SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Franklin v Blick**
Citation:	**[2014] ACTSC 273**
Hearing Dates:	23 October 2013, 4, 10, 11 April 2014
Decision Date:	30 October 2014
Before:	Burns J
Decision:	The defendant is liable for the plaintiff's injuries. The defendant's claim for contributory negligence fails. The plaintiff is awarded $1,659,392.75 in damages. The defendant is to pay the plaintiff's costs. This order is stayed for 14 days to allow the parties to apply for a different costs order if they wish to do so.
Category:	Principal Judgment
Catchwords:	**TORTS** – Negligence – standard of care – contributory negligence – road accident cases – bicycle accident **DAMAGES** – Measure of Damages in Actions for Tort – whether plaintiff will be able to return to pre-injury work duties and hours
Parties:	Michael Anthony Franklin (Plaintiff) David Blick (Defendant)
Representation:	**Counsel** Mr B Salmon QC and Mr S Whybrow (Plaintiff) Mr D Lloyd (Defendant) **Solicitors** Bradley Allen Love (Plaintiff) Lee & Lyons (Defendant)
File Number(s):	SC 625 of 2010

Burns J:

The bicycle accident

1. At approximately 5:45 pm on 17 June 2009 the plaintiff was riding his bicycle in a dedicated bicycle lane in a generally westerly direction on Capital Circle between the exit ramp for traffic travelling from Capital Circle on to Canberra Avenue, and the entry ramp for traffic entering Capital Circle from Canberra Avenue. At the same time, the defendant was riding his bicycle in the same direction as the plaintiff. They were not quite riding side by side. The defendant was slightly in front of and to the left of the plaintiff. At a point between the off ramp and the on ramp, whilst both bicycles ridden by the plaintiff and the defendant were within the dedicated bicycle lane, the bicycle ridden by the defendant hit a piece of wood on the road surface, causing the defendant to veer and collide with the plaintiff. As a consequence, the plaintiff fell from his bicycle onto the road surface in the motor vehicle lane, and was struck by a motor vehicle. There is no suggestion that the driver of the motor vehicle was negligent. The plaintiff suffered significant injuries, and now claims damages from the defendant on the basis that his injuries were caused by the negligence of the defendant.

2. The particulars of negligence pleaded by the plaintiff are:

    (a) failure to keep any or any proper lookout, and in particular failure to observe a piece of wood on the bicycle lane surface;

    (b) failure to ride his bicycle under any or any proper controls;

    (c) failure to steer or control his bicycle so as to avoid the said collision or at all;

    (d) colliding with the plaintiff's bicycle when by the exercise of proper care and control over his said bicycle, he could have avoided so doing;

    (e) failure to stop, slow down or swerve or in any other way so as to manage his said bicycle so as to avoid the said collision with the plaintiff's bicycle;

    (f) failure to have any, or any sufficient regard, to the presence of the piece of wood and the position of the plaintiff's bicycle.

3. The defendant admitted that he and the plaintiff had been riding bicycles on Capital Circuit as alleged by the plaintiff, but did not admit the fact of a collision between himself and the plaintiff, or the injuries said to have been suffered by the plaintiff. The defendant denied any negligence. In the alternative, the defendant alleged contributory negligence against the plaintiff on the basis of a failure to keep a proper lookout, a failure to take proper care for his own safety and failure to safely ride and manoeuvre his bicycle.

The plaintiff's background

4. The plaintiff was born in September 1965, making him 43 years old at the time of his accident. He finished school in 1983. The defendant attended the same school as the plaintiff, but was a year behind him. After he finished school the plaintiff spent a year doing casual work at the Lyons Service Station. He then commenced work at the Department of Health. Subsequently, in April 1985 he commenced work as a constable in the Australian Federal Police and remained there for several years. During his employment with the Australian Federal Police he commenced a Bachelor of Applied

Science in mathematics at the University of Canberra. Part way through this course he resigned from the Australian Federal Police and continued his studies as a full-time student. He completed his studies in 1989.

5. In 1990 he travelled to Paris, France with his partner, who had a job in the Australian Embassy. He initially undertook some work as a concierge in the Embassy, before obtaining employment with the OECD. During his stay in Paris, he and his partner were wed. In 1992, after returning to Canberra, the plaintiff was employed in software development by a private company AMFAC-Chemdata. The defendant was a fellow employee at that time. In 1993 the plaintiff's eldest son, James, was born. Between 1994 and 1996 he was employed by the Department of Industrial Relations as an applications developer doing programming work. In July 1995 his second son, Matthew, was born. Between 1996 and 1997 he was employed with the Australian Trade Commission (Austrade) in Canberra as an applications developer doing programming work.

6. From 1997 onwards, the plaintiff has always worked on contract, sometimes being employed on more than one contract at once. Between 1997 and 1998 he was employed with the Australian Quarantine and Inspection Service (AQIS) in Canberra and was also employed on a part-time contract with the Queensland Fisheries Management Authority. Between 1999 and 2002 he was again employed by the OECD in Paris after his wife received a second posting to the Australian Embassy. After returning to Australia in 2002, he continued providing remote technical assistance to the OECD on a contract basis until 2008. Between 2002 and 2005 he was employed on a part-time contract basis to provide technical support to the ACT Department of Health. Later, he also provided some technical assistance to this Department on a part-time contract basis between 2008 and 2009. From 2002 to the date of trial, he was employed on a contract basis to work at AQIS as an applications developer. At the date of the accident, he was working an average of 19.75 hours a week in this position. In 2008 and 2009 the plaintiff was also employed on contract by Stygron Pty Ltd to work with the Australian Competition and Consumer Commission as a software developer. At the date of the accident, he had been working an average of 22.85 hours a week on this contract.

7. The plaintiff gave evidence that he had been involved in a number of minor accidents, and had suffered minor injuries, in the years prior to the accident the subject of these proceedings. I am satisfied that he suffered no ongoing effects of those injuries. I am satisfied that these accidents are irrelevant for present purposes.

The evidence

8. The plaintiff testified that on the morning of 17 June 2009 he rode his bicycle to work, parking it in the garage underneath the building in which AQIS was situated. He said that at about 5:30 pm he and the defendant went to the garage to collect their bicycles to ride home. The plaintiff described his bicycle as a Merida brand road bike, a racing bike with an alloy frame. It had a 700 mm rim on it, which he described as quite narrow, and perhaps 2 cm wide tyres. He thought that it was an 18 speed bicycle. Attached to the bicycle were a pair of halogen lights, 15 and 10 watt, which had a battery pack attached to the bike itself. The plaintiff stated that these lights were very expensive, costing him £200.00 in the United Kingdom. He described them as very expensive and powerful lights which provided good visibility. He also had a set of red lights which flashed at the rear of his bicycle to make him visible to traffic approaching from behind.

It was quite cold, so he was wearing three layers of clothing. The outer, visible layer was orange with fluorescent piping on it.

9. The plaintiff and the defendant rode together on a bicycle lane which was on the edge of Commonwealth Avenue approaching Capital Circle. This was a marked bicycle lane which formed part of the roadway of Commonwealth Avenue and Capital Circle. The plaintiff and the defendant continued to ride on the bicycle lane through a tunnel on Capital Circle, and past the exit ramp from Capital Circle to Canberra Avenue. The plaintiff said that he had a vague recollection that he and the defendant were either riding beside each other, or he was just marginally behind the defendant, but he could not be sure. At some point before they reached the entry ramp for traffic from Canberra Avenue onto Capital Circle, the collision occurred. The plaintiff described the collision in this way:

> So as we passed the exit, some way before the entrance happened, I remember David's bike coming across and him – his body hitting me and I was thrown on the road. I don't have a strong memory of what happened next, other than the fact that a car ran over my back and seemed to spin me around to face the oncoming traffic.

10. After he was hit by the car, the plaintiff could recall the defendant trying to stop traffic. The plaintiff tried to crawl off the roadway, but his legs weren't responding. Another cyclist came over and held his head in place and told him not to move. He did not recall losing consciousness. He did not suffer any pain at first, but when the ambulance arrived and they tried moving him on to a gurney, he felt "incredible, intense pain". The pain was in his pelvis, legs and lower back. He was transported by ambulance to hospital, and again felt intense pain when they moved him from the gurney into a bed. He had a number of scans and x-rays, and thinks he must have been medicated because the pain subsided. He stayed in the acute care area for 24 hours before they found a bed in the orthopaedic ward for him. He was given patient controlled analgesia, which allowed him to give himself a dose of intravenous morphine. He found, however, that when he fell asleep the morphine would wear off and he would wake up in pain.

11. It is not in dispute that the plaintiff suffered a fractured pelvis, a fractured right transverse process, internal bleeding, grazes and bruising. The plaintiff testified that the doctors were initially concerned that he may have suffered organ damage because there was a lot of internal bleeding. He had to wait for about six days for the internal bleeding to stop before they were able to operate on his pelvis. After the operation he woke up in intense pain, as a catheter had not been inserted and he had a full bladder. It was about five hours after the operation before a catheter was inserted, during which time he was in intense pain. In the operation he had an external fixator attached into the iliac bones and they protruded about 10 cm from his body, and were then attached with rods on the outside. He also had a screw put into his sacrum. The screw was later removed in 2012.

12. After the surgery, the plaintiff was on intravenous morphine for pain relief, but it gave him hallucinations and bad dreams. He was then moved on to an oral analgesic, OxyContin. He also took Endone. For the first two weeks after surgery he was completely bedbound. If he needed to go to the toilet, he had to be lifted into a frame using a small crane. When he left hospital he was still on OxyContin, and over a period of months he weaned himself off that medication onto Endone and later Di-Gesic. During much of this period he described himself as "quite out of it".

13. During the time that the plaintiff was in hospital the defendant visited him frequently. He said that the defendant told him that he had hit a piece of timber before he collided with the plaintiff. The defendant described the timber as 1 ½ inch square in cross-section, and quite long, probably 1 ½ or 2 m in length. The defendant told the plaintiff that it had "turned his wheel", presumably meaning that the front wheel of the defendant's bike had turned towards the plaintiff when it struck the piece of wood. The plaintiff was asked whether he had told anyone that he had himself seen the piece of wood, and he said that he may have because he had been told about it so many times that he had convinced himself that he had seen it, but that in honesty he could not recall whether he had seen the piece of wood before the accident. He could not say whether the piece of wood was lying across the bike lane, or lying lengthways along the lane.

14. The plaintiff remained in hospital for 28 days from 17 June 2009, being discharged on 15 July 2009. At that time an external pelvis fixation device was still fitted. Upon discharge, he had limited endurance, used crutches, and had pain due to infection at the entry points of the external fixation device. He was required to use a shower chair when showering, and to use a lifting recliner to allow him to sit or rise from the seated position. Bed blocks were used to raise the height of his bed, and he used a goose-neck to assist getting in and out of bed.

15. After leaving hospital the plaintiff continued to suffer pain. Mostly it was chronic pain, but there were occasional flare-ups of acute pain. It was subsequently determined that the screw in his sacrum impinged on nerves, including the sciatic nerve, which caused him pain. The acute pain went away after the screw was removed. The plaintiff said that he continues to have low back pain, but no longer has sciatic pain.

16. In July 2009 the plaintiff commenced a rehabilitation and return to work program with Workfocus Australia. In August 2009 he had a surgical procedure at the Lidia Perin Memorial Hospital to remove the external fixation device. On 15 September 2009 he was reviewed by Dr Hocking and was referred for physiotherapy and hydrotherapy. Between September 2009 and March 2010 the plaintiff attended Ergogym for rehabilitation. Initially he attended several times a week, and undertook hydrotherapy and basic walking skills. Later this was reduced to attending once a month for monitoring of strengthening exercises. In early October 2009 the plaintiff was referred to Mr Jeff Parsons, a psychologist. He participated in five sessions between 16 November 2009 and 2 February 2010. On 29 October 2009 the plaintiff was again reviewed by Dr Hocking following complaints of dysesthesia in his right thigh. In November 2009 the plaintiff joined Active Leisure Centre and engaged a personal trainer to commence rehabilitation and physiotherapy routines to augment the program provided by Ergogym. He continued attending this gym and having regular guided strengthening sessions with a personal trainer until early 2013. From November 2009 until the present date he has used the services of a massage therapist to assist with pain management.

17. In about December 2009 the plaintiff and defendant visited the offices of a solicitor. The plaintiff had assumed that he would be "covered for personal injury" as the accident had involved a motor vehicle. He was advised that the third party insurance of the driver of the motor vehicle would only cover him for his injuries if it could be proved that the driver of the vehicle was negligent. Subsequently, the plaintiff made a claim against the defendant. In December 2009 the plaintiff returned to work on a graduated program.

18. On 1 March 2010 the plaintiff was reviewed by Dr Hughes complaining of significant lumbar pain causing sleep disruption. Between March 2010 and April 2010 he undertook another series of sessions with the psychologist due to problems balancing work and rehabilitation. In April 2010 he was able to increase his work load to 30 hours a week, before suffering flare-ups in the weeks ending 9 April 2010 and 30 April 2010. From May through to September 2010 the plaintiff frequently worked from home, combining work with rest, before again reaching 30 hours a week. He suffered further flare-ups in his condition in the weeks ending 15 October 2010 and 29 October 2010. During those weeks the plaintiff worked virtually no hours, spending long periods in bed. From September 2010 until March 2012 the plaintiff used the services of an osteopath, Stefanis Villanger, who provided significant, although short-term relief from sciatic and lower back pain.

19. From November 2010 to June 2012 the plaintiff consolidated his work hours at around 25 hours a week. Each time he attempted to increase his weekly working hours, he suffered increased pain.

20. On 1 November 2010 the plaintiff was seen by Dr Hughes and complained of lumbo-pelvic pain and left lower limb neuropathic pain. He reported taking Di-Gesic most days. He was seen again by Dr Hughes on 24 November 2010 and on 10 January 2011, and given a left sacroiliac joint injection with cortical steroid and local anaesthetic. On 20 November 2011 he commenced physiotherapy with Rob Ericsson of Capital Physiotherapy, which continued until the date of trial.

21. On 3 February 2011 Dr Malcolm Thompson performed a CT guided peri neural injection of cortical steroid and local anaesthetic into the left L4/L5 neural foramen. On 11 February 2011 he commenced a series of exercise physiology sessions at Capital Physiotherapy. This treatment ran, on and off, for a period of 12 months. On 1 March 2011 the plaintiff was seen by Dr Hughes complaining of significant disruption to his life as a result of lumbar pain, with sleep interruption caused by leg pain. On 4 March 2011 he commenced a pain management course run by Capital Physiotherapy. This was a series of five one-on-one sessions with a pain management specialist.

22. On 2 November 2011 the plaintiff was seen by Dr G Eaton, an occupational physician, who recommended another series of sessions with a clinical psychologist for further counselling, and to undergo some mindfulness training for the management of chronic pain. In February 2012 he commenced a mindfulness meditation course as recommended by Dr Eaton. In January 2012 he was referred to Matthew Hotchkis, a podiatrist, who diagnosed a 8 – 10 mm leg length difference and left plantarfasciosis. Prescription orthotics were constructed to address his leg length difference and to alleviate plantarfascial pain.

23. In July 2012 the plaintiff and his family flew to France for a holiday. His family flew economy class, but the plaintiff flew business class in an attempt to minimise the impact on his back. This was not particularly successful, as the plaintiff was uncomfortable most of the time. Whilst the plaintiff's family stayed in France for five weeks, the plaintiff returned after two weeks as he was becoming increasingly uncomfortable. In his evidence the plaintiff said that, based on this experience, he would probably not attempt overseas travel again.

24. Between July and November 2012 the plaintiff's work hours were reduced to an average of 13 hours a week as his sciatic pain worsened. In October 2012 he was reviewed by Associate Professor Smith complaining of left sided low back pain

radiating to the buttock and left lower leg, extending to the heel and occasionally the sole of the foot. The diagnosis was of inappropriate placement of the right iliosacral screw such that it impinged upon the left S1 nerve root. On 2 November 2012 a surgical procedure was performed by Associate Professor Smith to remove the iliosacral screw. On 18 May 2013 the plaintiff was seen again by Dr Eaton complaining of left lower back and buttock pain. He was referred to Ms V Coghlan, a clinical psychologist, who prescribed Endep. The plaintiff later had a further four sessions with Ms Coghlan in September and October 2013.

25. After returning to work in December 2012 the plaintiff was only able to maintain an average of 25 hours of work a week up to the date of trial. His average working hours for the entire period from December 2009 until the date of trial was 23.4 hours a week, compared to the 42.6 hours a week that he was working with the two clients that he had at the time of the accident.

26. Prior to the accident the appellant had been very fit and healthy. In the five years prior to the accident he had participated in a number of triathlons, decathlons and rogaines and adventure races. He rode his bike to work almost every day, did yoga, swam, was part of a running group and a riding group. He described himself as a very active, and probably the fittest that he'd ever been. Since the accident he has tried returning to sports but found that it resulted in increased pain. He still enjoys swimming, and swims sometimes in the lake when the weather is warm, but generally swims on Wednesdays at Civic Pool. He finds swimming relaxing, but he does not compete any more.

27. The plaintiff testified that his employment is very sedentary, requiring him to be at a computer terminal all day. As at the date of trial he had recently acquired a sit/stand workstation that allowed him to stand up occasionally, in an effort to try and increase his work hours. As at the date of trial he had only used the sit/stand workstation for about three or four weeks, but at that stage it had not made an impact on the hours he could work.

28. The plaintiff said that his social life had suffered, because before the accident it had centred on his sporting activities. After the accident he said that he felt "down" a lot of the time because of the constant pain and the need to take medication. Before the accident he would go out to dinner and go to cafes with friends regularly. He described a very active social life in addition to the sports he played. After the accident he found it very difficult to sit for long periods, which affected his social life. He found it difficult sleeping, particularly when he had sciatic pain. When he suffered flare-ups in his pain he also found it difficult to sleep. He purchased a hydrotherapy spa for use at home, and used it probably an hour a day, which he found beneficial. He continues to use Endone, but finds that it stops him from sleeping so he must be careful to time its use so that it wears off before he goes to bed.

29. The plaintiff said that he has good relationships with the people that he works for, so he has been able to pick up work on the understanding that he can't work full time. Prior to the accident, he had no difficulty getting adequate contract work. He acknowledged that there had been "a little bit of a downturn" in the industry in Canberra since the last Federal election. He said that he was currently on a six month contract, and was unsure what would happen at the end of that six months. The plaintiff testified that Dr Eaton suggested he should try and change his career, and find something that was less sedentary. The plaintiff said that as a consequence he did a Certificate IV in training and assessment with a view to being a trainer. After getting that Certificate, he

picked up a little bit of work training, but mostly doing assessment work and interviews. In that regard he was employed by CIT Solutions in Bruce. He found that the training work was good because he could stand up and move around, and also sit down when he needed to. The problem was that the CIT did not run many courses in areas in which the plaintiff had expertise, limiting his opportunities for training, so most of the work that he did for the CIT was assessing, which involved sitting, which he found uncomfortable.

30. The plaintiff gave the following evidence about the lighting conditions in the area where the accident occurred:

> So far as the lighting from streetlamps and your bike was concerned, has there ever been any problem in seeing the roadway?.... No, it's an exceptionally well lit area of Canberra, that part of the roadway. There's a dark patch about 100 m prior. There is a bridge where there is a dark – you come out of the tunnel and there is a small dark patch. There's an underpass going underneath, and then...
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> Do you mean an overpass?.... Well, yes, the road is an overpass. There is a road, or a service road that goes up to Parliament House underneath, and there is no streetlight there. But then once you hit the – after the exit ramp to Canberra Avenue, the exit road to Canberra Avenue, that's extremely well lit; about every 40 m or so, there is an overhead light.

31. In cross-examination the plaintiff agreed that it was dark when he was travelling home on 17 June 2009. He said that the journey would normally take him about 25 minutes. The bicycle lane on which he and the defendant were travelling was about 6 to 8 feet wide, and was not separated from the vehicular traffic lanes by any barrier. He agreed that as they were riding, he was basically alongside the defendant, although one of them from time to time may have been slightly ahead of the other. He also agreed that they normally talked as they rode, but he could not remember whether they were talking just prior to the accident. The plaintiff agreed that he was aware that motor vehicles used Capital Circle, and that motor vehicles generally travelled at speeds of 70 to 80 km per hour in that area. The plaintiff also agreed that the time the accident occurred was peak hour, so that it was a busy time of day for road users. The plaintiff estimated his speed prior to the accident as 25 km per hour.

32. The bike the plaintiff was riding had tyres about 2 cm in width. He said that you could get "smaller ones", but the ones he had were the common size for a road bike. He agreed that there was nothing stopping himself and the defendant riding single file, rather than riding side by side. The plaintiff disagreed with the suggestion that with tyres 2 cm in width something such as a twig on the roadway could cause him to become unbalanced and fall off his bike. The plaintiff agreed with the proposition that visibility is reduced at night, compared to daytime. He said that the accident occurred approximately 300 m after the tunnel, which was well lit, but denied that his vision had been affected by the bright lighting in the tunnel. The plaintiff disagreed with the suggestion that the area where the accident occurred was "very, very dark". The plaintiff said that after the tunnel there was a dark patch of approximately 100 to 150 m, but after that the road was well lit. The plaintiff said that the cycleway at the point of the accident was so well lit by overhead lights and by the lights of passing traffic that the lights on the bicycles probably added little. The plaintiff also rejected the suggestion that in the 20 or 30 m prior to the point of the collision there were no motor vehicles providing illumination of the area of the accident. The plaintiff said that it was peak hour, and the lanes were full of traffic.

33. The plaintiff agreed that in September or October 2010 he had instructed his solicitors that he had seen the piece of wood on the roadway prior to the collision. He said that was what he believed at the time, but now he was not so sure. He said that he had been told about the piece of wood so frequently after the accident that he believed at the time he gave instructions that he had seen it, but he no longer had a recollection of that. It was suggested to him that if he had seen the piece of wood prior to the accident, then he hadn't taken any action "to deal with it" before the accident, to which he responded that it would depend on how soon before the accident he saw it. The plaintiff agreed that it was his obligation and responsibility to keep a lookout for any obstacles ahead of him on the cycleway, but said that he honestly could not say whether he was taking care to look out for obstacles at the time of the accident. He agreed that as a cyclist you do not spend all of your time looking directly in front of you, and that you look around to make sure there is no threat from other directions as well.

34. The plaintiff agreed that after the removal of the sacroiliac screw there had been a significant improvement in respect of his sciatic pain in his left leg, and that this had enabled him to stop taking Lyrica. Since his operation in November 2012, he had not been able to noticeably increase his hours of work. After taking some time off to recover from the surgery, he was hopeful of being able to work longer hours. He believed he pushed his hours up close to 30 hours a week, but wasn't able to maintain that. He ceased going to the gym because he was frustrated at his lack of progress, not because of his injuries.

35. In the plaintiff's case an email from the defendant to his insurer dated 9 February 2010, which was copied to the plaintiff, was tendered. This reads:

> On 17 June 2009, Michael Franklin and I were cycling home from our workplaces. We left work at about 5:30pm. Both of us were wearing appropriate cycling clothing, have quality road bicycles which are well maintained and regularly serviced. We both had appropriate night lighting equipment for cycling. We were riding alongside each other in the purposebuilt cycling lane, Michael on my right side closest to the traffic but within the cycling lane.
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> It was approximately 5:45pm and dark as we were rounding Capital Circle at 25 – 28 kmh. Between the Canberra Avenue exit and entry ramp, my bicycle struck what I later discovered to be a tree stake, which was sitting in the left side of the bicycle lane (where I was riding). The tree stake was approximately 6 to 8 feet long and about 1 ½ inches square. I did not see this stake before the accident. Striking the stake, the front wheel of my bicycle slid out from under me causing me to fall onto Michael. Our wheels and pedals caught up together making us both to (sic) fall off our bikes. The inertia and collision caused Michael to fall to his right onto the road and into the path of the traffic lane parallel to his right. After hitting the ground, Michael was run over by a motor vehicle travelling in the same direction.
>
> Although I too had fallen to the ground, I got up and ran into the oncoming traffic to stop the cars and tend (sic) assistance to Michael. He was unable to stand and in severe pain. Other cyclists commuting home also stopped to assist and call for emergency services such as ACT Police and Ambulance. Michael was taken to the Canberra Hospital in a stable but severe condition.
>
> I stayed at the accident scene to provide statements to the police.

36. A police report completed by police who attended the scene of the accident described the weather conditions at the time of the accident as fine, and the light conditions as "Dark – Good street lighting".

37. A number of medical reports were tendered on behalf of the plaintiff. Dr Leon Le Leu, a consultant occupational physician, provided a report dated 22 June 2011, after having assessed the plaintiff on 7 June 2011. Dr Le Leu noted that at the time of assessment the plaintiff was working in a sedentary position, and had been working at home two days a week and at the office three days a week for some time. He had recently changed projects which meant he needed to be in the office five days a week. He noted the mechanism of the accident and the plaintiff's initial treatment and recovery. Dr Le Leu noted that the plaintiff reported going to the gymnasium three times a week, swimming twice a week, doing physiotherapy exercises seven days a week at home and visiting a physiotherapist once a week at the time of assessment. At the time he saw Dr Le Leu, the plaintiff had the following complaints:

    (a) Pain going into his buttocks and down the left leg to the heel;

    (b) He had recently started strapping the left foot to support the arch, which reduced the pain particularly at night when it normally throbs down his leg;

    (c) He was having difficulty sleeping, and was taking Endone which reduced the pain. He was on Endep at night;

    (d) He was constipated a lot of the time, but then he took medication for that which caused diarrhoea;

    (e) He experienced urgency in urination;

    (f) His libido was reduced;

    (g) He was normally permanently on medication;

    (h) He was trying to change his work hours so that he could get time off, wanting to start later in the day so that he could go to the gymnasium and then the spa at home before going to work;

    (i) He was unable to participate in activities such as triathlons, and generally running and riding like he used to. He could not sit on a bike for very long since the angle at which he sat aggravated his back; and

    (j) He was depressed for a short time, and saw a psychologist.

38. At the time he consulted Dr Le Leu the plaintiff was working up to 30 hours a week. Because he was a contractor, he was finding these reduced hours financially difficult but believed it would be worth it to get his rehabilitation sorted out. He reported being able to drive, but that flying was more difficult. He reported being able to sit for about 30 minutes before he had to get up. He had difficulty getting up from a squatting or kneeling position. He reported that his son or wife made his bed, that his sons now did the gardening, that he avoided heavy lifting and that vacuuming, sweeping and mopping were difficult.

39. Dr Le Leu expressed the opinion that the plaintiff's injuries arose out of the bicycle accident, and that there may be in future slow deterioration of his lower back since there was visible degeneration of the L4/5 disc. He noted that the plaintiff was able to do far less house work than before the accident, and was unable to participate in pre-accident activities such as running, triathlons and decathlons. He noted that the plaintiff's injuries had had a major effect on his ability to work and that he was still working reduced hours of 30 hours a week. He considered it likely that his ability to

work full time would be reduced in the future. He noted that he saw the plaintiff some two years after the accident and that, whilst there had been significant improvement in symptoms, he had now reached a plateau of improvement and he would probably continue to experience his current range of symptoms for the foreseeable future.

40. Dr Le Leu provided a second report dated 25 July 2013, having further assessed the plaintiff on 2 July 2013. By this time the iliosacral screw had been removed, providing significant improvement in the plaintiff's left sided sciatic pain. The plaintiff also reported that his work hours were "up and down", with him being unable to work at all at times. He hoped to maintain 25 hours a week. The plaintiff reported having ceased attending the gymnasium because he was not making any progress and his condition tended to flare-up after going to the gym. He continued to have pain in his left buttock, but it no longer radiated down the left leg. There was a length difference in his legs, so he had an orthotic in his right shoe. He still had trouble sleeping. He continued to have trouble with constipation and continued to experience urinary urgency. He reported having trouble sustaining an erection. He continued to attend a psychologist for treatment for depression. He reported much the same restrictions to recreational and domestic activities as he had in the previous consultation.

41. In his summary in this second report Dr Le Leu noted that the plaintiff's sciatic pain had improved dramatically, but the plaintiff complained that his back was as bad as it had ever been. There was some improvement in the clinical signs, such as no positive sciatic stretch test on the left. The plaintiff was still very limited in what he could do, and was very limited in his ability to do housework. For practical purposes, Dr Le Leu considered that the plaintiff's injuries and disabilities had stabilised. He considered that the plaintiff's current working hours of 25 hours a week were borderline consistent with his ongoing disabilities, but at times he had difficulty even achieving those. He noted that the plaintiff had to work with a specially designed monitor/keyboard arrangement so that he could sit or stand to do his work. Dr Le Leu considered it inevitable that the plaintiff would have many more periods of time off work due to flare-ups and may have long periods when he has to work reduced hours. He did not think any different treatment would be beneficial. His prognosis was for ongoing symptoms of the type the plaintiff was exhibiting, at or near their current levels for the foreseeable future. In general, he considered the plaintiff would remain greatly disabled by his injuries and that the situation was unlikely to change.

42. Dr Le Leu was cross-examined by the defendant. It was suggested to Dr Le Leu that the use of a sit/stand workstation by the plaintiff would allow him to work more hours a week, on average, than Dr Le Leu had suggested in his reports. Dr Le Leu responded:

> Well, I would dissent from that because on the both times I saw him he was already using that device, and was only just able to work 30 hours a week, and he was taking Di-Gesic and Endone and other things to control his pain, so I don't see that anything has changed by you just telling me that he is using a sit – stand desk, which he was doing anyway.

43. Dr Le Leu also rejected the proposition that the plaintiff may be able to increase his hours of work if instead of returning to his pre-injury occupation he was to become an IT teacher. Dr Le Leu thought that the plaintiff would have difficulty with prolonged sitting and standing, so we would have to mix those two positions. He did not think that a teaching position would be greatly different from the work he was currently undertaking.

44. A report dated 5 October 2012 from Professor Paul Smith, an orthopaedic and trauma surgeon, was tendered as part of the plaintiff's case. Professor Smith saw the plaintiff for treatment with respect to left sided sciatic pain. A CT scan demonstrated that the problem was an inappropriate placement of the right iliosacral screw such that the screw transgressed the left sided S1 nerve root frame, impinging on the left S1 nerve root. In addition, the fixation screw was inserted without a protective washer and the screw had been significantly buried within the bone. He recommended that the screw be removed.

45. Professor Smith provided a second report dated 5 November 2012 in which he confirmed that he had performed surgery that date removing the iliosacral screw.

46. The plaintiff tendered three reports from Dr James Bodel, an orthopaedic surgeon. In his first report dated 12 August 2011 Dr Bodel noted the history of injury and initial recovery. He was of the opinion that the plaintiff had suffered injuries to his lower back, pelvis and right sacroiliac joint in the accident. He felt that the plaintiff's injuries and disabilities had probably stabilised. He did not anticipate further improvement, with deterioration a more likely outcome. He noted that the plaintiff's injuries significantly interfered with his domestic, social and recreational activities. He also noted that the plaintiff had ongoing difficulty in returning to work, having achieved approximately 30 hours work a week after the accident when prior to his injuries he was working 40 hours a week or more. Dr Bodel considered it unlikely that the plaintiff would be able to upgrade his activities past his current level of work. The plaintiff's overall prognosis remained guarded.

47. In his second report dated 16 November 2011, Dr Bodel said that the plaintiff had suffered a 19% Whole Person Impairment.

48. Dr Bodel's third report is dated 24 July 2013. He noted that the plaintiff's clinical condition appeared to have stabilised, having had a significant improvement in his overall level of function since removal of the sacroiliac joint screw. He considered it unlikely that further treatment would be required, apart from conservative measures that the plaintiff was currently undertaking. The plaintiff's ongoing disabilities, however, were quite significant, interfering in all aspects of domestic, social and recreational activities. His ongoing disabilities interfered with his employment, with the plaintiff struggling to work 25 hours, and occasionally 30 hours a week, but not able to upgrade to full time hours of work. Dr Bodel thought that, based on his current clinical presentation, 25 hours a week of the type of work that the plaintiff was doing was the appropriate level of work for him.

49. Dr Bodel was also cross-examined by the defendant. He also rejected the proposition that the use of a sit/stand workstation by the plaintiff would enable him to work more than 25 or 30 hours a week. Dr Bodel said:

> I think from the clinical presentation at the time that I have seen him, and the most recent examination was about eight and a half months ago, that he would struggle to work full time in any modified version of his occupation or any related occupation that had similar physical requirements. He has an ongoing pain profile that I believe makes it difficult for him to engage in reliable reproducible full-time activities.

50. The defendant gave evidence commencing on 4 April 2014, and subsequently continuing on 10 April 2014. At the time he gave evidence the defendant was able to

recall very little about the circumstances of the events of 17 June 2009. He was diagnosed with a pituitary tumour in 2012, necessitating medical treatment. He testified that since that time his short-term and some of his long-term memory had faded. He had no recollection of the accident, and in particular had no recollection of the light conditions in the area that the accident occurred. He testified that when riding his bicycle, he would look out for debris on the road. He said that he had never seen a piece of wood as had been described to him on the road on any other occasion, either before or after the accident. He said that when riding his bike he scans ahead, and to each side, to try to anticipate what is happening.

51. The defendant was interviewed by an investigator retained by his insurers on 26 August 2010. A copy of the transcript of that interview was tendered in the defendant's case. In that interview, the defendant stated that the bicycles ridden by himself and the plaintiff on 17 June 2009 were fitted with headlights, which were illuminated at the time of the accident. Both were wearing safety helmets. Both were also wearing appropriate high visibility clothing. With respect to the lighting in the area where the accident occurred, the following questions and answers are recorded:

> Q70. Was it dark at that time?
>
> A: Yes.
>
> Q71. What was visibility like at that time of night?
>
> A: Not too bad. It's peak hour traffic, so there's a lot of lights from the cars, and we also had our cycling lights on.
>
> Q72. Were they operating effectively?
>
> A. Absolutely.
>
> Q73. Do they have low beam on high beam or just the one?
>
> A. Just the high beam.
>
> Q74. And it you were able to see a head adequately?
>
> A. Yes.
>
> Q75. Were the street lights on in the area?
>
> A. From memory, yes.
>
> Q76. Would you describe the street lighting where the accident occurred as well lit… Poorly lit?
>
> A. Oh, yeah, poorly lit.

52. The defendant described the accident to the investigator in the following terms:

> Q85. To the best of your recollection, please explain precisely how this incident occurred.
>
> A. Michael and I were travelling side-by-side in the cycle lane. I was on the left-hand side of the cycle lane and Michael was on my right. We were travelling at approximately between 25 and 27 km an hour, which is the usual pace that we would be riding at. It was dark. We were riding along, chatting, looking ahead. At that particular point in the road, normally, we would be looking a little bit to the left because there is merging lane coming from Canberra Avenue, so we have to look out for cars. The next thing I knew was something had caused my front wheel to move out from underneath me and I was starting to fall. I fell onto Michael, who was riding by my side, and the result of which caused him to crash… Fall into the car lane on his right, at which point he had probably… Oh, I couldn't tell you how many seconds because everything was going fast that he was struck by a car that was travelling in the same direction in that lane.

> Q86. Now, you indicated to me that your bicycle struck something on the roadway and we've been advised that it was a tree stake. Did you know that at the time?
>
> A. Not at that instant but after the police came and I told them what had happened, they marched down the road and they picked up this eight-foot tree stake and said, "This looks like what you hit it".
>
> Q87. So you didn't actually see it?
>
> A. I didn't see what I'd hit but it was something that was large and wooden because I heard it hit my bike and get caught up in the wheels and so forth.
>
> Q88. Is there any reason you didn't see it before you struck?
>
> A. Probably because it would have been lying in a north/south position on the road, so I wouldn't have seen it lying across the road. It would have been up and down in front of me, and it would have been a similar colour to the road, and it was quite big. It would have been, yeah, at least 6 to 8 feet long.

53. Later in the interview, the defendant was asked whether he knew what happened to the stake after the accident, to which he replied "It was discarded on the grass verge and the last time I looked it was still there".

54. In cross-examination the defendant said that he would not go so far as to say that the position where the accident occurred was very well lit. However, the defendant gave evidence that he had not travelled over that section of road for some two years prior to him giving evidence. Bearing in mind the defendant's obvious memory problems, his recollection of the lighting of the scene must be approached with caution. The defendant agreed that in 2009 he had good headlights on his bike, probably the best lights available for purchase at that time, however he thought that the quality of the headlights available at that time was not such as to light roads well.

55. The investigator, Kerry Thorpe, who interviewed the defendant on behalf of his insurer, gave evidence in the defendant's case. He said that after the defendant told him that the stake was still at the accident site in the interview on 26 August 2010, he went to the location and found a piece of wood in the exact location as described by the defendant. The piece of wood found by Mr Thorpe had since been lost, however photographs of the piece of wood and the position where it was located were tendered in the defendant's case.

56. On behalf of the defendant Jeremy Brown gave evidence. At about 5:45 pm on 17 June 2009 he was driving in the right hand lane of Capital Circle in the same direction that the plaintiff and defendant were travelling. In the left-hand lane, and slightly ahead of his vehicle, was another vehicle. He observed the collision between the plaintiff and this other vehicle out of the corner of his eye. He pulled over to the side of the road, and he and his wife went back to assist. The first person that he spoke to was the defendant, who said "I have run over a stick". Mr Brown then assisted the plaintiff, and then walked back along the road with the defendant. He said that they found a small piece of timber on the cycleway. Someone picked it up and threw it on to the grass adjacent. Mr Brown was shown the photograph of the piece of wood found by Mr Thorpe adjacent to the position where the accident occurred, and said that the piece of wood in the photograph had the same appearance of the piece of wood that he saw on 17 June 2009. Mr Brown could not recall what the lighting was like at the scene on the night of the 17 June 2009, but was able to recall that he had no trouble in finding the piece of wood when he walked back along the cycleway. His recollection was that the

piece of wood was on an angle across the cycleway, but he could not recall exactly what angle.

57. Denise Brown, the wife of Jeremy Brown, also gave evidence. She testified to a conversation with the defendant after the accident in which he said that he had run over something on the road, a piece of wood, and he didn't see it. Mrs Brown did not see the piece of wood that evening. She said that it was dark, in the sense that it was night time, when the accident occurred, but she was unable to recall any overhead lights.

58. A number of medical reports were tendered in the course of the defendant's case. A report dated 15 February 2011 from Dr Geoffrey Stubbs, an orthopaedic surgeon, noted that the plaintiff was a former triathlete who suffered a fracture of his pelvis and other injuries in a motor vehicle accident. It noted he had not returned to sport, but had returned to work. Dr Stubbs noted the circumstances of the accident, the injuries sustained by the plaintiff and the treatment he had undertaken. He noted that at the time of the accident the plaintiff was 43 years old, married with teenaged sons aged 15 and 13. Before the accident he was working as a full-time IT consultant and was able to do all the house and yard work required of him. He also took part in triathlon and event races and followed a training program involving him riding his bicycle 35 km to and from work four days a week. He participated with a regular running group and swam regularly. When seen by Dr Stubbs the plaintiff was 45 years old and working part-time. He had not ridden his bicycle on the road since the accident, but had an exercise bicycle at home, although he could ride that for only about 15 minutes. He had installed a home spa as this seemed to help his ongoing back pain. He no longer ran, but did swim three times a week. He took painkillers on a regular basis, occasionally taking stronger painkillers if he was making a long car trip. Dr Stubbs noted that the plaintiff drove to work and around town, but that his wife would drive on longer journeys. He was capable of doing light house work, but no longer vacuumed or made beds. He supervised his sons doing the yard work. The plaintiff reported ongoing low back pain, necessitating frequent changes of posture. The plaintiff complained that he was stiff and sore when getting up in the morning. Dr Stubbs said that the plaintiff was very disappointed that he was not back to his former level of fitness and was still unable to do triathlons even though 20 months had passed since the accident.

59. Dr Stubbs undertook a clinical examination of the plaintiff. He described the plaintiff's spinal movement as excellent. He stated that the plaintiff could touch his toes, bring his knees onto his chest, perform straight leg raising comfortably beyond 100° and, despite his complaint of a sensation of pins and needles in the upper part of the right thigh, had a negative traction sign. He considered that the plaintiff's fitness had deteriorated from an elite level to merely an excellent level. He did not believe that the plaintiff was likely to improve further. At that time, the residual injuries identified by Doctor Stubbs were:

    1. A symptomatic but united fracture of the right transverse process of the 5th lumbar vertebrae;

    2. A united ring fracture of the pelvis involving a diastasis of the symphysis pubis and a dislocation of the right sacroiliac joint (and an occult injury to the left sacroiliac joint);

    3. Meralgia parasthetica from traction to the lateral cutaneous nerve of the right thigh, caused either by tension from the external fixateur frame applied in the initial stages of his treatment or direct injury when the pins were inserted to the application of the framing.

60. Dr Stubbs expressed the opinion that no further treatment was required, and the plaintiff had reached a point of maximum medical improvement. He believed that the plaintiff was fit to engage in his pre-injury occupation. He expressed himself surprised that the plaintiff had only returned to work the 25 hours a week.

61. Dr Stubbs second report is dated 5 February 2013, having reviewed the plaintiff on the same day. He noted that the plaintiff was then 47 years old and continued working on a part-time basis as an information and technology consultant. He noted that the plaintiff was trying to get away from this particular work since it was all deskbound and he found prolonged sitting uncomfortable. Dr Stubbs noted that in the 12 months prior to his review the plaintiff had made an effort to find work as a trainer/teacher of information technology. Dr Stubbs noted that the plaintiff's transfixion screw inserted to stabilise the sacroiliac fracture had been removed, resulting in an improvement in his previous sciatic pain, otherwise there was not much change in the plaintiff's condition from when he was previously seen by Dr Stubbs. Doctor Stubbs noted the plaintiff had suffered a loss of ability to carry out heavy housework, heavy gardening tasks and sports and recreational activities. He presently required cleaning assistance to three hours a fortnight and gardening assistance twice a year, which was likely to continue. He believed that the plaintiff should successfully graduate to work as an IT teacher working full time hours.

62. Dr Stubbs also gave oral evidence during the hearing. On the assumption that the sit/stand station utilised by the plaintiff allowed him to change his position when he was feeling uncomfortable, Doctor Stubbs believed that there was a very good prospect that the plaintiff would be able to return to full-time employment. In cross-examination Doctor Stubbs agreed that there was no sign of functional overlay or malingering on the part of the plaintiff. He accepted that reduced working hours was one of the possible outcomes for the plaintiff.

63. A report dated 2 March 2011 from Dr Keith Lethlean, a consultant neurologist, was tendered by the defendant. Dr Lethlean reported that the plaintiff complained of pain from the mid-lumber to the low sacral area, varying from between 3 and 6 out of 10 on the analogue scale. The plaintiff complained that pain passed down the left leg to the outer aspect of the left ankle causing throbbing, and if he could not get up and ease it there would be tingling in the left sole. The plaintiff complained that pain disrupted his sleep, and also complained of increased frequency of micturition and reduced libido and erectile maintenance. Dr Lethlean stated that the plaintiff had returned to work around Christmas 2009, working 9 hours a week, increasing to 35 hours a week by June 2010. Due to back pain, his hours at the time that he saw Dr Lethlean were only 25 hours a week. Dr Lethlean expressed the view that the plaintiff had shown steady improvement since the accident, but that he was restricted by low back pain which extended down the left leg. He noted that the plaintiff's work hours had been limited by, and more recently reduced by, pain but that he anticipated modifying his workplace to include a stand/sit table which may prove helpful. He considered the plaintiff's prognosis to be good, with a reasonable expectation that he would be able to eventually return to full-time employment.

64. Dr Lethlean also gave oral evidence and was cross-examined. He was asked what effect the plaintiff's use of a sit/stand workstation was likely to have on his ability to return to work full time. Dr Lethlean commented that it was likely to have an effect, but he could not say that it would be so effective that he would be able to work full time. He noted that he had only seen the plaintiff on a single occasion, in February 2011, at

which time he had anticipated that the plaintiff may make a full recovery. As such, he had offered a good prognosis, but he could not state that that would in fact be borne out. In cross-examination, Dr Lethlean agreed that it was not surprising that the plaintiff was not able to work full time.

65. A report dated 29 January 2013 from Dr Janaka Seneviratne, a consultant neurologist and clinical neurophysiologist, was also attended by the defendant. He noted the injury sustained by the plaintiff in the accident on 17 June 2009, and his subsequent treatment. He noted that the plaintiff initially took some time off work due to the injury, but he had returned to work as an IT consultant. The plaintiff complained that he found sitting down for prolonged periods exacerbated his lower back pain. He noted that the plaintiff reported feeling depressed following the injury, and had seen a psychologist. He expressed the opinion that the plaintiff's quality of life had been affected by his injuries. He was however of the opinion that the plaintiff had the capacity to engage in his pre-injury occupation, with pre-injury duties and hours.

66. Dr Seneviratne also gave oral evidence and was cross-examined. He testified that on the basis of an assumption that the plaintiff was able to use a sit/stand workstation, he believed the plaintiff would be able to return to his pre-injury duties and hours. In cross-examination he agreed that it was not surprising that the plaintiff's pain and discomfort had not resolved, but he thought that the level of disability was such that the plaintiff was capable of returning to his pre-injury hours. He accepted that on occasion the plaintiff's condition may flare-up, requiring time off work. He agreed that there was no sign of functional overlay or malingering on the part of the plaintiff. He said that in his report he had not given a timeframe for the plaintiff to return to full-time employment, but that he had been "quite hopeful" that he could get back to pre-injury duties and hours.

Consideration

Liability

67. The plaintiff's submission on the question of liability was very straightforward. The plaintiff submitted that the defendant was negligent in failing to keep a proper lookout for dangers on the cycleway as he was riding his bicycle on Capital Circle. The plaintiff submitted that it may be inferred that the defendant failed to keep a proper lookout because he did not see the large piece of wood which the defendant struck, causing him to fall off his bike and onto the plaintiff, causing him to fall into the adjacent traffic lane where he was struck by a car.

68. The defendant submitted that the plaintiff's case on liability should fail because:

    (a) The duty that the defendant owed to the plaintiff was only one to take reasonable care in all of the circumstances;

    (b) The plaintiff's case properly understood does not include an allegation that the defendant failed to take reasonable care. The mere fact of losing control of a bicycle or not seeing an obstacle is not without more a breach of the duty to exercise reasonable care;

    (c) The plaintiff called no lay or expert evidence addressing what reasonable care required in the circumstances. The evidence strongly pointed to the proposition that the loss of control of the bicycle by the defendant was caused

by the presence of a long piece of timber, and further that the exercise of reasonable care did not require the defendant to exercise the skill required to be able to see or avoid that piece of timber;

(d) The plaintiff had called no evidence to discharge the onus on him to prove that any breach of duty by the defendant caused the loss.

69. Before going any further, it is appropriate to make clear my findings of fact on the question of liability. There was nothing in the evidence of the plaintiff which would cause me to doubt his evidence, and I accept the evidence that he gave. I have some misgivings about the evidence of the defendant, purely on the basis that he has no present recollection, or limited present recollection, of the relevant events. I accept that the defendant was being truthful, to the best of his ability, in answering the questions that were put to him by his insurer's investigator, and in the contents of the email he sent to his insurers in 2009.

70. I am satisfied that the plaintiff and the defendant were riding together on Capital Circle at about 5:45 pm on 17 June 2009. On the balance of probabilities, I am satisfied that the defendant was riding on the left-hand side of, and slightly in front of, the plaintiff. I am satisfied that both the plaintiff's and the defendant's bicycles were fitted with effective headlights, which were activated at the time of the accident. I am satisfied that it was dark at about 5:45 pm on 17 June 2009, but I am satisfied that the lighting in the area of the accident was good. First, I am satisfied, on the basis of the evidence of the plaintiff and the contents of the police report, that the lighting on that section of road was good. In addition, I am satisfied that the overhead lighting was augmented by the headlights of the plaintiff's and defendant's bicycles and by the lights of traffic approaching from behind the plaintiff and the defendant. There were at least two cars, and probably more, approaching from behind the plaintiff and the defendant immediately before the accident, both of which vehicles would have provided additional illumination to the surface of the road and the cycleway beyond the lighting available from the overhead lights and the headlights of the bicycles. I am satisfied on the balance of probabilities that the bicycle ridden by the defendant struck a piece of wood lying on the cycleway, causing the defendant to lose control of his bicycle. The defendant consequently fell to his right, striking the plaintiff and causing the plaintiff to fall into the adjacent traffic lane. The plaintiff was immediately run over by a car in circumstances where the driver of the car had no opportunity to avoid colliding with the plaintiff. I am satisfied that the piece of wood found by Mr Thorpe on the side of Capital Circle, and shown in the photographs taken by Mr Thorpe, is the piece of wood which was struck by the defendant, causing him to lose his balance. This was the same piece of wood observed by Mr Brown on the cycleway immediately after the accident. That piece of wood is approximately 6 feet long and about 1 ½ inches square. I am satisfied that immediately prior to the collision the plaintiff and the defendant were travelling at about 25 to 27 km per hour. This equates to approximately 7 metres per second, not a particularly high speed when it is recollected that sprinters can run at 10 metres a second or more. I am also satisfied that the defendant was aware of the danger presented by objects on the cycleway, and was aware of the need to observe the cycleway in the direction of his travel in order to avoid such objects. I am satisfied that he was aware of the potential for such objects to cause him to lose his balance if he struck them whilst riding his bicycle. The defendant, on his own evidence, was accustomed to keeping a lookout for much smaller items than the piece of wood which he struck on this occasion.

71. The defendant submitted that it was “critical” that the plaintiff said in his oral evidence that he did not remember seeing any piece of timber on the cycleway. The defendant also relied heavily upon the evidence of Jeremy Brown that when he saw the timber it was on an angle across the cycleway. Clearly, in referring to these pieces of evidence the defendant sought to suggest that the piece of timber was positioned across the cycleway prior to the accident, and the plaintiff’s failure to see it suggests that the defendant was not negligent in failing to see it. There are difficulties with this approach. First, I am unwilling to infer that the position of the piece of wood on the cycleway as observed by Mr Brown is the same position that it was in prior to the accident. It is quite likely that the piece of wood moved as a consequence of being struck by the defendant’s bicycle, not only as a consequence of the initial contact but also in the process of the defendant and his bike falling onto the plaintiff. Secondly, Mr Brown was not able to give any relevant details about the angle on which the piece of wood was lying on the cycleway, nor how close it was to either the left or right hand edges of the cycleway. It is also important to remember that the plaintiff did not give evidence that he had not seen a piece of wood, only that he did not, as at the date he gave evidence, recall having seen it.

72. One thing is certain. This large piece of wood was lying on the cycleway directly in the path of the defendant’s bicycle. The lighting in the area was good. Having seen the photograph of the piece of wood which was struck by the defendant, and bearing in mind the quality of the lighting at the scene and the moderate speed at which the defendant was travelling, I am satisfied on the balance of probabilities that the defendant would have seen the piece of wood in adequate time to take evasive action had he been keeping a proper lookout for objects on the cycleway. I cannot be satisfied that the piece of wood was positioned in such a way, prior to being struck by the defendants bicycle, that the plaintiff would have seen it had he been keeping a proper lookout.

73. In his written submissions, the defendant submitted that the plaintiff’s case must fail as no expert evidence had been led by the plaintiff. In my opinion, this is not a case which required such evidence. There can be no doubt that the defendant owed other road users, particularly cyclists such as the plaintiff, a duty of care to exercise reasonable care to avoid causing injury to other road users. In my opinion this duty extends to exercising reasonable care to avoid running over objects on the cycleway likely to cause him to lose control of his bicycle. The defendant was aware that the plaintiff was riding his bicycle adjacent to the defendant, so that any loss of control of the defendants bicycle presented a risk of injury to the plaintiff. The need to exercise reasonable care to avoid colliding with objects likely to cause the defendant to lose control of his bicycle was even more apparent because the cycleway on which the plaintiff and defendant were riding was immediately adjacent to a busy road. I am satisfied that the defendant did not exercise reasonable care to observe the piece of wood in his path on the cycleway, and to avoid it. Bearing in mind the size of the piece of wood and the lighting in the area, I am satisfied that if the defendant had exercised reasonable care he would have seen and avoided the piece of wood. I am satisfied that the defendant breached his duty of care to the plaintiff, and that the plaintiff’s injuries as a consequence of falling from his bike and being struck by a car directly flow from the defendant’s negligence.

Contributory negligence

74. The defendant submitted that if he was found liable in negligence on the basis that he failed to detect the piece of wood and take action to avoid it, the plaintiff should be found equally culpable for also failing to observe the piece of wood on the cycleway. The onus of establishing contributory negligence falls on the defendant. In the present case, that means that the defendant must establish, on the balance of probabilities, at least that the plaintiff did not see the piece of wood prior to the accident in circumstances where he should have seen it had he been keeping a proper lookout. I am not satisfied that the defendant has satisfied the onus cast on him. Assuming for present purposes that the plaintiff did not see the piece of wood on the cycleway before the accident, the evidence does not allow me to find that the wood was in a position, bearing in mind the relative positions of the plaintiff and defendant on the cycleway, where the plaintiff should have seen it had he been keeping a proper lookout. To the extent that it may be suggested that the plaintiff was negligent in riding side by side with the defendant, no evidence was adduced to establish that a reasonable cyclist would not have written side by side in that particular bicycle lane. The defendant's claim of contributory negligence fails.

Damages

75. I am grateful to the parties for having quite sensibly agreed on the quantum of most of the heads of damages. The only matters which remain in contention are damages for loss of future earning capacity, and consequent loss of future superannuation. The plaintiff submitted that loss of future earning capacity should be calculated on the basis that he will only be able to work 25 hours a week on average until his projected retirement age of 67. The defendant submitted that the relatively recent adoption by the plaintiff of the use of a sit/stand workstation may lead to the plaintiff being able to work longer hours. The defendant also submitted that I should accept the opinion of Dr Stubbs that the plaintiff is fit to continue in full-time clerical work, which opinion was supported by Dr Seneviratne. The defendant submitted that I should award a buffer of $100,000.00 for loss of future earning capacity, and loss of superannuation. Dr Stubbs is an orthopaedic surgeon and Dr Seneviratne is a neurologist and neurophysiologist. In my opinion the person best qualified to give an opinion concerning the plaintiff's ability to work is Dr Le Leu, an occupational physician. Based upon his evidence I am satisfied that, on average, the plaintiff will only be able to work 25 hours a week until his retirement age of 67. This evidence was supported by that of Dr Bodel. The defendant did not challenge the calculations of damages for loss of future earning capacity and consequent loss of superannuation provided by the plaintiff. I will adopt these figures, but I will reduce them by 15% to allow for vicissitudes. I therefore award damages as follows:

General damages (inclusive of interest)	$150,000.00
Past out-of-pocket expenses (inclusive of interest)	$110,000.00
Future out-of-pocket expenses	$118,550.00
Past wage loss	$280,000.00
Interest on past wage loss	$15,000.00
Past superannuation	$40,000.00

Fox v Wood component	$46,917.00
Past and future domestic assistance	$60,000.00
Future loss of earning capacity	$716,802.93
Future loss of superannuation entitlement	$122,122.82
Total:	$1,659,392.75

76. Unless the parties wish to be heard on the question of costs, I order the defendant to pay the plaintiff's costs of the proceedings. I will stay that order for 14 days to allow the parties to apply for a different costs order if they wish to do so.

I certify that the preceding seventy six [76] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Burns.

Associate:

Date: 30 October 2014