SUPREME COURT OF QUEENSLAND

CITATION:	*RACQ Insurance Limited v Foster* [2018] QCA 252
PARTIES:	**RACQ INSURANCE LIMITED** **ABN 50 009 704 152** (appellant) **v** **KAREN FOSTER** (respondent)
FILE NO/S:	Appeal No 7600 of 2017 SC No 5017 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 135 (Mullins J)
DELIVERED ON:	3 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	10 November 2017
JUDGES:	Gotterson and Morrison and Philippides JJA
ORDERS:	**1. The appeal is dismissed with costs.** **2. The cross appeal is dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – IN GENERAL – where the respondent was driving a bus in the course of her employment and a vehicle driven by the first defendant collided with the rear end of the bus – where the first defendant was insured by the appellant who was ordered to pay the respondent's damages for personal injuries, loss and damage – where the appellant appeals against the primary judge's finding that the respondent only had a slight residual work capacity – whether the primary judge's finding that the respondent had a slight residual earning capacity was contrary to the evidence and constituted a misapprehension of the expert medical evidence DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY– where the appellant appeals against the primary judge's assessment of damages for diminution of earning capacity, for past and future care and for past economic loss – where the respondent cross appeals

against the primary judge's assessment of damages for diminution of earning capacity and the primary judge's finding that the *Civil Liability Act* 2003 (Qld) applied to the assessment of damages – whether as a result of the amendment in 2007 to s 5 of the *Civil Liability Act* 2003 (Qld) the test espoused in *Newberry v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 519 and applied in *King v Parsons* [2006] 2 Qd R 122 is no longer apposite – whether the Court in *Farnham v Pruden* [2017] 1 Qd R 128 was incorrect in holding that *Newberry* and *King* remain the definitive authorities as to the meaning of s 32 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – whether the trial judge erred in holding that the accident did not satisfy the test for injury in s 32 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) and therefore s 5(1)(b) of the *Civil Liability Act* 2003 (Qld) did not operate to exclude the respondent from receiving damages under the *Civil Liability Act* 2003 (Qld)

Acts Interpretation Act 1954 (Qld), s 14B
Civil Liability Act 2003 (Qld), s 5, s 5(1)(b), s 59
Criminal Code and Civil Liability Amendment Bill 2007 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 149
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 32, s 35, s 108

Allianz Australia Insurance Ltd v McCarthy [2012] QCA 312, cited
Anodising & Aluminium Finishers v Coleman [2002] 1 Qd R 141; [1999] QCA 467, cited
Ballesteros v Chidlow & Anor [2006] QCA 323, cited
Bugge v REB Engineering Pty Ltd [1999] 2 Qd R 227; [1998] QSC 185, applied
Duong v Versacold Logistics Ltd [2010] QSC 466, cited
Farnham v Pruden [2017] 1 Qd R 128; [2016] QCA 18, applied
Favelle Mort Ltd v Murray (1976) 133 CLR 580; [1976] HCA 13, applied
Hopkins v WorkCover Queensland [2004] QCA 155, considered
Hughes v Tucaby Engineering Pty Ltd [2011] QSC 256, cited
King v Parsons [2006] 2 Qd R 122; [2006] QCA 49, applied
Koven v Hail Creek Coal Pty Ltd [2011] QSC 51, cited
Martin v Andrews [2016] QSC 20, considered
McNally v Essenhaven Pty Ltd [2001] QCA 452, distinguished
Mercer v ANZ Banking Group Ltd (2000) 48 NSWLR 740; [2000] NSWCA 138, applied
Newberry v Suncorp Metway Insurance Ltd [2006] 1 Qd R 519; [2006] QCA 48, applied
Phillips v MCG Group Pty Ltd [2013] QCA 83, considered
Pollock v Thiess Pty Ltd (No 2) [2014] QSC 95, cited
Qantas Airways Limited v Fisher [2014] QCA 329, cited
RACQ Insurance Limited v Brennan [2013] QCA 150, considered

Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679; [2016] HCA 22, cited
Shaw v Menzies [2011] QCA 197, cited
Smith v Topp [2003] QCA 397, cited
Thomas v O'Shea (1989) Aust Torts Reports 80-251, considered
Van Gervan v Fenton (1992) 175 CLR 327; [1992] HCA 54, applied

COUNSEL: K S Howe with R Nichols for the appellant
G F Crow QC, with J Trost, for the respondent

SOLICITORS: Quinlan Miller & Treston for the appellant
Slater & Gordon for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philippides JA and with the reasons given by her Honour.

[2] **MORRISON JA:** I agree with the reasons of Philippides JA and the orders her Honour proposes.

[3] **PHILIPPIDES JA:**

Background

[4] The respondent was awarded damages for personal injuries, loss and damage as a result of a collision which occurred on 2 September 2014. The respondent was driving a bus in the course of her employment and approaching a roundabout when a Holden Commodore vehicle driven by the first defendant drove through the roundabout and went out of control. It collided with the rear of the bus and ricocheted to its resting place on the median strip.

[5] The main issue at trial was the assessment of the quantum of damages, in particular the nature and extent of the physical injuries sustained by the respondent and the consequences of the injuries for her employability. Also in issue was whether damages were to be assessed at common law or under the *Civil Liability Act* 2003 (Qld) (the CLA).

[6] The appellant appealed against the judgment on the grounds that the learned primary judge erred:

1. in the finding that the respondent had only a slight residual work capacity, that finding being contrary to and a misapprehension of the evidence.
2. in the assessment of damages for diminution of earning capacity.
3. in the assessment of damages for past and future care.
4. in the assessment of damages for past economic loss.

[7] The respondent cross appealed on a number of grounds all of which were abandoned except for the contention that the primary judge erred:

1. in finding that the CLA applied to the assessment of damages; and

2. in the assessment of damages for diminution of earning capacity.

The decision of the primary judge

[8] The respondent claimed damages as a result of injuries sustained due to the accident, namely soft tissue injuries to the cervical and lumbar spine and subsequently, a psychological injury being an adjustment disorder.

[9] The primary judge set out the respondent's history. At the time of the accident, the respondent was 50 years of age and had been employed as a bus driver since 2009. She had not performed office roles since before 2000 (other than limited roles in 2012 and in 2014 while performing on a suitable duties plan).[1] The respondent returned to work in December 2014 and undertook light office duties. She was unable to return to driving a bus, as her general practitioner would not certify that she could drive a commercial vehicle and her employment was terminated in March 2015, after which she remained unemployed.[2]

[10] The respondent undertook various WorkCover and CTP rehabilitation programs. She underwent an 11 month rehabilitation program and a number of psychological counselling sessions with Ms Harrison (a clinical psychologist). In her report of January 2016, Ms Harrison described the respondent's future prognosis as uncertain; she was continuing to experience chronic pain, but her symptoms of depression, anxiety and stress reduced over the course of the therapy. Ms Harrison was of the opinion the effectiveness of the psychological treatment was restricted because of the respondent's chronic pain, lack of finances, ongoing sleep disruption and social withdrawal.[3] At her last session in January 2016, Ms Harrison described the respondent as presenting with low mood, reporting ongoing feelings of hopelessness, and describing "poor motivation, insomnia, ongoing pain, social isolation and frequent tearfulness".[4] On the Depression Anxiety and Stress Scales, the respondent scored extremely severe for depression, but normal for anxiety and stress.[5] Her Honour observed:[6]

> "Despite all the treatment and medication the [respondent] has had since the accident for the pain in her neck and lower back, the pain has persisted and [she] copes by managing her activities to avoid aggravating the pain. As a result, [she] stays at home, and spends a lot of time on her recliner chair."

[11] While, liability for the collision was admitted, her Honour considered it relevant to record the respondent's evidence as to the movement of the vehicles in the course of the collision because of the appellant's submissions as to the respondent's tendency to exaggerate. The primary judge made the following observations relevant to the issue of the severity of the impact:[7]

> "The [respondent] described the impact of the first defendant's sedan striking the bus as 'very heavy' and stated that 'it was hit with high

---

1 AB at 53-54 and 102.
2 Reasons at [10].
3 Reasons at [13].
4 AB at 339.
5 Reasons at [16].
6 Reasons at [17].
7 Reasons at [8].

> impact that actually pushed the bus to the side.' The [respondent] estimated the weight of the bus as nine tonne and described that she was 'holding the steering wheel trying to control the bus to make sure that it didn't go out of control.' In the course of the [respondent's] evidence, the DVD (exhibit 5) that contains the CCTV footage from the bus that recorded the path of the bus, but also the path of the first defendant's vehicle immediately before the collision, was played. The footage shows the first defendant's vehicle travelling on the opposite side of the road towards the bus. The moment of impact is identifiable, as the [respondent] moves slightly in her seat and steers the bus closer to the kerb before stopping the bus. In the course of cross-examination, the [respondent] stated her belief that there were two impacts, namely when the vehicle first came across and ricocheted off the gutter hitting the front wheel of the bus and the vehicle then turns on its side and goes down and hits the back of the bus. The photographs in exhibit 3 of the damage to the bus show only damage on the driver's side between the rear of the bus and the rear wheel. The [respondent] suggested in her evidence that on impact the bus moved sideways about half a metre. The movement of the bus at the point of impact that is identifiable on the footage from the [respondent's] immediate reaction does not reflect such lateral movement and I would describe it in terms of a slight shudder. The [respondent's] description of the accident and particularly the effect of the impact of the first defendant's vehicle was exaggerated."

[12] Having reviewed the medical and other evidence her Honour made the following conclusions as to the extent of the respondent's injuries:[8]

> "Just as the [respondent] exaggerated her description of the impact that caused the accident, her own perception of the symptoms and limitations that she suffers from her injuries is that they are much more significant than the medical opinion and the opinion of Ms Mitchell suggests. Although Ms Hague is an occupational therapist and Ms Mitchell is a physiotherapist, so that they evaluate different capacities, I found Ms Mitchell's evidence consistent with the weight of orthopaedic and neurosurgical medical opinion that the level of pain experienced by the [respondent] in her spine was not explained by the physical state of her spine.
>
> *I accept that the [respondent] was not suffering pain in her neck and lower back before the accident and the injury to the cervical spine is the most serious of the injuries she suffered.* The preponderance of medical opinion supports the assessment made by Dr Johnson of a 6 per cent whole person impairment for the cervical spine injury. It may be that the difference between Dr Johnson's opinion of 6 per cent whole person impairment for the lumbar spine compared to the consistent opinion otherwise of Dr Weidmann, Dr Walters, Dr Pincus and Dr Anderson was the state of the [respondent's] lumbar spine on the day that Dr Johnson examined the [respondent]. The weight of the medical opinion supports the conclusion that the

---

8 Reasons at [56]-[57].

> [respondent's] lumbar spine injury should be assessed at zero per cent whole person impairment. *There is little difference in the psychiatrists' assessments of the [respondent's] mild psychiatric injury.* It is appropriate to proceed on the basis of a 6 per cent PIRS." (emphasis added)

[13] The primary judge rejected the submission that the respondent had no earning capacity, finding that there was "some prospect"[9] of obtaining employment, but there was only a "slight residual earning capacity".[10] In so finding, the primary judge reasoned as follows:[11]

> "I am not persuaded by the [respondent's] evidence in the context of the opinions of the medical experts as to the extent of her impairment in her cervical and lumbar spines, even exacerbated by the overlay of her psychiatric issues, that she has no prospects of finding future employment. I consider Ms Hague's opinion on the [respondent's] unemployability was overly influenced by the [respondent's] report of her own limitations which was inconsistent with Ms Mitchell's evaluation of the [respondent], eg in relation to moving from a sitting to a standing position. It is apparent from the [respondent's] evidence that she has adopted a routine for managing her pain that is currently not conducive to paid employment, but on her own evidence as to the chores that she does undertake at home and the expert evidence from Ms Mitchell as to her functional capacity, *she has some prospect for obtaining light sedentary work*, where she is able to ensure that she is neither standing nor sitting for any length of time. The extreme reaction that the [respondent] has had to her overall moderate spine injuries means that *any allowance for future employment must be modest*.
>
> Although the [respondent] stated in evidence that she would have worked until she was at least 70 years old, that was an unlikely scenario at the date of the accident, in light of her history since 2007 of lengthy absences from work, due to medical issues, even before the accident. I have therefore concluded that the [respondent] should only be compensated for future economic loss on the basis that it was unlikely that she would have worked past the age of 62 years or about a further 10 years from the date of judgment. I will use the net weekly wage of $980 that it appears to be based on what the [respondent's] co-worker was receiving at trial for like work to that done by the [respondent] at the date of the accident and is the net wage used in the [respondent's] quantum schedule (exhibit 11). I will discount the calculation by one-third to reflect the greater vicissitudes of life that must be factored in for the [respondent] (having regard to her extreme reaction to the injuries suffered in this accident and her prior medical history) and *the slight residual earning capacity*. That results in $270,000 for future economic loss." (emphasis added)

---

9 Reasons at [80].
10 Reasons at [81].
11 Reasons at [80]-[81].

Ground 1 – Error in the finding as to the respondent's residual work capacity

The appellant's submissions

[14] The appellant argued that the finding that the respondent had only a "slight" residual earning capacity was contrary to the evidence and constituted a misapprehension of the relevant evidence and was also contrary to the preponderance of the expert medical evidence. Reliance was placed on the expert medical evidence, orthopaedic and neurological (which was not rejected by the primary judge) and the evidence of Ms Mitchell, physiotherapist (which was accepted by the primary judge). The appellant also relied on the primary judge's findings that the respondent had exaggerated the effect of the impact;[12] and similarly exaggerated, or had her own perception of, the symptoms and limitations that was inconsistent with the accepted medical opinions and the opinion of Ms Mitchell.[13] Emphasis was placed on the fact that, rather than finding the respondent was mistaken about the movement of the bus and its impact, the primary judge found that the respondent's description of the accident and its impact were exaggerated.[14]

[15] The appellant argued that the preponderance of the expert medical evidence, neurological and orthopaedic, was to the effect that in all likelihood the respondent would be able to return to her pre-accident occupation as a bus driver and a range of other occupations. The appellant submitted that the psychiatric and orthopaedic evidence was to the effect that there was nothing to prevent the respondent driving as a bus driver and that the psychiatrist's evidence did not assist or fill the gap. No psychiatric evidence was tendered that the respondent's mild adjustment disorder and depression explained her otherwise unexplainable complaints of severe pain.

[16] The appellant's argument, therefore, was that the totality of the relevant evidence, together with findings made by the primary judge, necessarily led to the conclusion that any physical and psychological injury suffered by the respondent was minor and did not impede her work capacity. In addition, the respondent's own subjective complaints of extreme pain and limited function, thereby limiting her work capacity, were exaggerated and unreliable. Accordingly, there was insufficient evidence for a finding that the injuries sustained left the respondent with only a slight residual earning capacity as a consequence of any injury sustained in the motor vehicle accident. Alternatively, such a finding was contrary to the medical or specialist evidence accepted by the primary judge and the primary judge's findings of exaggeration by the respondent.

The respondent's submissions

[17] The respondent argued that the appellant's submissions amounted to an attempt to reargue the trial. The respondent argued that the appellant's contentions misstated the primary judge's approach, which was not to "reject" or "dismiss" any witness' evidence, nor "accept" it in its entirety but to prefer or discount *aspects* of certain witness' evidence in relation to narrowly defined issues. It was submitted that after summarising evidence of relevant experts and lay witnesses, the primary judge made clear findings that the respondent's level of pain and disability fell in between

---

12 Reasons at [8].
13 Reasons at [56].
14 Reasons at [8].

the evidence of the respondent and the overly optimistic opinion from Ms Mitchell, in particular. Relevantly, the primary judge did not describe the respondent as being "dishonest". The ultimate findings of fact were, therefore, *supported* by the evidence as analysed and weighed by her Honour.

[18] The respondent argued that the basic error underlying the appellant's argument was that it sought to obtain more favourable findings of fact on appeal, without attempting to meet the relevant tests[15] that the appellant must demonstrate the primary judge's findings of fact were wrong by reference to incontrovertible facts or uncontested testimony being glaringly improbable or contrary to compelling inference. In that regard, reliance was placed on de Jersey CJ's statements in *RACQ Insurance Limited v Brennan*:[16]

> "It should in any event be remembered that an appeal court will be 'particularly slow to reverse the trial judge on a question of the amount of damages'. Acknowledging that this primary Judge proceeded on a factual basis reasonably open, then proceeding to the next issue, on no view could this particular component be described as 'a wholly erroneous estimate of the damage suffered', the criterion to be drawn from *Gamser v Nominal Defendant* (1977) 136 CLR 145, 148 per Gibbs J (quoting from *Miller v Jennings* (1954) 92 CLR 190, 195-6)."

Consideration

[19] The appellant referred to the evidence of Dr Johnson, a neurosurgeon, that there was no physical injury preventing the respondent's return to work but rather it was her stated pain that prevented such a return. Emphasis was placed on his evidence that the respondent could return to work and was likely to be able to return to work (within a three to six month period) after she had undergone further treatment to address her maladaption to the injury actually suffered. However, Dr Johnson also gave evidence (as her Honour noted) that in the respondent's current clinical state, the respondent "would be unlikely to maintain gainful employment due to her immobility secondary to her neck and back pain".[17] His recommendation was that the respondent be provided with effective functional movement training to improve her work capacity and return to employment.[18] Dr Johnson's assessment (which her Honour also took into account)[19] was that the respondent's lumbosacral spine fell into DRE Lumbar Category 2 (with a six per cent whole person impairment) and the cervical spine fell into DRE Cervical Spine Category 2 (with a six per cent whole person impairment) resulting in a whole person impairment of 12 per cent. While, Dr Johnson accepted in cross examination that, based on the imaging and examination, there was no structural or physical injury of initial significance, he maintained that it was the respondent's "symptoms of pain that were restricting her return to the workforce".[20]

---

15 *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679 at [43].
16 [2013] QCA 150 at [25].
17 Reasons at [26].
18 Reasons at [26], such a program was suggested as part of the respondent's reasonable rehabilitation needs, but the appellant declined to fund it.
19 Reasons at [27].
20 Reasons at [27].

[20] The appellant also referred to evidence, which was not rejected by the primary judge, of Dr Pincus, an orthopaedic surgeon, in his report of 13 January 2016 that the respondent's injuries would not prevent her from working as a bus driver[21] and his rejection of any assertion that the respondent's alleged pain and disability from pain resulted in an inability to work.[22] The primary judge noted that Dr Pincus accepted that his assessments of DRE categories measured "impairment and not necessarily work disability".[23] Dr Pincus also accepted that he had not specifically considered the Queensland Department of Transport and Main Roads' requirements regarding the physical capacity of bus drivers when forming his opinion of the respondent's employability.[24]

[21] It is correct, as the appellant maintained, that the primary judge did not reject the evidence of Dr Weidmann, a neurosurgeon,[25] that he was unable to find that the respondent was medically unfit from her usual employment as a bus driver on the basis of clinical neurological and radiological findings and his cross examination evidence that, in making that determination, he had taken into account the pain that would reasonably be expected from an incident of this nature.[26] However, in considering that evidence, her Honour also observed that Dr Weidmann accepted that there was no reliable assessment system whereby disability could be objectively assessed and his observation that "Pain is very subjective … you can't measure it and you can't prove it or disprove it".[27]

[22] The appellant also relied on evidence given by Dr Anderson, an occupational physician, which was not rejected by the primary judge. That concerned his evidence recorded in her Honour's reasons[28] that any accident related injuries were minor. Importantly, however, as her Honour also noted, Dr Anderson considered the respondent "would not be fit to return to her previous occupation or any other jobs in which she [had] experience and that her work capacity would be limited to a part-time, light weight, semi sedentary occupation in which she could alter her postural position".[29] Even so, her Honour also observed that Dr Anderson considered "some form of reception work could be a possibility".[30] Her Honour noted that this accorded with the view of Dr Walters, orthopaedic surgeon, as at 14 November 2014 that the respondent "was capable of performing some form of light duties".[31]

[23] The appellant submitted that the respondent's injuries were insufficient to produce the pain and disability of which she complained. Reference was made to Dr Pincus' evidence that, while the respondent had some injury to her cervical and lumbar spines, it was not of sufficient nature to cause the patient to have such a high level of pain and consequent disability.[32] The appellant argued that similar propositions were put to Ms Mitchell, Dr Anderson and Dr Weidmann by the respondent's

---

21 AB at 638.
22 AB at 41.
23 Reasons at [37].
24 AB at 40-41.
25 Reasons at [29].
26 AB at 115.
27 Reasons at [29].
28 Reasons at [41].
29 Reasons at [41].
30 Reasons at [41].
31 Reasons at [33].
32 AB at 41.

counsel.[33] It is also to be observed that Dr Pincus accepted that the respondent's coping mechanisms with respect to pain may be interfered with, if not overcome, by a depressive illness.[34] Further, it must be borne in mind that, while the primary judge did conclude, that the respondent's perception of her symptoms and limitations from her injuries were "much more significant than the medical opinion and the opinion of Ms Mitchell suggests"[35] her Honour did not find that the respondent was malingering or dishonest in her reporting and, indeed, no such finding of dishonesty was sought.

[24] As to the argument that the psychiatric evidence did not assist in concluding that there was an impairment in earning capacity, reliance was placed on the following evidence of Dr Markou set out in the primary judge's reasons:[36]

> "Because of the limitation of function of neck movement, and the ongoing pain that exists there in [the respondent's] neck and in her lower back, her ability to work has been severely limited. At this point she is unable to work as a result of these physical limitations, though should her physical limitations improve then there is no reason why she cannot engage in work, from a psychiatric perspective."

[25] Dr Markou's evidence was that it was pain that was really the sphere of the respondent's impairment, which was to be properly assessed by a pain physician, not her mental state.[37] However, as the primary judge also observed, Dr Markou's prognosis was guarded because the respondent's psychological state had become more entrenched.[38] He predicted that her depression and demoralisation would persist on a chronic basis without improvement in her physical state.

[26] The appellant referred to the evidence of Dr Chalk who, in his report of 4 November 2016, diagnosed the respondent as developing symptoms of an adjustment disorder with depressed and anxious mood in the setting of chronic pain. Her Honour referred to the confirmation by Dr Chalk of his opinion that the respondent's psychiatric symptoms were mild and not such as to preclude her employment.[39] Dr Chalk considered that any pain was minor and would not affect the respondent's ability to work, but also accepted that "you can't rate pain in employability as it is completely separate. Pain is not something everyone can see but is rather subjective".[40]

[27] Her Honour accepted that the respondent was not suffering pain in her neck and lower back before the accident and that the cervical spine injury was the most serious of the injuries suffered.[41] The primary judge also observed that there was also common ground in psychiatric evidence given by Dr Markou and Dr Chalk that the respondent had suffered from an adjustment disorder with anxiety and

---

33 AB at 66, 121 and 124. The proposition put to these witnesses focused on the respondent's mental state not her pain level from injuries.
34 AB at 41.
35 Reasons at [56].
36 Reasons at [53].
37 AB at 181.
38 Reasons at [54].
39 Reasons at [55].
40 AB at 695.
41 Reasons at [57].

depression and a pain disorder.[42] Her Honour referred to the opinions of Dr Markou[43] and Dr Chalk[44] concerning the impact of pain on the respondent's work limitations.

[28] Although the primary judge accepted that the respondent was in pain, her Honour also took into account evidence that her "perception of the symptoms and limitations [was] much more significant than the medical opinion and the opinion of Ms Mitchell suggest[ed]".[45] However, importantly, as already mentioned, there was no finding that the respondent was dishonest in her evidence, nor that she was malingering.

[29] Her Honour's findings that the respondent *had* suffered spinal and mild psychiatric injuries consequent on the accident and the allied finding as to the respondent's enduring pain were open on the evidence outlined in her Honour's reasons and were not negated by her Honour's observation that the respondent's "perception of [her] symptoms" was more significant than the expert opinions.

[30] The primary judge was not, however, persuaded by the respondent's and Ms Hague's assertions that the respondent had *no* capacity for work, "even exacerbated by the overlay of [the respondent's] psychiatric issues".[46] In that regard, her Honour found that Ms Hague's opinion on the respondent's unemployability "was overly influenced" by the respondent's report of her own limitations, which was inconsistent with Ms Mitchell's evaluation. Nor was her Honour persuaded by the appellant's submissions that there was no ongoing impact on the respondents earning capacity. Rather, her Honour's determination was that the respondent retained "some prospect for obtaining light sedentary work, where she is able to ensure that she is neither standing nor sitting for any length of time".[47] As the respondent submitted, the primary judge's findings that there was some capacity for work were consistent with the opinions of Drs Anderson and Walters and with Dr Johnson's opinion that she could obtain some employment with further treatment. They represent a finding closer to the expert opinions of Dr Pincus and Ms Mitchell rather than Ms Hague. They also took into account the limited effect of the respondent's "psychiatric issues" and some (but not all) of the opinion of Ms Hague, the only expert occupational therapist, regarding the respondent's limited capacity for work.

[31] The findings that the respondent had been injured and suffered permanent impairment were available on the medical and psychiatric evidence, as was the finding that the respondent had ongoing pain, limitations in her range movement and restrictions in her capacity to work. There is no substance in the argument that the finding of only a slight residual earning capacity was flawed. The finding was open on the evidence. This ground of appeal fails.

Ground 2 of the appeal and Ground 2 of the cross appeal - Assessment of diminution of earning capacity

The primary judge's assessment

---

42 Reasons at [52].
43 Reasons at [53].
44 Reasons at [55].
45 Reasons at [56].
46 Reasons at [80].
47 Reasons at [80].

[32] The matter of diminution of earning capacity, as the primary judge observed, was the single most significant head of damage upon which the parties have made quite disparate submissions. Her Honour recorded that the approach urged by the respondent was to proceed on the basis that the respondent was commercially unemployable and that her future economic loss should be calculated on the basis of what she would have earned as a bus driver until the age of 70 years with a 10 per cent discount for all contingencies. The approach put forward by the appellant was that the respondent had a capacity for employment that she was not exercising and that only a modest sum of $75,000 should be awarded.

[33] The primary judge awarded $270,000 for future economic loss on the basis already mentioned.[48]

The appellant's submissions

[34] The appellant was critical of the primary judge's approach of commencing her assessment from a base which utilised the respondent's full loss of wages of $980 per week until age 62, which, it was said, only amounted to a discount of one third to reflect the vicissitudes of life taking into account the respondent's extreme reaction to the injuries suffered, her prior medical history and the slight residual earning capacity.[49]

[35] The appellant argued that the methodology was inconsistent with what was said to be the finding that the respondent did have a capacity for employment which she chose not to exercise. It was submitted that the primary judge erred in her approach because the overwhelming evidence was that the respondent would be able to return to bus driving or any other occupation that she chose. In that regard, it was said that the respondent made no application or any enquiries as to work and that her failure to work amounted to an election or choice to pursue studies. The case was said to be "on all fours" with the case of *Duong v Versacold Logistics Ltd*[50] and it was argued that a nominal global sum was therefore appropriate. A sum of no more than $75,000 was appropriate for the circumstances of this case given the finding as to the extreme reaction the respondent had had to her overall modest injuries.

[36] Addressing ground two of the cross appeal, the appellant argued that it was no answer to submit that a sufficient discount was made by allowing compensation to age 62 as it was clear the respondent would not have worked until age 70 in any event. There was overwhelming pre-existing conditions to militate against that.[51]

The respondent's submissions

[37] The respondent referred to Ms Hague's opinion, that the respondent was not plausibly employable in office based roles because of her outdated vocational experience, her age and lack of computer literacy,[52] which, it was said, was not challenged. The primary judge summarised that this opinion was based only on the

---

48 Reasons at [81].
49 Reasons at [81].
50 [2010] QSC 466. (Cases such as *Allianz Australia Insurance Ltd v McCarthy* [2012] QCA 312 and *Ballesteros v Chidlow & Anor* [2006] QCA 323 are applicable.)
51 AB at 88, 89, 696-697, 698-699, 700-704, 708-711 and 932.
52 AB at 167-169.

respondent's lack of computer literacy,[53] ignoring age and vocational experience. Reference was made to her Honour's statement of Ms Mitchell's evidence that the respondent was unlikely to obtain any significant "light sedentary work, where she is able to ensure that she is neither standing nor sitting for any length of time".[54] Ms Hague's expert opinion implied that younger, computer literate and/or experienced applicants (who were able to sit or stand for a significant length of time) would be preferred to the respondent. Relying on McMeekin J's decision in *Martin v Andrews*,[55] it was submitted that any discount to an award to account for the respondent's prospects of obtaining such alternative employment must be minimal.

[38] The respondent argued that the primary judge heavily discounted the assessment of damages in a twofold manner. Firstly, her Honour determined that the respondent's remaining working life was only 10 years rather than accepting the respondent's assertion of 18 years, to the age of 70. Secondly, her Honour discounted the respondent's award by a third in light of her medical issues (which it was submitted had already been accounted for in the reduced working life), her "extreme reaction to the injuries suffered" and her "slight residual earning capacity".[56]

[39] It was thus argued that the primary judge effectively applied a discount of 56 per cent (allowing $270,000 out of a total of $612,500, being $980 per week x 625 – the multiplier for 18 years discounted on the five per cent tables), which in effect included a double discount to account for the respondent's unrelated medical issues. While it was accepted that the usual discount of less than 10 per cent was too generous to the respondent in the circumstances of this case,[57] it was argued that a discount of 56 per cent was harsh.

[40] It was submitted that the respondent earnt a modest income and would have most likely persevered until at least retirement age, certainly it was said beyond the age of 62. Severe underlying conditions, such as terminal conditions could justify high discounts, but the respondent had recovered from her shoulder injuries and returned to full time work. Furthermore, factors such as remote, sporadic, unstable, risky or physically arduous employment that might lead to higher discounts[58] did not apply. Her underlying degenerative spine condition had been asymptomatic. No evidence suggested the respondent would have been likely to develop unmanageable symptoms despite the accident. Furthermore, while it is accepted that the methodology adopted by the primary judge in determining a discount has been approved in *Hopkins v WorkCover Queensland*[59] and in *Phillips v MCG Group Pty Ltd*,[60] the *discount* was *excessive on the facts*, particularly in accounting for underlying medical conditions in relation to *both* remaining working life and

---

53 Reasons at [50]. Although, her Honour noted that "Ms Hague summarised her opinion as to the reason why the plaintiff was not employable as 'it's a combination of factors, physical, the psychological, her self-efficacy, her age, her pain'".

54 Reasons at [80].

55 [2016] QSC 20 at [98].

56 Reasons at [81].

57 Luntz, H, *Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, Sydney 2002 at para [6.4.14].

58 See *Martin v Andrews* [2016] QSC 20 at [110].

59 [2004] QCA 155.

60 [2013] QCA 83.

vicissitudes. It was submitted that such discount should not have been any higher than 30 per cent.

[41] Reference was made to *Thomas v O'Shea*[61] in support of a submission that, if that represented the law in Queensland, the appropriate discount level ought to be no more than 10 per cent. It was conceded that, at least since 1999, *Thomas* has not been considered an accurate statement of law in Queensland. This is well explained by Chesterman J in *Bugge v REB Engineering Pty Ltd*,[62] in particular, where his Honour said:[63]

> "The New South Wales cases do not support the proposition that once the plaintiff has proved the matters referred to in *Thomas* damages must be assessed on the basis that his earning capacity has been destroyed unless the defendant discharges the evidentiary burden described. They do no more than show that the absence of evidence from a defendant as to available alternative employment may well lead, depending upon the calibre of the plaintiff's evidence, to that conclusion."

[42] In this case, the appellant failed to bring evidence as to any available viable alternate employment for the respondent. Whilst it was not submitted that *ipso facto* the respondent ought to receive a full, or near full, award through to age 70, it was submitted that a court was required to consider carefully the calibre of the respondent's evidence upon the issue of the availability of suitable alternative employment. It was submitted that the error of the primary judge was in failing to take into account the high calibre of the respondent's evidence on this issue, in particular.

[43] The respondent referred to the comprehensive rehabilitation programs funded by WorkCover and RACQ with the aim to finding the respondent suitable alternative employment that had failed. Although the rehabilitation program funded by WorkCover preceded any assessment by Ms Mitchell, the rehabilitation programs funded by RACQ from November 2015 to September 2016 at Edge Rehabilitation post-dated Ms Mitchell's assessment of 12 July 2016.

[44] The respondent accepted the primary judge's analysis that, upon the basis of the expert evidence from Ms Mitchell as to functional capacity,[64] the respondent had some prospect of obtaining light sedentary work where she was able to ensure that she was neither standing nor sitting for any length of time. However, it was submitted that with the considerable efforts of experts engaged in the WorkCover rehabilitation process and, more particularly, Edge Rehabilitation from November 2015 to September 2016, any more than triple the usual discount of 10 per cent was, on the evidence in this case, excessive. It was submitted, therefore, that the discount ought to be 30 per cent and not in the vicinity of 56 per cent. The

---

61 (1989) Aust Torts Reports 80-251.

62 [1999] 2 Qd R 227 at [50]-[54].

63 [1999] 2 Qd R 227 at [54]. The reasons in *Bugge* have been applied in numerous cases - *Anodising & Aluminium Finishers v Coleman* [1999] QCA 467; *Smith v Topp* [2003] QCA 397; *Qantas Airways Limited v Fisher* [2014] QCA 329; and have been followed in many other judgments, e.g. *Koven v Hail Creek Coal Pty Ltd* [2011] QSC 51; *Martin v Andrews* [2016] QSC 20; *Pollock v Thiess Pty Ltd (No 2)* [2014] QSC 95; and *Hughes v Tucaby Engineering Pty Ltd* [2011] QSC 256.

64 Reasons at [80].

respondent argued in the cross appeal for a suggested award of $428,750 (70 per cent of $612,500).

Consideration

[45] There was a sound basis for the primary judge's approach in finding that, notwithstanding the respondent's intention to work to age 70, that it was unlikely that the respondent would have worked beyond age 62, that is a further 10 years. That assessment of the likely working life was made in light of the respondents working history since 2007 "of lengthy absences from work".[65]

[46] There is no basis for concluding that her Honour proceeded on an incorrect factual basis in determining, notwithstanding the finding of exaggeration, that the respondent had sustained injuries with consequent pain which limited her capacity to work. There was no error of the kind referred to in *RACQ Insurance Ltd v Brennan*.[66] Her Honour's reasons implicitly proceeded on the basis that the respondent would be unable to return to work as a bus driver. The evidence of the respondent's self-report to Ms Mitchell that she could physically drive a bus did not equate to an admission that the respondent could continue employment as a bus driver. Nor was Ms Mitchell's evidence to that effect. As already observed, the evidence of Drs Anderson, Weidmann and Pincus was qualified.

[47] The contention that the respondent chose not to seek employment and made no attempt to work fails to bear in mind the respondent's determined commitment to undergo rehabilitation (outlined in detail by the primary judge in her reasons), which was ultimately discontinued when further rehabilitation, recommended by medical advice, was declined to be funded by the appellant.[67] The criticism that the primary judge erred in failing to approach the assessment on the basis of a global sum is misconceived and no authority was put forward to demonstrate error in the methodology used by her Honour. Reference was made to *McNally v Essenhaven Pty Ltd*,[68] but nothing in that decision compelled a global sum to be awarded in this case. "The assessment of damages for personal injuries in an action for negligence is not an exact science. It must always be governed by considerations of practical common sense in the context of the circumstances of the particular case".[69]

[48] As to the question of the discount applied by the primary judge, ground 4 of the respondent's cross appeal is flawed. The argument fails in the contention that the assessment made by the primary judge of a working life to age 70 itself amounted to a discount. The flaw lies in equating the finding of the likelihood of the respondent working to age 62 as approximating a discount of a third on the five per cent taken. The likelihood of the respondent working only for another 10 years was one open on the evidence of the respondent's work history in the light of pre-existing conditions, which had caused lengthy absences from work. Clearly, the approach taken by the primary judge was to fix on a discount of one third of the likely working life. There was abundant evidence to permit that assessment.

Ground 4 of the appeal – Assessment of past economic loss

---

65 Reasons at [81].
66 [2013] QCA 150.
67 Reasons at [26].
68 [2001] QCA 452 at [11].
69 *Van Gervan v Fenton* (1992) 175 CLR 327 at 343 per Deane and Dawson JJ.

The primary judge's assessment

[49] The primary judge approached the assessment of past economic loss as follows:[70]

> "From the date of the accident to the giving of judgment in favour of the [respondent] is 147 weeks. Both parties agree that the actual earnings of $7,937 must be deducted from the calculation of past economic loss. The [respondent] uses a net weekly wage of $950 and the defendants use $817. It is not apparent from exhibit 3 from where the figure of $950 is sourced. It appears that the figure of $817 comes from the schedule of the [respondent's] earnings in Tab C of exhibit 3 for the 2014 financial year, but that overlooks in that financial year the [respondent] had about three weeks on workers' compensation. Although the accident occurred in the 2015 financial year, the [respondent] is not able to dissect the earnings from her employer for that year between pre and post accident earnings. I will therefore use the net earnings for the 2014 financial year in respect of 49 weeks which makes $844 per week. That makes a total of $124,068, leaving a balance of $116,131, after deducting the sum of $7,937. There are 2.82 years between the date of accident and the date of judgment. That is a relatively short period and I do not propose to discount the assessment of past economic loss for the vicissitudes of life."

The appellant's submissions

[50] In respect of past economic loss, the appellant submitted that the primary judge awarding the respondent economic loss for the full period from the date of accident until trial, being 2.82 years,[71] was flawed in that it did not give a sufficient discount to reflect the evidence. The appellant submitted that the award for past loss of earnings was irreconcilable with the absence of evidence explaining the respondent's failure to return to any sort of work other than due to the respondent's own exaggeration and conflation of her limitations (as found by the primary judge) so as to elevate her claim for damages. Reliance was also placed on the evidence of Drs Weidmann and Pincus that the respondent was capable of employment as a bus driver. Reference was also made to the evidence of Ms Mitchell that the respondent's movements during testing were inconsistent and the respondent was still capable of working in a variety of occupations (as at July 2016). The primary judge accepted this evidence and that the respondent had adopted a routine for managing her pain not conducive to paid employment even though she demonstrated some capacity for the same. Even if an allowance was made for loss of earnings to July 2016 (104 weeks), past economic loss after deducting earnings, etc. would be $79,839.

The respondent's submissions

[51] The respondent submitted that it was unsurprising she had not secured suitable light employment, given her slight capacity for sedentary work without lengthy periods of sitting and standing, the barriers to employment including her age, outdated experience and computer illiteracy and also her commitment to rehabilitation[72] and

---

70 Reasons at [74].
71 Reasons at [74].
72 Reasons at [9], [12], [14] and [26].

adherence to reasonable advice from her treating physicians (much of it approved, funded and overseen by the appellant). In particular, over a period of 11 months from November 2015 to September 2016, Edge Rehabilitation, on the appellant's instructions, attempted to rehabilitate the respondent utilising multidisciplinary treatment, but were unable to identify suitable employment.[73]

Consideration

[52] As regards past economic loss, it is evident that there was no error in her Honour's determination that an allowance was appropriate for the full period from the accident to the trial (rather than only up to July 2016). In that regard, I accept the respondent's submissions, particularly given the extensive rehabilitation undergone and the respondent's attempt to return to work.

Ground Three – The award for past and future care

[53] Assessment of damages for gratuitous care is regulated by s 59 of the CLA which provides:

> "(1) Damages for gratuitous services provided to an injured person are not to be awarded unless —
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
>
> (c) the services are provided, or are to be provided
>
> (i) for at least 6 hours per week; and
>
> (ii) for at least 6 months.
>
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
>
> (3) In assessing damages for gratuitous services, a court must take into account —
>
> (a) any offsetting benefit the service provider obtains through providing the services; and
>
> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[54] The parties were agreed as to the relevant rates for any award for past and future care. The primary judge accepted the respondent's evidence that she needed greater assistance from Mr McLeod up to 12 months from the date of the accident. Her Honour explained the basis of the award of $18,396 for past care and $44,388 for future care as follows:[74]

---

73 AB at 355-467.

74 Reasons at [85].

> "Despite the lack of precision in the evidence of both the [respondent] and Mr McLeod as to the extent of care provided immediately after the accident, I accept that there was enough detail in the evidence to allow a finding of seven hours per week for the first year. It is apparent that although the [respondent] continued to receive some help from Mr McLeod after the first year, … the [respondent] settled herself into a routine where she could look after most of the chores in the house for herself, if she did them in her own time. Taking into account that in the second year after the accident, she also had some small assistance from Mr Murray for a period of six months, I consider it reasonable to allow past care for the second year after the accident at four hours per week. For the balance of the period of 0.82 years to the date of judgment, I consider the assistance that the [respondent] has established on the evidence that she requires in the house is limited to the occasional meal, changing the sheets on her bed, cleaning her bathroom every third or fourth weekend and assistance in hanging out a heavy wash. I estimate that assistance at no more than two hours per week and that is also the assistance the [respondent] has established she requires for the future. That makes past care of 657 hours at $28 per hour which is a total of $18,396. That makes future care on the basis of two hours per week at $30 per hour for 30 years (822) less 10 per cent for vicissitudes which is $44,388."

The appellant's submissions

[55] Referring to *Shaw v Menzies*,[75] it was submitted that the vague and imprecise nature of the evidence did not justify an award for care. The appellant complained that, notwithstanding that the primary judge referred to Mr Murray's and Mr McLeod's evidence as not reliable or helpful[76] and to the imprecise state of the evidence and findings of exaggeration by the respondent, her Honour broadly accepted that there was enough detail in the evidence to make the findings she did and to accept the evidence of the respondent as to the assistance required by her. This approach was said to be unsatisfactory and was contrary to the evidence.

[56] In particular, it was said that Mr Murray's[77] and Mr McLeod's[78] evidence clearly did not satisfy the requirements of s 59 of the CLA. There was no breakup of the evidence as to what care was necessary as a consequence of the injuries sustained in the subject accident. The evidence was imprecise. Some tasks related to her shoulder condition.[79] Ms Hague's evidence (which the primary judge dismissed as being overly influenced by the respondent's reports of her own limitations favouring instead the evidence of Ms Mitchell)[80] did not fill the gap. Further, the expert medical evidence indicated there was no need for any care.[81] The respondent told Ms Mitchell she was independent in all of her tasks, she simply self-paced.[82] Ms

---

75 [2011] QCA 197 at [73] and [78].
76 Reasons at [23] and [24].
77 AB at 28, 30 and 31.
78 AB at 88-89.
79 AB at 79.46, 88, 89, 100.40-41, and 164 (restricted movement of shoulders).
80 Reasons at [56] and [80].
81 AB at 639, 649, 654 and 663.
82 AB at 69.46-47 and 70.

Mitchell's evidence, which it was said was not rejected by the primary judge, was that there was no need for care.[83] It was submitted that the care was not necessary and did not satisfy the threshold of six hours per week for six months.

The respondent's submissions

[57] The respondent contended that the finding that the respondent received "seven hours of care per week for the first year",[84] which satisfied the threshold in s 59(1) of the CLA, was correct.[85] The respondent argued that while, as noted by the primary judge, a precise calculation of the hours of care required was not possible, her Honour was entitled to rely on Mr McLeod's time estimates, albeit using "caution" in relying literally on the estimates.[86] That was not fatal to the claim[87] as the usual standard of proof applied. The pertinent evidence was that, after the accident, the respondent required assistance with tasks that she had previously performed herself, including: changing her bed; cleaning her bathroom; some shopping; car cleaning; caring for her dogs; some laundry duties; some driving; meal preparation; and some vacuuming.[88] Mr Murray's evidence of assisting with mopping, dog walking, cleaning and driving only applied from approximately 11 months after the accident.[89] Further, the primary judge did not dismiss Ms Hague's evidence but rather discounted her assessment of the respondent's pain and work capacity.[90] Her opinion regarding care requirements was not rejected.

[58] It was submitted that, once it was accepted that the respondent had issues of limitations in her movement and pain stemming from her injuries, an approximation of an hour per day for the first year was supported by the available evidence and was not an unreasonable estimate and was one open to the primary judge. It was further submitted that the evidence supported a finding that such requirement for care has not significantly reduced.

[59] In conclusion, it was submitted that in the present case, the primary judge has applied correct legal principle in reaching her assessment and being cognisant of her judicial duty, carefully carried out that duty as was "incumbent upon her to bring her judgment to bear with respect to the evidence, which she did".[91]

[60] Ms Mitchell saw the respondent in July 2016 (22 months post-accident) and determined that the respondent was able to perform several home duties (some with aids),[92] but she did not assess capabilities or care required prior to that time. This was reflected in the finding that, from September 2016, the respondent required or would require care for only two hours per week.[93]

Consideration

---

83 AB at 654 and 663.
84 Reasons at [85].
85 Alternatively, by the cross-claim it was argued that the CLA did not apply.
86 Reasons at [23].
87 *Shaw v Menzies* [2011] QCA 197 at [73] and [78].
88 AB at 20-23, 27, 28-32, 45-49, 80-88, 104-107, 169-170; Reasons at [22]-[23], [47] and [51].
89 Reasons at [24].
90 Reasons at [56] and [80].
91 *Phillips v MCG Group Pty Ltd* [2013] QCA 83 at [75].
92 AB at 663.
93 Reasons at [85].

[61] In my view, it has not been demonstrated that there was error by the primary judge in her Honour's approach to and assessment of the matter of past and future care. Her Honour's finding of exaggeration by the respondent did not preclude her Honour from finding that the respondent did in fact require care. Her Honour took a cautious view of the evidence of Mr McLeod, noting the concessions that he had made in cross examination.[94] There is no basis to conclude that the primary judge's assessment of seven hours was so excessive as to be beyond the limits of a sound discretionary judgment. Her Honour's assessment of seven hours per week was one that was open on the evidence.

Ground 2 of the cross appeal – the application of the *CLA*

The CLA

[62] Section 5(1)(b) of the CLA excludes the application of the CLA where "compensation is payable" for an "injury" under the *Workers Compensation and Rehabilitation Act* 2003 (Qld) (the WCRA).[95] Section 5 relevantly states:

> "(1) This Act does **not** apply in relation to *deciding liability or awards* of damages for personal injury if the harm resulting from the breach of duty is or includes —
>
> (a) ...
>
> (b) *an injury for which compensation is payable under the [WCRA]*, other than an injury to which section 34(1)(c) or 35 of that Act applies." (emphasis added)

[63] Section 5 of the CLA had prior to an amendment in 2007[96] provided:

> "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 [WCRA], other than an injury to which section 34(l)(c) or 35 of that Act applies."

[64] By s 108 of the WCRA, an "injury" to a "worker" is compensable under the WCRA. "Injury" is relevantly defined by s 32 as "personal injury arising out of, or in the course of, employment *if the employment is a significant contributing factor to the injury*". (emphasis added)

The primary judge's determination

[65] There was no dispute that the respondent's personal injuries were components of the "harm resulting from the breach of duty" of the driver of the vehicle, Mr Carter,

---

94 Reasons at [23].

95 For the purpose of s 5(1)(b), it is immaterial whether the compensation for the injury is actually claimed under the relevant *Workers' Compensation Act* (WCA) or whether the entitlement to seek damages for the injury is regulated under that Act: s 5(2).

96 The *Criminal Code and Civil Liability Amendment Act* 2007 No 14 of 2007; date of assent 20 March 2007, but pursuant to s 2 retrospectively commencing on 6 November 2006.

which collided with the respondent's bus, the question raised by the respondent was whether her injuries were compensable injuries under the WCRA.

[66] At trial the appellant's case was that general damages fell to be assessed under the CLA. The respondent's case however was that her employment as a bus driver was factually a significant contributing factor to the occurrence of the accident, so that by virtue of s 5(1)(b) of the CLA, that Act did not apply. The trial judge rejected that contention and held that the CLA did apply. By her cross-appeal, the respondent submitted that the primary judge erred in law in finding that the CLA applied to the respondent's assessment of damages, including general damages, damages for gratuitous care and interest calculations.

[67] In considering the application of s 5(1)(b) of the CLA, the primary judge noted the amendment of s 5 of the CLA and had regard to its consideration in *Newberry v Suncorp Metway Insurance Ltd*[97] and *King v Parsons*.[98]

[68] In *Newberry*, it was held that a claim by Mr Newberry for damages for personal injuries against the appellant CTP insurer of a vehicle that struck a delivery truck, in which the claimant was travelling in the course of his employment, did not fall within the exclusion in s 5 of the CLA such that the CLA applied to the claim. Her Honour referred[99] to observations by Keane JA (with whom the other members of the Court agreed) that the exclusion "effected by s 5(b) of the *CLA* postulates a claim for damages for personal injury caused by a breach of duty owed to the injured claimant by the specific person against whom the claim is made".[100] As the exclusionary effect of s 5(b) of the CLA operated by reference to the terms of the claim, it was necessary to consider if the claim addressed the requirement of s 32 of the WCRA that the injury was one where his employment was a significant contributing factor to the injury. Her Honour applied[101] the following statement by Keane JA concerning the definition of injury in s 32 of the WCRA:[102]

> "It cannot be disputed that, when s 32 of the *WCRA* speaks of 'employment' contributing to the worker's injury, it is referring to employment as a set of circumstances, that is to the exigencies of the employment of the worker by the employer. The legislation is referring to 'what the worker in fact does during the course of employment'. The requirement of s 32 of the *WCRA* that the employment significantly contribute to the injury is apt to require that the exigencies of the employment must contribute in some significant way to the occurrence of the injury which the claimant asserts was caused by the breach of duty of the person (not the employer) against whom the claim is made." (footnotes omitted)

[69] Her Honour also had regard to the decision in *Farnham v Pruden*,[103] where, in considering the amended version of s 5 of the CLA, *Newberry* and *King*, Morrison JA

---

97 [2006] 1 Qd R 519.
98 [2006] 2 Qd R 122.
99 Reasons at [62].
100 [2006] 1 Qd R 519 at [18].
101 Reasons at [62].
102 [2006] 1 Qd R 519 at [27].
103 [2016] QCA 18; [2017] 1 Qd R 128.

(with whom the other members of the Court agreed) expressed the view[104] that both *Newberry* and *King* were correctly decided.

[70] *Farnham* concerned an action for personal injuries brought by Ms Farnham, who was employed by a government agency on a casual basis as a community visitor, and who worked from home using her own car to visit foster children at their respective foster homes. She was injured in an accident when she was travelling from her home to a foster child's home. At first instance, it was held that the CLA applied to the assessment of damages on the basis of the application of s 32 of the WCRA. On appeal,[105] it was held that Ms Farnham's claim was caught by s 35 of the WCRA with the consequence that the CLA applied. Her Honour referred to the following statement of Morrison JA concerning the application of s 32 of the WCRA adopting dicta of Keane JA in *Newberry*:[106]

> "I respectfully agree that the requirement of s 32 of the [WCRA], that the employment significantly contribute to the injury, requires that the exigencies of the employment must contribute in some significant way to the occurrence of the injury caused by the breach of duty of the person (not the employer) against whom the claim is made."

[71] Her Honour noted the respective arguments put forward by the parties:[107]

> "The plaintiff submits her employment as a bus driver was factually a significant contributing factor to the occurrence of the accident, as her employment was more than a fact apt to explain why she was where she was when the first defendant's breach of duty caused her injuries, and that the CLA is excluded pursuant to s 5(1)(b) of the CLA. The defendants submit there is no evidence that the exigencies or activities of the plaintiff's employment made a significant contribution to the occurrence of the injury which was claimed to result from the breach of duty of the first defendant and the fact that the plaintiff was employed as a bus driver was merely coincidental."

[72] Her Honour concluded that, while it was the case that the respondent was only driving the bus as it approached the roundabout where the accident occurred because of her employment, the CLA was not excluded by s 5 of the CLA reasoning as follows:[108]

> "*Connection between the time and place of the accident and employment is not sufficient, however, to satisfy the test for an injury pursuant to s 32 of the WCRA*. The [respondent's] statement of claim is a classic pleading for a claim for personal injuries sustained in a motor vehicle accident. It is pleaded that the [respondent] was driving the subject bus at the time of the accident, but there is no pleading of any circumstances that can be characterised as "the exigencies of the employment of the worker by the employer". *The fact that the [respondent] was in receipt of workers' compensation*

---

104 [2017] 1 Qd R 128 at [55]-[57].
105 [2017] 1 Qd R 128 at [43].
106 [2017] 1 Qd R 128 at [55].
107 Reasons at [68].
108 Reasons at [69].

> *benefits after the accident does not determine the question of whether the injury to the [respondent] fell within s 32 of the WCRA*. Consistent with the approach taken to the current version of s 5 of the CLA in *Farnham*, I conclude that the CLA applies to the [respondent's] claim for damages." (emphasis added)

The respondent's submissions

[73] It was submitted on behalf of the respondent that, the respondent's injuries clearly arose in the course of her employment as a "worker", the only issue being whether the respondent's employment was "a significant contributing factor" to her injuries. As to that matter, it was argued that the respondent's employment (specifically the task of driving a bus along a route on public roads) exposed her to the negligence of other drivers, including Mr Carter. Her employment was therefore a "significant contributing factor to the injury" and the injuries were ones for which compensation was payable under the WCRA, such that the CLA did not apply. The respondent's injuries, although caused by the breach of duty of the appellant's insured, occurred because she was required to be driving on the road and thereby was exposed to that breach. Moreover, as a bus driver, she was required to be on that bus route at that time. This was not a mere "coincidence". She had not chosen to be there of her free will – she was directed to perform that activity at that time and place by her employer. These exigencies of employment clearly contributed *significantly* to the occurrence of the injury.

[74] The respondent argued that the approach to s 5(b) of the CLA espoused in *Newberry*[109] that the section was informed by and directed to the terms of the claimant's claim ceased to be apposite once the words "any civil claim" were removed by the 2007 amendment. As a result, the formulation of the civil claim was no longer relevant to a consideration of the application of s 5 of the CLA. For the same reasons, the interpretation in *King*[110] which followed *Newberry* was also no longer apposite.

[75] Relying on s 14B of the *Acts Interpretation Act* 1954 (Qld), the respondent submitted that extrinsic material could be taken into account in assisting in the interpretation of s 5 of the CLA. Reference was made to the following portion of the explanatory memorandum to the *Criminal Code and Civil Liability Amendment Bill* 2007:

> "Section 5 of the *Civil Liability Act 2003* was inserted to exclude work-related injuries from the application of the Act.
>
> The amendment to the [CLA] aims to redress the effect of the Queensland Court of Appeal decision in [Newberry], which was handed down on 3 March 2006. In *Newberry*, although the claimant was injured in a motor vehicle accident while at work, the damages were assessed under the [CLA] because his claim was against a third party (the driver of the other vehicle) and his employment was not a material ingredient to the claim against the third party.

---

109 [2006] 1 Qd R 519 at [14] and [22]-[24].

110 [2006] 2 Qd R 122.

> The intention of the amendment is to protect workers' rights by providing that a common law claim for damages by a worker in factual situations such as those in *Newberry*, will be assessed at common law, rather than under the [CLA]. The amendment will reinstate the Government's stated intention regarding the protection of workers' rights under the [CLA]."

[76] It was submitted that, in applying *Newberry*, the primary judge failed to appreciate the effect of the 2007 amendment to the CLA and erred in considering the wording of the respondent's pleadings, including *not* pleading the "exigencies of employment", was a relevant consideration for the primary judge to take into account.

[77] The respondent submitted that a further point of distinction was that the exclusion in the previous version of s 5 of the CLA was not dependent on whether "compensation" was payable, as it incorporated only the definition of "injury" from the WCRA and not the *operation* of the compensation provisions. The respondent submitted that the exclusion in the present form of s 5 of the CLA *required* the Court to consider the *operation* of the WCRA, specifically whether compensation is payable. The respondent sought to draw support for that argument from statements by Keane JA in *Newberry*[111] as to the separate exercises of interpreting the CLA and WCRA. As such, although *Newberry* was not relevant to an interpretation of the present form of s 5 of the CLA, Keane JA's comment regarding workers compensation claims was particularly relevant.[112]

[78] The respondent criticised the primary judge's reliance on *Farnham*[113] as authority for the interpretation of s 32 of the WCRA,[114] and the decision in *Farnham* on the basis that *Farnham* did not take into account the change in wording of the CLA. It was submitted that in *Farnham*,[115] Morrison JA erroneously stated the requirements for a "claim" under s 32 of the WCRA, by adopting Keane JA's formulation in *Newberry*,[116] "that the exigencies of employment must contribute in some significant way to the occurrence of the injury... caused by the breach of duty of the person... against whom the claim is made".

[79] It was submitted that where the requirements of employment expose a worker to a risk of injury, and that risk materialised, employment was a significant contributing factor to the injury and compensation was payable. To deny that class of workers compensation on the basis that employment is not a significant contributing factor, even though the employment exposed them to that risk, would place unintended and severe restrictions on the workers compensation scheme. However, that was said to be the effect of the decision in *Farnham*.

The appellant's submissions

---

111 [2006] 1 Qd R 519 at [45]-[46].

112 [2006] 1 Qd R 519 at [24], [45] and [46].

113 [2016] QCA 18; [2017] 1 Qd R 128.

114 Reasons at [66]-[67] and [69]. Even though *Farnham* was decided on the basis that s 35 of the WCRA applied, where employment need not be a significant contributing factor. Pursuant to s 5 of the CLA, if s 35 of the WCRA applies then, although compensation is payable, the CLA still applies.

115 [2016] QCA 18 at [55].

116 [2006] 1 Qd R 519 at [27].

[80] The appellant accepted that the 2007 amendments to the CLA in response to the decision of *Newberry* arguably shifted the focus from the facts pleaded to the eventual determination of factual findings as to causation and contribution. In determining the question on applicability of the CLA, pursuant to s 32 of the WCRA, the respondent was required to establish that her employment was a *significant* contributing factor to the injury insofar as it concerned the physical injuries suffered[117] and, that her employment was the *major significant* contributing factor to the injury insofar as it concerned her psychological injury.[118]

[81] It was submitted that both Keane JA in *Newberry* and Morrison JA in *Farnham* were correct to highlight that, particularly in cases involving liability for an injury against non-employer third parties, the issue of factual causation and the extent of contribution (if any) to the occurrence of an injury because of the plaintiff's employment must necessarily be considered. In order to consider such matters, the Court is entitled, and ought, to look to the extent to which factual causation and contribution is alleged by the plaintiff by reference to their employment in the statement of claim. For a determination on these questions, the material facts relied upon by the respondent to assert that her employment was either a *significant* contributing factor or *the major significant* contributing factor to the injuries suffered were required to be identified.[119] It is relevant to note, as the primary judge did, that the respondent's pleaded claim omits any reference whatsoever to her employment and fails to plead any fact by which the Court was required to determine such employment contributed in any *significant* (as opposed to coincidental) fashion or rather, that such employment was the *major significant* factor to the occurrence of the injuries.

[82] *Farnham* was decided against the plaintiff in that case for the same reasons that arise in this case. That is, no claim was ever articulated in *Farnham* in the statement of claim, or evidence adduced, on the very question of whether the respondent's employment exigencies or activities *significantly* contributed to the injury. The effect of the respondent's submission in this case is that it is sufficient to satisfy the test to merely adduce evidence of the injury having occurred during the course of the respondent's employment and to assert that if the respondent had not been employed to be in that location on that date at that time, then the injury would not have occurred. Whilst such matters may establish *contribution* to the occurrence of the injury, they go nowhere toward establishing "*significant*" contribution or *major significant* contribution. As in *Farnham*, this was the fatal deficiency in the respondent's case at trial.

Consideration

[83] It may be accepted that the effect of the 2007 amendment is to shift the focus of inquiry from the nature of the claim for damages for personal injury resulting from negligence and whether it concerns an injury to which employment is claimed to be a significant contributory factor. Rather, under s 5(1)(b), inquiry is directed to whether damages for personal injury results from negligence causing harm being an injury for which compensation is payable under the WCRA. That change of focus from the terms of the claim as such to the assessment of liability or damages for the personal injury requires consideration of causal issues but also a consideration of

---

117 WCRA, s 32(1)(a).
118 WCRA, s 32(1)(b).
119 *Uniform Civil Procedure Rules* 1999 (Qld), r 149.

the meaning of "injury" under s 32 of the WCRA. Section 32 continues to be a central provision since by s 108 of the WCRA, compensation is payable to a "worker" for an "injury" as defined by s 32.

[84] In that regard, *Newberry* and *King* remain the definitive authorities as to the meaning of s 32, as it was correctly determined to be in *Farnham*. In *Newberry*, Keane JA articulated what the concept of injury entailed as follows:[120]

> "… the fact that an injury has been suffered arising out of employment, or in the course of employment, is not sufficient to establish that the employment has been 'a significant contributing factor to the injury'. To read s. 32 of the *WCRA* in that way would be to read the latter words out of the section, and in my respectful opinion to accord scant respect to the evident intention of the legislature to require a more substantial connection between employment and injury than is required by the phrases 'arising out of employment' or 'in the course of employment'.
>
> Further, there is no warrant in the language of s. 32 of the *WCRA* for reading the words 'if the employment is a significant contributing factor to the injury' as lessening the stringency of the requirement that the injury 'arise out of the employment', as was suggested in the course of argument on the appeal. It is clear, as a matter of language, that the words 'if the employment is a significant contributing factor to the injury' are intended to be a requirement of connection between employment and injury additional to each of the requirements that the injury occur in the course of employment or arising out of the employment. It cannot, in my respectful opinion, sensibly be read as lessening the stringency of the latter or increasing the stringency of the former." (reference omitted)

[85] Rejection of the respondent's argument as to the meaning of injury does not have the consequence claimed by the respondent that compensation would not be available under the regime of the WCRA. As Keane JA observed in *Newberry*:[121]

> "The rejection of the learned primary judge's approach does not mean, as the learned primary judge considered it would, that 'workers would be denied compensation in almost all cases where the injury was incurred while travelling to or from work or while travelling in the course of employment'. It is to be emphasised here that we are not concerned with the operation of the WCRA but with the operation of the CLA. Where a worker is insured while travelling in the course of employment and suffers an injury as a result of activities which were part of his employment, it can readily be said that the employment is a significant contributing factor to the occurrence of that injury. This was a routine example of a claim by an injured worker for workers' compensation where considerations of "fault", and the consequences of fault, are irrelevant." (footnotes omitted)

[86] The WCRA also makes special provision for the case where a worker is travelling to and from work by ensuring that employment need not be a "significant

---

120 [2006] 1 Qd R 519 at [41]-[42].

121 [2006] 1 Qd R 519 at [45].

contributing factor" to give rise to a compensable injury under the WCRA (see s 35(2) of the WCRA).

[87] Keane JA distinguished injuries for which compensation was available under the WCRA from claims for damages against non-employers such as that before the Court in *Newberry*:[122]

> "In this latter case, one is necessarily confronted by *different issues* from those which arise in a claim for workers' compensation by the injured worker. The claim for damages must come to grips with the need to assert that the claimant's employment activities were a significant factor contributing to the injury and that the injury was caused by a breach of duty owed to the claimant by some person other than the employer of the claimant. That raises issues of causation which must address the contribution of the claimant's employment activities to an injury which is also claimed to be caused by the fault of a person other than the employer, and the significance of those activities in a context in which notions of legal fault on the part of the third party are of the essence of the claim. *In the case of a claim under s 5(b) of the CLA, these issues of fault and causation as a result of that fault must be addressed. Such issues are entirely absent from, and irrelevant to the routine claim for workers' compensation for an injury suffered while travelling in the course of employment*. (references omitted, emphasis added)

[88] Concepts of fault and causation have not been excised from relevance because of the amendment to s 5 of the CLA to remove the terminology of "claim" and "claimant". They remain pertinent to the consideration of liability and assessment of damages for personal injuries in terms of whether or not the CLA applies by virtue of s 5(1)(b) of the CLA.

[89] There is no basis to question the reasoning or determination in *Farnham*, nor the consideration in that case of the decisions of *Favelle Mort Ltd v Murray*[123] and *Mercer v ANZ Banking Group Ltd*[124] which provide no assistance to the respondent.

[90] Her Honour was correct to conclude that the assessment of damages fell to be determined pursuant to the CLA. Although her Honour referred to the pleaded claim, it is clear that her Honour did so to highlight that the accident and liability therefore could not be said to be one where the exigencies of employment contributed to the occurrence of the accident in a manner required by s 32 of the WCRA.

Orders

[91] The appellant has failed to demonstrate error as alleged in its grounds of appeal, as has the respondent with respect to the two grounds relied upon in her cross appeal.

[92] Accordingly, I would order that:

1. The appeal be dismissed with costs.

---

122 [2006] 1 Qd R 519 at [46].
123 (1976) 133 CLR 580.
124 (2000) 48 NSWLR 740.

2. The cross appeal be dismissed with costs.