SUPREME COURT OF QUEENSLAND

CITATION:	*Hunt v Lemura & Anor* [2011] QSC 378
PARTIES:	**CARLA LOUISE HUNT** (Plaintiff) v **CARL SEBASTIAN LEMURA** (First Defendant) **AUSTRALIAN ASSOCIATED MOTOR INSURERS (ACN 004 791 744)** (Second Defendant)
FILE NO/S:	564 of 2010
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	2 December 2011
DELIVERED AT:	Cairns
HEARING DATE:	3-5 October 2011
JUDGE:	Henry J
ORDER:	**Judgment for the plaintiff in the sum of $140,594.32**
CATCHWORDS:	DAMAGES – PERSONAL INJURIES – MOTOR VEHICLE ACCIDENT – QUANTUM – Where plaintiff injuries in a motor vehicle accident – liability admitted by the second defendant – assessment of damages pursuant to the *Civil Liability Act 2003* (Qld) for general damages – ISV assessment – cervical and lumbar spine soft tissue injury – adverse psychological reaction, past economic loss, future economic loss, past and future care and assistance and future treatment and medical expenses – where assessment made as to reliability of witness *Civil Liability Act 2003* (Qld) – ss 51, 55, 59, 60, 60(2), 61. *Civil Liability Regulation 2003* (Qld) – Schedule 3 ss 3, 4, 5, 9, 10, 12; Schedule 4; Schedule 6A.
COUNSEL:	A R Philp SC with P Lafferty for the plaintiff G Crow SC for the defendants
SOLICITORS:	Roati & Firth Solicitors for the plaintiff

Miller Harris Lawyers for the defendant

[1] Carla Hunt claims damages for personal injuries suffered as a result of a collision by Carl Lemura's motor vehicle into the rear of a motor vehicle driven by Mrs Hunt in congested traffic in Mackay on 22 July 2008.

[2] Mr Lemura and his compulsory third party insurer, AAMI, admit Mr Lemura breached his duty of care to Mrs Hunt[1] and have not disputed they are liable for the loss and damage caused to Mrs Hunt by the collision. It is the nature and extent of the injuries sustained and the quantum of damages occasioned by those injuries that is in dispute.

[3] Mrs Hunt pleads the collision caused whiplash injuries to her cervical, thoracic and lumbar spines which have caused and will in the future continue to cause, significant loss. Her future economic loss and future expenses represent a substantial majority of her damages claim.

[4] Mr Lemura and AAMI plead Mrs Hunt did not suffer the injury or, alternatively, that it was a minor and short-term injury. They plead she had pre-existing cervical, thoracic and lumbar disorders which she has understated and that she has overstated the nature and extent of any current cervical, thoracic and lumbar symptoms.

Mrs Hunt's evidence of her injury

[5] Following the accident Mrs Hunt experienced pain in her neck, chest and back. She was taken to Mackay Base Hospital, examined and discharged. She continued to suffer from ongoing neck and back pain and repeatedly sought out medical assistance for it.

[6] Mrs Hunt's evidence was that since the accident she has experienced[2] a constant ache in her neck, thoracic spine and lumbar spine which increases in intensity during the day and results in pain that can be severe. Her lower back pain extends into her buttocks and down her legs with the pain on the right side being the worst. She experiences intermittent tingling in the fingertips of her left and right hands, numbness extending down her right arm and partial numbness in her right foot, that over time has extended into her right leg She also experienced frequent headaches of varying intensity, with a very severe headache occurring every 10 to 12 days or so and sometimes remaining persistent for three or four days at a time. Since the accident she has experienced difficulty sleeping because of her ongoing pain. There was also some evidence of her having had psychological problems since the accident but a mental disorder is not claimed.

[7] Mrs Hunt asserted that her pain has interfered with her ability to work, sleep and engage in family and leisure activities and her enjoyment of life has been adversely affected. At her workplace, as a part-time customer sales and service consultant with Suncorp, she found it difficult to sit for prolonged periods and found ordinary minor movements at her desk, including tending to the telephone

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1 Amended Defence [2]

2 e.g. ex 18 pp9,10

and computer, uncomfortable[3]. She would sometimes lie on the floor in a back room at work to relieve the pain[4]. She was distracted and made uncharacteristic errors[5]. She found relief in Valium, which she found assisted her to do her job, but became concerned she was addicted to it[6]. In her private life she had been a fit, active person engaged in outdoor activities and sport and physical games with her children but on her evidence she no longer engages in such activity and no longer enjoys family gatherings[7]. She found her previously effortless house and garden work became a "*huge effort*"[8]. She was no longer able to keep her home as clean and tidy as she did previously and spends less time on domestic duties she previously performed and enjoyed, such as cooking[9]. In short, her pain and the distraction it causes her are said to have adversely affected her enjoyment of life.

[8] At the time of the accident the plaintiff was a working 25 ½ hours per week for Suncorp. On her return to work a week after the accident, she experienced difficulties because of her symptoms and reduced her working hours to approximately 12 hours per week. She gradually returned to her normal working hours by 30 September 2008. However, she gave evidence of continued difficulties, particularly with her concentration and memory, caused by her symptoms. Over seven months later she again reduced her hours to about 12 hours per week in May 2009, before ultimately resigning from her position, effective on 30 June 2009.

Expert evidence about the injury

[9] The parties adduced evidence from the following experts (sequenced in the order in which they examined Mrs Hunt) who gave the following opinions as to Mrs Hunt's injury:

1. Dr Bruce Martin,[10] consultant orthopaedic surgeon, examined the plaintiff on 27 January 2009, and was called by the defendants. Dr Martin diagnosed a soft tissue strain/sprain injury to the cervical spine and chest wall[11]. He opined the injury had resolved, there were no requirements for treatment or rehabilitation and the plaintiff possessed full capacity for her usual employment[12].

2. Dr Lynton Giles, clinical anatomist[13], examined the plaintiff on 30 April 2009 and was called by the plaintiff. Dr Giles opined that the plaintiff had chronic musculo-ligamentous cervical, lumbar and thoracic soft tissue injuries that had not resolved[14]. He opined her symptoms may deteriorate if she has to work in postures that aggravate her spinal symptoms or if she

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3 T1-42/10-43
4 T1-42/20
5 T1-42/51
6 T1-43/7
7 Ex 18 pp 13,14
8 T1-45/19
9 Ex 18 pp 15,16
10 Report ex 7
11 Report ex7 p4
12 Report ex7 p5
13 Report ex 15 pp 1-38
14 Report ex15 p20-21

has to take part in lifting and repetitive bending[15] and that her pain was unlikely to resolve with treatment[16].

3. Dr Scott Campbell[17], neuro-surgeon, examined the plaintiff on 17 July 2009 and was called by the plaintiff. Dr Campbell diagnosed the plaintiff as suffering from chronic soft tissue musculo-ligamentous injury to the cervical and lumbar spine.[18] He considered the plaintiff's prognosis with regard to return to work was guarded due to difficulties with prolonged sitting and standing and lifting and carrying equipment.[19] He opined her symptoms had become chronic and were unlikely to resolve.[20]

4. Dr John McGuire[21], orthopaedic surgeon, examined the plaintiff on 3 August 2009 and was called by the plaintiff. Dr McGuire diagnosed soft tissue injuries to the cervical, thoracic and lumbar spines with possible posterior ligament injury to the cervical spine and possible disc protrusion at L4-5. He regarded her prognosis as poor[22]. He opined her inability to sit for prolonged periods of time at a computer station would likely be a permanent problem for her.[23]

5. Kathryn Purse[24], occupational therapist, examined the plaintiff on 8 September 2009 and was called by the plaintiff. Ms Purse opined the testing carried out indicates that currently Mrs Hunt is not fit to work in any capacity due to her experience of severe pain symptoms, general right sided weakness, and her reduced endurance for continued activity[25].

6. Dr Michael Weidmann[26], neuro-surgeon, examined the plaintiff on 29 April 2010, and was called by the defendant. Dr Weidmann opined Mrs Hunt suffered a chronic musculo-ligamentous injury to the cervical and lumbar spine[27] and regarded her ongoing back and neck symptoms as consistent with those injuries[28]. He opined she is medically fit for any employment that does not require repetitive bending or lifting activities and that allows her to sit, stand or move about as necessary[29].

7. Dr Lloyd Toft[30], orthopaedic surgeon, examined the plaintiff on 29 April 2010 and was called by the defendant. Dr Toft opined there had been a strain of the musculo-ligamentous supporting structures of the cervical,

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15 Report ex 15 p 21
16 Report ex 15 p 20
17 Report ex 15 pp 39-45
18 Report ex 15 p 42
19 Ibid
20 Report ex 15 p 43
21 Report ex 15 pp 46-57
22 Report ex 15 p 51
23 Ibid
24 Report ex 15 pp 58-64
25 Report ex 15 p 63
26 Report ex 5
27 Report ex5 p5
28 Report ex5 p6
29 Ibid
30 Report ex 4

thoracic and lumbar spines and soft tissue injuries to limbs.[31] He considered there had been a gross over presentation of any apparent disability and opined Mrs Hunt did not suffer from any injuries as a result of the accident that would prevent her from returning to her usual occupation.[32]

8. Dr Nicholas Burke[33], consultant occupational physician, examined the plaintiff on 27 August 2010 and was called by the defendant. Dr Burke diagnosed a musculo-ligamentous injury of the cervical and lumbar spine[34]. He considered her ongoing symptoms were not solely attributable to the injury suffered in the collision and also stemmed from psychosocial factors[35]. He opined her underlying biomedical impairment is not particularly marked and she has the capacity to return to the type of work she has done in the past[36].

Lack of recent examinations by Plaintiff's experts

[10] Given the fluctuations in Mrs Hunt's apparent capacity to work during 2009 it is noteworthy that the only experts to have examined her after that year were the experts called for Mr Lemura and AAMI, namely Doctors Weidmann, Toft and Burke.

[11] There is no evidence that any of Mrs Hunt's experts re-examined her in 2010 or this year. The evidence of the experts called for Mrs Hunt at trial was based on examinations that occurred over two years earlier and, on the issue of the extent of her ongoing incapacity, was contradicted by experts who had examined her more recently.

[12] The only evidence of the extent of Mrs Hunt's ongoing incapacity since 2010 is her own evidence. This means her credibility, particularly the reliability of her assertions as to the recent extent of the ongoing effects of her injury, is of obvious importance to the success of her case.

Mrs Hunt's credibility

[13] Mr Crow SC, counsel for Lemura and AAMI highlighted a number of matters to contend that Mrs Hunt was not a credible witness. These included an alleged lack of candour regarding other motor vehicle collisions and in disclosing pre-collision symptoms, the alleged medical impact of her collision of 9 May 2009 (a collision after the subject collision) and her alleged exaggeration of symptoms.

[14] As will be seen, such issues as there are with Mrs Hunt's credibility appear to result from a lack of reliability on some aspects rather than dishonesty. That does not make the consideration of these issues any less important. In *Bell v Mastermyne Pty Ltd*[37] McMeekin J observed:

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31 Report ex 4 p 4
32 Report ex 4 p 5
33 Report ex 6
34 Report ex 6 p5
35 Report ex6 p6
36 Report ex6 pp6,7
37 [2008] QSC 331 at [19]

> *"The assessment of damages for personal injury depends to a very large extent on a plaintiff's honest reporting – of his or her symptoms; of their impact on the plaintiff's life; of pre-existing problems; of the genuineness of effort to regain employment after injury; and of their capacity to maintain employment. These are all difficult issues for a defendant to thoroughly investigate and test. In truth no-one knows what level of pain an individual experiences and what impact that pain has on any particular plaintiff's capacity to maintain their activities "*[38]

Lack of candour regarding other collisions?

[15] Mrs Hunt was involved in motor vehicle collisions on 9 May 2007, 22 July 2008 (the subject collision), 9 May 2009 and 25 March 2011[39].

[16] Mr Crow submits that when she was examined by Dr Campbell and Dr Maguire, only several months after the collision of 9 May 2009, she was dishonest in that she failed to mention that collision or the collision of 9 May 2007 to them[40]. However her evidence at trial does not assist his argument that she would necessarily have realised those collisions should have been disclosed to the examining Doctors.

[17] When asked in cross-examination to recall how many motor vehicle accidents she had been involved in her answers suggested some confusion as to what type of vehicular episode the question went to[41]. For instance, she initially responded "*nil*" but then said:

> *"I've had one on the 22nd of July 2008, and then someone reversed into me – oh, two – I think later in the year or 2009, but that was just – that was no impact. I actually knew the man."*[42]

[18] Her reference in that answer to there having been no impact was obviously inconsistent with information given elsewhere in the same answer, namely that someone had reversed into her. Her subsequent fuller description of the circumstances of the collision of 9 May 2009, explained that a family friend who was rendezvousing with her to collect a child had inadvertently reversed his truck into the stationary vehicle in which she was seated, scraping the top of her vehicle bonnet.[43] The manner and content of her evidence at this stage of cross-examination suggested some confusion in her mind as to whether a minor impact of that kind was "*a motor vehicle accident*".

[19] That impression was bolstered by her failure in cross-examination to at first mention the other two collisions, namely of 9 May 2007 and 25 March 2011.[44] The former collision involved the front of the Land Cruiser she was driving colliding with the rear of a vehicle that had moved but then stopped again at a stop sign.[45] As to the most recent collision, she said:

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38 Cited with agreement in *Monger v Camwade Pty Ltd* [2011] QSC 97 at [25]
39 Ex 19
40 T3-5 L3-35
41 T1-47/5-11
42 T1-47/10
43 T1-47/30-50
44 T1-47/26
45 T1-50/50-T1-51/15

> *"Yes, that was only I think this year. But that was – that – oh, again he just dinted my bumper bar. He reversed into me. He went to reverse up, go to another bowser. I was behind him. That was minor, minor, minor, just cracked the plastic."*[46]

I did not detect any deliberate evasiveness in her initial failure to mention those two collisions. Rather it appeared despite the broad wording of the question about whether she had been involved in other motor vehicle accidents, she did not think the question was directed at such minor vehicle contact. This may flag an issue about reliability in the sense that her answers did not convey the full extent of information sought by the questioner. However it did not appear that her self-editing of information she regarded as irrelevant was dishonest. The apparently genuine nature of her misunderstanding of the relevance of the questioning on this topic at trial significantly undermines the force of Mr Crow's submission that she was dishonest in not mentioning the collision of 9 May 2009, or for that matter of 9 May 2007, when examined by Dr Campbell and Dr Maguire. So does the Doctors' evidence of what they actually asked her.

[20] Dr Campbell testified it was unlikely that he would have asked about any prior or subsequent accidents[47]. Dr Maguire indicated he would not have specifically asked whether she had been involved in other motor vehicle accidents but rather whether she had suffered any other major injuries in the past[48]. Dr Toft, who saw Mrs Hunt after she had been in three collisions, reported under the past history heading, "*She had not had any previous accidents or injuries*" and under the subsequent history heading "*She has had no further accidents or injuries*"[49]. There is no evidence of what questions he asked Mrs Hunt on these topics. Dr Giles' report says under the past history heading "*She has no previous history of a motor vehicle accident or any other accidents*"[50], although at the time of his examination she had not yet experienced the third collision.

[21] In the absence of evidence of how direct the questioning of these Doctors was on this topic, an obvious and innocuous possibility, consistent with Mrs Hunt's evidence at trial, is that she did not think it relevant to mention the other motor vehicle collisions because they were less significant and involved no injury. There is no evidence of such questioning and no basis to conclude there was any dishonesty by Mrs Hunt in this context.

Lack of candour in disclosing pre-collision symptoms?

[22] The Amended Defence pleads "*the plaintiff has suffered from a chronically painful neck and back since May 2007*", that is, since a time before the 2009 collision with which this case is concerned[51]. That pleading appears to have been prompted by the emergence pre-trial of evidence that Mrs Hunt had received chiropractic treatment subsequent to her motor vehicle collision on 9 May 2007. Mr Crow placed very significant weight on Mrs Hunt's apparent failure to disclose

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46 T1-48/1-10
47 T2-29/58
48 T2-70/57-T2-71/2
49 Report ex 4 p2
50 Report ex 15 p4
51 Amended Defence [3(b)]

her pre-collision symptoms to all of the experts who examined her prior to the final examining expert, Dr Burke.

[23] The foundation for this aspect of the attack upon Mrs Hunt's credibility lay in the records of a chiropractic practice, Discover Chiropractic, which the defendants tendered by consent as part of ex 3[52]. Those records show that on 10 May 2007, the day after the stop sign collision referred to above, the chiropractic practice took Mrs Hunt's case history[53]. The second page of that patient case history form[54] was signed by Mrs Hunt on 11 May 2007. On that second page, under the heading "*Addressing the issues that brought you in*", the chief areas of complaint are described as "*neck and back pain*" which, according to the boxes ticked, was said to be constant and getting worse and said to interfere with her work, sleep, walking, sitting, hobbies and leisure.

[24] Mr Crow also emphasised the content of another part of that page in which Mrs Hunt had ticked various boxes under the heading "*Please check all symptoms you have ever had, even if they do not seem related to your current problem*". Mrs Hunt ticked the following symptoms: headaches, pins and needles in arms, dizziness, numbness in fingers, fatigue, sleeping problems, dizziness/fainting, nausea/vomiting, chest pain, blurred vision, indigestion, bowel or bladder problems, constipation/diarrohea, pins and needles in legs, depression, neck stiffness, back pain and loss of balance. Mr Crow emphasized that many of these symptoms were symptoms Mrs Hunt lays claim to suffering as a consequence of the subject collision. However, this part of the form, which must be read by reference to its heading, did not suggest that Mrs Hunt was suffering from those symptoms in combination at the time of her chiropractic attendance.

[25] The records greater significance is that they demonstrate Mrs Hunt engaged in a lengthy series of chiropractic consultations.

[26] The practice's handwritten treatment notes of her attendances[55] record nineteen consultations from 11 May 2007 to 27 June 2008 inclusive. Parts of the notes are illegible and much of the legible handwriting in the notes involves abbreviations, such as "*C1, C1, C4, CT4, T6, L5"*. These are reasonably well known medical abbreviations referring to parts of the spine and their presence in chiropractic notes is unremarkable. Obviously the 19 attendances were for chiropractic assistance but as flagged with counsel in the course of the trial, in the absence of evidence explaining the notes it is not possible to infer much from their specific content[56]. No such explanatory evidence was forthcoming, save that Dr Burke, who had read the notes, said they described treatment to various parts of her spine including the lumbar spine and thoracic spine[57].

[27] The ultimate significance of the notes is that they evidence such a large number of chiropractic consultations. Nineteen attendances upon a chiropractor in the space of a little over a year prior to the subject collision suggests an enduring spinal

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52 Ex 3 pp 82-86
53 Ex 3 p 82
54 Ex 3 p 83
55 Ex 3 pp 85-86
56 T2-40/37
57 T2-17 L13

problem, consistently with Mrs Hunt's description in the initial case history form of her ongoing neck and back pain. It bespeaks a physical problem of sufficient significance in her life to have warranted treatment, making it unlikely she would have forgotten about it when later asked by the experts in this case about any past neck or back problems.

[28] Despite this the first expert she disclosed the chiropractic treatment history to was the last expert in time to deal with her, Dr Burke.

[29] Dr Martin noted in his report:-

> "*There is no prior history of neck injury or neck symptoms. There is no other relevant past medical history*."[58]

[30] Dr Giles acknowledged in cross-examination that in taking Mrs Hunt's history he would have asked if she had been having medical treatment for neck or back pain prior to the subject collision and Mrs Hunt had answered she was not[59]. He acknowledged that he had been unaware of her previous chiropractic treatment at the time of providing his report and had not been informed that she suffered from neck and back pain back in 2007[60].

[31] Dr Campbell gave evidence that he asked Mrs Hunt whether she had any previous neck pain or lower back pain[61]. While he was not specifically asked what her response was it appears she must have responded in the negative since his report under the past medical history heading states "*nil significant*". He acknowledged Mrs Hunt did not mention having received chiropractic treatment prior to the accident[62].

[32] Dr Maguire reported under the past medical history heading "*Ms Hunt has not had any previous back complaints or neck complaints*"[63]. He confirmed in evidence that was something Mrs Hunt had actually told him[64]. He later qualified his evidence by asserting he had understood she had no "*major*" complaints in her neck or back. He expressed the view that if she had had significant past problems with her neck or back there would have been multiple presentations to her medical practitioner with multiple prescriptions of narcotic medication, which there were not[65].

[33] Dr Weidmann reported under the heading past medical history:

> "*She told me she was in good general medical health prior to this accident and she specifically denied any previous injuries or symptoms relating to her cervical or lumbar spines."*[66]

[34] Dr Toft reports under the past history heading:

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58 Report ex 7 p 3
59 T2-61/31
60 T2-61/33-56
61 T2-30/1
62 T2-27/9
63 Report ex 15 p 49
64 T2-67/54
65 T2-72/31
66 Report ex 5 p 3

> "*Ms Hunt states that she had never had any previous neck or back pain. She had not had any previous accidents or injuries.*"[67]

[35] The only doctor to whom she did disclose her past chiropractic treatment, Dr Burke, recorded under the past history heading:-

> "Nil significant. No significant car accidents, motor bike accidents, work accidents or injuries. No sporting accidents or injuries. No significant neck pain or back pain in the past. However, she used to see a chiropractor on a weekly basis. This was at Discover Chiropractic. She told me she would go there approximately once a month when she needed some attention. She told me that she may get some neck pain associated with using the computer and she would go to the chiropractor in relation to this."[68]

[36] As Mr Crow points out, that account to Dr Burke suggests Mrs Hunt told him the source of her pre-existing neck pain was computer use but that is inconsistent with Mrs Hunt's evidence at trial.

[37] Mrs Hunt gave evidence that before the subject collision she had experienced muscular lower back pain, arising from sporting activities such as netball, playing in the back yard with the children and water skiing, which would go away in a day or two.[69] She suggested the occasion when she first went to the chiropractor was around the time that she had been water skiing[70] although earlier she implied that the apparently single day of water skiing had given her muscular pain in her legs but no significant muscular pain in her lower back[71].

[38] She asserted it was coincidental that the date of her initial attendance at the chiropractor was only two days after her motor vehicle collision in 2007[72]. I accept that assertion. There is no evidence she was injured in that collision.

[39] In her quantum statement she said the muscular pain in her neck and back which caused her to consult the chiropractor soon resolved and she continued further chiropractic treatment on the chiropractor's recommendation for the maintenance of her spine and general well being[73]. When asked at trial about the neck and back pain, which the chiropractic records noted as her chief areas of complaint on her initial attendance, she indicated that within a couple of days of that attendance she was fine and the problem had become insignificant[74]. She said it did not interfere with her work[75]. When questioned about the series of chiropractic attendances she denied that she had been having ongoing significant pains in her neck and lower back prior to the subject collision[76]. Rather, she explained she had engaged in the

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67 Report ex 4 p 2
68 Report ex 6 p 4
69 T1-55/15
70 T1-61/45
71 T1-58/30
72 T1-61/43
73 Ex 18 p2
74 T1-63/30
75 T1-65/20
76 T1-71/2

repeat attendances because her chiropractor had advised her to[77], not because of ongoing pain or muscle soreness[78]. She did acknowledge that she experienced neck and back pain which would come and go from time to time[79] although she maintained that she made her repeat attendances upon the chiropractor upon his recommendation that she do so for health and wellbeing[80]. She explained of her attendances that she thought of it as "*just a massage*"[81]. She maintained the neck and back pain from which she suffered from time to time prior to the subject collision was muscular[82]. She went on to explain that there was no comparison between that muscular pain and the symptoms she experienced after the subject collision[83].

[40] When Mrs Hunt was tested in cross-examination about her pre-existing neck and back pain and repeated chiropractic attendances her generally credible demeanour appeared to falter. This may well have been because she was troubled by the emphasis being placed by the cross-examiner on those subjects but she did not appear to be candid as to the obvious reason why she would have repeatedly attended a chiropractor. It is implausible that Mrs Hunt would have attended so many times upon a chiropractor solely because the chiropractor recommended she do so. It is implausible she would have had so many attendances unless she was actually continuing to have some neck and or back problems for which she was seeking attention. She acknowledged as much when she told Dr Burke she would go to the Chiropractor when she needed attention[84]. Her problems must in her view have been sufficiently significant to warrant repeated chiropractic consultation.

[41] That is not to suggest that Mrs Hunt had a pre-existing injury of the kind or gravity with which this case is concerned. I accept she did not. There is, for instance, no suggestion that her past neck and back pain gave rise to time off work or a need for pain relief by prescription drugs.

[42] However, there is an obvious coincidence of general location, namely the neck and back, as between the problems that attracted repeated chiropractic attention and the injury with which this case is concerned. While it is understandable she might not have thought it relevant to mention motor vehicle accidents in which she had received no injuries, it is more surprising she did not think it relevant to mention to six of the seven examining Doctors her past problems in the same general parts of her body that were under consideration.

[43] Her counsel emphasised that she did at least disclose the chiropractic treatment to Dr Burke, which may demonstrate Dr Burke asked more pointed questions or was more persistent than the earlier examining Doctors[85]. It was submitted the fact there had been disclosure to Dr Burke supported the view that her earlier non-

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77 T1-71/21
78 T2-9/58
79 T1-72/30
80 T1-73/17
81 T1-72/11
82 T1-74/20
83 T1-76/43
84 Report ex 6 p4
85 T3-40/2-23

disclosure was not part of a deliberate plan to mislead. I accept the logic of that submission. However the force of her counsel's submission that Mrs Hunt's non-disclosure to the earlier experts in time may have been caused by the mode of questioning involved is diminished by weight of numbers. It is highly unlikely that as many as six examining Doctors all shared such incompetent questioning styles that they all failed to ask or were unclear in asking Mrs Hunt whether she had previously experienced or received treatment for neck or back pain.

[44] It is inherently more likely that she deliberately decided against mentioning her past neck and back pain and chiropractic treatment when examined by those Doctors. However it does not follow that her deliberate omissions were driven by an intention to mislead. As already mentioned, such a conclusion does not rest well with the fact she did at least make the disclosure to Dr Burke.

[45] The more likely explanation, is that, despite the fact of her past neck and back pain and chiropractic treatment coming within the ambit of what she was asked by the Doctors, she repeatedly decided that the neck and back problems which prompted her attendances upon a chiropractor were not related to her existing problem and not relevant to mention. There are echoes in this self-editing approach of her responses when asked about previous motor vehicle accidents, discussed above.

[46] It is unlikely her disclosure of the true position regarding her past neck and back problems and repeated chiropractic consultations would have made a significant difference to the medical opinions reached, in that, as already mentioned, it did not involve an injury of the nature and gravity with which this case is concerned. However the fact that she decided information obviously within the ambit of questioning by examining doctors was not in her opinion relevant and thus did not mention it is a matter to be born in mind generally in assessing the reliability of clinical information she provided to Doctors.

[47] Mr Crow also emphasised her non-disclosure of her past neck and back problems as a "*significant disability*" when she signed her Notice of Accident Claim Form[86] on 15 August 2008. However, the definition of that term refers to a past injury or disability which "*may be relevant*" to the assessment of the subject injury. It is likely that Mrs Hunt did not perceive her past neck and problems as an injury or disability and did not perceive them as having relevance to the assessment of the subject injury. She easily could have erred on the side of caution by disclosing those past problems in the form but her decision not to do so does not herald a concern about reliability in the way her non-disclosure of those problems to Doctors does.

Medical impact of collision of 9 May 2009?

[48] Lemura and AAMI plead that if in fact Mrs Hunt is not fit for sedentary employment then that inability is caused by her pre-existing neck and back pains and or injuries sustained by her in the motor vehicle accident of 9 May 2009 where the front of her vehicle was reversed into.

[49] I have already found that Mrs Hunt's pre-existing neck and back pains did not constitute a pre-existing injury of the kind or gravity with which this case is

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[86] Ex 20 p3

concerned. There is simply no evidence that Mrs Hunt's pre-existing neck and back problems impaired her ability to perform sedentary employment.

[50] As to the allegation her alleged inability to perform sedentary employment is caused by injuries sustained by her in the motor vehicle accident of 9 May 2009, there is no evidence at all that she sustained any physical injury. Mrs Hunt's evidence that it caused her no pain was uncontradicted and was supported by a reference to there being "*no injuries*" in the notes of her general practitioner, who she informed of the accident during a consultation three days later on 12 May 2009[87].

[51] However, Mr Crow submitted that even if there had been no physical injury occasioned by the accident it nonetheless had an injurious effect in the form of stress which caused her to take time off work and reduce her working hours, before resigning, all within the space of less than two months.

[52] At the time of her May 2009 collision, Mrs Hunt had been back working her normal part-time hours for over seven months. According to the record of Dr Hodgens, the general practitioner attended by her on 12 May 2009, Mrs Hunt was significantly stressed about what could have happened in the accident, notwithstanding that she had no injuries.[88] The reason for the consultation was recorded as anxiety and Valium was prescribed. The doctor noted that she needed one week off to be followed by part-time work for five weeks[89]. Since Mrs Hunt normally only worked part-time this note must have contemplated that she should reduce those normal hours for five weeks on her return to work. A medical certificate issued by Dr Hodgens on the same date was provided to Mrs Hunt's employer[90]. In the certificate the Doctor expressed the opinion that Mrs Hunt was suffering from acute anxiety since having the car accident on 9 May 2009 and would be unable to work at all for one week. The doctor went on to say:

> "*She is suffering from chronic pain, depression and anxiety from her previous accident. She will be unfit for duty from 12/5/09 up to and including 19/5/09 and will only be able to work part-time, 12 hours per week after this until 19/6/09.*"[91]

[53] After her week off work Mrs Hunt went on reduced hours of approximately 12 hours per week up to and including 15 June 2009[92]. However, after the end of the five-week reduced working hours arrangement, she submitted her resignation, effective 30 June 2009. It appears she last worked on 23 May 2009[93].

[54] It is against this factual background that Mr Crow urges the circumstantial inference the effect of the collision of 9 May 2009 upon Mrs Hunt was the true cause of her alleged inability to continue working.

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87 T1-80/11, ex 3 p 21
88 Ex 3 p 21
89 Ibid
90 Ex 17 p 471
91 Ibid
92 Ex 18 p 12, ex 3 p 56
93 Ex18 Schedule G p2

[55] A premise of that argument appears to be that Mrs Hunt was coping adequately with working her full compliment of part-time hours prior to the collision of 9 May 2009. It is true Mrs Hunt had been back working her full part-time hours for a sustained period to her employer's satisfaction[94], but she was apparently struggling to do so. On her account she had continued to experience significant difficulties, particularly with her concentration and memory[95].

[56] Mrs Hunt's lawyer had, in a letter dated 12 March 2009, sought a report from clinical anatomist Dr Lynton Giles. Dr Giles' ensuing report referred to her ongoing pain in the work context[96]. His report was the same date as the examination, 30 April 2009, nine days before the collision the defendants allege was the cause of her inability to continue working.

[57] On 7 May 2009, two days before the collision when her vehicle was reversed into she consulted Dr Hodgens about her ongoing pain since the 2008 collision and her related depression and anxiety[97]. On that day, Dr Hodgens issued a medical certificate indicating Mrs Hunt would be unfit for full-time duty from 7 May 2009 up to and including 11 June 2009 but would be able to work part-time[98]. The reference to fulltime duty was obviously to her full part-time hours. Her employer apparently interpreted the certificate in that way because there is an inter-staff email of Friday 8 May 2009 on Suncorp's employment file which says of Mrs Hunt:

> *"The above staff member has come to work today and has produced a doctor's certificate advising that she is unable to work fulltime as per attachment. She has advised that this is due to injuries sustained from a vehicle accident which occurred last year and for which you were the case advisor… Staff member has indicated during medical certificate period she would like to reduce her hours to 12 per week over two days…"*[99].

[58] Those records demonstrate Mrs Hunt had already indicated she was not coping and needed to reduce her hours before the collision of 9 May 2009 occurred. While the collision of 9 May caused Mrs Hunt significant stress, the theory it was the main cause of Mrs Hunt's apparent inability to continue to work is unsustainable.

[59] The more noteworthy aspect of the above-discussed facts is not the collision of 9 May 2009 but the mixed causal influence of her problems in coping with pain, anxiety and depression upon her capacity to maintain her full working hours, a matter further discussed below.

Exaggeration of symptoms?

[60] The Defence pleads that Mrs Hunt has deliberately overstated the nature and extent of her cervical, thoracic and lumbar symptoms to assessing medical

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94 T1-79/2
95 Ex 18 p 12, T1-79/15-28
96 Ex 15 p 1
97 Ex 3 p 21
98 Ex 17 p 452
99 Ex 17 p 459

practitioners[100]. This appears to be a reference to Mrs Hunt's assessing Doctors. In this context the defendants' counsel particularly highlighted the detection of non-organic signs by some examining experts.

[61] Dr Martin's report of his examination on 27 January 2009 noted under "*clinical examination*" that Mrs Hunt moved her head normally during conversation and with other activities during the consultation. On the other hand he noted during the examination that her neck movements were apparently significantly limited to about 50 per cent of normal expected range[101]. While Dr Martin did not expressly identify this as a contradiction, Mr Crow submits that must be the explanation for his observation in the concluding part of his report that there are "*some inorganic signs*".

[62] The fact that on examination by Dr Martin, Mrs Hunt's neck movements were apparently limited to about 50 per cent of the normally expected range is not inconsistent with her apparently moving her head normally during conversation and other activities. Unless patients are specifically asked to turn their head beyond 50 per cent of the normal range of movement the need for them to do so of their own accord is inherently low. Dr Martin's report did not say that in the course of her normal movements she had turned her head beyond 50 per cent of the normal expected range. Nor did he say so in the course of his evidence during the trial.

[63] Dr Martin noted it was helpful to observe normal movements with movements during formal examination[102], however, his evidence stopped short of alleging Mrs Hunt had been malingering during the examination. Mrs Hunt's indications during the examination of the "*presence of widespread pain symptom affecting the whole of the back, the neck, both upper extremities, and both lower extremities*"[103] were not all believed by Dr Martin, because in his view they could not be related to an injury of the nature that she suffered in the subject accident[104].

[64] The timing of Dr Martin's examination of Mrs Hunt coincides with the period when she had returned to full working hours and precedes the period where she again found it necessary to reduce her hours before ultimately resigning. It is likely Dr Martin's disbelief of the extent of Mrs Hunt's reported symptoms was influenced by the fact she was undertaking her normal working duties for her normal working hours. However, while he doubted the extent of the symptoms and the restrictions noted on examination[105] and did not accept that her symptoms were ongoing[106], he conceded that her description of her symptoms might have been legitimate[107].

[65] Dr Toft, who examined Mrs Hunt on 29 April 2010, noted in his report that Mrs Hunt moved "*her head and neck freely during the interview, demonstrating almost*

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100 Amended Defence para 3(q)
101 Ex 7 pp 3,4
102 T2-75/41
103 Report ex 7 p 3
104 Report ex 7 p 4, T2-74/23
105 T2-74/30
106 T2-75/16
107 T2-75/4

full rotation in both directions in response to questions". He noted that when examined in the supine position her straight leg raising was not more than 20 per cent on either side yet when seated on the edge of the couch she was able to demonstrate 90 per cent of straight leg raising[108]. In a similar vein he noticed that when standing and attempting to flex her lumbar spine she could only get her fingertips to the mid-thigh level whereas when seated on the couch with her legs extended she could flex her lumbar spine to get her fingertips to the lower shin level[109]. He explained in evidence that despite the different positioning in the alternative forms of both of these tests, there should have been no variation in Mrs Hunt's exhibited range of movement. He regarded her limited ranges of movement as inconsistent with the subject injury[110]. He felt her effort on examination was *"sub-optimal"* and that there was "*a significant voluntary element*" to the signs she exhibited on examination[111]. He reported, "*There would appear to be gross over-presentation of any apparent disability*"[112].

[66] Dr Weidmann examined Mrs Hunt on the same date as Dr Toft. He noticed Mrs Hunt *"moved carefully"* but also noted, *"There were no obvious inappropriate or inconsistent clinical findings"*[113]. Thus he did not detect the same inorganic signs as Dr Toft, despite examining her on the same day. On the other hand they are specialists in different fields and there is no evidence their examination methodology was the same. Significantly, Dr Weidmann's ultimate opinion of the true extent of Mrs Hunt's impairment was not materially different from Dr Toft's – he placed Mrs Hunt in the same low category of impairment as Dr Toft did[114].

[67] It is unlikely that on a day Mrs Hunt was being examined for AAMI by two Doctors she would dishonestly overstate her symptoms to one but not the other. It may be Dr Toft's disbelieving opinion of Mrs Hunt was coloured by the view he expressed in cross-examination that whiplash injuries should resolve to low-level symptoms after a few weeks or months[115]. The divergence of opinion in this case suggests not all experts adhere to that view. The inorganic signs detected by Dr Toft were objective indicators of over-presentation, but it does not follow that the over-presentation was dishonest. Dr Toft observed in his report that further treatment "*would reinforce Ms Hunt's perception that there is some significant underlying pathology causing her symptoms*"[116]. This appears, as he acknowledged in cross-examination, to be a concession that Mrs Hunt genuinely believed she was suffering the symptoms she claimed.

[68] Dr Burke, the last expert in time to examine Mrs Hunt, also detected quite pronounced non-organic signs on assessment. Dr Burke reported, *"This included simulated rotation, axial loading and a quite marked disparity between supine and sitting straight leg raising tests"*[117]. Like Dr Toft, Dr Burke's detection of

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108 Report ex 4 p 3, T2-23/4-26
109 Ibid
110 T2-23/
111 Report ex 4 p 4
112 Report ex 4 p 5
113 Report ex 5 p5
114 DRE I , discussed further below.
115 T2-20/35
116 Report ex 4 p5
117 Report ex 6 p5

inorganic signs involved comparable testing rather than the mere comparison of general movement with movement on testing used by Dr Martin.

[69] In combination the evidence of Dr Toft and Dr Burke provide powerful evidence of over-presentation by Mrs Hunt, but not necessarily of dishonesty.

[70] Dr Burke did not suggest the pronounced inconsistencies detected on examination were a product of dishonest overstatement and instead suggested they were because of psychological factors[118]. The contaminating influence of psychological factors suggests there may have been an unwitting over-presentation, rather than deliberate exaggeration, of physical symptoms to the examining experts.

[71] Dr Toft obviously thinks Mrs Hunt's perceptions of the extent of her symptoms do not reflect the medical reality. Dr Weidman hints at the influence of psychological factors by referring in his report to Mrs Hunt's belief, within three days of the subject collision, that she would be affected for life as "*a self fulfilling prophecy*"[119]. He went on to say:

> "*She has some secondary psychological issues which are not major but would require the assessment and opinion of a psychologist or psychiatrist. Other symptoms such as lack of energy, blurred vision, dizziness, forgetfulness and lack of concentration are all non-specific and not related to the physical injuries. They may be due to anxiety."*[120]

[72] Dr Burke was more direct. He noted:

> *"It is evident there are other factors contributing to her ongoing symptoms and disability. She did develop a depressive disorder, which appears to have significantly improved. However, she remains on Efexor.*
>
> *There are a number of quite pronounced non-organic signs present throughout the assessment. It would be my opinion that there are other factors (possibly psycho-social) contributing to her ongoing symptoms and disability…*
>
> *In my opinion, these are likely to lie in the psycho-social domain…*
>
> *As indicated above, it is likely that the pain and disability that she has experienced is multi-factorial in origin with contributions from the accident related injury, as well as other factors."*[121]

[73] Dr Burke conceded in cross-examination that patients may feel pain at different levels for the same injury[122] and implied Mrs Hunt's history of repeated chiropractic consultation prior to the subject collision suggests that she had

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118 Report ex 6 p5
119 Report ex 5 p5,6
120 Report ex 5 p 6
121 Report ex 6 p 5, 6
122 T2-14/51

difficulty in managing pain[123]. However, he maintained that Mrs Hunt's description of the marked impact of the subject injury upon her is out of proportion to the injury that she actually received.[124]

[74] In the upshot, while there is persuasive evidence of over-presentation on Mrs Hunt's part when examined last year the probability is that it was a product of psychological factors rather than dishonesty. That said, the fact of over-presentation detracts from the reliability of Mrs Hunt's lay ability to self assess her symptomology.

Nature and extent of injury

[75] Based on the preponderance of medical opinion I find the injury suffered by Mrs Hunt was a chronic musculo-ligamentous injury to her cervical spine and a chronic musculo-ligamentous injury to her lumbar spine[125].

[76] The more contentious issue is whether and to what extent the injury has resolved.

[77] The first medical expert in time to examine Mrs Hunt was Dr Martin. He considered the injury had resolved and that Mrs Hunt possessed full capacity for her usual employment. At the time of the examination, on 27 January 2009, Mrs Hunt had been back working her full part-time hours for almost four months. As mentioned above, that probably influenced Dr Martin's assessment of her capacity to work. That is unsurprising. The fact that Mrs Hunt returned to full part-time work for a sustained period after the collision is itself relevant evidence in the case of her capacity to work. However Dr Martin's examination occurred a long time ago. Given the absence of a follow up examination by him in more recent times and the abundance of more recent examinations by other experts from both sides I am not prepared to give any determinative weight to his opinion.

[78] Mrs Hunt's three medical experts, to whom I will refer as the earlier examining medical experts, are each of the opinion that the injury has not and is unlikely to resolve. I do not accept that opinion, for the reasons now discussed.

[79] Those three witnesses, Dr Giles, Dr Campbell and Dr Maguire[126], examined Mrs Hunt on 30 April 2009, 17 July 2009 and 3 August 2009 respectively. This was the same era within which Mrs Hunt resigned her position.

[80] The three medical experts of Mr Lemura and AAMI, who examined Mrs Hunt subsequent to that era, are effectively of the opinion that the injury has resolved or largely resolved and that, with some qualifications, Mrs Hunt is able to return to work. Those witnesses, Dr Weidmann, Dr Toft and Dr Burke examined Mrs Hunt on 29 April 2010 and 27 August 2010, a span of dates roughly a year after the span within which Mrs Hunt's experts examined her.

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123 T2-17/24

124 T2-16/3

125 Doctors Giles and McGuire also diagnosed soft tissue injury to the thoracic spine but Dr McGuire found there were no associated ongoing features of that injury.

126 I include Dr Giles among the "medical experts" conscious he is not a medical Doctor but rather a Chiropractor and Clinical Anatomist. I have not included Ms Purse in this aspect of the discussion in that she is an occupational therapist.

[81] The fact that those latter three examining medical experts expressed generally more favourable prognoses than the earlier three examining medical experts is hardly surprising given the lapse of a year or so between their examinations of Mrs Hunt. I appreciate it was inherent in the opinions of the earlier three examining medical experts that further improvement in Mrs Hunt's condition was unlikely. For instance Dr Campbell opined she had reached *"maximal medical improvement"* and her symptoms were *"unlikely"* to resolve[127]. However it is a notorious fact that medical conditions can alter over time. Recovery rates vary. Another of Mrs Hunt's experts, Dr Giles, observed whiplash associated disorders have a "*highly variable rate of recovery"*[128] and cited studies demonstrating great variations between whiplash patients in the duration of symptoms[129].

[82] I also appreciate that the earlier three examining medical experts made forecasts about the likelihood of future improvement with access to objective information such as x-rays and scans. However records of that kind were also available to the more recent examining Doctors. Moreover, interpretations of the significance of that imaging varied even amongst Mrs Hunt's three experts[130]. That is unsurprising. Even Dr Giles, who dwelt the longest of the experts on imaging, emphasised its significant limitations in detection and diagnosis of whiplash injuries[131]. In any event while the visual records of a patient's state at a fixed point in time cannot change, a patient's condition can change.

[83] The opinion of the earlier three experts that further improvement was unlikely does not cause me to reject the conclusion inherent in the opinions of the most recent examining experts that, a year or so on, there had been improvement.

[84] In my view there was nothing particularly compelling about the evidence and expertise of the three earlier examining medical experts and nothing concerning about the evidence and expertise of the most three recent examining medical experts as to warrant more weight being placed on the earlier opinions in time than the most recent. I was impressed by the combination of expertise of the most recent three examining experts and how they dealt with cross-examination but it is the substantially more recent timing of their examinations that is determinative in my preference for their opinions.

[85] The most recent examining Doctors had the benefit of the passage of further time and more recent examinations of Mrs Hunt. In the circumstances of this case there is no persuasive reason why the evidence of the most recent examining experts ought not be regarded as the most reliable by reason that it is, by a substantial margin, the most up to date. I accept their opinion, in effect, that the injury had resolved or largely resolved by the time of their 2010 examinations.

[86] That is not to say that the evidence of the earlier three examining experts is irrelevant. It is, for example, of obvious relevance to the assessment of the pain and suffering Mrs Hunt endured and her capacity to return to work in 2009.

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127 Report ex 15 p43

128 Report ex 15 p13

129 Report ex 15 pp17,18

130 Compare for example the difference of views as to the significance of the L4/5 disc bulge as between Dr Campbell (ex 15 p42) and Dr Giles (ex 15 pp12,19).

131 Report ex15 pp13-15

[87] Mrs Hunt's evidence provides the most up to date evidence of the recent extent of the ongoing effects of her injury but a number of considerations detract from her reliability. She is not a medical expert. She has previously exhibited some unwarranted selectivity in the provision of clinical information, namely the non-disclosure of her pre-collision neck and back pain to six of the seven examining Doctors. The fact of her past over-presentation detracts from the reliability of her self-assessment. It is likely that psychological factors have influenced her perception of her physical symptomology. In all of the circumstances I prefer the most recent three examining experts to Mrs Hunt as providing the most reliable evidence of the extent and on-going medical effects of Mrs Hunt's injury.

[88] Again, that is not to say that Mrs Hunt's evidence is irrelevant. My reservations about the reliability of her assessment of the extent of her injury and its symptoms are not borne of a concern that she is dishonest. Mrs Hunt's evidence about other subjects is also relevant to the assessment of damages and this is not a case in which reservations about the reliability of a witness on some matters of admittedly important fact tarnishes the witness' evidence as to all matters of fact.

[89] In arriving at the above discussed conclusions I do not overlook the evidence of Ms Purse, an occupational therapist, to whom Mrs Hunt presented as significantly impaired when examined by Ms Purse a month after Dr McGuire on 8 September 2009. However Ms Purse's opinion as to Mrs Hunt's medical impairment is of minor comparable weight to that of the above-mentioned range of medical experts in this context. In any event, as with the other of the plaintiff's experts her examination was also a long time before the examinations of the most recent examining experts called by the defendant. Her evidence still has some relevance on the issue of Mrs Hunt's pain, suffering and loss of amenity and her capacity to return to work in 2009.

General damages

[90] The assessment of personal injuries damages in this matter is governed by the *Civil Liability Act* 2003 ("the Act") and the *Civil Liability Regulation* 2003 ("the Regulation"). General damages are defined in s 51 of the Act as including pain, suffering and loss of amenities of life.

[91] Section 61 of the Act requires that total general damages must be assigned an injury scale value ("ISV") that is to be assessed under the Regulation. In assessing the ISV the Court must consider designated ISV ranges contained within Schedule 4 of the Regulation[132].

[92] Section 10 of Schedule 3 of the Regulation provides that the extent of whole person impairment is an important consideration affecting the assessment of an ISV. Section 12 provides that in assessing an ISV a court must give greater weight to a medical assessment of a whole person impairment percentage based on the criteria under AMA 5 than one that is not. AMA 5 is a guide used by doctors to assign percentage ratings of impairment to persons who have suffered injury.

[93] In respect of the spine, the AMA guide uses diagnosis related estimates ("DRE"). There are five DRE categories for each of the cervical, thoracic and lumbar spines.

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[132] Per Regulation Schedule 3 s 2

Category I estimates 0 per cent impairment, category II estimates 5-8 per cent impairment, category III estimates 10-13 per cent impairment, category III estimates 10-13 per cent impairment and so on.

[94] In the present matter the plaintiff's doctors who used the guide, Doctors Campbell and Maguire, regarded Mrs Hunt's cervical and lumbar spine injuries as each meeting DRE category II. Dr Campbell assessed them at 6 per cent each giving rise to a 12 per cent whole person impairment. Dr Maguire's assessment was similar, namely 5 per cent and 6 per cent respectively, giving rise to 11 per cent whole person impairment. Doctors Giles and McGuire diagnosed soft tissue injury to the thoracic spine and Dr McGuire, who found there were no associated ongoing features of that injury, placed the thoracic injury in DRE category I, 0 per cent impairment.

[95] In contrast, the defence doctors who used the guide, Doctors Weidmann and Burke, who examined Mrs Hunt more recently, regarded the lumbar and cervical injuries as both coming within DRE I, the effect of which is to mandate a finding of 0 per cent whole person impairment[133]. Dr Weidmann found Mrs Hunt did not meet the criteria for DRE lumbar or cervical categories II as his findings did not include significant guarding or spasm at the time of examination or asymmetric loss of range of motion or radicular complaints[134], these being criteria required for a category II finding. In a similar vein Dr Burke found there was no observable spasm or guarding, no non-verifiable radicular complaints and no evidence of dysmetria or fractures[135], thus confining his assessment to DRE I only.

[96] It is noteworthy that the DRE II assessments of Doctors Campbell and Maguire meant features such as muscle spasm were present on their examination whereas they were no longer present by the time of the examinations of Dr Weidmann and Burke. In cross-examination of Dr Weidmann it was suggested it was not unusual that the presence of muscle guarding or spasm might be present on one examination but not another and he responded, *"…that may be the case, yes"*. However the difficulty for Mrs Hunt's case is that there were three expert examinations in 2010 and there is no evidence that any of them detected muscle spasm. It is a reasonable inference in the circumstances that by that era muscle spasm was no longer occurring.

[97] Schedule 4 of the Regulation contains different categories and corresponding ISV scales. In the present case, the potentially relevant categories and scales are:

88 moderate cervical spine injury–soft tissue injury: ISV 5-10
89 minor cervical spine injury: ISV 0-4
93 moderate thoracic or lumbar spine injury–soft tissue injury: ISV 5-10
94 minor thoracic or lumbar spine injury: ISV 0-4

[98] The comments and examples of soft tissue injury included in the Schedule in respect of those items makes it plain, at least as a starting point, that a DRE II assessment can meet the requirements of the moderate categories whereas a DRE I

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133 Even allowing for separate assessments for the lumbar and cervical spine, 0% plus 0% equals 0%.

134 Report ex 5 pp 7-8

135 Report ex 6 p 6

assessment corresponds more appropriately to a minor categorisation. Given my above-explained preference for the more recent assessments I prefer the DRE I categorisations of Doctors Weidmann and Burke and therefore regard the relevant Schedule 4 items, at least as a starting point by reference to the DRE assessment numbers, to be 89, minor cervical spine injury and 94, minor thoracic or lumbar spine injury.

[99] The Schedule's comments in respect of both of those items suggest an ISV at or near the top of the range of 0-4. For instance, for a minor cervical spine injury an ISV at or near the top of the range will be appropriate if the injury, despite improvement causes headaches and some ongoing pain, as is the case here. A minor thoracic or lumbar spine injury will warrant an ISV at or near the top of the range if the injury will substantially reach maximum medical improvement within about 18 months after it is sustained, again as is seemingly the case here.

[100] However, I have reservations as to whether a top of the range assessment of ISV based on whole person impairment, that is, ISV 4, is an appropriately high starting point bearing in mind that the comments in both categories contemplate the persistence after eighteen months of *"only minor symptoms"* or *"symptoms that are merely a nuisance".* The most recent examining expert, Dr Burke reported Mrs Hunt had significant ongoing pain and disability. This suggests her symptoms at that time, which was more than 18 months since the accident, were not merely a nuisance or only minor.

[101] Furthermore, s 10 of Schedule 3 makes plain that the extent of whole person impairment is an important but not the only consideration affecting the assessment of an ISV. Section 9 of the Schedule indicates, in assessing an ISV, a court may have regard to matters other than the examples and comments in the categories of Schedule 4 to the extent they are relevant in a particular case, for example pain, suffering and loss of amenities of life[136]. In this case, the extent of the pain, suffering and loss of amenities of life deserves attention in order to determine whether there should be a higher assessment than appears to be appropriate solely by reference to the comments and examples of the Schedule in regard to the minor and moderate items.

[102] A dilemma in gauging Mrs Hunt's pain, suffering and loss of amenity of life for the purposes of an ISV assessment is that, as Dr Burke observed, *"it is likely that the pain and disability she has experienced is multifactorial in origin with contributions from the accident related injury, as well as other factors"*[137]. Dr Burke considered those other factors lay in the psychosocial domain.

[103] Section 5 of Schedule 3 provides:

> *"5 Adverse psychological reaction*
>
> *(1) This section applies if a court is assessing an ISV where an injured person has an adverse psychological reaction to a physical injury.*
>
> *(2) The court must treat the adverse psychological reaction merely as a feature of the injury."*

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136 Regulation Schedule 3 s 9

137 Report ex 6 pp 3 and 6

[104] The requirement that an adverse psychological reaction to a physical injury be treated *"merely"* as a feature of the injury means that the adverse psychological reaction is not to be treated as if it is a separate injury, for instance as one of the categories of mental disorders listed in Schedule 4. This is made clear by the Regulation's Schedule 7 Dictionary, which provides that *"adverse psychological reaction"* does not include a mental disorder. The Dictionary provides that *"mental disorder"* means a mental disorder recognised under the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM 4").

[105] There is evidence Mrs Hunt received treatment for depression experienced by her subsequent to the accident. Two psychiatric reports by Dr Jon Steinberg, psychiatrist, were tendered at trial[138]. Dr Steinberg opined that as a result of her pain she developed symptoms consistent with a major depressive disorder diagnosed by him as meeting DSM 4 but regarded by him as being in full remission by his report of 25 February 2009. However he considered she required treatment with anti-depressant medication for the following eighteen months. He also opined she would benefit from a further five sessions with a clinical psychologist, Carolyn Richie, *"to assist her in her adjustment to the management of pain"*[139] but it appears she only had a further two sessions with Ms Richie, on 27 May 2009 and 16 June 2009[140].

[106] Mrs Hunt's major depressive disorder must be disregarded in assessing general damages in that a psychiatric injury is not pleaded and it exceeds the defined scope of an adverse psychological reaction that can be taken into account in assessing the ISV of the physical injury.

[107] Pain was clearly caused by the injury and the evidence suggests Mrs Hunt did have an adverse psychological reaction, some aspects of which can reasonably be regarded as falling short of a mental disorder. For instance, she asserts the pain symptoms from the injury made her frustrated, emotional, irritable, exhausted and unmotivated[141] and impaired her ability to concentrate[142]. However Dr Weidmann opined her lack of energy and concentration was not related to the physical injury and may be related to anxiety[143]. It is a reasonable inference that Mrs Hunt's adverse psychological reaction derived partly but not exclusively from the physical injury.

[108] More broadly, it is apparent that Mrs Hunt's pain, suffering and loss of amenity of life, while significant, should not be regarded as having continued to result solely from the physical injury. In my view her over-presentation to examining experts in 2010 and the marked disproportion at that time between her injury and the significant symptoms to which she laid claim indicates that by that era the contribution of psychological factors, only some of which derived from the physical injury, had become more significant than the physical injury as an ongoing cause of the symptomology to which she laid claim. However sight must

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138 Medical records ex 3, pp 43-54.
139 Medical records ex 3, p51
140 Ex 18 Schedule C
141 Ex 18 p10 to 11.
142 T1-42/50
143 Report ex5 p6

not be lost of the fact that prior to that era she had already endured very significant pain and suffering from her injury.

[109] Notwithstanding the diminution over time of the causal connection between the injury and Mrs Hunt's apparent pain, suffering and loss of amenity of life I regard the causal role of the two categories of ISV physical injuries as having been sufficiently significant to warrant the ISV assessments for each separate injury being set beyond the top of the range of items 89 and 94 and instead set towards the lower end of the range of items 88 and 93.

[110] My overall impression of the evidence is that the pain and suffering consequences of the cervical spine injury were marginally more severe than those associated with the lumbar spine injury[144].

[111] In the circumstances I assess the ISV of the cervical spine injury only, under category 88 moderate cervical spine injury – soft tissue injury, as 6 and the ISV of the lumbar spine injury only, under category 93 moderate thoracic or lumbar spine injury – soft tissue injury, as 5.

[112] It follows under the Regulation that it would be the higher ISV of 6 for the soft tissue injury to the cervical spine, the "dominant injury"[145], that would attract the calculation of the general damages award. However, as s 3 of Schedule 3 of the Regulation acknowledges, the effects of multiple injuries commonly overlap, with each injury contributing to the overall level of adverse impact on the injured person. In addition to the cervical injury there is the lumbar spine injury that I have already assessed at an ISV of 5. Two of the 2009 examining experts also detected some evidence of a separate thoracic spine injury.[146] While I do not on the whole of the evidence conclude that was a third injury, such as to require a third injury assessment under Schedule 4 of the Regulation, it is obvious that the combined effects of the cervical and lumbar spine injuries caused significant pain and discomfort beyond those discrete regions, including to the region of the thoracic spine.

[113] To reflect the overall level of adverse impact of the injuries I exercise my discretion under s 3 of Schedule 3 of the Regulation to assess the dominant injury ISV at a higher level in the range of ISV's for that injury than I would for that injury only. That range is 5 to 10. I assess the moderate cervical spine soft tissue injury ISV at 10.

[114] It was submitted for Mrs Hunt that I ought uplift the ISV, in the manner contemplated by s 4 of Schedule 3 beyond the maximum ISV in the dominant injury range. However, because of my findings, my starting point in this process was lower than that urged on Mrs Hunt's behalf. I am satisfied an ISV of 10 sufficiently reflects the severity of the combined level of adverse impact of the injuries.

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144 For example Mrs Hunt told Dr Burke she found the cervical injury to have had the worse impact.

145 Regulation Schedule 3 s3

146 Doctors Magurie and Giles

[115] Applying the calculation provisions of Schedule 6A of the Regulation to an ISV of 10, would give rise to general damages of $11,000.

[116] I award general damages of $11,000.

[117] Interest cannot be ordered on an award for general damages[147].

Special Damages

[118] Special damages have been agreed between the parties at $11,000. I award that jointly admitted amount.

[119] The plaintiff accepts the defendants' approach, in its Damages Schedule calculation of excluding the amounts paid by Medicare and Workcover from the sum on which interest is calculated as well as applying an interest rate of 2.64 per cent[148]. Adjusting that calculation to the period since the accident of 3.36 years gives rise to interest on the special damages of $385.16

Past Economic Loss

[120] Mrs Hunt claims past economic loss on the assumption that but for the subject injury she would have continued working part time for Suncorp up to and beyond the time of the trial. The amounts claimed for past economic loss in her Schedule of Damages, adjusted to the date of judgment and excluding interest, are:

(i) *23.07.08 – 27.07.08*
10.3 hours per week x $19.60/hour = $201.88
(note – the plaintiff received weekly benefits from WorkCover Queensland totalling $195.10)

(ii) *28.07.08 – 24.08.08*
= 13.5 hours per week x $19.60/hour = $264.60
Nett per week x 4 weeks = $1,058.40

(iii) *25.08.08 - 29.09.08*
= 3 hours per week x $19.60/hour
= $58.80 nett per week x 5 weeks = $294.00

(iv) *25.05.09 – 13.06.09*
= 13.5 hours per week x $19.60/hour
= $264.60 nett per week x 5 weeks = $1,323.00

(v) *01.07.09 – 02.12.11*
= 25.5 hours per week x $19.60/hour
= $499.80 nett per week x 126 weeks = $62,974.80

[121] Mr Lemura and AAMI contend that Mrs Hunt should only be reimbursed for her loss of earnings up to her resumption of her full part time hours on 30 September 2008. They accept the calculation of past economic loss for that period as set out in (i), (ii) and (iii) above and I will award those amounts.

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147 s60 *Civil Liability Act*
148 T3-48/14

[122] However Mrs Hunt also claims $1,323.00 in lost income as a result of her reduced working hours from 25 May to 13 June 2009 (detailed in (iv) above) and $62,974.80 for her loss of income during the 126 weeks from the date of her loss of employment by resignation from 1 July 2009 to the present (detailed in (v) above).

[123] The defendants do not accept those subsequent components of the past economic loss claimed because those alleged losses are said to have occurred after the collision of 9 May 2009 when Mrs Hunt again reduced her hours and then resigned.

[124] The defendants contend any inability to work after the collision of 9 May 2009 was because of the impact of that collision. I have already rejected that argument, noting Mrs Hunt had reported she was struggling to cope with work prior to the 2009 collision. Despite the influences of anxiety and depression I am satisfied it was the injury and her problems in coping with it that caused her to again reduce her hours. I will therefore award the amount claimed in part (iv) of the past economic loss listed in Schedule G to the Quantum Statement, a total of $1,323.

[125] The real issue is whether Mrs Hunt's eventual resignation and, more particularly, her continued unemployment since then was caused by the subject injury.

[126] The circumstances culminating in Mrs Hunt again reducing her working hours after the collision of 9 May 2009 were discussed above. There is little evidentiary detail about what occurred thereafter, nor is there any detailed evidence regarding her motivation for resigning from work effective of 30 June 2009.

[127] The only direct evidence as to the reason why she resigned was her explanation in cross-examination:

> "*There was a series of events that led to my decision to ceasing work. I had misplaced a million dollars but had recovered it the same day…I had told a client to – I swore at him, I swore at him because I had extreme pain. I was making many errors at work. I was not coping between work and home life. My children were suffering in the sense that I would get home and yell and scream at them because I was not coping with the pain. That was also taking a lot of pain medication. I decided to make a choice between career and my family. It was not a hard decision at that time because my family comes first."*[149]

[128] Prior to her reduction of hours and her subsequent resignation she had managed, notwithstanding her depressive disorder, to return to and continue at her full part-time hours for over seven months. It is implicit in her above answer that despite her stoicism her inability to manage pain put pressures on her in her work and home life that eventually overwhelmed her. As mentioned above, the psychiatrist Dr Steinberg had recommended she attend a further five sessions with clinical psychologist Carolyn Richie to assist in her adjustment to the management of pain but she only had a further two sessions with Ms Richie, on 27 May 2009 and 16

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[149] T1-79/15-27. Ex17 p140, a termination advice, merely refers to her termination being "employee initiated" and refers to "change in circumstances" and "health".

June 2009, both of which were prior to her resignation. It appears from her quantum statement that her only treatments since resignation have been for her physical injury, as distinct from her capacity to manage the pain associated with it.

[129] As to what little evidence there is as to why Mrs Hunt did not work again she asserts in her quantum statement that she has been unable to participate in gainful employment since her resignation[150]. She simply states in her quantum statement that she is no longer capable of working due to her injuries and consequent limitations[151]. However, there is strong evidence suggesting that by during 2010 the causal influence of her injuries upon any incapacity to work had diminished significantly.

[130] As I have already found, Mrs Hunt's over-presentation to examining experts in 2010 and the marked disproportion at that time between her injury and the significant symptoms to which she laid claim indicates that by that time the contribution of psychological factors, only some of which derived from the physical injury, had become more significant than the physical injury as an ongoing cause of the symptomology to which she laid claim.

[131] Despite the apparently mixed causal influence of her problems in coping with pain, anxiety and depression upon her capacity to continue to work in 2009, I conclude it is likely, given the apparent extent of her soft tissue injuries as noted in that era by Doctors Giles, Campbell and Maguire, that the subject injury is what caused her to cease work. However, that was in 2009.

[132] As 2010 progressed and she was examined by Doctors Weidmann, Toft and Burke, her injury had largely resolved. Dr Toft was plainly of the view that she could return to her usual occupation. As for Dr Weidmann, he reported:

> *"I accept that symptoms may bother her at work and may interfere with her level of function and productivity but it is difficult to say that she is medically unfit for work. In my opinion, she is medically fit for any employment that does not require repetitive bending or lifting activities and that allows her to sit, stand or move about as necessary. With some modifications, I would expect her to be fit for her pre-injury duties although she may have difficulty finding suitable work on the open job market[152]."*

[133] Four months later Dr Burke, the last medical expert in time to examine her, observed:

> *"She describes quite marked and profound symptoms. However, the work she used to undertake was part-time, at around 25 hours per week. The typical demands associated with these duties were not overly marked. The level of underlying biomedical impairment is not particularly marked. It is likely she would experience and report symptoms if she did return to the workforce. However, in my opinion, she does have the capacity to return*

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150 Ex 18 p 12
151 Ex 18 p 13
152 Report ex 5 p 6

> *to the type of work she has performed in the past (sales and services consultant).*"[153]

Dr Burke had earlier commented on the factors in the psychosocial domain contributing significantly to her ongoing symptomology. He recommended that she be referred to an intensive multi-disciplinary pain rehabilitation programme[154]. That recommendation was made on 27 August 2010. At the trial, well over a year later, there was no evidence of her having undertaken any such programme.

[134] Such evidence as there was at trial of her ongoing inability to work appears only to have been the bland assertions mentioned above in her quantum statement. I find them unpersuasive, particularly in the light of positive evidence in the experts' reports in 2010 of her capacity to return to work of a similar kind she had previously performed.

[135] In my view Mrs Hunt has not proved her continued unemployment for all of the period from resignation to now was caused by the injury. The calculation of what her past economic loss was from the date of her resignation to now will be imprecise in that the injury was causative of economic loss for a proportion rather than the whole of that period. Section 55 of the *Civil Liability Act* is therefore relevant. It relevantly provides:

> *"55 When earnings can not be precisely calculated*
>
> *(1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.*
>
> *(2) The court may only award damages if it is satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.*
>
> *(3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award. …"*

[136] The plaintiff's methodology of assessing past economic loss based on what it is assumed Mrs Hunt would have continued to earn if working her full part time hours is uncontroversial. The defendants, who concede the application of the plaintiff's methodology to the 2008 periods of economic loss, do not challenge its assumptions as to hours and pay rates. I adopt its assumptions. However, it cannot be applied in full throughout the ensuing period up to the present. To do so would assume Mrs Hunt was unable to work for the entire period because of the injury, an assumption inconsistent with my above-discussed acceptance of the opinion of the medical experts who examined her in 2010.

[137] On the other hand the assessment method ought not cease its application from the date on which I infer Mrs Hunt was again fit for work. She would have required

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153 Ex 6 pp 6, 7

154 Report ex 6 p 6

some time beyond that within which to again find employment of the kind she had lost because of the injury. During that period her loss of income, as a causal consequence of the injury, would continue.

[138] It cannot be assumed she would obtain comparable employment quickly. There was no evidence put forward regarding the availability of comparable part time work for Mrs Hunt in or near Mackay. While it is reasonable to infer comparable part-time positions involving similar hours and remuneration would be available it needs to be borne in mind that such vacancies arise from time to time so that from week to week the pool of available such vacancies is considerably smaller than the total amount of such vacancies advertised throughout a year. It cannot be assumed she would succeed in her first application and it could take time as vacancies progressively arise before she would be successful.

[139] Further, Mrs Hunt would need to be more discerning than an average office worker as to the physical demands of prospective part-time positions so as to reduce the risk of renewed injury. Dr Weidmann's earlier quoted qualifications on the ease with which she could transition back to work are relevant.

[140] Mrs Hunt's long period off work due to injury would also reduce her competitive advantage against other part-time job seekers which would affect the speed within which she would likely find suitable employment.

[141] I will assume after Mrs Hunt was fit for work that a further period of eight months would be required to allow for the above adverse contingencies in her successfully seeking employment.

[142] It appears Mrs Hunt was fit or nearly fit for work by the time of her examinations on 29 April 2010 by Doctors Weidmann and Toft. However when Dr Burke examined Mrs Hunt on 27 August 2010 he recommended she undertake a two-week intensive pain rehabilitation programme. Adding some fair opportunity for her to properly prepare to return to work, it is reasonable to assume she would have been fit to return to work by 1 November 2010.

[143] Allowing a further eight months for her to successfully seek employment I assume she could have been back in comparable employment by 1 July 2011 at which time her past economic loss caused by the injury would have ceased[155].

[144] Adopting the rates indicated in Item (v) of Schedule G to Mrs Hunt's quantum statement, I calculate past economic loss from 1 July 2009 to 1 July 2011 as follows:

(a) 2009 - $499.80 net per week x 26 weeks	=	$12,994.80
(b) 2010 - $499.80 net per week x 52 weeks	=	$25,989.60
(c) 2011 - $499.80 net per week x 26 weeks	=	$12,994.80
		$51,979.20

[145] It follows that the amounts awarded for past economic loss for the following periods are:

(i) *23.07.08 – 27.07.08 = $201.88*

[155] The approach undertaken above of identifying a theoretical work resumption date is similar to that approved in *Ballestros v Chidlow & Anor* [2006] QCA 323.

(ii)	*28.07.08 – 24.08.08*	=	*$1,058.40*
(iii)	*25.08.08 - 29.09.08*	=	*$294.00*
(iv)	*25.05.09 – 13.06.09*	=	*$1,323.00*
(v)	*01.07.09 – 01.07.11*	=	*$51,979.20*
			$54,856.48

[146] Interest is allowable on past economic loss at a rate of 2.64 per cent pursuant to s 60(2) of the Act. An award of $54,856.48, at a 2.64 per cent interest rate over 3.36 years attracts interest of $4,866.

[147] There should also be an award for lost superannuation contributions[156] due to past economic loss at a rate of 9 per cent, that is, $4,937.08.

Future Economic Loss

[148] It is submitted for Mrs Hunt that she is not able return to work. For the above reasons I am of the view Mrs Hunt could already have returned to part-time work in a comparable position to that which she had to resign from because of her injury.

[149] However Mrs Hunt had intended to take on full-time work once her youngest child reaches high school next year. While there was an attempt made in submissions to undermine the probability of that occurring and continuing, with reference being made to her husband's significant income and the pattern of his work which takes him away from home for extended periods, I accept Mrs Hunt's evidence she intended to return to full-time work in 2012. There is no evidence to contradict it and it is not inherently implausible. It is unremarkable that she aspired to return to full-time work once her children finished primary school. There is no evidence to suggest that but for the injury Mrs Hunt would not have been able to increase to full-time hours in 2012 and I accept given her apparent past competence in her work that she would have been successful in doing so.

[150] There are however a number of problems caused by the injury which diminish her future earning capacity. Given their nature they do not permit a precise assessment and a global approach to the assessment is inevitable. Reference to them involves some theoretical consideration of what her future lost earnings might be, however, it is the loss of earning capacity rather than the loss of earnings which I am endeavouring to address.[157]

[151] Firstly the above-discussed adverse contingencies bearing upon her successfully seeking part-time work are also relevant to her successfully seeking full-time work. On the one hand she was not guaranteed full time work so it cannot be assumed that but for the injury there would have been no delay at all in her

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157 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 4, 16

securing full time employment as soon as her youngest child started high school in 2012. On the other hand, in consequence of the injury and her past work-related problems arising from it she is a less competitive applicant than an applicant without such a history. Also she would need to be more discerning that the average office worker as to the physical demands of prospective full-time positions so as to reduce the risk of renewed injury. For the purposes of developing some indication of a global award for future economic loss I would infer a delay of six months as the period she would take, additional to normal delay, to find full-time work that she otherwise would have started had she not been injured. I assume she would already have resumed working part-time back on 1 July 2011. Thus I would allow the difference between her likely part-time and full time-time net income for six months from 2012 as representing a loss of future earning capacity. Adopting the net part-time and full-time weekly income figures in the relevant part of Schedule G to the quantum statement, of $500 and $700[158] respectively, the weekly difference of $200 net over a six month period, ie 26 weeks, would be $5,200.

[152] Secondly, none of the experts whose evidence I favour gave specific consideration to whether or by when Mrs Hunt would be fit for full-time work. Since I accept the expert opinion the injury had resolved I readily infer Mrs Hunt will be physically able to perform full-time work. However, I do not have the benefit of evidence of whether she will be physically able to do such work from the outset of next year or whether some further time would be required. I would take the precaution of allowing some added time. Given my acceptance of the evidence that her injury has resolved it can be reasonably inferred an allowance of a further period of six months would be ample. By reference to the above calculation that would equate to a further $5,200 indicative component of economic loss.

[153] The third aspect to Mrs Hunt's lost future full-time earning capacity derives from her potentially heightened vulnerability to the injury being aggravated, causing her to be unable to work full-time for periods beyond her accrued sick leave entitlements and possibly causing periodic loss of employment. The experts whose opinions I have preferred did not expressly acknowledge that risk. However their evidence does imply an element of some risk of further difficulty. For instance Dr Weidmann's emphasis on the need for employment that does not require repetitive bending or lifting[159] implicitly acknowledges such activity may cause physical problems for Mrs Hunt. Dr Toft does not consider her injuries would be "*detrimentally affected"* but does acknowledge the possibility her symptoms could be *"exacerbated"*.[160] Dr Burke reported it was likely she would *"experience and report symptoms if she did return to the workforce".* Having regard to those comments in combination with the common knowledge of the human condition that past injuries that have resolved can be re-enlivened or aggravated, it is reasonable to allow for some future economic loss based on the above risk. That evidence of the dimunition in future full-time earning capacity is not as significant as in some other cases where awards of $40,000 to $50,000 have been made for this aspect.[161] I would allow $35,00 for this aspect.

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158 I infer these figures reflect the correct net income for the position type Mrs Hunt gave evidence she aspired to.

159 Report ex 5 p 6

160 Report ex 4 p 6

161 Eg *Ballesteros v Chidlow & Anor* [2005] QSC 280; *Cook v Bowen & Anor* [2007] QDC 108

[154] Considering the above three indicative considerations collectively I conclude the appropriate global figure for future economic loss is $45,000. I note counsel for Mr Lemura and AAMI conceded an award of $40,000 was appropriate.

[155] I award $45,000 for future economic loss.

[156] I award future loss of superannuation, being 9 per cent of the above loss, namely $4,050.

Past and Future Care and Assistance

[157] The plaintiff claims for past and future care and assistance. In calculating care and assistance the plaintiff relies on upon the opinion of Ms Purse who estimated that the plaintiff required care in the amount of 14 hours per week from the time of the accident, which would have slowly reduced to the ongoing requirement of eight hours per week.[162] The foundation for the calculation of those hours was arguably not adequately identified but that point was not taken at trial and in any event is rendered academic by another problem with this aspect of the claim.

[158] Mr Lemura and AAMI submitted that Mrs Hunt is not entitled to recover damages for past care and assistance and rely on s 59 of the Act which relevantly provides:

> *"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. …*
>
> *(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. …"*

[159] It ought be appreciated that s 59 requires a threshold to be met whereby damages for gratuitous services are not to be awarded unless the services have been, or are to be, provided for both six hours per week and for at least six months.[163]

[160] The defendants' submit the plaintiff has not cleared the first hurdle of proving that gratuitous services were necessary. Mrs Hunt asserts in her quantum statement that her husband, niece and a son helped her with personal care tasks for three months after the accident; she requires assistance with domestic chores which is provided by her husband, children and parents; her husband and children have taken over mowing and gardening at home. Her statement also affirmed the truth of the facts relied on in Ms Purse's report, although those facts appear to be similar to those provided in her quantum statement.

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162 Report ex 15 p 6

163 *Kriz v King & Anor* [2007] 1 QdR 327

[161] This evidence appeared to be inconsistent with her assertion to Dr Weidmann that *"she undertakes all tasks but finds it difficult"*[164]. However my overall impression of her evidence on that aspect in cross-examination and re-examination is that whatever was said by her to Dr Weidmann related to her capacity to undertake household tasks rather than the question of who else helped with them.

[162] In my view it can reasonably be inferred on the evidence that some gratuitious services were necessary, at least until the injury resolved. However the lack of detail in the evidence on this subject[165] heralds a different, more significant problem for Mrs Hunt in complying with s 59, namely the exclusion by s 59(3) of damages for gratuitous services replacing services provided by the injured person. The defendants contend in effect that the services claimed included, contrary to s 59(3), mostly services which she had provided to the household and that there is really no evidence of what the hours per week of the allowable component were, let alone that those hours were for at least six hours per week as is required in s 59(1)(c).

[163] The problem is largely the same as that which arose in *Leonardi v Payne and Anor*[166] and which Cullinane J found to be an insurmountable obstacle to the claim for past and future assistance. There it was apparent the estimates of the occupational therapist had taken into account tasks the plaintiff had performed prior to her injuries for the other members of the family as well as for herself. His Honour declined to make his own assessment, observing:

> *"The evidence does not permit a finding of the plaintiff's needs if the matter were considered by reference only to the plaintiff's needs for such assistance as opposed to the needs of all members of the family which were previously provided by the plaintiff."*[167]

[164] Those observations identify a problem which is also present in this matter. I am urged to infer that Ms Purse's estimates do not include hours precluded by s 59(3). It is submitted in effect that I can draw such an inference more safely in the absence of Ms Purse being cross-examined to the contrary. However there must be at least some evidence that supports the drawing of such an inference. Such evidence as there is weighs against the drawing of such an inference. The only breakdown of the assistance Ms Purse says is necessary is the hours for each category of tasks.[168] They are services of a kind Mrs Hunt previously provided and their duration suggests they probably have not been altered to make allowance for s 59(3).

[165] Quite apart from the above difficulty, which is in my view determinative, it was unlikely on the whole of the evidence that after the exclusory application of s 59(3) Mrs Hunt's allowable care and assistance would have been for at least six hours per week for at least six months. It needs to be borne in mind she returned to her former position for a sustained period before finally resigning; she continued to perform many domestic tasks of the kind being claimed for; and the causal

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164 Report ex 5 p 3

165 Compare for example the level of detail in *Shaw v Menzies & Anor* [2011] QCA 197

166 [2009] QSC 382

167 Ibid [61]

168 Report ex 14 p 63

contribution of the injury to any ongoing need for care and assistance had diminished significantly by 2010.

[166] In any event on the evidence before me s 59 precludes the recovery of damages for past and future care and assistance in this matter.

Future treatment and medical expenses

[167] Mrs Hunt's claim for future medical, rehabilitation, pharmaceutical and travel expenses implicitly assumes an acceptance of the opinion of her expert witnesses that the injury has not and will not resolve. I have rejected that opinion.

[168] Proceeding consistently with my findings some allowance ought be made to allow for:

(a) the need for a rehabilitation programme to assist with cognitive behavioral therapy and exercise/strengthening as urged by Dr Burke at a likely cost of $3000;
(b) the incidental need from time to time for pharmaceutical products to alleviate pain;
(c) the future risk of aggravation of the injury and consequent need for treatment and pharmaceutical products.

[169] Given the imprecision inherent in assessing those expenses I adopt a global amount. The defendant concedes a global amount of $1000. The likely cost of $3000 for the programme recommended by the defendant's own expert Dr Burke demonstrates a global award of $1000 is inadequate to fairly compensate Mrs Hunt for her admittedly uncertain likely future expenses.

[170] The cost of the programme would, if taken, likely be incurred in the near future and there is no need to discount it significantly to allow for its present value but the same cannot be said of the quite uncertain other categories of future expenditure in (b) and (c) above. Assuming that in combination those costs average out to about $150 a year that would amount to about $1.50 per week for 47 years (life expectancy) which on the 5% tables (multiplier 962) equates to $1,443.

[171] In all of the circumstances I award a global amount of $4500 for future treatment and medical expenses

Order

[172] In summary my assessment of damages is:

General Damages	$11,000.00
Special Damages	$11,000.00
Interest on Special Damages	$ 385.16
Past Economic Loss	$54,856.08
Interest on Past Economic Loss	$ 4,866.00
Past Superannuation	$ 4,937.08
Future Economic Loss	$45,000.00

Future Superannuation	$ 4,050.00
Future Treatment and Medical Expenses	$ 4,500,00
Total	$140,594.32

[173] I give judgment for the plaintiff in the sum of $140,594.32.