# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Bezant v Davis & Anor* [2010] QSC 229 |
| PARTIES: | **JULIE JOY BEZANT**<br>**(**plaintiff)<br>**v**<br>**CASEY LEIGH DAVIS**<br>(first defendant)<br>**And**<br>**ALLIANZ AUSTRALIA INSURANCE LTD**<br>**ACN 80 094 802 525**<br>(second defendant) |
| FILE NO/S: | S120 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court Rockhampton |
| DELIVERED ON: | 22 June 2010 |
| DELIVERED AT: | Rockhampton |
| HEARING DATE: | 10 June 2010 |
| JUDGE: | McMeekin J |
| ORDER: | **Judgment for the plaintiff in the sum of $264,423.97.** |
| CATCHWORDS: | DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where plaintiff suffered a fractured pelvis and a minor head injury in a motor vehicle accident – where liability admitted<br><br>*Civil Liability Act* 2003 (Qld)<br><br>*Purkess v Crittenden* (1965) 114 CLR 164<br><br>*Van Gervan v Fenton* (1992) 175 CLR 327<br><br>*Watts v Rake* (1960) 108 CLR 158 |
| COUNSEL: | R. Morton for the plaintiff<br><br>G. Crow for the defendants |
| SOLICITORS: | Morton & Morton for the plaintiff<br><br>McInnes Wilson for the defendants |

[1] **McMEEKIN J:** The plaintiff, Julie Joy Bezant, claims damages for personal injuries suffered on the 14th of June 2006 in a motor vehicle accident. Liability is admitted. I am required to assess damages. Ms Bezant was born on the 10th of June 1956 and celebrated her 54th birthday on the day of the trial. She was fifty years of age when injured.

**Injuries Suffered and Treatment**

[2] Ms Bezant suffered a fractured pelvis and a head injury with an associated right scalp laceration. The fracture of the pelvis was a serious one involving fractures of the sacrum, both superior and inferior pubic rami and disruption of the pelvic ring and left sacroiliac joint.

[3] Due to the severity of her pelvic injuries Ms Bezant was taken from the Hervey Bay Hospital to the Royal Brisbane Hospital. There she underwent surgery. A transverse pin was inserted in the distal left femur and skeletal traction applied. She was restricted to bed for six weeks and then gradually mobilised, initially in a wheel chair and later with the aid of a frame. She relied on a frame or Canadian crutches to get about until around mid-2007. She still occasionally resorts to the use of crutches.

[4] Dr McGee, an orthopaedic surgeon who saw her in August 2007, remarked that at times she was still using a crutch but "mainly for confidence and to stop people from knocking into her".[1] In her oral evidence Ms Bezant confirmed that was accurate. Dr McGee commented at that time that clinically Ms Bezant was not limited, that she did not functionally have a leg length inequality and that her main problem was post traumatic pain particularly of the posterior pelvis and stiffness in the spine.[2]

[5] It is significant that pain now is not a feature of Ms Bezant's presentation and has not been for some time. She complains of discomfort with certain activities and postures and a degree of stiffness which would appear to be entirely consistent with the severe fractures that she has experienced and the uniting of the fractures in a deformed position.

[6] In addition the plaintiff has suffered a head injury and has been assessed by psychiatrists, Dr Mulholland and Professor Whiteford, and a neurologist, Dr Alison Reid.

[7] Following the preparation of their respective reports the psychiatrists conferred at the direction of the Court and after discussion agreed that a diagnosis of adjustment disorder with mixed anxiety and depressed mood best fitted the clinical presentation. They agreed that ten sessions of counselling with a psychologist would be reasonable and, to use Professor Whiteford's words, "likely to effectively manage Ms Bezant's adjustment disorder".[3] They agreed too that the sessions of counselling may not be successful and in that event referral to a psychiatrist would be required and they agree that the prospect of a need for that referral was in the order of 33%. They agree that all other components of the PIRS scale involved a mild impairment and a PIRS rating of 6% was appropriate.

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1 At p. 227 of exhibit 4.1.8.
2 At p. 228 of exhibit 4.
3 At p. 308 of exhibit 4.

[8] Dr Reid considered the head injury to be "very mild" with a short period of unconsciousness and no apparent sequelae.[4]

**The Civil Liability Act 2003**

[9] The assessment of damages is governed by the provisions of the *Civil Liability Act* 2003 ("CLA") and the *Civil Liability Regulations* 2003 ("The Regulations").

**General Damages**

[10] As Ms Bezant suffered multiple injuries I am required by the CLA to determine the dominant injury as it is defined, having regard to the injury scale values ("ISVs") applicable to that injury, determine where in the range of ISVs provided for that injury it should fall, and then determine whether the maximum ISV in that range ("the maximum dominant ISV") adequately reflects the adverse impact of all the injuries. If the maximum dominant ISV is not sufficient then the ISV may be higher but not more than 100 and only rarely more than 25% above the maximum dominant ISV selected.[5]

[11] The parties are agreed that the dominant injury consists of the fracture to the pelvis. They disagree on whether the injury falls within item 126 of schedule 4 of the Regulation ("serious pelvis or hip injury") or item 127 ("moderate pelvis or hip injury").

[12] Counsel are agreed as to the categorisation of the remaining injuries. The adjustment disorder falls within item 12 of schedule 4 ("moderate mental disorder") with an ISV of between two to ten. Given the PIRS rating of 6% I would assess the ISV at the mid range of 6. The laceration to the scalp falls within item 155 ("scarring to parts of the body other than the face") with an ISV of 0 to 25. Mr Morton who appeared for the plaintiff contended for an ISV at or near the middle of the range suggesting that the injury fell within the fourth point of the commentary of the table. Here, however, the scarring resulting from the laceration is of no embarrassment to Ms Bezant as it is covered by her hair line and is invisible, and the only complication that she has suffered is that small glass pieces have been expelled from the scarred area from time to time. It seems to me the ISV should fall towards the bottom end of the range and I assess an ISV of 2. Finally it is clear that Ms Bezant had a minor head injury. It would appear that she was knocked unconscious at some point. It is not clear that there are any ongoing symptoms from the head injury not covered by the allowances for the adjustment disorder or laceration to the scalp. I think the appropriate item is item 9 with an ISV range of 0 to 5 and an assessment of 2.

[13] I return then to the area of debate. The defendants submit that the injury to the pelvis falls within the moderate range and hence item 127 is appropriate with an ISV assessment of 25, the top of that range. The plaintiff contends for a characterisation of a serious pelvis injury with the appropriate ISV being 35. By reason of the other injuries the plaintiff contends for an increase of 50% giving an ISV of 53.

[14] The comment that is made in item 126 is: "there will be substantial residual disability, for example, severe lack of bladder and bowel control, sexual dysfunction, or deformity making the use of two canes or crutches routine".

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4 At p. 278 of exhibit 4.

5 See sections 3 and 4 of Schedule 3 of the Regulation.

[15] Ms Bezant does complain of some loss of bowel control although this seems to be sporadic. It is not the subject of any qualified expert report, although the orthopaedic surgeons seemed to accept such a complication as consistent with the injury that she had suffered. However her description of the incontinence that she has experienced would not satisfy the description "severe lack of… bowel control". As I understood her evidence whilst she has had more frequent problems in earlier times there have been two occasions in the last five or six months where there has been some faecal soiling. The episodes are becoming less frequent.

[16] Ms Bezant does not require the use of canes or crutches as a matter of routine.

[17] The examples of the injury provided in item 126 include a fracture dislocation of the pelvis involving both ischial and pubic rami. That I think covers the injury suffered here.

[18] The comment supplied about the appropriate level of ISV is that an ISV at or near the bottom of the range "would be appropriate for an injury causing whole person impairment for the injury of 20%".

[19] Two orthopaedic medico legal reports were tendered, one by Dr Morgan and the other by Dr Pincus. Their examinations occurred in February and April of 2008 respectively. The only significant difference between their findings was that Dr Morgan thought that the left hemi pelvis was 2.5cm higher than the right hemi pelvis. Dr Pincus recorded that "[i]t was not my impression from the x-rays I reviewed that there was indeed more than one inch of displacement of the ischium"[6] and after reviewing the X-rays Dr Pincus confirmed his view that he was "unable to find evidence of more than 2.5cm displacement of the left ischium."[7] He measured the displacement at somewhere between 18mm and 21mm. The significance of this debate is that the AMA guidelines that the doctors are required to use to assess an impairment rating allow for an increase in ten per cent of the rating if the displacement exceeds one inch. As a consequence Dr Morgan assesses the impairment rating at 23% and Dr Pincus at 15%. Neither doctor suggested that it made any real difference to Ms Bezant's condition if the displacement was as Dr Morgan thought or as Dr Pincus thought.

[20] There was no cross examination of the medical witnesses. There is no feature of the evidence that I can see, established on the balance of probabilities, which would support the assessment by Dr Morgan. In the circumstances, the onus being on the plaintiff to establish her injuries and loss, she has not established, on the balance of probabilities, the greater displacement and hence higher level of impairment that Dr Morgan suggested. The AMA guides therefore require an assessment more in line with that provided by Dr Pincus of 15%.

[21] In my view the injury suffered does not satisfy the requirements of item 126 but rather item 127, but clearly would fall at the top end of that range. I thus assess an ISV of 25.

[22] Given that the ISV assessments that I make for the pelvic injury fall at the very top of the ISV range available and given that the other injuries complained of are quite different in character from the pelvic injury it is appropriate that there be some uplift to reflect those multiple injuries.

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6 See p. 299 of exhibit 4.1.19.

7 See p. 302 of exhibit 4.1.22.

[23] I bear in mind that Ms Bezant is of middle age, that there has been a significant disruption to Ms Bezant's life caused by these injuries, but that pain is not a significant feature of her presentation. I propose increasing the maximum dominant ISV by 20% and hence arrive at an ISV assessment of 30. Pursuant to schedule 6A of the Regulations I assess damages at $45,000.00.

**Past Economic Loss**

[24] Prior to the subject accident Ms Bezant was a teacher of yoga (the "Turiya" method). Her earnings were modest. She had qualified in 2001 and had pursued her yoga teaching as her principal source of income since that time. Mr Morton carried out an analysis of the tax returns that were supplied. Her average net weekly earnings were:

| Year Ended | Average Net Weekly |
|---|---|
| 30.06.2002 | $44.52 |
| 30.06.2003 | $49.13 |
| 30.06.2004 | $45.46 |
| 30.06.2005 | $36.12 |
| 30.06.2006 | $56.62 |

[25] Mr Morton's submission was that the earnings demonstrated an upward movement, that there had been a significant increase between 2005 and 2006 and that this should be extrapolated forward.

[26] Ms Bezant's wish was to build up the business. She had hoped to achieve ten lessons per week with ten students in each class. At the time of the accident she was holding seven lessons per week and had, at a maximum, 40 students, although the number could vary significantly and was seasonal.

[27] Ms Bezant explained that she had a ten year plan and that by about now (that is in 2010) she would have had to make up her mind whether the yoga teaching was sufficiently viable to enable her to continue with it as her principal income earning activity.

[28] Ms Bezant had a background in various occupations but principally in travel. Her parents had operated a travel agency and she had worked on and off in that business. She is friendly with the manager of a local travel agency in Maryborough where she lives and indicated that he had asked her to come back to work in the agency from time to time. A clerical award was tendered indicating potential earnings when working in an agency of about $300 per week

[29] While there is no dispute that Ms Bezant has restrictions which would prevent her from performing the usual duties of a yoga teacher, as she cannot adopt and demonstrate the positions that the discipline demands, it is worth noting that both orthopaedic surgeons seem to be of the view that although Ms Bezant was clearly restricted in her ability to teach yoga that did not necessarily mean that she could not instruct at all. Dr Morgan's

view was that she could continue to instruct in yoga "albeit for reduced periods and at a lesser level of competence"[8].

[30] It is instructive that she has maintained relevant registration and insurance in place obviously with the prospect that she may return to some level of teaching at some stage.

[31] Nonetheless no submission was made that I ought not to proceed on the basis that, to date at least, Ms Bezant's capacity to instruct was so limited as to make it commercially unviable and I will proceed on that assumption.

[32] The defendants' submission was that the pre-accident earnings provided the surest guide to the potential loss, had the accident not intervened. This had roughly been on average around $50 per week and that should be applied over the period since the accident.

[33] The plaintiff's submissions were that there was a significant increase between 2005 and 2006, that I ought to accept Ms Bezant's future was a reasonably good one, and award her damages based on an ever increasing income from that source up to about $40,000 per annum.[9] Ms Bezant pointed out that some of the senior teachers in Maryborough were due to retire in the not too distant future, one being aged 76 and the other in her early 70s.

[34] The difficulty with the plaintiff's submissions is that there is really no evidence to support the claimed potential increase in the numbers of students likely to attend Ms Bezant's classes, assuming that the accident had not occurred. As she mentioned in her evidence, new teachers come onto the scene. Thus the retirement of older teachers would not necessarily have any significant impact. As well, the senior teachers were not taking a large number of classes. As her own history demonstrates the earnings can vary widely. Her annual earnings in 2006 were only a few hundred dollars greater than her earnings in 2003. In the meantime there had been a significant dip in her earnings. In my view there is no good reason to assume that the earnings were any more likely to increase as decrease, as they had done in the past. There is certainly no basis for an assumption that her student numbers were likely to double, as the submission required.

[35] Ms Bezant's attitude seemed to be that she would have persisted with the yoga teaching at least until now, although she would have considered earnings of the type that she had enjoyed pre-accident as unsatisfactory. That being so it seems to me that the defendants' submissions more accurately reflect the probabilities. I assess damages at $10,400.00.

**Future Economic Loss**

[36] Similar considerations apply to the future assessed as did to the past. The defendant contends for an assessment of $50 per week over 12 years to take Ms Bezant into her mid 60s. The plaintiff's submissions seeks an award of $147,900.00 adopting a loss of $300 per week on the 5% discount tables to age 70 and discounted by 15%.

[8] See p. 239 of exhibit 4.1.10.

[9] 10 students at each of 10 lessons per week at $10.

[37] There is no good reason to think that Ms Bezant was likely to achieve an income of $300 per week. Indeed there is no evidence that any yoga teacher in Maryborough has ever achieved an income at that level.

[38] It was submitted that Ms Bezant would have turned to other methods of earning income had she not been able to improve her yoga earnings. There are two observations that I would make. First, it is far from clear that Ms Bezant was strongly motivated to pursue employment. It would seem that she was only prompted to return to any form of work – even the relatively minimal level that she achieved – at the urgings of Centrelink officers.[10] To her credit she seems to have embraced that urging and pursued her career in yoga teaching with some energy. Second, there is very little in the way of evidence to indicate that she cannot return to such work as a travel agent. Dr Morgan commented that her "future remunerative prospects have been reduced" pointing out that she had a limited capacity to stand or walk for prolonged periods or carry heavy objects. He went on:

> "Even sitting for prolonged periods is likely to give rise to discomfort. She is capable of some physical activities such as those of a clerical nature, telemarketing or call centre operation."[11]

[39] Dr Pincus commented that the injury "would not prevent her from returning to her prior work doing office duties in a travel agency".[12]

[40] Assuming that Ms Bezant had not been injured, if the earnings from yoga had not worked out as she had hoped then she nonetheless could have returned to her travel agency work, but maintained yoga teaching in her spare time. She made it plain that she enjoyed the teaching of yoga. Her injuries would prevent her now from doing both. As well her capacity to sit and concentrate for long periods is plainly reduced and she would be significantly less attractive as an employee in a travel agency.

[41] Thus I am satisfied that there has been impairment to Ms Bezant's earning capacity and one likely to be productive of financial loss, but it is at a fairly modest level. The evidence plainly demonstrates that yoga teachers are able to go on well past what might be considered a normal retirement age. As I have mentioned one of the teachers continues at the age of 76 years.

[42] I assess the loss at $65,000.00.[13]

**Damages for Past Gratuitous Services**

[43] As a result of her injuries and consequent disabilities Ms Bezant has received a deal of care, principally from her boarder, Mr Keats Bradbury. Services provided include the provision of meals, the performance of shopping, driving her whenever required, and miscellaneous domestic chores.

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10 Whom she referred to as "the powers that be" T1-57/10-20

11 At p. 39 of exhibit 4.1.10.

12 At p. 203 of exhibit 4.1.

13 As a rough guide - $50 pw over 16 years as a yoga teacher, and $35,000 as a global sum reflecting the general impact on her prospects of obtaining and maintaining clerical or the like positions ($300 x 11 years (444) x 25%).

[44] The need for such services is a compensable loss and that loss is measured by, in general, the market cost of providing the services: *Van Gervan v Fenton.*[14] The parties were agreed that the market cost of provision of services was $22 per hour for the past claim and $25 per hour for the future claim.

[45] The assessment of damages under this head is governed by the provisions of s 59 of the *CLA* which provides as follows:

> "**59 Damages for gratuitous services**
> (1) Damages for gratuitous services 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) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.
> (4) 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."

[46] The defendants concede that gratuitous services were necessary as a result of the subject injury and that the threshold requirements of s 59(1)(c) of the *CLA* have been met. There was no submission made that any other provision in the section affected the assessment.

[47] The defendants contend that the assessment should be in the order of $13,400.00 adopting a need for assistance at a total of 611 hours since her discharge from hospital. The submission is substantially based on particulars provided of the gratuitous care needed as set out in the letter from the plaintiff's solicitors which became exhibit 9, and subsequent to that letter on a report of an occupational therapist, one Ms Tschirpig.

[48] The plaintiff's submission was that the assessment should be based on an assumption of the provision of care of a total of 2,582.5 hours over that same period and an assessment made of over $64,500. The submission is dependant upon the acceptance of the assessment of the time spent caring for the plaintiff made by the plaintiff and her principal carer, Mr Bradbury. Their evidence was to the effect that for the period that Ms Bezant was bed ridden ("the first period") she needed about 44 hours per week care. For the period that she was partially weight bearing, up to mid-2007 ("the second

[14] (1992) 176 CLR 327.

period"), she needed about 30 hours per week care. Thereafter the plaintiff's claims adopt a figure of one hour care per day.

[49] Whilst there is no doubt that Mr Bradbury has provided a significant level of care for Ms Bezant, it is difficult to accept that the levels of care were as extensive as he now recalls. For example, in the first period 35 hours per week is claimed[15] as the necessary time to prepare meals for Ms Bezant. When one bears in mind that the meals that Mr Bradbury was preparing included his own meal as well as Ms Bezant's, I find it impossible to accept that there was an extra 5 hours work per day in the preparation of those meals.

[50] In the letter to which I have referred, exhibit 9, the solicitors advised that the care provided by Mr Bradbury in the first period for "domestic chores, cooking and driving" was in the order of 2 hours per day. The letter was put to Ms Bezant in cross examination and she confirmed, a little hesitantly, that the letter was written on her instructions.[16] It would be surprising if the letter was not. The matter was not re-explored in re-examination.

[51] In relation to the second period, when Ms Bezant was partially weight bearing, the letter particularised the care provided for the same services as in the order of 7 to 10 hours per week. Again the discrepancy between the particulars then provided and the amount of care now claimed (30 hours per week) was not explained.

[52] I appreciate that mistakes can easily occur when solicitors endeavour to obtain instructions and I appreciate too that it is not an easy matter to assess the level of care being provided. However the combination of what seems to me to be unsupportable amounts of time being sought for the type of services provided, and the much more modest particulars that were earlier given, causes me to treat the plaintiff's claims with considerable caution.

[53] When one turns to the "expert" evidence the plaintiff's cause is not advanced greatly. Dr Morgan specifically dealt with the issue of future domestic assistance. He considered that she would need assistance with lawn mowing, gardening, household cleaning and repairs and quantified that assistance as in the order of some 4 hours per week.[17] Dr Pincus' views on this were as follows:

> "Ms Bezant is likely to be able to carry out her activities of daily living such as household chores as she gets stronger and loses weight. I would not expect any requirements for long term assistance around the house."[18]

[54] Often the occupational therapist provides the best insight into the need for such assistance but the only report tendered, that of Ms Tschirpig, does not advance matters greatly. Ms Tschirpig carried out her assessment in July 2007, at about the time the plaintiff reduces her claim to about 1 hour per day. It is clear that Ms Tschirpig thought that Ms Bezant would benefit from rehabilitation. Her focus was on getting Ms Bezant back to work. Her only comment about any need for care was a recommendation that

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15 I refer to Mr Morton's schedule – exhibit 14.
16 See T1-73/15.
17 At p. 239 of exhibit 4.
18 At p. 283 of exhibit 4.1.15.

Ms Bezant be provided with "short term cleaning assistance, 2 hours per fortnight" to be reviewed in 3 months.[19]

[55] I am conscious that Ms Bezant has an adjustment disorder and no doubt such disorders can cause perceptions of impairment and disability to be greater than they would otherwise be if the disorder was appropriately treated. As well it is commonplace that the care actually provided to injured persons by persons well disposed towards them, as I am sure Mr Bradbury was to Ms Bezant, can well exceed what objective observers would consider reasonable. I note that Ms Tschirpig's report did not purport to assess Ms Bezant's full range of care needs and I can readily accept that Mr Bradbury has performed duties relating to the heavier household tasks which were necessarily required by reason of the injuries. It is difficult to see, however, why Ms Bezant cannot prepare a meal for herself, carry out modest shopping and do basic housework. I think that the best guide I have comes from Dr Morgan. His assessment was carried out in February of 2008.

[56] Using Mr Morton's schedule as a guide[20] for the first period, from the discharge from hospital until 14 September 2006 when Ms Bezant became partially weight bearing, I assess her need at 15.75 hours per week. Essentially I have reduced the meal preparation time to 1 hour per day.

[57] Similarly for the second period, from 15 September to 15 June 2007, I have reduced the preparation for meals period down to 1 hour per day and her need for miscellaneous assistance to 30 minutes per day. That results in a total of 12.25 hours per week.

[58] For the final period, from 15 June 2007 to the present, I allow 5 hours per week. Whilst I have been guided by Dr Morgan's views, I am conscious that he was not aware of the psychiatric issues, and his assessment did not acknowledge the difficulties with driving, which activity has taken up a deal of Mr Bradbury's time. A claim is made for paid services relating to housekeeping which I deal with below, but which I have borne in mind in this assessment.

[59] In addition I allow the claim for travel to Brisbane for treatment. Again Mr Bradbury has been required to drive the vehicle due to Ms Bezant's physical and psychological difficulties.

[60] Adopting the agreed rate per hour of $22.00 I allow damages for past care at $30,980.00.

**Future Gratuitous Assistance**

[61] The only significant difference between the past and future assessments is the possible impact of the psychological treatment that is proposed. That may reduce the plaintiff's anxiety in traffic, and her perception of her difficulties, and hence her reliance on Mr Bradbury. Success is not certain.

[62] I am conscious of Dr Pincus' comment: "Ms Bezant is likely to be able to carry out her activities of daily living such as household chores as she gets stronger and loses weight. I would not expect any requirements for long term assistance around the

[19] At p. 224 of exhibit 4.1.7.
[20] Exhibit 14.

house. I also would not expect her longer term to have to continue to use crutches to walk outside."[21] Nonetheless I consider that he has underestimated the impact of he injury on Ms Bezant. I allow the future assistance at 4 hours per week.

[63] The agreed rate is $25.00 per hour. Allowing that care over the plaintiff's statistical life expectancy of 34 years, and discounting as required on the 5% tables, results in an assessment of $86,590.00.

**Future Chiropractic Treatment Costs**

[64] A claim is made for the cost of attendance on a chiropractor at $35.00 per week (that is one visit per fortnight). The claim is made for the balance for Ms Bezant's life expectancy. The need for that continuing attendance on a chiropractor is in issue.

[65] There are three difficulties with the claim. First, there is a lack of medical support for the claimed need. Second, Ms Bezant had a long history of attending on chiropractic care prior to the subject accident and there is medical evidence of problems with her spine that would justify such attendances. Third, the matter is complicated by the fact that Ms Bezant still struggles with the adjustment disorder that she has.

[66] Ms Bezant has attended on a chiropractor at considerable expense to herself, despite being on a limited budget, ever since she became weight bearing. She continues to do so. Ms Bezant asserted that she receives significant benefit from the treatments. She was confirmed in that by Mr Bradbury's observations.

[67] Her need for such treatment is not supported by the medical evidence. Under the heading "Future Therapeutic Requirements"[22] Dr Morgan stated:

> "She does not require operative intervention. Instead, she would be better suited to a significant reduction in body weight, the ongoing ingestion of analgesics and stretching and yoga exercises.
>
> I can see no indication for any chiropractic treatment. The concept of repeated adjustments of this soundly mal united pelvis is illogical. Similarly, further physiotherapy will give no great assistance."

[68] Dr Pincus did not specifically address the question of a need for chiropractic treatment but he certainly does not give it any support. He said that he expected that she would not degenerate and would have ongoing symptoms of stiffness. He was in possession of Dr Morgan's report and hence aware of his opinions concerning future chiropractic treatment and I assume would have mentioned any disagreement.

[69] It is relevant that for many years prior to the subject accident Ms Bezant was in the habit of attending on a chiropractor. The history that Dr Morgan recorded was that Ms Bezant had had previous problems referrable to the lumbar spine. Ms Bezant denied giving that history. She maintained that she went to the chiropractor on a monthly basis for "maintenance" and to enable her to perform her yoga. I note that her attendances on a chiropractor long pre-date her taking up yoga in 2001.[23] However Dr Morgan recorded that the history was "consistent with the multi level spurring noted on

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21 At p. 283 of exhibit 4.

22 At p. 239 of exhibit 4.1.10.

23 See the chiropractor's records at p. 183 of exhibit 4.1.5.

her radiographs" and as well he noted that she suffered from a "constitutional spondylitic problem" unrelated to the accident.[24]

[70] Subsequent to the subject accident the second defendant met some payments to a chiropractor, and in submissions concedes that some amount should be allowed for chiropractic services. This conduct acknowledges that to an extent the first defendant's negligence created a need in the plaintiff for those services and that a reasonable measure of them would be the amount that the defendants concede.

[71] No attempt has been made to differentiate between treatments that might have been attributable to accident caused injury and treatments that may have been attributable to whatever condition prompted the pre-accident treatment. No evidence has been called from the chiropractor as to what treatments were applied. His records have been tendered but they are not helpful. To the extent that the expense involves the disentangling of a pre-existing condition from the present condition then the onus lay on the defendants to call that evidence: *Watts v Rake*;[25] *Purkess v Crittenden*;[26] cf. *Malec v JC Hutton Pty Ltd*;[27] *Smith v Topp*;[28] *Hopkins v WorkCover Queensland*.[29]

[72] However, before one reaches that point, to the extent that the plaintiff seeks to establish the prima face right to the amounts expended as an item of damage, the onus lies on the plaintiff.

[73] The question is whether that onus has been discharged by the plaintiff's belief, undoubtedly honestly held, that fortnightly treatments give her some relief from her condition.

[74] It is necessary to bear in mind that the test is one of reasonableness, not what might be ideal.[30] Relevant to that question of reasonableness are at least two factors in addition to the plaintiff's claim that the condition provides her with some relief. First, the relief is temporary. Its effects are spent after a week or so. The overall cost of the claim therefore becomes very significant.

[75] Second, as I have said, there is no medical evidence to support the claimed need for treatment. Where there is no evidence that a treatment is based on an accepted body of scientific knowledge then in my view it is very difficult for the plaintiff to demonstrate that a substantial expense is necessary or reasonable.[31]

[76] The defendants' concession that some chiropractic treatment was appropriate goes some way to meeting the need to demonstrate necessity of treatment. The question that remains is where would the test of reasonableness draw the line? The defendants' contention is that ten treatments post accident would have been sufficient. The plaintiff's contention is that all her past costs should be met by the defendants and

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24 At p.237 of exhibit 4.1.10.
25 (1960) 108 CLR 158.
26 (1965) 114 CLR 164.
27 (1990) 169 CLR 638.
28 [2003] QCA 397 at [38].
29 [2004] QCA 155.
30 *Arthur Robinson (Grafton) Pty Ltd v Carter* (1967-68) 122 CLR 649 at 661.
31 *Hornery v O'Neal & Anor*, unreported, Tasmanian Supreme Court, No 1120 of 1986, B6/1995, 10 February 1995, BC9502968 per Green CJ.

those expenses be allowed at a rate of $65.00 per week (including travel) for the balance of her life expectancy.

[77] Mr Morton contends that even if the chiropractic treatment amounted to no more than a placebo that nonetheless it would be reasonable to allow the claim as it was effective in relieving the plaintiff's discomfort.

[78] I do not think that there is any reason to disallow such claims, even though the effect may be no more than a placebo effect, where the plaintiff is in receipt of medical opinion from an apparently reputable source that the treatment ought to be attempted. The difficulty here is that there was no such advice, or at least no evidence of it.

[79] That being so it seems to me that that submission cannot be right in principle. It certainly has the undesirable effect of opening the flood gates to claims by plaintiffs, who otherwise appear perfectly honest, to be paid what they please.

[80] Mr Morton's submission has the further difficulty that if the plaintiff's problems can be satisfied by a placebo then the true nature and extent of her problems are called into question.[32] Against a background of an assessment of an existing psychiatric disorder Ms Bezant's honesty is not in issue, but in the absence of any other explanation, I assume that psychiatric factors are playing a part.

[81] In my view great moderation is called for in these circumstances. It is proposed that an allowance be made for the psychological and psychiatric treatment that the doctors have recommended. It must be assumed that there are reasonably good prospects of that treatment benefiting her.

[82] I propose allowing a modest amount for future treatments of the type claimed, whether it is by way of chiropractic care, or through a physiotherapist, or the like, for a limited period to allow time for any psychological treatment to have an effect. I do so on the assumption that the psychiatric condition is of significance in the plaintiff's perception of her problems and of what relieves her problems.

[83] I allow $3,500.00 for this component.

**Miscellaneous Future Expenses**

[84] An amount of $5.00 per week is claimed under the heading miscellaneous and is intended to reflect the occasional need for medications and the like to relieve Ms Bezant's discomfort. In my view the claim is appropriate.

[85] A claim is made for $15.00 per week for housecleaning. It is true that Ms Bezant needs that assistance at least in relation to the heavier aspects of such work, but I have allowed for that in the future gratuitous assistance component.

[86] A claim is made for homeopathic medication. In my view it is inappropriate to make any allowance for such medications unless there is some reasonable medical basis put for the expense.

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[32] Although I note that the "placebo effect" is attracting serious attention in medical science with the suggestion that the beneficial effect of placebos is so well accepted that practitioners should harness those benefits by the deliberate administration of placebo treatments: see "Biological, Clinical, and Ethical Advances of Placebo Effects" by Finniss et al. *The Lancet*, Volume 375, Issue 9715, pp 686 - 695, 20 February 2010.

[87] The principal reason for taking the medication related to Ms Bezant's bowel problems which are not really addressed by the medical evidence. On her account these problems are reducing over time. In the absence of more precise evidence I cannot see that an award is justified.

[88] An amount is claimed for the cost of travel expenses, principally to seek chiropractic care as I understand it. I have included an amount in the allowance for chiropractic care and will not allow any further sum.

[89] The amounts claimed for psychological and psychiatric care are allowed as claimed. I do not understand there to be any disagreement on those items.

[90] The total allowed for future expenses, including chiropractic expenses of $3,500, is $10,927.00.

**Special Damages**

[91] The defendants do not dispute that the following items be allowed.

| Description | Amount |
|---|---|
| Careflight | $2, 215.00 |
| Rental of crutches | $119.80 |
| Chiropractic Visits – 10 @ $45.00 per visit | $450.00 |
| Pharmaceuticals | $50.00 |
| HIC | $696.35 |

[92] The disputes relate to the following items:

| Description | Amount |
|---|---|
| Cleaning | $4, 157.14 |
| Washing | $112.50 |
| Travel | $9, 994.29 |
| Medibank Private | $1, 399.20 |
| Chiropractic Fees | $2, 815.00 |

[93] The items for travel (save for journeys to Brisbane for treatment - $3,900 is attributed to those journeys), Medibank private and chiropractic fees all relate to the claim for chiropractic treatment. As can be seen the claims made here are substantial. Excluding interest they total $10,308.49.

[94] I have set out the competing contentions above. Consistently with what I have set out it is appropriate to allow some amount for the past treatments.

[95] The issue is whether a line should be drawn as to when the incurring of these expenses became unreasonable. I have already recorded that the second defendant paid these fees for a period. The only significant change in the material facts is that in about mid-March 2008 Dr Morgan's report became available advising his opinion that there was no medically sound basis for the continuation of the treatment.

[96] The question can be posed in this way: is it reasonable to deny a plaintiff recovery of monies in fact expended in relief of her accident caused symptoms, which treatment she contends was effective in providing relief of those symptoms, because an orthopaedic surgeon opines that the treatment should not have provided such relief, particularly in circumstances where, during the time in question, the plaintiff's perceptions and reactions were affected by an untreated psychiatric condition? I note my view that the plaintiff seemed to me to be an honest historian.

[97] Given the limitations on medical science, I am reluctant to find that where there has been actual expenditure the law's response must be, in all circumstances, that there is to be no recovery.

[98] I propose to allow the claims subject to one deduction – a significant component of the claim reflects travel costs to Gympie, an hour's drive each way from the plaintiff's home. In my view there is no good basis for requiring that the defendants meet those costs. A chiropractor was available, and indeed used by the plaintiff, in Maryborough. I will allow $4,469.20 for the claim. I have allowed $5.00 for the travel costs incurred in each of the 51 attendances referred to in the schedule.[33]

[99] The other significant debate relates to the cleaning expenses of $4,157.14 incurred by the plaintiff. The defendants' contention is that the allowance made for past gratuitous services is intended to cover the cost of the provision of cleaning. Indeed that was the only component of the defendants' allowance from 15 December 2006 onwards.

[100] What the defendants' submission overlooks is that the plaintiff does not drive. Initially of course she was physically unable to drive and her evidence indicates that her anxiety is such a level that she cannot cope with driving now. If her problems are psychological then the treatment that has been recommended presumably will endeavour to assist her with that. The psychiatrist seemed to think that there was a reasonable prospect of success with that treatment.

[101] Again here the defendants' approach to some extent turns on the report by Ms Tschirpig, the occupational therapist. While her recommendation that the plaintiff be provided "with short term cleaning assistance, 2 hours per fortnight" implies that her opinion was that the plaintiff needed no more, she does not address the other aspects of her condition. The report specifically acknowledges that at the time of the assessment the plaintiff was "receiving/ paying for assistance with most domestic tasks".[34] I have not found that report to be of much assistance.

[102] Whilst I am conscious of the risk of double counting given the award for past gratuitous assistance, I think that an overall reasonable assessment requires that these items of out of pocket expenditure for house cleaning and washing be allowed. I have made my assessment of past gratuitous assistance on the assumption that this claim would be met.

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[33] At p. 314 of exhibit 4.2.4.

[34] At p. 223 of exhibit 4.1.7.

[103] The plaintiff has been required to travel to Brisbane on 5 occasions and has done so with the assistance of Mr Bradbury. Her evidence was to the effect that the trips were slow because of the need to continuously stop and rest. $3,900.00 is claimed under this heading. No reason was advanced by the defendants as to why the amount should not be allowed.

**Summary**

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

| | |
|---|---|
| Pain, suffering and loss of amenities of life | $45,000.00 |
| Past economic loss | $10,400.00 |
| Interest on past economic loss[35] | $1,204.97 |
| Future loss of earning capacity | $65,000.00 |
| Past gratuitous services | $30,980.00 |
| Future gratuitous assistance | $86,590.00 |
| Miscellaneous future expenses | $10,927.00 |
| Special damages | $13,282.49 |
| Interest on special damages[36] | $1,039.51 |
| **Total Damages** | **$264,423.97** |

**Orders**

[105] There will be judgment for the plaintiff in the sum of $264,423.97.

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

[35] $10,400 x 2.875% x 4.03yrs.
[36] On $8,971.94 at 2.875% over 4.03 yrs.