate for the year before ($53,820 – which extrapolates nearly eight months of actual earnings) which lower base is adopted for all calculations. The plaintiff does not reach his 2003-04 income level until 5 years later on the defendant's approach.

[106] Hence the defendant's approach builds in an assumed chance of a lengthy suspension every year and then discounts substantially again for that chance.

[107] The plaintiff's approach suffers from the converse problem. It makes no allowance for the chance of lengthy suspensions. The plaintiff's own history shows that to be an inherently unlikely future. He had been suspended on six occasions between February 1999 and the subject incident, apart from the three suspensions due to testing positive to drugs.[58] Those latter suspensions had put the plaintiff out of racing for 18 months.

[108] The plaintiff's submission takes the number of rides he had from 1 August 2003 to the date of the accident (223), assumes that reflects an average year (grossed up to 414 to allow for the months from accident to 31 July), calculates the percentage of winning (12%) and place getting (32%) rides and assumes that reflects the plaintiff's sustainable long term winning average, assumes one half of the rides occurred at TAB meets (the plaintiff rode at both at TAB and non-TAB meets and prize money available varied on whether it was a TAB meet or a non-TAB meet) and then applies the available prize money and riding fees assuming those number of rides and winning percentages.

[109] The principal difficulty with the plaintiff's approach is that I have no reason to assume that the period from 1 August 2003 to accident (a period of 28 weeks) is reflective of the plaintiff's sustainable long term earning capacity. It assumes no discount for suspensions or injuries. Mr Stanley's own experience is a reminder of the likelihood of both. Mr Stanley, who it was suggested was a more experienced, and perhaps more talented, rider than the plaintiff, had had numerous suspensions but not, I should add, for testing positive to drugs.[59] As well, his career reflects the inherent dangers in the sport – he suffered two significant injuries that incapacitated him and prevented him riding for two years and nine months between 2005 and the trial.[60]

[110] While one might hope that the plaintiff may have learnt, after his third and lengthy suspension, that he could not expect to smoke marijuana and also ride professionally, there was no certainty that he would not again succumb to temptation. Cannabis is an addictive drug. He had twice before tested positive and yet tested positive a third time. If another positive test was returned I would expect the stewards to impose a suspension of at least 12 months. It was plainly a risk.

[111] I assess damages at $270,000. Either methodology, if adjusted appropriately, brings one to about that figure. Adopting the defendant's approach but not double counting by discounting by 25% gives about $265,000. Adopting the plaintiff's methodology, as reflecting his best possible likely future, but discounting that by 25% to reflect the realistic contingencies, results in a figure of about $273,000.

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[58] Ex 12.

[59] T2-10/25 – 15 or 20 suspensions but only for limited periods of three weeks or less, he having completed his apprenticeship in December 2000.

[60] The injuries included a fractured skull and a broken leg: T2-10/1-20.

[112] Given the plaintiff's receipt of Centrelink benefits and workers' compensation to date ($262,212), there can only be a nominal amount of interest allowed which I assess at $1,400.

Future Impairment of Earning Capacity

[113] The plaintiff contends for a loss of $800,000 under this head and the defendant $314,188.

[114] There are two periods to consider – the time until the plaintiff would have retired as a jockey if the subject accident had not occurred, and the period thereafter.

[115] For that first period evidence concerning present day earnings was provided by Messrs Stanley and Simmons. Mr Simmons said that his gross income for the year ended 30 June 2010 was $100,000 before tax – about $1,400 net per week. He rode in provincial Queensland and found that his services were in high demand. He thought that any competent rider would enjoy the same success "at that this point of time".

[116] Mr Stanley indicated that he earned about $1,500 to $2,000 net per week.

[117] No attempt was made to demonstrate that the plaintiff was comparable in skill to either rider, indeed the cross examination of Mr Stanley was to the effect that Mr Stanley was more highly skilled.[61] That is not to say that the plaintiff was not a competent rider. As I have mentioned at the time of the subject fall he was leading the jockey's premiership in Mackay.

[118] Another point of distinction between Mr Stanley and the plaintiff is that Mr Stanley rides about 20 times per week to achieve his income.[62] The analysis of the plaintiff's rides in the 28 week period prior to the subject accident indicates far fewer rides per week – about eight. The opportunities in Central Queensland, where the plaintiff was likely to work, are more limited – the plaintiff speaks of up to 12 to 14 rides being available.[63]

[119] On the other hand, Mr Stanley does not ride track work which can pay well. Mr Attard makes his living from such work and taking on miscellaneous tasks around stables. He earns a base of $600 net per week for riding track work from 5am to 8am, six days a week, and can earn up to $1000 net per week depending on other work available. He considered that there was a "huge demand" for "capable track work riders that have got a lot of experience and can hold pullers and ride young horses."[64] Mr Attard is based in one of the larger and more successful stables in Melbourne.

[120] One advantage that the plaintiff claimed over the other jockeys who gave evidence was that he has no problem "riding light", that is he could maintain a light riding weight without the need for wasting. This has two advantages – he can preserve his strength and he can secure more rides that demand the lighter weight.

[121] One final piece of evidence is the statistical data provided by Queensland Racing. In 2008-09 the vast bulk of jockeys in Queensland (329 out of 396) earned less than

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[61] T2-17/10.
[62] T2-24/35.
[63] Ex 3 – para 137.
[64] T1-93/5.

$50,000 gross. Only 45 jockeys (or 11%) earned between $50,000 and $100,000 and 22 jockeys (6%) more than that.[65] I do not know whether the plaintiff was consistently in the top 17% of jockeys (by earnings) in Queensland before his fall.

[122] In 2003-04 the plaintiff was averaging about $1000 net per week in the period from 1 July 2003 until his fall. It seems that with a reasonable work ethic the plaintiff would have been able to earn $1200 net per week quite comfortably today.[66] He had the chance of earning considerably more.

[123] There is a small and, to a degree, speculative, residual earning capacity. Dr Atkinson opined that attendance at a pain management program after the conclusion of litigation could result in getting the plaintiff back to some part time work. At the highest that can only be unskilled work not requiring bending, lifting, or sitting or standing for any length of time.[67] The defendant was unable to suggest any particular occupation that might be appropriate.

[124] The plaintiff indicated in his statement that he proposed riding professionally for another 14 years.[68] The context suggested that he meant from the time of the incident which would suggest prospective retirement at about age 48, although his counsel submitted that it should be taken to be from the time of trial with a retirement date at age 55 years. While I am confident that the plaintiff would have attempted to continue to race for as long was he was able to successfully, the statistical evidence is that few jockeys work past age 50 – less than 8%.[69] That seems to me to be a more reliable guide than an expression of uninformed hope.

[125] It is difficult to balance out these various considerations. Adopting $1200 net per week as a long term sustainable average and applying that to a probable retirement age of 50, with a 30% discount for contingencies and residual capacity, results in a loss of $310,000.[70] In arriving at the discount for contingencies I am conscious that there needs to be some allowance for the prospect that the plaintiff might have earned considerably more than I have allowed. The chance of that was certainly not so negligible as to be ignored entirely.[71] However that must be balanced against the chance of a revival of some earning capacity and acknowledgment of the significant risk of injury. There remains the risk of suspension. There is also the probability that as he aged the plaintiff's capacity to maintain a successful winning percentage of races would diminish – that presumably is why jockeys do eventually retire. Age wearies them. Their incomes diminish.

[126] After retirement as a jockey the plaintiff could have maintained a reasonably substantial earning capacity so long as he was fit. He probably would have sought work in and around stables, doing physical labour and riding track work that he could get. He could have sought work in other unskilled areas such as a courier driver as did Mr Whitmore. He had some limited experience in work such as kitchen hand, fencing labourer, and labourer in a mechanical workshop which may have stood him in good

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65 Ex 12.

66 Adopting Mr Grant-Taylor's 6½% increase from a base of $1000 gives a result of this order – see para [28] of Ex 20.

67 Dr Weidmann – Ex 4 at p 87 para 8.5.

68 Ex 3 at para 141.

69 Ex 19 attachment "A".

70 $1200 x 368 x 70%.

71 Cf. *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.

stead. No doubt Mr Appo's physical capacities would have reduced as he aged and his prospects of maintaining employment would have similarly reduced.

[127] The defendant advanced $300 as the measure of the loss for this period, without any particular basis, and the plaintiff $1000, relying on the evidence of Mr Attard. Mr Attard worked in Melbourne. He had no knowledge of the rates payable in Mackay. I have no reason to think that the plaintiff would have been prepared to move interstate to secure better paying work.

[128] I have no doubt that the plaintiff would have taken a significant step down in earnings once he could no longer ride professionally. His earning capacity would have lessened as he aged. Doing the best I can on what is a very speculative matter I adopt a reduction in earning capacity of about 50% upon retirement. Whilst there still needs to be some discounting for contingencies, the risk of injury would of course be greatly lessened after retirement. There are no particular risk factors save that as he aged the plaintiff was likely to struggle to maintain fitness and strength to keep the work for which he was best suited – in and around stables. There needs to be some allowance for a decreasing earning capacity. As well there is the prospect of the plaintiff being able to exercise some earning capacity in his injured state. I assess the loss at $150,000.[72]

[129] Thus for the future impairment of earning capacity I allow $460,000.

Superannuation

[130] Being independent contractors jockeys must make their own arrangements for superannuation. Thus no allowance can be made for the period of the plaintiff's professional riding career.

[131] That restriction however does not apply to the period after retirement from professional riding. The parties agree that 9% of the amount allowed for that future period should be allowed under this head. – ie $13,500.

Paid Services

[132] There is no claim made for the past.

[133] The parties are agreed that an allowance should be made of $24,660 for the future loss.

Future Expenses

[134] The plaintiff claims $74,261 and the defendant concedes $29,168.

[135] The principal differences relate to the ongoing costs of medication, the likely frequency of attendances on a medical practitioner, and ongoing management of the pain condition. The plaintiff's submission assumes that there will be no change to the current regime of treatment.

[136] Dr Atkinson recommended attendance at a pain management clinic, a course the plaintiff says that he is keen to follow up. Successful pain management should result

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[72] ($600 per week net x 299 (from age 50 to age 60)) + ($300 per week x 65 (from age 60 to age 65)) x 75% = ($179,400 + $19,500) x 75% = 149,175.

in a reduced need for medication and treatment. While there is no guarantee of success that possibility cannot be simply ignored.

[137] I make the following allowances:

(a) Cost of attendance at a Pain Clinic - $5,000
(b) Ongoing management - $12,400[73]
(c) GP attendances - $3,500[74]
(d) Medications - $22,500[75]

[138] I cannot realistically see the plaintiff pursuing a gymnasium program as claimed.

[139] I allow a total of $43,400.

Special Damages

[140] Special Damages are agreed at $64,397.02. I allow interest at $538.

Summary

[141] In summary I assess the damages as follows:

Pain, suffering and loss of amenities of life	$68,000.00
Past economic loss	$270,000.00
Interest on past economic loss	$1,400.00
Future loss of earning capacity	$460,000.00
Future Loss of Superannuation	$13,500.00
Future paid assistance	$24,660.00
Miscellaneous future expenses	$43,400.00
Special damages	$64,397.02
Interest on special damages	$538.00
Total Damages	**$945,895.02**

Orders

[142] There will be judgment for the plaintiff in the sum of $945,895.02.

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

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73 There is nothing in Dr Atkinson's report (Ex 4 – p106) to suggest a limitation on the need for management to only five years as the defendant submits.

74 The defendant's submitted rate but over 35 years.

75 Adopting the plaintiff's calculations but reduced by 50% to allow for the prospects of successful treatment.