SUPREME COURT OF QUEENSLAND

CITATION:	*Shaw v Menzies & Anor* [2011] QCA 197
PARTIES:	**JOHN SHAW** (appellant) **v** **DAVID ANDREW MENZIES** (first respondent) **SUNCORP METWAY INSURANCE** (second respondent)
FILE NO/S:	Appeal No 12516 of 2010 SC No 9569 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2011
JUDGES:	White JA, Margaret Wilson AJA and Peter Lyons J Judgment of the Court
ORDERS:	**1. Allow the appeal.** **2. In lieu of order 1 made below, order that judgment be entered for the appellant (plaintiff) against the respondent (second defendant) in the sum of $704,418.04.** **3. Affirm the order for costs made below.** **4. The second respondent pay the appellant's costs of and incidental to the appeal.**
CATCHWORDS:	TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – where the plaintiff's motorcycle collided with a semi-trailer driven by the first respondent – where at trial liability was apportioned as to 70 per cent against the plaintiff and 30 per cent against the first respondent – whether the primary judge erred in the apportionment of liability DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the plaintiff appeals on the ground that the primary judge failed to make any award under s 59 *Civil*

Liability Act 2003 (Qld) for gratuitous services and to award interest on the plaintiff's assessed loss of past earning capacity – where the defendant concedes that interest of past economic loss ought to have been awarded – whether the primary judged erred in failing to award damages for gratuitous services

Civil Liability Act 2003 (Qld), s 59, s 59A, s 59B, s 59C, s 59D, s 60(1)(b)
Motor Accident Insurance Act 1994 (Qld), s 51
Transport Operations (Road Use Management – Road Rules) Regulation 1999 (Qld), s 28

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
CSR Ltd v Eddy 92005) 226 CLR 1; [2005] HCA 64, considered
Elford v FAI General Insurance Company Ltd [1994] 1 Qd R 258; [1992] QCA 41, cited
Kriz v King [2007] 1 Qd R 327; [2006] QCA 351, cited
Van Gervan v Fenton (1992) 175 CLR 327; [1992] HCA 54, cited

COUNSEL: R A I Myers for the appellant
S C Williams QC, with J Rolls, for the respondent

SOLICITORS: Jon Kent Lawyers for the appellant
Jensen McConaghy for the respondent

[1] **THE COURT**: The appellant (*the plaintiff*) was injured in a collision between the motorcycle which he was riding, and a semi-trailer driven by the first respondent (*the defendant*)[1]. At trial, liability was apportioned as to 70 per cent against the plaintiff, and 30 per cent against the defendant. The plaintiff has appealed against the decision of the learned trial Judge, both in relation to liability and quantum.

Background

[2] The accident occurred on 12 May 2006, at the intersection of Balham and Granard Roads, at Rocklea. In the period leading up to the collision, both vehicles were proceeding west along Granard Road towards its intersection with Balham Road.

[3] The defendant was driving a Kenworth Prime Mover, to which was attached a trailer some 12 metres in length. The trailer itself was 2.4 metres wide, but it carried steel sheets which were 3.1 metres wide, resulting in an overhang on each side of the trailer.

[4] The prime mover was fitted with indicator lights on the front (visible only from the front of the vehicle), as well as indicator and brake lights on its mudguards; and a flashing amber light on the roof of the cab. There were also indicator lights on the trailer, about half way along its length, and at the rear. In addition, there was a flashing amber light on the back of the trailer, together with a number of red and

[1] The proceedings were defended by the second defendant insurer. In these reasons, for convenience, the expression "defendant" refers to the first defendant as appropriate or to both defendants.

yellow delineator signs, a sign with the words "Oversize", and a sign with the words "Do Not Overtake Turning Vehicle".

[5] There are, generally speaking, three lanes for westbound traffic on Granard Road between Balham Road and Beatty Road. The intersections at Balham Road and Beatty Road are controlled by traffic lights. There are two westbound lanes through the Beatty Road intersection, which, as one leaves the intersection, become the second and third lanes from the southern edge of Granard Road. For vehicles approaching the intersection from the south on Beatty Road, there are two left turn lanes into Granard Road. These merge with the two westbound lanes closer to the southern side of Granard Road.

[6] As one approaches the Balham Road intersection from the east, there is a large sign on the median strip, indicating that Granard Road leads to Ipswich, with left and right turns at the intersection (*the Ipswich sign*). To the west of this sign there is a right turn lane or "slot", of sufficient length to accommodate a number of vehicles.

[7] There was evidence from the plaintiff, which did not seem to be challenged, that the Balham Road intersection sign was some 120 to 130 metres from that intersection. The evidence also suggested that the distance between the Beatty Road intersection and the Balham Street intersection was between 400 and 500 metres.

[8] In his statement of claim, the plaintiff alleged that the defendant was driving the semi-trailer in the middle of the three westbound lanes on Granard Road, towards the Balham Road intersection. In his defence (or, more accurately, the defence of the second defendant, on which the defendant relied) this allegation was admitted, with the qualification that "at approximately 150 yards before the intersection of Granard Road and Balham Road, (the defendant) had moved the position of the vehicle so that it occupied both the (left-hand) lane and the middle lane"; and that the defendant had indicated that he was positioning his vehicle to turn left by operating his indicator.

Summary of evidence relating to liability

[9] The plaintiff gave evidence that he had approached the Beatty Road intersection from the east, and stopped in Granard Road at the traffic lights at Beatty Road. The defendant's semi-trailer entered Granard Road from the plaintiff's left, just prior to the lights changing. The plaintiff was in the left-hand of the two through lanes at this intersection, behind a silver-coloured vehicle. Both vehicles followed the defendant's semi-trailer, which had moved into the middle westbound lane on Granard Road. The semi-trailer reached a speed of approximately 50 km per hour. After travelling some distance, the silver vehicle moved to the right-hand lane. The plaintiff then moved his motorcycle to the left-hand lane, some 20 metres before the Ipswich sign, or some 150 metres from the intersection. The plaintiff then travelled at a speed between 50 to 60 km per hour, slightly faster than the semi-trailer, and was gaining on it slowly. The plaintiff had moved to the left-hand lane because he intended to turn off to the left, after the Balham Road intersection.

[10] The plaintiff then gave evidence that the semi-trailer commenced to move across into the left-hand lane, and was slowing down. The plaintiff braked quite heavily, and sounded his horn. He estimated that his speed reduced to between 10 and 15 km per hour, and he "dropped back … almost back to the … back of (the defendant's) trailer" but did not go behind it. At one point he gave evidence that

this occurred some 70 metres before the Balham Street intersection, though in cross-examination he accepted that 100 metres before the intersection the semi-trailer had "come over onto me".

[11] The plaintiff then gave evidence that the defendant drove his vehicle "back into his lane", at which point the plaintiff proceeded to move forward in relation to the semi-trailer. About 30 to 40 metres before the intersection, the semi-trailer again moved into the left-hand lane. The plaintiff was concerned both about the prime mover, and the rear wheels of the defendant's trailer coming over into his lane. He accelerated to pass the semi-trailer but collided with it.

[12] The plaintiff said he did not see indicator lights on the semi-trailer indicating an intention to turn left. When cross-examined about his inability to see these lights, he referred to the relative position of his motorcycle to the semi-trailer, the overhanging steel sheets, and the fact he was wearing a helmet.

[13] The defendant gave evidence that he had been driving semi-trailers for 27 years. He gave evidence that he had seen the plaintiff's motorcycle when he turned out of Beatty Road, and that it was on Beatty Road. He said that he observed it on two or three occasions in his left-hand side mirror thereafter; though on another occasion, he said he watched the motorcycle "the whole way down Granard Road"; and that motorcycles "are the biggest fear for a truck driver". The defendant said the motorcycle was sitting to his left-hand side, in the left-hand lane, behind him (though on one occasion in cross-examination he said that the motorcycle was beside him). He gave evidence that he "was already half in the kerb lane and half in the centre lane… the whole… way down Granard Road".

[14] The defendant gave evidence that as he made the turn from Beatty Road into Granard Road he was travelling at between 10 and 20 km per hour and that the maximum speed he reached along Granard Road was 20 to 30 km per hour. He gave evidence that as he approached the Balham Road intersection, his speed reduced to 5 km per hour. He said that as he approached the intersection, in the last 150 metres or so, the prime mover and trailer were "[i]n the middle of the two left-hand lanes", thereby suggesting that they straddled the line between those lanes. He gave evidence that as he approached the corner, "[y]ou might deviate to the right for just a fraction to get out to the middle of the intersection to – before you turn back … Just a dart out, then swing it straight back in"; and that he had carried out such a manoeuvre immediately before the accident. He said that as he started to turn the prime mover, he looked in his rear vision mirror, and saw the motorcycle to his left-hand lane, behind the trailer, by "only … a couple of metres". He said that the motorcycle had been in the same position "the whole way down" from Beatty Road.

[15] In cross-examination, the defendant said that the plaintiff's motorcycle had been behind him and to his left in Beatty Road and that it followed the defendant's vehicle onto Granard Road. He agreed that his speed would have increased after he turned into Granard Road, "to probably no more than 40 or 50 kilometres per hour". The effect of his evidence was that the plaintiff had matched the defendant's speed from Beatty Road, virtually to the point of the collision. He also said that he was "travelling in the two left-hand lanes the whole way down Granard Road". When asked whether he had swung back into the centre lane as he approached the Balham Road intersection, he said, "I would have veered my prime mover out at the intersection".

[16] The defendant was cross-examined about a statement he had given on 12 August 2006, three months after the accident. In that, he stated that he had stopped at the red light at the Balham Road intersection, intending to turn left into Balham Road. He had stopped in the middle of the left and middle lanes, and had turned his indicator on some 50 to 100 metres prior to stopping. He had seen the motorcyclist in his right mirror, directly behind the trailer. He had just commenced his left turn when the collision occurred. He estimated the speed of the motorcyclist at between 40 and 60 km per hour. His statement recorded that, after the accident, the motorcyclist kept asking where the driver of the truck was, but the defendant did not identify himself to him.

[17] Shortly after the accident, the defendant had been interviewed by Constable Duff. The defendant was cross-examined about the interview. Constable Duff gave evidence that the defendant said that he was coming down Granard Road; that he turned left into Balham Road; that he had to "swing out wide because I am oversize"; that the motorcycle "was in behind me. At the last minute he has pulled out and come down my left-hand side and hit my front left guard." Constable Duff asked the defendant when he had first seen the motorcycle, to which he replied "Up about McDonalds he was sitting in the left lane." Photographic evidence demonstrates that the McDonald's Restaurant is located on the northern side of Granard Road some distance before (to the east of) its intersection with Beatty Road.

[18] The defendant asserted that because he had a wide load, he was permitted by law to "take both lanes". He also asserted that, by reason of the sign on the back of the trailer, when making the left turn, he had right of way over any westbound vehicle to his left, provided the vehicle was further back than the rear of the trailer.

[19] There was evidence from the drivers of two vehicles, stationary in Balham Road, approaching Granard Road from the south. The learned primary Judge did not act on this evidence, primarily because of the limited opportunity these witnesses had to view relevant events, and there is no reason to take a different course on this appeal.

Findings on liability

[20] The learned primary Judge identified the difficulties both the plaintiff and the defendant had in assessing relative speeds and positions, because they were in moving vehicles. He accepted that the left-hand indicator lights were activated on both the prime mover and the trailer. His Honour expressed some reservation as to whether the plaintiff could have seen the indicator light half-way along the trailer, but held that the indicator light on the mudguard of the prime mover was visible to the plaintiff.

[21] His Honour accepted that, at one stage, the plaintiff was behind the prime mover, and that he had moved "to a point either behind it to its left or alongside it on its left hand side". He considered that the statement that the defendant had seen the plaintiff in his right-hand mirror had been erroneously recorded. His Honour noted the plaintiff's opportunity to observe the signs on the rear of the trailer, which should have placed the plaintiff on alert. He also held that the fact that the semi-trailer had slowed significantly should have alerted the plaintiff to the fact that the defendant was about to turn left in front of him.

[22] Reliance had been placed on s 28 of the *Transport Operations (Road Use Management – Road Rules) Regulation* 1999 (Qld) (*TORUM Regulation*). The

significance of this provision will be discussed more fully later. However, his Honour referred to the defendant's evidence that this provision gave him "right of way to make the left turn". His Honour was satisfied that the defendant was entitled to move from the middle lane when he sought to turn into Balham Road, but stated that this entitlement was "not absolute" and that the manoeuvre "must be exercised with care and with due observance of the circumstances obtaining at the time". His Honour considered the manoeuvre to be "an inherently dangerous one, notwithstanding that it was authorised by law". His Honour considered that the defendant had to remain "alert for other drivers who may not be complying with the rules of the road".

[23] His Honour considered that the plaintiff must have seen the warning signs on the rear of the trailer, and the indicator on the prime mover's mudguard. He rejected the plaintiff's evidence describing the manoeuvre of the prime mover and semi-trailer. He considered that under s 28(2) of the TORUM Regulation, the plaintiff "was obliged … to give way to the vehicle turning left". He also attributed liability to the defendant, on the basis that the defendant, "[k]nowing that the plaintiff was in a vulnerable position, …failed to keep him under observation or, at least, take extra care in turning". His Honour apportioned liability as to 70 per cent against the plaintiff, and as to 30 per cent against the defendant.

Appeal submissions on liability

[24] The plaintiff's submissions in the appeal drew attention to the defendant's evidence that he had seen the plaintiff travelling behind him in the kerbside lane. It was submitted that the defendant's failure to keep a lookout was the sole cause of the accident. It was also submitted that the learned primary Judge had failed to take into account some significant difficulties relating to the defendant's version of events, including the inconsistency between his evidence about his position on Granard Road, and the facts as pleaded in the defence; as well as his statement that he had been stopped at the traffic lights at Balham Road, before making the left turn.

[25] For the plaintiff it was also submitted that the defendant's statement to the loss assessor that he had seen the plaintiff in his right hand side mirror was consistent with the plaintiff's evidence that he had travelled some distance in the same lane as, and behind, the defendant; and that his Honour had incorrectly held the statement to be erroneously recorded.

[26] It was submitted that in view of the unreliability of the defendant's evidence, his evidence should not have been accepted; particularly any evidence that he had operated his left turning indicator in a timely fashion.

[27] It was further submitted that the warning signs on the rear of the semi-trailer were of no relevance, given that, until shortly before the collision, the semi-trailer was proceeding in the middle lane westbound on Granard Road.

[28] It was submitted that the left turn indicator did not provide proper warning of the defendant's manoeuvre. Further, the change of direction of the prime mover back towards the centre lane justified the plaintiff's decision to continue towards and through the intersection in the left-hand lane.

[29] It was submitted that the learned primary Judge erred in accepting the defendant's evidence that he could not have carried out the manoeuvre described by the plaintiff in a distance of 75 metres.

[30] Finally, it was submitted that the learned primary Judge erred in his reliance on s 28(2) of the TORUM Regulation, it being a condition of that Regulation that the driver carrying out the manoeuvre could safely occupy the lane next to the left-hand lane, and could safely turn left at the intersection by occupying that lane, or both that lane and the left lane.

[31] The defendant supported the judgment at first instance on the basis that the learned primary Judge had accepted much of the evidence of the defendant. In particular, it was submitted that the plaintiff had failed to keep a proper look out.

Conclusions on liability

[32] There is no acceptable evidence that the plaintiff was exceeding the speed limit. On the defendant's evidence, the plaintiff approximated the defendant's speed for most of the distance between Beatty Road and Balham Road; and the defendant's speed was not greater than 50 km per hour. On the plaintiff's evidence, his speed was similar to that of the defendant; although as he approached Balham Road it was slightly greater, as he was moving up beside the semi-trailer.

[33] There is no reason to disturb the learned primary Judge's finding that the defendant had activated his left turn indicator, shortly prior to the collision. However, there is no explicit finding as to the time before the collision, or the approximate place, at which this occurred.

[34] On the defendant's evidence, the plaintiff was in the left-hand, westbound lane before the defendant commenced to manoeuvre his vehicle to the left, preparatory to making the turn into Balham Road. That is consistent with the plaintiff's evidence.

[35] There is no reason to disturb the learned primary Judge's finding rejecting the plaintiff's description of the defendant's manoeuvre from the middle lane, halfway across into the left lane, and back fully into the middle lane, before commencing the turn into Balham Road. However, it is clear that the defendant carried out a manoeuvre which involved first moving to his left, and then back to his right, before the turn. It is likely that the manoeuvre to the right would be misleading to a person in the plaintiff's position, as to the defendant's intention. Moreover, such a manoeuvre is likely to lead a person in the position of the plaintiff to think that an indicator light indicated an intention to change lanes, which intention had been abandoned.

[36] It is now necessary to give fuller consideration to s 28 of the TORUM Regulation. It includes the following:[2]

> "**28 Starting a left turn from a multi-lane road**
>
> (1) A driver turning left at an intersection from a multi-lane road must approach and enter the intersection from within the left lane unless—
>
> (a) the driver is required or permitted to approach and enter the intersection from within another marked lane under section 88(1), 92 or 159; or
>
> (b) the driver is turning, at B lights or a white traffic arrow, in accordance with part 17, division 2; or
>
> (c) subsection (2) applies to the driver.

[2] Reprint 2F in force at 16 December 2005.

Maximum penalty—20 penalty units.

(2) A driver may approach and enter the intersection from the marked lane next to the left lane as well as, or instead of, the left lane if—

(a) the driver's vehicle, together with any load or projection, is 7.5m long, or longer; and

(b) the vehicle displays a do not overtake turning vehicle sign; and

(c) any part of the vehicle is within 50m of the nearest point of the intersection; and

(d) it is not practicable for the driver to turn left from within the left lane; and

(e) the driver can safely occupy the next marked lane and can safely turn left at the intersection by occupying the next marked lane, or both [lanes].

(3) In this section—

left lane means—

(a) the marked lane nearest to the far left side of the road; or

(b) if there is an obstruction (for example, a parked car or roadworks) in that marked lane—the marked lane nearest to that marked lane that is not obstructed.

marked lane, for a driver, does not include a special purpose lane in which the driver is not permitted to drive."

[37] There has been no suggestion that s 28(1)(a) or (b) applied.[3] In the present case, the availability to the defendant of s 28 depends upon the application of subsection (2). No issue arises from subsections (2)(a) and (b). It may be accepted that subsection (2)(d) has been satisfied.

[38] There is room for debate whether subsection (2)(c) has been satisfied. Some of the defendant's evidence suggests that he relied on the provision for much of the distance between Beatty Road and Balham Road. The defence would suggest that the turning manoeuvre commenced 100 metres back from the intersection.

[39] A more important issue arises under subsection (2)(e). It may be accepted that occupation of the middle westbound lane by the defendant's vehicle was, of itself, safe. The critical issue is whether the defendant could safely turn left at the intersection by occupying that lane, or that lane and the left-hand westbound lane.

[40] Difficulties with this issue commence with the fact of the accident itself. Absent some abnormal behaviour or erratic driving, the occurrence of the accident rather points to the fact that the turn could not be made safely.

[41] Beyond that, the defendant's own evidence shows that, as he approached the Balham Road intersection, he knew the plaintiff's motorcycle to be in the left-hand lane, either beside or a short distance behind the semi-trailer, and travelling at a speed similar to that at which the defendant was travelling. Even if the motorcycle were behind the defendant's vehicle, the fact that the defendant was slowing down was likely to reduce the distance between the vehicles, and increase

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[3] At the trial, the defendant relied on s 28(2) of the TORUM Regulation.

the risk of a collision. In those circumstances, the defendant could not safely make the turn, without permitting the plaintiff to pass, or satisfying himself that the plaintiff had slowed sufficiently so that the defendant could safely make the turn. Neither of those things occurred. The conclusion that the turn could not, in the circumstances, be made safely, is supported by his Honour's finding that the defendant's manoeuvre "was an inherently dangerous one", and by his attribution of liability to the extent of 30 per cent against the defendant.

[42] The defendant's reliance on s 28 of the TORUM Regulation was misplaced. The defendant was not authorised to approach and enter the intersection except from within the left-hand lane. It follows that his manoeuvre made for the purpose of turning left into Balham Road was not authorised.

[43] The learned primary Judge's reasons did not consider in detail the issues raised by s 28(2) of the TORUM Regulation. It follows from what has been said earlier that his Honour erred in finding that, by virtue of s 28(2), the defendant "was entitled to move from the middle lane when [he] sought to turn into Balham Road".

[44] The only provision of the TORUM Regulation identified by his Honour was s 28(2). It would be erroneous to find that the plaintiff was "obliged under the Regulation to give way to the vehicle turning left", if that finding were based on s 28(2). His Honour may have had in mind s 143 of the TORUM Regulation, prohibiting a driver passing to the left of a vehicle displaying a "Do Not Overtake Turning Vehicle" sign, if that vehicle is turning left, and is giving a left change of direction signal. To find a breach of this provision, it would have been necessary to make findings as to the relative positions of the motorcycle and the semi-trailer at the time when the defendant commenced to indicate, and to make, a left turn. No such findings were made.

[45] The observation of the learned primary Judge that the manoeuvre being undertaken by the defendant in turning left was an inherently dangerous one, is, with respect correct; all the more so if the manoeuvre were not authorised by s 28(2) of the TORUM Regulation.

[46] There remain, however, findings which point to contributory negligence on the part of the plaintiff, namely, the finding that the defendant's left turn indicator had been activated, and was visible to the plaintiff; and the finding that the defendant's vehicle was slowing down as it approached the Balham Road intersection (indicative of, at least, the possibility that the defendant's vehicle was not proceeding directly through the intersection along Granard Road, but might turn left). The significance of these matters is, however, affected by the fact that the defendant turned the prime mover to the right, even if only very briefly, before turning left to Balham Road. It is also affected by the fact that the final turn to the left must have occurred very shortly before the collision, leaving the plaintiff very little time at that point to take any evasive action.

[47] In the result, liability should be apportioned as to 75 per cent against the defendant, and 25 per cent against the plaintiff.

Quantum

[48] The plaintiff has confined his grounds of appeal insofar as they relate to the quantum of damages assessed by the trial judge to the failure to make any award under s 59 of the *Civil Liability Act* 2003 (Qld) for gratuitous services rendered to

him by his wife and mother-in-law, and his Honour's failure to award interest on the plaintiff's assessed loss of past earning capacity.

[49] The defendant concedes that interest on past economic loss ought to have been awarded (after taking into account the net WorkCover benefits received). In the event the appeal was otherwise unsuccessful, the plaintiff argued that the amount for interest, after apportionment, would not alter substantially the total award of damages being only $4,620. In that circumstance, the plaintiff contended, the appeal ought not be allowed.[4] The defendant paid $5,000 to the plaintiff on 11 February 2010 to satisfy this aspect of the claim which was accepted.

[50] In order to give some context to this part of the appeal some general observations should be made about the plaintiff's circumstances. As found by the trial judge:

> "[32] The injuries suffered by the plaintiff include a compressed comminuted fracture of the C5 vertebra, a subluxation of the left C5/6 facet joint, a fracture of the mid shaft to the right ulna and a fracture to the right femur.
>
> [33] There was also evidence that he suffered an adjustment disorder with mixed and anxiety and depressed mood.
>
> [34] The plaintiff was treated in hospital for three days. On release he was fitted with a halo brace and a full torso brace. The braces were worn for four months, after which he wore a soft collar for six weeks.
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> [35] In October 2006, the plaintiff started physiotherapy and, about four weeks after that, a course of hydrotherapy.
>
> [36] It is agreed between the parties that the injuries to the plaintiff's neck should be assessed as a "serious cervical spine injury" under item 86 of the fourth schedule to the Regulation. That provides for an Injury Scale Value of 16 to 40.
>
> [37] Dr Pentis's opinion was that the plaintiff has an impairment in the cervical region approximating a 20% whole person impairment.
>
> [38] In assessing the appropriate ISV for the plaintiff's injuries I need, in this case, to determine the dominant injury. This is clearly the injury to his neck. His other injuries were not the subject of any detailed comment and can be accommodated within the range allowed for the neck injury.
>
> [39] I have taken into account the following: the plaintiff's age (36 at the time of the accident, 41 today), the pain and suffering he endured and the inevitable degeneration that would have occurred had this accident not occurred, the level of adverse impairment and the injuries other than the neck injury.
>
> [40] According to the commentary to item 86 an RSV near the top of the range will be appropriate only if there is a whole

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4 *Elford v FAI General Insurance Co Ltd* [1994] 1 Qd R 258; [1992] QCA 41.

> person impairment for the injury of more than 25%. In a range which spans 24 points (16-40) I think that the appropriate RSV, after taking into account all matters referred to above, is 35. That realises an award under this head of $56,000.00."[5]

Gratuitous care

[51] The plaintiff alleged in his statement of claim that he "required gratuitous assistance and will continue to require gratuitous assistance for the remainder of his life" – a rather laconic pleading in light of the legislative threshold requirements in s 59 of the *Civil Liability Act*. The schedule to the statement of claim claimed $11,400 for past care and $10,000 for future care.[6] In its further amended defence the second defendant expressly challenged[7] that aspect of the claim as not meeting the thresholds in s 59. The plaintiff's amended reply merely affirmed the original statement of claim and schedule. This rather casual approach to a not insignificant aspect of the plaintiff's claim was reflected in the evidence (or paucity thereof) on this issue adduced at the trial from the plaintiff and his wife.

[52] Section 59 of the *Civil Liability Act* regulates the award of damages for gratuitous services provided to an injured person. It provides:

> "**59 Damages for gratuitous services provided to an injured person**
>
> (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

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5 AR 366-367.

6 However, in submissions at the end of the trial, the plaintiff claimed $125,825.40 for past care and $194,154.45 for future care.

7 AR 314-315.

> services because the injured person has been or is likely to be cared for in a hospital or other institution."

[53] In *Kriz v King*[8] the President, with whom Jerrard JA and Helman J agreed, said:

> "[18] Because s. 59 restricts a claimant's previously unfettered common law right to seek damages for gratuitous services, the section should only be regarded as limiting that common law right if it does so clearly and unambiguously … For that reason s. 59(1)(c) should be interpreted in the way which least diminishes a claimant's common law rights to damages for gratuitous services. Giving the words their ordinary meaning and applying that important principle of construction, it is my view that s. 59(1)(c) of the Act has the effect that damages for gratuitous services are not to be awarded unless the services have been provided or are to be provided for both six hours per week and for at least six months; once that threshold is met then damages for gratuitous services can be awarded even if the services thereafter are provided or are to be provided for less than six hours per week."[9]

So, as was plain from the terms of s 59, what the plaintiff had to demonstrate were services "for at least six hours per week" and "for at least six months". At trial the plaintiff relied on his own evidence, that of his wife, and particularly, the reports and the oral evidence of Ms Lesley Stephenson, an occupational therapist.

[54] In his reasons the trial judge noted the requirements of s 59 and said:

> "[55] … I accept that there was a need for intensive care for the four months following the accident. That care though diminished once the plaintiff was removed from the braces which had been applied."[10]

Of Ms Stephenson's evidence (and reports) his Honour said:

> "[57] Evidence from an occupational therapist was called for the purposes of demonstrating how much care would have been necessary during the period following the accident. The assessment given by Ms Stephenson falls into a familiar category. While I do not doubt that she held the views expressed in her report, they must be considered in light of a number of matters, not least that they are based entirely upon the recollections and history provided by the plaintiff and, then, her assessment of what would have occurred in the circumstances of this particular family.
>
> [58] The submission on behalf of the defendants was that Ms Stephenson's evidence with respect to items such as meal preparation, dishwashing, shopping, cleaning, laundry, and home maintenance was unsatisfactory. I agree. In

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8 [2007] 1 Qd R 327; [2006] QCA 351.

9 At 332-333.

10 At 369.

> arriving at her conclusions, Ms Stephenson appears not to have taken into account that there were other members of the household (apart from the plaintiff's wife there were three children in the family) and there is nothing to suggest that anything additional was required to be done, for example, for meal preparation, to that which would have been done for other members of the household. Her failure to take that into account applies to many, if not all, of the matters I have listed above and, in doing so, results in an overestimate of the time which can properly be ascribed to the needs of the plaintiff.
>
> [59] I do not accept her evidence with respect to the four month period following the accident and I find that the plaintiff has not demonstrated that the threshold established by s 59 of the Act has been crossed. It follows that the claims for care are not maintainable."[11]

[55] On appeal the defendant supported this approach arguing that little was added to the domestic burden by the need to prepare meals and otherwise run a household which included the injured plaintiff much of which the plaintiff had done prior to his injuries.

The evidence

[56] The plaintiff was taken to the Princess Alexandra Hospital by ambulance on 12 May 2006 and discharged home on 18 May. He had many re-admissions for adjustments to his braces and for their ultimate removal. He was treated for a fractured right fibula, a severe laceration to the right forearm, shoulder abrasions and an avulsion fracture of the right ulna. His most serious injury was a burst fracture at C5. A traction device was attached to his skull for three days and he was then encased in a full torso brace including a halo brace screwed to his skull. He was taught how to walk with his legs in plaster and wearing the brace. He wore the brace for three and a half months.[12]

[57] The defendant does not dispute the plaintiff's need for extensive care during this period rather it is the period after the brace was removed which is in contention.

[58] While the plaintiff was in the halo brace he could do almost nothing for himself. He described the device as like having "a big steel cage around [his] head".[13] The pin sites needed cleaning three times a day. He needed assistance to get in and out of a chair, out of bed and toileting (for two weeks). He could not lie down to sleep. He was unable to prepare any meals or perform any other personal tasks for himself. After the halo brace was removed he wore a hard collar and then a soft collar. He was able to attend to his own personal care thereafter with some assistance.

[59] The plaintiff was asked in cross-examination by Mr S C Williams QC about what he had told Ms Stephenson, the occupational therapist:

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11 AR 370.

12 Derived from the report of Dr John Pentis of 14 September 2006, AR 205, where he described the appellant as wearing a soft collar for his neck when he saw him on 5 September 2006. The parties and the judge assumed four months.

13 AR 32.

> "Did you on each of those occasions give her information as to the period that you required some assistance? -- I can't remember. I can't recall but I probably would have.
>
> Anyway, if you gave her an indication of those times as to what assistance you required, that would have been true? -- I'm not sure."

The plaintiff was not challenged about the content of Ms Stephenson's reports in so far as she purported to set out the plaintiff's domestic needs and the time taken to fulfil them as he had related those needs to her, although Ms Stephenson was challenged about the basis for her estimates. The plaintiff was asked very few questions in evidence-in-chief about these matters, and he was not asked to affirm Ms Stephenson's reports insofar as they relied on information obtained from him.

[60] The plaintiff first consulted with Ms Stephenson on 7 December 2006, nearly seven months after the accident. He reported constant pain in many areas of his body – his neck, occipital area, numbness in his arms, headaches where the steel brace was attached, in the muscle in the back of his right knee and inside his right calf and low back pain. He told Ms Stephenson he could stand for up to 10 minutes statically or 30 minutes dynamically with increased pain. He experienced pain reaching up.

[61] Under the heading "Activities of Daily Living" Ms Stephenson wrote:

> "Dressing
> He is independent in dressing, though he needed help with all dressing tasks for the five months when wearing a brace. He still has difficulty on donning lower limb garments as this involves bending; he tends to sit and lift his feet up to his torso. He said he worries about his independence in these tasks as it is unlikely he will continue to be so flexible when he is older.
>
> Toileting
> His father connected safety rails in the toilet for him. He is now independent in toileting.
>
> Bathing
> His father connected safety rails in the shower for him. He could not get in or out of a bath; this would be too dangerous. He is mostly independent in bathing, though he cannot wash his back. He is able to wash his legs and feet with difficulty; by holding fixtures and lifting his legs up to his torso, he is able to reach them without bending.
>
> Personal Care
> He is able to cut his toenails with difficulty; he sits and lifts his feet up to within arm-reach and cuts them without looking, so to avoid bending his neck. His daughter helps him to cut his toe nails.
>
> Eating
> He is independent in eating and can mostly cut his own food; however, he could not carve a large piece of meat.
>
> Shopping/Food Preparation
> He cannot do shopping.
>
> He is able to reach food and equipment on high shelves, but not if they are so high that he needs to stretch up, as this aggravates his

> neck pain. He can reach food and equipment on low shelves with difficulty, by squatting.
>
> He is able to do some light meal preparation, with difficulty. He is able to pour from a bottle or kettle only quickly because bending (to watch where he is pouring) aggravates his neck pain. He occasionally helps with frozen meals but cannot stand at a bench and flex his neck to chop foods. His oven is at a low height and he cannot safely put a dish into it, or take one out.
>
> He used to do meal preparation.
>
> Cleaning
> He cannot do cleaning because of the strain on his neck when looking down and using his arms for strenuous tasks. Even small tasks, like scraping more than a few dishes, aggravate his neck pain.
>
> Laundry
> He cannot do laundry tasks because of the bending and lifting involved; he has too much neck pain to do laundry tasks."[14]

[62] Ms Stephenson prepared a table to show how much assistance with domestic tasks the plaintiff required for "5 months post injury". Perhaps this was to reflect her understanding that he wore the brace for that length of time; or, it may be an error because in the table Ms Stephenson refers to four months post-accident which is the period that seems to have been accepted at trial by both parties and the judge that the plaintiff wore the brace(s).[15]

Task	**Person who helped**	**Initial 4 months post-accident**	**From 4 months post-accident,** *continuing indefinitely*
Dressing	Partner	30 minutes per day	5 minutes per day
Bathing	Partner	20 minutes per day	-
Wound Care	Partner	35-45 minutes per day	-
Hair-washing	Partner	10 minutes per day	-
Toenail cutting	Daughter	10 minutes per month	10 minutes per month
Cutting Food	Partner	5 minutes per day	-
Chair Transfers	Partner	30 minutes per day	-
Bed Transfers	Partner	10 minutes per day	-
WC Transfers	Partner	20 minutes per day for 2 weeks only	-
Meal Preparation	Partner	1 hour per day	1 hour per day
Dish-Washing	Partner	20 minutes per day	20 minutes per day
Shopping	Partner	1 hour per week	1 hour per week
Cleaning	Partner	2-3 hours per week	2-3 hours per week
Laundry	Partner	2-3 hours per week	2-3 hours per week
Home Maintenance	Brother	30 hours per year	30 hours per year
Lawn Mowing	Hired *Jim's Mowing*	$30 / fortnight	$30 / fortnight

[14] AR 227-228.
[15] See [34] below.

Task	**Person who helped**	**Initial 4 months post-accident**	**From 4 months post-accident,** *continuing indefinitely*
Vehicle Maintenance	Hired mechanic	10 hours per year	10 hours per year
Car-Washing	Drive-Thru	$16 / 3 weeks	$16 / 3 weeks
Driving	Partner and Mother-in-law	2 hours per week	2 hours per week
Accompanying to medical appointments	Partner	3-4 hours per week	2-4 hours per week
Household Affairs (eg., paying bills)	Partner	30 minutes per week	30 minutes per week
Baby-sitting	Mother-in-law	8 hours per day	5 hours per week

[63] Mr Williams submitted that of those items, meal preparation, dish washing, shopping, cleaning and laundry were activities which the plaintiff's partner would have undertaken for the family in any event and that the extra time attributable to him was negligible. He challenged the amount for lawn mowing, vehicle maintenance and car washing as they had been paid and ought to have been claimed as special damages. He contended that there was no evidence from the plaintiff or from any other source about the period devoted to paying household bills (or whether it was something which the plaintiff had undertaken previously); and baby sitting carried out by his mother-in-law, was not his need. The submission was that only 1 hour 19.5 minutes per week was care which fell within s 59.

[64] The plaintiff attended a second consultation with Ms Stephenson on 26 February 2009. He reported that he required support from his wife and mother-in-law for transport to and from medical appointments described as two hours a week for seven months.[16] Some of the times recorded were not consistent with those set out in Ms Stephenson's first report. She accepted that the earlier estimates were more likely to be accurate being closer in time. The plaintiff did confirm that he needed support from his wife to transport him to and from doctors' appointments. In the earlier report Ms Stephenson had noted[17] that in December 2006 the plaintiff was attending appointments on most days such as for physiotherapy and to see a psychologist and noted that he took a taxi or his mother-in-law drove him. The estimate for that assistance was three to four hours per week in the four months post-accident and two to four hours per week after that period and "continuing indefinitely".

[65] There was no particular cross-examination about these estimates. The unchallenged evidence indicated that the plaintiff consulted with or received treatment from many specialists such as physiotherapists, psychologists, psychiatrists and numerous follow-up visits to the Princess Alexandra Hospital after he was discharged.

[66] Ms Stephenson was cross-examined about how she allocated time to the plaintiff's needs. Mr Williams asked Ms Stephenson:[18]

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16 AR 247.
17 AR 227.
18 AR 79.

> "I take it the estimates that you have offered there in relation to his partner's participation relate to her work for the household in total rather than specifically for Mr Shaw? -- I would say that if you also consider children that I would – I would take these as being very conservative estimates of more for an individual [than] if you take into account extra care of children, that would go up.
>
> Well, if you just assume for the present that I am interested in isolating -----? --Yes.
>
> ----- what Mr Shaw's accident related needs for care were? -- Yes, yes.
>
> Now, in terms of Mr Shaw's accident-related needs -----? -- Yes.
>
> -----and the manner in which they were satisfied-----? -- That's correct, yes.
>
> -----one wouldn't spend two to three hours per week doing his laundry?-- Well, that even takes into account – you could easily do that because it takes into account a couple of loads of washing. You have to wait for the washing to run through its cycle. You then hang it out. You have to get it off the line and you have to iron it and very minimum that takes for a person in a house two hours, up to three hours when you are doing ironing. So I think that's a very reasonable estimate for one person, that you could more or less say that every person in the household is going to contribute at least another hour to that. If there's six or seven people in a household you will add an extra hour per person onto that base amount. So that's – this is very much trying to isolate his needs when I was considering the domestic – I am happy to go through each of them and discuss it on that basis with you."

[67] Mr Williams continued to press Ms Stephenson about the allocation of time for the plaintiff alone in her assessment of his domestic needs. He complained that it was inappropriate to factor in waiting time for the laundry cycle to complete. She answered:

> "Yes, but if you get a commercial cleaner in and you ask them to do your laundry and your household cleaning, it will always increase the time – you know, a cleaner might come in and do your house in a couple of hours but by the time they put loads of washing on and wait for it to go through its cycle and put it out, it definitely increases the commercial domestic cleaning time because of the waiting time. So while you can simultaneously do things, there's definite waiting time with laundry, and if you are also waiting like a person with a spinal injury and a chronic neck pain that can't reach up and take clothes off the line and you are waiting for the clothes to dry, the person would either have to go away and do a split shift and come back and get them at another time or you'd have to get a second person to pull the washing in. So I don't think it's an unreasonable allocation."[19]

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19 AR 79-80.

[68] Mr Williams then turned to the analysis of tasks which were done for other members of the household at the same time. Ms Stephenson responded:

> "… I would say meal preparation for a family is probably more like an hour and a-half. Dishwashing for the family, that would probably be another 10 to 20 minutes if there's a big family. It definitely increases things. Shopping, if there's a huge amount of shopping like children in the family and you might have to go shopping more often for fresh things, you could be looking one to two hours a week, or at least one and a-half hours a week. Cleaning, if there's a lot – if the children are not helping much, they're still young, you can easily go up to four to five hours a week just tidying toys, you know, cleaning up after games, et cetera, et cetera. Laundry, I think it would go up to four to five hours more realistically, even six hours for children, especially if there's school uniforms involved. So each one is slightly different but they're definitely more than what I have estimated. *We're trying very much to isolate a person – imagining the person as a unit in a house by themselves and that would be my estimate of what's basically required in that postinjury care scenario.*"[20] (emphasis added)

Mr Williams challenged Ms Stephenson that she was adding 50 per cent for the other members of the household to each of her estimates but she responded that it was her experience of what it took with children.

[69] It appeared from the cross-examination that the respondent accepted the amount in the schedule for care for the period whilst the plaintiff was in the halo brace. Ms Stephenson thought that four months was an unrealistic period for soft tissue healing and there would be a further period of about three months before the plaintiff would become independent.

[70] Again, when challenged about her allocation of time in a family situation she responded:

> "So he's still the person who, if he were living alone by himself, my estimates are based on what it would take if he was alone by himself and, you know, you might be able to, you know, cut it up different ways by saying, you know, that extra people will cut it down but with meal preparation you either require it or you don't and he definitely couldn't do it for himself in that period which means that for a very basic meal to be prepared, if you're looking at really three meals a day like preparing snacks for breakfast, lunch and dinner, it's more realistically two hours a day for a single person but an hour a day I think is a very reasonable estimate for a fast meal being prepared at night and a bit of help with other meals in the day, so I don't think it's unrealistic, and then if children require help, they will come home from school and they will need snacks made and drinks made and cleaning up after that and then extra time at night, extra food, extra chopping, extra preparing and whether it's by 50 percent or not, it definitely will take longer than what I've put there."[21]

[71] The plaintiff's wife gave evidence. Mr R Myers, for the plaintiff, asked her about the care she gave her husband:

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[20] AR 80.

[21] AR 81.

> "Would you tell his Honour what you had to do in terms of John's care after his return home? -- I had to do all aspects of personal care. So I had to take care of him, I had to make his meals. He mostly stayed in bed and then, I'm not sure, I think it was about six months later, he got a blue recliner chair, and he'd sit in that then but mostly it was -----
>
> All right. Before-----? -- lying in bed, but it wasn't really lying because his head never touched the pillow, so.
>
> All right. And just explain to his Honour, will you, what duties you had to perform in terms of the halo brace. What was needed to be done on a day-to-day basis? -- He had to – he had to clean around the wound every day, I think it was at least twice a day, with a water solution and bobby – bobby pins I was going to say – cotton wool buds, he had to clean around it. He had – the halo brace had a sheepskin underneath it and it – you know, after two weeks of it, it just – it was in summer, too, and it just really smelled. So I tried to put the washer underneath there and sort of wash it and then get a towel and make sure it was really dry, put some powder down there, but, you know, I done the best I could.
>
> All right. And, Mrs Shaw, tell me this, on, say, looking at the time that you spent, in that early period when John was still in the halo brace, how many hours a day would you spend on caring for him or doing duties such as meal preparation and cleaning which prior to the 12th of May 2006 he had done? -- I'd say at least – at least six hours a day.
>
> All right. Now, how long did that continue for? -- Four to five weeks. Then he slowly – well, he was still pretty -----
>
> Sorry? -- I mean, the whole time he had the brace on he wasn't himself. Even now he's not himself. But I can't – I don't know how long I would have spent."[22]

[72] Mr Williams submitted on appeal that some of this questioning (about tasks done previously) was based on an incorrect premise, that is, what had to be established were the plaintiff's needs arising as a consequence of his injuries that had to be done *for him* rather than what he did around the house prior to his injuries and could no longer do. To some extent that is correct, but s 59(2) precludes damages being awarded for gratuitous services if those services were provided prior to the injuries. For example, if a spouse solely did the meal preparation before the plaintiff was injured there could be no claim for that service after. However, Mrs Shaw said that her husband contributed domestically just as much as she and as he loved cooking he had largely taken over that task prior to his accident as well as doing yard work.[23] Mrs Shaw explained that her husband cooked the family meals about three times a week by the time of trial and was able to do a few minor domestic tasks. She was asked nothing in cross-examination about her care of the plaintiff.

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22 AR 91.

23 The appellant gave similar evidence and that he had done home maintenance, at AR 31-32 and AR 60.

Discussion

[73] The *Civil Liability Act* was introduced in 2003. The requirements for any award of damages for gratuitous services provided to an injured person thereafter are clear:

- the services must be necessary;
- the need must arise solely out of the injuries;
- the services were provided for at least six hours a week for at least six months after the injury.[24]

Accordingly, a plaintiff who includes a claim for damages for gratuitous care must adduce sufficient evidence to meet each of those thresholds. It has been a long-standing practice that solicitors advise clients making a claim for damages for personal injury, particularly where the claim includes a component for gratuitous care, to keep a weekly diary recording tasks and time to perform them by family members. As this case has demonstrated, failure to have some system, because of the requirements of s 59, may mean that a deserving plaintiff may not cross those thresholds.

[74] The meaning to be attributed to gratuitous services in the legislation is its meaning at common law. In *CSR Ltd v Eddy*[25] Gleeson CJ, Gummow and Heydon JJ discussing generally the development of the law in Australia on the recovery as damages of the provision of gratuitous care to an injured plaintiff, confirmed that:

> "… in a claim for personal injury the plaintiff was entitled to recover an amount equivalent to the commercial cost of nursing and domestic services which had been provided in the past and would be provided in the future by the family or friends of the plaintiff."[26]

And that:

> "… the true basis of the claim was the need of the plaintiff for the services; that the plaintiff did not have to show that the need was or might be productive of financial loss; and that the plaintiff's damages were not to be determined by reference to the actual cost to the plaintiff of having the services provided or by reference to the income foregone by the provider, but by reference to the cost of providing those services generally in the market."[27]

[75] Their Honours continued:

> "However, the *Griffiths v Kerkemeyer* line of cases does not turn on a "post-accident" or an "accident-created need" in the abstract. In *Van Gervan v Fenton* Mason CJ, Toohey and McHugh JJ said: "the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff *for those services provided for him or her*". That passage was concurred with by Brennan J and quoted with approval by Gaudron J. When later in their judgment Mason CJ, Toohey and McHugh JJ referred to "need", it was to "need" in that sense. Thus they immediately thereafter asserted the proposition that "it is the need for the services which gives the plaintiff the right to an

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24 *Kriz v King* [2007] 1 Qd R 327 at [18]; [2006] QCA 351.
25 [2005] HCA 64.
26 At [6].
27 At [7].

> award for damages". They reiterated it later when they spoke of "the services required by the injured person" and "the services which the plaintiff reasonably needs". Although Dawson J did not agree with the majority's approach in *Van Gervan v Fenton*, he accepted in *Kars v Kars* that the basis of *Griffiths v Kerkemeyer* was that a "plaintiff receives the value of services voluntarily provided by way of damages as compensation for the loss suffered by reason of the injuries which manifest itself in the form of a need for those services", and what was in issue was "the voluntary provision of services *to* a plaintiff". The majority in *Kars v Kars* (Toohey, McHugh, Gummow and Kirby JJ) described the principle as permitting recovery of damages "in respect of the cost to a family member of fulfilling the natural obligations to attend to the injuries and disabilities caused *to* the plaintiff by the tort." …"[28]

[76] Mr Williams submitted that the trial judge was correct to reject Ms Stephenson's evidence because she did not differentiate between domestic activity for the whole family and assistance to the plaintiff in respect of the tasks for which damages were claimed. That is not correct, as the passages from the trial transcript, set out above, make plain. Mr Williams was also concerned that Ms Stephenson took a commercial approach to the care needed by the plaintiff rather than dissecting this particular family, working out the hours devoted to him alone as best that might be achieved, and applying a commercial rate to those hours.

[77] While it is true that it will be necessary to assess the needs of a plaintiff in the context of his own situation, nonetheless, in regarding the injured plaintiff as an isolated unit whose injuries generate a need for services to him, the approach in *Van Gervan v Fenton*[29], confirmed in *CSR v Eddy*[30], is by reference to the *cost of providing those services generally in the market*. It would not, therefore, appear consistent with that authority to argue that in a family context a shorter period of time would (or should) be devoted to a plaintiff's needs when consideration is being given to group tasks than the market cost of servicing those needs. Sensibly that assessment must be done on the basis of satisfying those needs as a single unit. This must be so, even more compellingly, when considering future care. Families break down, illness in a partner might intervene, children's needs change and so on. There was a tendency, evident on the appeal, of substituting the lawyers' personal understanding (or, more accurately, lack of understanding) about domestic tasks, rather than to defer to an acknowledged expert in the area. There was no sound reason advanced to depart from the model proposed by Ms Stephenson.

[78] The trial judge was, with respect, incorrect in several conclusions he reached about the gratuitous care claim. He said:

> "… While I do not doubt that [Ms Stephenson] held the views expressed in her report, they must be considered in light of a number of matters, not least that they are based entirely upon the recollections and history provided by the plaintiff and, then, her assessment of what would have occurred in the circumstances of this particular family."[31]

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28 At [20].

29 (1992) 175 CLR 327; [1992] HCA 54.

30 [2005] HCA 64 at [7].

31 AR 370; Reasons [57].

While the plaintiff's answer in cross-examination set out above[32] was not a robust affirmation of what he told Ms Stephenson, it was never contended that he exaggerated his evidence or was untruthful in any particular. He had sustained serious and disabling injuries. The recital of his pain and physical (and emotional) deficits to doctors was not questioned. The court could, in those circumstances, be reasonably satisfied that the plaintiff's injuries required care of the kind described.[33] There was no reason for Ms Stephenson not to rely on what he told her. It was unnecessary for her to have spent time in that particular household observing and analysing.

[79] The second error was to contend that Ms Stephenson did not take into account that there were other members of the household.[34] The passages from her evidence at trial as set out above[35], demonstrate that Ms Stephenson did approach her task with the plaintiff as an individual in mind in assessing his needs.

[80] His Honour said he did not accept Ms Stephenson's evidence with respect to the four month period following the accident and concluded that the plaintiff had, thus, not demonstrated that the threshold in s 59 had been crossed. However, the defendant did, apparently, accept Ms Stephenson's evidence and that of the plaintiff and his wife as to his needs for the three and a half to four month period while he was wearing the brace and his Honour does not make clear why he did not.

[81] Since there has been error, it is, therefore, necessary to attempt to assess the plaintiff's damages for gratuitous care, if it can be done, from the evidence without the benefit of detailed findings by the trial judge on this head of damage. Much of the evidence has already been mentioned. The plaintiff wore a halo brace likely for three and a half months after he was discharged from hospital. Dr J Pentis in his report of 14 September 2006 wrote that when he saw the plaintiff on 5 September 2006 he was wearing a soft collar. The plaintiff gave evidence that he wore a hard collar when the halo brace was removed and then a soft collar. In that early period, as set out in the reports, the collar was only removed for showering. Dr Pentis reported[36] that the plaintiff continued to suffer from frontal and occipital headaches; could not lift and had difficulty bending and twisting. The range of movement in his neck was poor in all directions and he experienced pain on attempting it. When the plaintiff saw Dr Pentis on 14 September 2010 his neck was still stiff and he suffered constant headaches, front and back and in the neck with tightness in the region. He experienced difficulty in twisting and turning and with driving. Lifting was a problem. His hiatus hernia was reported as precluding him from taking a lot of medication for his neck pain. He experienced paraesthesia in his upper limbs and hands and outer aspect of his left leg. He undertook light activities "if he can cope". He was recommended to avoid strain in the upper limb girdle.[37]

[82] Ms Stephenson in her report dated 8 December 2006 described the plaintiff's neck pain as follows:

> "He has pain to the base of his neck and in the occipital area. The pain extends to the back of his skull. [The plaintiff] said that

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32 At [12].

33 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 per Dixon J.

34 AR 370; Reasons [58].

35 A[19]-[21] and [23].

36 Report 15 September 2006; AR 205.

37 AR 216-217.

> when he sits upright and keeps his head very still, he has less pain in his neck, but "any movement at all" aggravates his neck pain. Static neck flexion aggravates his neck pain. He has sharp pains in the back of his neck on bending forward. Sleeping is particularly difficult due to this pain and he wakes a lot during the night. He has worse numbness in the arms at night and this causes sleep disturbance.
>
> He uses hot packs, a TENS machine, hot showers and medication to ease this pain.
>
> He has tried to not use pain medication as he does not feel like himself. Also, he said he is afraid that he will get used to them over time."[38]

The plaintiff told Ms Stephenson that where the steel braces had been attached he had headache pain around his forehead and localised pain at the back of his head which was constant. He experienced an aching pain in the muscles in the back of his right knee and inside his right calf. The pain in his lower back was aggravated by walking.

[83] Ms Stephenson described the plaintiff's activities of daily living[39] noting that he was independent in dressing but needed help with all dressing tasks while he was wearing the brace. When he saw her in December 2006 he had difficulty donning lower limb garments as it involved bending. Because a family member had connected safety rails he was then independent in toileting and showering although both were difficult. His daughter assisted him to cut his toenails. He was largely independent for eating. He was unable to do shopping. He could do some light meal preparation with difficulty. He occasionally helped with frozen meals but could not stand at a bench and flex his neck to chop food. He could not safely put a dish into or take it out of the oven. Prior to his injury, as he said in his oral evidence, the plaintiff used to do meal preparation. He was unable to clean because of the strain on his neck when looking down and using his arms for strenuous tasks. Ms Stephenson noted that even small tasks like scraping more than a few dishes aggravated his neck pain. The plaintiff was unable to do laundry tasks because of the bending and lifting involved. He told Ms Stephenson he could not do home, vehicle or garden maintenance because of neck pain on flexing his neck, bending or using his arms for strenuous tasks. He noted that his then partner, now his wife, managed the finances (but did not say if he had done so prior to the accident).

[84] As has been discussed above, Ms Stephenson approached the task by isolating the requirements for the plaintiff as an individual in making an assessment of the number of hours of assistance required. Against the uncontroverted evidence of the plaintiff, albeit as related to Ms Stephenson, and, to a lesser extent Dr Pentis, about the level of pain which he experienced and the limitations which it had on his activities, the following table reflects what should be allowed and this, in turn, may establish if the plaintiff has met the thresholds in s 59 of the *Civil Liability Act.*

(i) From 18 May 2006[40] *to early September 2006 (removal of halo brace), say, 3.5 months*

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38 AR 221.

39 AR 227.

40 The period of care in the Princess Alexandra Hospital must be excluded from the calculations, s 59(3).

Activity	Time Spent	Hours per week
Dressing	30 minutes per day	3 hrs 30 mins
Bathing	20 minutes per day	2 hrs 20 mins
Wound care	35-45 minutes per day (allow 40 minutes)	4 hrs 40 mins
Hair washing	10 minutes per day	1 hr 10 mins
Toenail cutting	10 minutes per month	
Cutting food	5 minutes per day	35 mins
Chair transfers	30 minutes per day	3 hrs 30 mins
Bed transfers	10 minutes per day	1 hr 10 mins
WC transfers	20 minutes per day (2 weeks only) (not included)	
Meal preparation	1 hour per day	7 hrs
Dishwashing	20 minutes per day	2 hrs 20 mins
Shopping	1 hour per week	1 hr
Cleaning	2 – 3 hours per week	2 hrs
Laundry	2 – 3 hours per week	2 hrs
Home maintenance	30 hours per year	35 mins
Driving	2 hours per week	2 hrs
Accompanying to medical appointments	3 – 4 hours per week	3 hrs
TOTAL		**36 hrs 50 mins**

[85] The plaintiff had claimed lawn mowing, vehicle maintenance and car washing expenses but these were paid for and therefore constituted special damages which could have been claimed under that head. These were activities which the plaintiff did prior to sustaining his injuries and could no longer do, they related to his needs and were productive of financial loss. Baby sitting while his wife worked, which he formerly did, and which, after his injuries was performed by his mother-in-law, was claimed but was not then recoverable on the principle enunciated in *CSR v Eddy*.[41] Amendment to the *Civil Liability Act* now permits some recovery for gratuitous services formerly provided by an injured person[42], but is not retrospective.

(ii) From removal of halo brace to approximately 18 November 2006, say 2.5 months

Activity	Time Spent	Hours per week
Dressing	5 minutes per day	35 mins
Toenail cutting	2.5 minutes a week (not included)	
Meal preparation	1 hour per day	7 hrs
Dishwashing	20 minutes per day	2 hrs 20 mins
Shopping	1 hour per week	1 hr
Cleaning	2 – 3 hours per week	2 hrs
Laundry	2 – 3 hours per week	2 hrs
Home maintenance	30 hours per year	35 mins
Driving	2 hours per week	2 hrs

41 (2005) 226 CLR 1; [2005] HCA 64.

42 *Civil Liability Act* 2003 (Qld), ss 59A, 59B, 59C and 59D.

Activity	Time Spent	Hours per week
Accompanying to medical appointments	2 – 4 hours per week	2 hrs
TOTAL		**19**

[86] The plaintiff, accordingly, met the threshold of six hours a week for six months as required by s 59 of the *Civil Liability Act* and ought to have been awarded damages for gratuitous care.

[87] It is convenient, before turning to the calculations, to deal with the balance of the period. As established in *Kriz v King*[43], once the threshold has been reached damages may be awarded even if less than six hours a week are provided.

(iii) From 18 November 2006 to trial submissions on 30 September 2010

[88] The plaintiff saw Ms Stephenson on 26 February 2009 for an updated medico/legal report. He told her of continuing pain in his neck, exacerbated by heavy lifting. He also reported low back pain exacerbated by sitting for long periods. He told Ms Stephenson of headaches on a daily basis, changing only in severity. The pain extended to the back of his head and behind his eyes. That pain was exacerbated by sudden head and neck movement, for example, when driving and conducting over shoulder checks in traffic. However, his numeric pain response showed[44] that he had days when the pain was weak or not experienced at all. The greatest limitation was in the plaintiff's neck where he had severe restriction of movement. He was able to drive himself, he reported, for up to an hour. Up to seven months after the accident the plaintiff required assistance of the kind set out above at (ii). Thereafter he required some assistance with house cleaning, shopping and house maintenance. He was able to do the cooking for the family (and thus himself) only three times a week.

(iv) From trial for the future

[89] The plaintiff will require, for the future, domestic assistance of the kind described above for three hours per week. He can now manage most other domestic activities albeit slowly and often in some pain. The requirement in the legislation is that the services are "necessary".

Calculations

[90] Ms Stephenson provided commercial rates which were not contested by the plaintiff below or on appeal. Personal and domestic assistance was identified as costing $34.00 per hour in 2006 and $37.25 in 2009. When the higher was introduced was not identified, so it is assumed to be from 2009. Using the hours mentioned above produces in the following:

Period		Calculation	Total $
(i)	18 May to early September 2006 – 3.5 months	37 hours per week for 3.5months	17,612.00
	Plus WC transfers	4.5 hours	153.00
(ii)	From early September 2006 to 18 December – say 3.5 months	19 hours at $34 per hour	9,044.00
(iii)	From 18 December 2006 to 30 September 2010 (trial)	3 hours per week for 197 weeks	20,493.75

[43] [2007] 1 Qd R 327; [2006] QCA 351.

[44] AR 241.

Period	Calculation	Total $
	(156 weeks at $34 per hour, 41 weeks at $37.25 per hour)	
Total		**47,302.75**

Future care

[91] This should be confined to domestic assistance for three hours per week for a life expectation of 37 years at five per cent interest with a multiplier of $894: $99,904.50. That amount should be discounted for the vicissitudes of life and a round figure of $80,000 be awarded.

[92] The plaintiff should be awarded $47,302.75 for past gratuitous care and $80,000 for the future. There is no entitlement to interest on past gratuitous care damages.[45]

Interest on Past Loss of Earning Capacity Damages

[93] The defendant has conceded the plaintiff's entitlement to this interest. After deducting the net WorkCover benefits[46] of $57,038.34, $129,326.66[47] attracts interest at five per cent per annum over four years and four months amounting to $28,020.78. The amount of $5,000 has been paid by the plaintiff in respect of this aspect of the appeal and must be brought into account leaving an amount of $23,020.78.

Summary of quantum

[94] His Honour awarded damages of $790,233.85 to the plaintiff before apportionment noting that the insurer was "entitled to a refund from the net judgment after contribution of $4,000" pursuant to s 51 of the *Motor Accident Insurance Act* 1994 (Qld). That seems to be a reference to rehabilitation expenses to Axiom College. Section 51 provides a method for this expense to be recovered. Because it was mentioned in the judgment it may be assumed that the second respondent complied with the s 51(4) explanation to the plaintiff requirement. By s 51(9A), the expense is deemed to be the injured person's expense and allowed. If there is a reduction because of contributory negligence the quantum of the expense is set off after apportionment. His Honour's total before apportionment of $790,233.85 does not include this expense of $4,000 which should be added in. Damages additional to those awarded below are:

Interest on past economic loss		$23,020.78
Past gratuitous care		$47,302.75
Future gratuitous care		$80,000.00
Rehabilitation expenses		$ 4,000.00
		$154,323.53
	plus	$790,233.85
		$944,557.38

The figure of $944,557.38 must be apportioned to reflect the plaintiff's contributory negligence of 25 per cent giving a figure of $708,418.04 from which must be set off the $4,000 for rehabilitation expenses. The final figure is $704,418.04.

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45 *Civil Liability Act* 2003 (Qld), s 60(1)(b).

46 The parties' representatives provided this figure after the appeal hearing at the request of the Court.

47 $186,365 - $57,038.34 = $129,326.66.

Orders

1. Allow the appeal.

2. In lieu of order 1 made below, order that judgment be entered for the appellant (plaintiff) against the respondent (second defendant) in the sum of $704,418.04.

3. Affirm the order for costs made below.

4. The second respondent pay the appellant’s costs of and incidental to the appeal.