SUPREME COURT OF QUEENSLAND

CITATION:	*Hunt v Australian Associated Motor Insurers Ltd* [2012] QCA 183
PARTIES:	**CARLA LOUISE HUNT** (appellant) **v** **AUSTRALIAN ASSOCIATED MOTOR INSURERS LTD** ACN 004 791 744 (respondent)
FILE NO/S:	Appeal No 11963 of 2011 SC No 564 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	29 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2012
JUDGES:	Muir and White JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The judgment given on 2 December 2011 be varied by substituting $142,037.32 for $140,594.32.** **3. The appellant pay the respondent's costs of the appeal.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – IN GENERAL – where respondent and first defendant admitted liability for damages for personal injuries suffered in collision between vehicles driven by first defendant and by appellant – where primary judge awarded sum of $140,594.32 – where appellant contends that primary judge erred in finding her injuries resolved by 2010 – where appellant contends that primary judge erred in findings of future economic loss – where appellant contends that primary judge erred in findings of future lost superannuation, of cost of future treatment and medical expenses and pharmaceutical products – where primary judgment contained mathematical error in sum allowed for pharmaceutical products – where appellant

contends that primary judge erred in assessment of past and future care and assistance – whether correction of mathematical error ought to be rectified only under the slip rule – whether primary judge erred in findings – whether appeal allowed

Civil Liability Act 2003 (Qld), s 59(1)

Ballesteros v Chidlow & Anor [2006] QCA 323, cited
Elford v FAI Insurance Company Limited [1994] 1 Qd R 258; [1992] QCA 41, considered
Hughes v National Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134; [1979] HCA 2, cited
Mc Gregor-Lowndes v Collector of Customs (Qld) (1968) 11 FLR 349, cited
Ritz Hotel Ltd v Charles of the Ritz Ltd (1988) 15 NSWLR 158, cited
Roof & Ceiling Construction Co v S A Wigan & Co Pty Ltd [1972] QWN 14, cited
Walker v Walker (1937) 57 CLR 630; [1937] HCA 44, cited

COUNSEL: A R Philp SC for the appellant
G Crow SC, and S Deaves, for the respondent

SOLICITORS: Roati & Firth Lawyers for the appellant
Miller Harris Lawyers for the respondent

[1] **MUIR JA:**

Introduction

The appellant commenced proceedings in the Supreme Court claiming damages for personal injuries suffered in a collision between a vehicle driven by the first defendant and a vehicle driven by the appellant. The respondent, the first defendant's compulsory third party insurer, and the first defendant, who is not a party to this appeal, admitted liability but quantum remained in issue. The respondent and first defendant alleged that the appellant had pre-existing cervical, thoracic and lumbar disorders which she had understated and that she had overstated the nature and extent of current cervical, thoracic and lumbar symptoms. On 2 December 2011, after a three day trial, the primary judge gave judgment for the appellant in the sum of $140,594.32. The appellant has appealed, contending that her award of damages should be increased as follows:

Future Economic Loss	$180,800.00 to replace	$45,000.00
Future Superannuation	$16,272.00 to replace	$4,050.00
Future Expenses	$12,620.00 to replace	$4,500.00
Past Care	$14,000.00 to replace	$0.00
Future Care	$40,000.00 to replace	$0.00

[2] I propose to address the grounds of appeal in the order in which they were raised in the appellant's notice of appeal.

The trial judge erred in finding that the appellant's injuries had been resolved by 2010

The appellant's contentions

[3] Counsel for the appellant advanced submissions in support of this ground to the following effect. The primary judge's finding that the appellant's injuries had resolved was based on expert evidence led by the respondent and first defendant, which the primary judge preferred to the expert evidence led by the appellant. That preference was not challenged, but it was contended that the evidence that the primary judge accepted did not permit the conclusion that the appellant would be able to perform full time work in the future.

[4] There was no direct evidence as to when, if ever, the appellant would be fit for full time work. The only basis stated by the primary judge for drawing the inference was the expert opinion evidence to the effect that the appellant's injury had resolved.[1] However, none of the experts accepted by the primary judge described the appellant's injuries as "resolved". His interpretation of their evidence was mistaken.

[5] An injury has not resolved merely because a whole person impairment percentage based on the criteria under AMA 5 is assessed at 0 per cent. That would confuse impairment (as assessed) with actual disability. It would be ignoring pain which cannot and is not taken into account on an impairment assessment.

[6] An injury has not resolved merely because the appellant would be capable of returning to some form of work. Each of the doctors accepted by the primary judge placed restrictions on the appellant's capacity to return to part time work owing to the injuries sustained in the accident. The doctors implicitly recognised that there were ongoing symptoms and restrictions resulting from such injuries. The primary judge's conclusion is inconsistent with his assessment of general damages "on item numbers warranting a higher ISV than the 0 per cent impairment warranted and a recognition that the [appellant] had sustained an adverse psychological reaction to her physical injuries".

[7] The primary judge recognised that the appellant's pain, suffering and loss of amenity of life were significant.[2] His watering down of the effect of her injuries by psychological factors, only some of which derived from the physical injury, could not be viewed as equivalent to the appellant's injury having resolved. The primary judge's misunderstanding of the expert evidence resulted in his failure to properly analyse the capacity of the appellant to engage in full time work. That was not the subject of evidence led by the respondent and the restrictions placed upon the appellants return to part time work by the accepted expert evidence should have caused the primary judge to conclude that the appellant lacked the capacity to ever engage in full time work.

The primary judge's summary of the evidence of the experts accepted by him

[8] The general findings of the primary judge in respect of the evidence of the accepted experts is contained in para [9] of his reasons where his Honour said:[3]

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1 Reasons at [152].

2 Reasons at [108].

3 Citations omitted.

> "Dr Michael Weidmann, neuro-surgeon, examined the [appellant] on 29 April 2010, and was called by the [respondent]. Dr Weidmann opined [the appellant] suffered a chronic musculo-ligamentous injury to the cervical and lumbar spine and regarded her ongoing back and neck symptoms as consistent with those injuries. 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.
>
> Dr Lloyd Toft, orthopaedic surgeon, examined the [appellant] on 29 April 2010 and was called by the [respondent]. Dr Toft opined there had been a strain of the musculo-ligamentous supporting structures of the cervical, thoracic and lumbar spines and soft tissue injuries to limbs. He considered there had been a gross over presentation of any apparent disability and opined [the appellant] did not suffer from any injuries as a result of the accident that would prevent her from returning to her usual occupation.
>
> Dr Nicholas Burke, consultant occupational physician, examined the [appellant] on 27 August 2010 and was called by the [respondent]. Dr Burke diagnosed a musculo-ligamentous injury of the cervical and lumbar spine. He considered her ongoing symptoms were not solely attributable to the injury suffered in the collision and also stemmed from psychosocial factors. 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."

[9] Addressing the question of the extent to which the appellant's injuries had resolved, the primary judge said, relevantly:

> "[75] Based on the preponderance of medical opinion I find the injury suffered by [the appellant] was a chronic musculo-ligamentous injury to her cervical spine and a chronic musculo-ligamentous injury to her lumbar spine.
>
> [76] The more contentious issue is whether and to what extent the injury has resolved.
>
> …
>
> [80] The [accepted] medical experts… are effectively of the opinion that the injury has resolved or largely resolved and that, with some qualifications, [the appellant] is able to return to work. Those witnesses, Dr Weidmann, Dr Toft and Dr Burke examined [the appellant] on 29 April 2010 and 27 August 2010, a span of dates roughly a year after the span within which [the appellant]'s experts examined her.
>
> …
>
> [85] …I accept their opinion, in effect, that the injury had resolved or largely resolved by the time of their 2010 examinations."

The evidence of the accepted experts

[10] Dr Burke, in his report of 27 August 2010, gave the following opinions:

> "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 to the type of work she has performed in the past (sales and service consultant).
>
> She indicated that her long term ambition was to be an auditor; again, I think she would have the capacity to undertake these types of duties."

[11] Dr Weidmann's relevant opinion is stated as follows in para 8.6 of his report dated 29 April 2010:

> "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."

[12] In para 8.7, Dr Weidmann concluded that the appellant had a "0% impairment of the whole person as a result of the lumbar spine injury as per the AMA guidelines". A similar conclusion was reached in respect of the appellant's cervical spine injury in para 8.8. Dr Weidmann said in paras 8.9 and 8.10:

> "A 0% impairment does not necessarily mean there is an absence of symptoms.
>
> The AMA guides define disability as '*An alteration of an individual's capacity to meet personal, social, or occupational demands because of an impairment*'. However it is accepted that there is no reliable assessment system whereby disability can be objectively assessed and quantified."

[13] In cross-examination, Dr Weidmann accepted that a 0 per cent impairment did not necessarily mean that there was an absence of symptoms. He accepted that he recognised in his report that her symptoms could have an impact on her duties at home and her leisure activities. This exchange occurred:

> "And it's not just the pain symptom, is it? It's - because a person is experiencing pain, they're often on strong pain killers, aren't they?-- Yes.
>
> And those pain killers can lead to a lack of concentration and a general decrease in energy, et cetera, can't they?-- Some of the stronger pain killers can do that, but the - the usual milder ones tend not to do that.
>
> No, but the - I'm talking about the stronger ones?-- Yes."

[14] Dr Toft's report of 30 April 2010 relevantly stated:

> "**DIAGNOSIS**
>
> - Strain of the musculo-ligamentous supporting structures of the cervical, thoracic and lumbar spines
>
> - Soft tissue injuries to limbs
>
> **OPINION AND ASSESSMENT**
>
> …
>
> The current physical examination could not be regarded as being consistent with the usual pattern or presentation seen with organic pathology. There would appear to be gross over presentation of any apparent disability. There were numerous non organic signs as well as contradictory signs. I believe it would have to be conceded that the complaint of symptoms and the consequent disability is out of proportion to those expected from the nature of the injury and the treatments which have been instituted…
>
> **Treatment**
>
> It is noted that [the appellant] has had a range of therapies without any lasting benefit. Thus, further attempts at treatment would not be beneficial and would reinforce [the appellant]'s perception that there is some significant underlying pathology causing her symptoms.
>
> **Prognosis**
>
> I do not believe that [the appellant] has suffered any injuries in the subject accident which will cause any future deterioration or complications or requirement for treatment.
>
> **Occupation**
>
> In my opinion, [the appellant] has not suffered any physical injuries in the subject accident which would prevent her from returning to her usual occupation.
>
> **Activities of Daily Living**
>
> [The appellant] would be able to manage all she has to do by appropriate modification of any activities which exacerbate her symptoms.
>
> **Sports, Recreation and Leisure Activities**
>
> It would be a matter for [the appellant] to determine whether she was prepared to tolerate any symptoms which such activities may cause or exacerbate. However, I do not believe that she has suffered any injuries in the subject accident which would be detrimentally affected should she choose to undertake such activities."

[15] In cross-examination, this exchange took place:

> "All right?-- -----types of injuries. However, it is well recorded that people may continue to have symptoms of a type of injury, but that doesn't necessarily equate with impairment of course.
>
> All right. So, you - it's not impossible to have symptoms that become chronic for this type of injury that the [appellant] suffered? -- No, that's - you're correct.
>
> You're aware where you differ from the other orthopaedic evidence is that you really just don't accept that the symptoms she presented with were real?-- Well, it's more - more the - the physical signs. They were not consistent with, in my long experience, any underlying organic condition and certainly there is no evidence of any underlying organic condition of any - well, of any significance-----
>
> But I thought-----?-- -----from the investigation."

[16] Dr Toft said that the appellant's symptoms were not consistent with what he would have expected from her injury.

The primary judge's findings on credibility

[17] The primary judge found the appellant to be an honest but unreliable witness[4]. He was led to that conclusion principally because of the appellant's failure to disclose to any of the many medical practitioners who examined her, apart from Dr Burke, her 19 attendances on a chiropractor, between 11 May 2007 and 27 June 2008 inclusive, for treatment for neck and back pain. The primary judge found that the condition for which she was receiving treatment did not give rise "to time off work or a need for pain relief by prescription drugs".[5] His Honour concluded, however, that the failure to disclose bore on her credibility, at least in so far as her history of her symptoms were concerned. He said:[6]

> "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 [borne] in mind generally in assessing the reliability of clinical information she provided to Doctors."

[18] In that part of his reasons in which he considered the question of whether the appellant had deliberately overstated the nature and extent of her cervical, thoracic and lumbar symptoms to assessing medical practitioners,[7] his Honour said,[8] "In

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4 Reasons at [14].
5 Reasons at [41].
6 Reasons at [46].
7 Reasons at [60] – [74].
8 Reasons at [69].

combination, the evidence of Dr Toft and Dr Burke provides powerful evidence of over-presentation by [the appellant], but not necessarily of dishonesty.

[19] His Honour took the view that:[9]

> "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."

[20] The primary judge concluded his reasons on this topic with the following summary:[10]

> "In the upshot, while there is persuasive evidence of over-presentation on [the appellant]'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 [the appellant]'s lay ability to self assess her symptomology."

[21] As well as the over-presentation issue, the primary judge concluded that the appellant's perceptions of her symptoms were distorted by psychological factors. He referred to the evidence of Drs Burke and Toft in this regard in paras [70] – [73] of his reasons and when, considering the nature and extent of the appellant's injury, he said:[11]

> "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 [the appellant] as providing the most reliable evidence of the extent and on-going medical effects of [the appellant]'s injury."

[22] The primary judge concluded that the opinion of the accepted experts was that "… the injury had resolved or largely resolved by the time of their 2010 examinations".[12] That conclusion was open to the primary judge on the evidence of the accepted experts. But the question of whether the appellant's injury had "resolved or largely resolved" was something of a non-issue. Focus on it deflected attention from the evidence of the accepted experts and the findings of the primary judge on the appellant's ability to continue with her past, or similar, employment.

The evidence of the accepted experts in relation to pain symptoms and ability to work

[23] The evidence of Dr Toft was clear and unequivocal on the question of the appellant's ability to return to work. Dr Burke was of the view that there were "other factors contributing to [the appellant's] ongoing symptoms and disability" that were "likely to lie in the psychosocial domain". He did not consider that there was any requirement for future care and assistance. Although he thought it likely that the appellant would "experience and report symptoms [presumably, of pain and discomfort] if she did return to the workforce", he was nevertheless of the opinion that she did have the capacity to "return to the type of work she has performed in the

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9 Reasons at [70].
10 Reasons at [74].
11 Reasons at [87].
12 Reasons at [85].

past" and that she had the capacity to be an auditor. The general effect of his evidence was that, as a result of matters not relating to the accident, as well as her condition as a result of the accident, the appellant's capacity to work was largely unaffected, even though she would be likely, from time to time, to experience pain and discomfort.

[24] Dr Weidmann's opinion that the appellant's condition had "become stable and stationary" was also clear. He was of the view that the appellant was fit for her pre-injury duties but that some modifications in her mode of work may be necessary and that "she may have difficulty finding suitable work on the open job market". In his opinion, symptoms such as "lack of energy, blurred vision, dizziness, forgetfulness and lack of concentration" were not related to the appellant's physical injuries. It would seem that Dr Weidmann was of the opinion that the pain reported by the appellant was a "secondary psychological" issue.

[25] Dr Weidmann's cross-examination, apart from one aspect which does not remain in issue, was limited to a few general questions about the nature of pain symptoms. As was apparent from the cross-examinations of Drs Weidmann and Burke, the nature and extent of the pain reported by the appellant was not able to be objectively assessed: its determination largely depended on the evidence of the appellant herself.

[26] In his oral evidence, Dr Burke made it plain that his assessment was on the basis of the injuries sustained by the appellant in the accident and that he had attempted to exclude from his assessment any impairment resulting from psychological factors not resulting from the accident. In his oral evidence, Dr Burke was of the opinion that the appellant's "underlying injury was relatively minor and [that] the …overall impact in relation to that minor… injury is not overly… marked". He observed that the appellant's "description of the impact on her life is… quite marked, but that's out of proportion to… the injury that she actually received". Dr Burke also said that the appellant had "pre-existing pain symptoms" which she was having "some difficulties with managing… in the lead up to [the accident]". He thought that the pre-existing condition had been "significantly aggravated" by the accident.

[27] The evidence of the appellant at trial about her pre-accident pain was at variance with the histories given by the appellant to any witness other than Dr Burke. Dr Toft, for example, reported that "... she had never had any previous neck or back pain. She had not had any previous accidents or injuries". The primary judge made it plain that he did not accept the appellant's account of her post-accident pain symptoms. That was the account on which the medical experts based their opinions even though, as discussed above, Dr Burke discounted what the appellant had told him.

The primary judge's findings in relation to pain and ability to work

[28] The primary judge found in relation to the appellant's pain symptoms:[13]

> "Pain was clearly caused by the injury and the evidence suggests [the appellant] 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

[13] Reasons at [107] – [108] (citations omitted).

> and impaired her ability to concentrate. However Dr Weidmann opined her lack of energy and concentration was not related to the physical injury and may be related to anxiety. It is a reasonable inference that [the appellant]'s adverse psychological reaction derived partly but not exclusively from the physical injury.
>
> More broadly, it is apparent that [the appellant]'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 not be lost of the fact that prior to that era she had already endured very significant pain and suffering from her injury."

[29] The primary judge more specifically addressed the appellant's ability to work in paragraphs [129] to [131] of his reasons.

> "As to what little evidence there is as to why [the appellant] did not work again she asserts in her quantum statement that she has been unable to participate in gainful employment since her resignation. She simply states in her quantum statement that she is no longer capable of working due to her injuries and consequent limitations. However, there is strong evidence suggesting that by during 2010 the causal influence of her injuries upon any incapacity to work had diminished significantly.
>
> As I have already found, [the appellant]'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.
>
> 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."[14]

[30] After referring to the opinions in the accepted expert reports as to the appellant's fitness for work, the primary judge observed:[15]

> "Dr Burke had earlier commented on the factors in the psychosocial domain contributing significantly to her ongoing symptomology. He

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14 Reasons at [129] – [131].

15 Reasons at [133] – [135].

> recommended that she be referred to an intensive multi-disciplinary pain rehabilitation programme. 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.
>
> 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.
>
> **In my view [the appellant] has not proved her continued unemployment for all of the period from resignation to now was caused by the injury.**" (emphasis added)

[31] The primary judge reached the following conclusions:[16]

> "It appears [the appellant] 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 [the appellant] 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.
>
> 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."

[32] In my respectful opinion, these conclusions were amply supported by the evidence discussed above and referred to in the primary judge's reasons.

The argument that the accepted experts did not consider the appellant's fitness for full time work

[33] In his oral submissions, counsel for the appellant submitted that the accepted experts had not addressed the question of the appellant's fitness for full time work as opposed to part time work of the nature of the work she was doing at the time of the accident. But, even if Dr Toft did not directly address that question, his report made it plain that, in his opinion, the appellant was able to work in her "usual occupation" which he identified as that of "a sales and service consultant".

[34] Dr Weidmann stated in his report that the appellant "with some modifications" was "fit for her pre-injury duties". This opinion does not appear to me to have any implicit qualification that the appellant's hours of work not exceed those worked at the time of her accident.

[35] In paragraph 10 of his report, Dr Burke observed:

> "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 to the type of work she has performed in the past (sales and service consultant)."

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16 Reasons at [142] – [143].

[36] Dr Burke did not expressly or, in my view, implicitly limit the appellant's capacity to work as a sales and service consultant to part time work only. His opinion that the appellant had the capacity to work as an auditor was also unqualified.

[37] When regard is had to the unreliability of the evidence relied on by the appellant to support the argument that she was unsuited to full time work, it becomes even more apparent that this argument cannot be accepted.

[38] For the above reasons, the appellant's first and primary argument must be rejected.

Conclusions in respect of the challenge to the primary judge's findings in respect of future economic loss

[39] After noting the "strong evidence suggesting that… during 2010 the causal influence of [the appellant's] injuries upon any incapacity to work had diminished significantly" and remarking on the appellant's "over-presentation to examining experts in 2010 and the marked disproportion at that time between her injury" and her claimed symptoms, the primary judge reviewed the evidence of the accepted experts in relation to the appellant's capacity to work. The primary judge implicitly contrasted the expert evidence with the appellant's "bland assertions… in her quantum statement" which he found "unpersuasive".

[40] Having regard to the expert evidence the primary judge found that the appellant would have been fit to return to work by 1 November 2010. He then allowed a further eight months for the appellant to obtain employment. This was in recognition of the appellant's disadvantages arising from the time out of the work force and the need for her to be more discerning in her choice of employment as a result of her disabilities.

[41] These matters also support the rejection of the arguments advanced by the appellant in support of its future economic loss case.

The primary judge erred in making insufficient allowance for future lost superannuation, future treatment and medical expenses and for pharmaceutical products

[42] The arguments advanced to support an increase in the award of damages to cover these matters depended on a successful challenge to the judge's findings about the appellant's capacity to work. Accordingly, this ground was not made out generally.

[43] Counsel for the respondent accepted that due to a mathematical error in the reasons, the sum allowed for pharmaceutical products was $1,443 less than it should have been. It was argued, however, that the relative smallness of the sum "does not warrant the allowing of the appeal and this Court's interference".[17] The authorities relied on by the respondent do not establish that there is any objection in principle to rectifying a mistaken calculation so as to give the appellant the award of damages intended by the trial judge. It is, in fact, implicit in the reasons of the Court in *Elford v FAI Insurance Company Limited*,[18] on which counsel for the respondent principally relied, that there is no reason in principle why errors of the nature of those now under consideration, should not be remedied. Counsel for the respondent

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17 *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258; [1992] QCA 41; and *Ballesteros v Chidlow & Anor* [2006] QCA 323 at [33].

18 [1994] 1 Qd R 258 at 264.

argued that such an error could and should be rectified under the slip rule. That may well be the case normally, but the error was not established until after the appeal was initiated and the decision was taken to raise it in the appellant's outline of argument. The mistake, having been drawn to the Court's attention, should be corrected to prevent the appellant being disadvantaged by a slip on the part of the primary judge. The correction will carry no costs consequences: the appeal would have proceeded even if the $1,443 had been paid.

The primary judge erred in his assessment of past and future care and assistance

[44] It was contended by the appellant that, as the evidence of past and future care given by the appellant and an occupational therapist, Ms Purse, was unchallenged, it was not open to the primary judge to reject it and make his own assessment. Counsel submitted that a return to work by the appellant did not exclude a claim for past or future care as the evidence did not show that the appellant continued to perform tasks of the kind for which she claimed. Past care, it was submitted, should have been assessed at a base six hours per week at $25 per hour to the date of Ms Purse's assessment (08.09.09), thereafter two hours should have been allowed to reflect the primary judge's finding of an improvement in the appellant's condition. The amount thus arrived at would be $14,000. Future care should be assessed at two hours per week (at $28 per hour) for 30 years (822 multiplier). This amounted to $40,000 after discounting.

[45] Counsel for the respondent pointed out that the primary judge found the appellant to be an unreliable witness. He also found "…Ms Purse's opinion as to [the appellant's] medical impairment is of minor comparable weight to that of the… [accepted] medical experts". It was submitted that even if Ms Purse's opinion had been accepted in full, it was evidence only of the need for services and was not relevant to whether the services were provided.

[46] Section 59(1) of the *Civil Liability Act* provides:

> "Damages for gratuitous services provided to an injured person are not to be awarded unless –
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
>
> (c) the services are provided, or are to be provided –
>
> (i) for at least 6 hours per week; and
>
> (ii) for at least 6 months."

[47] Counsel for the respondent submitted that there was no evidence which established that the appellant was given the care which she alleged to have received. The evidence, upon which the appellant relies, for present purposes, is that of Ms Purse and herself. Ms Purse's report was admitted without objection and, prima facie, the hearsay evidence in it was therefore evidence for all purposes and should have been given the weight the trial judge thought appropriate.[19]

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[19] *Walker v Walker* (1937) 57 CLR 630 at 636; *Roof & Ceiling Construction Co v S A Wigan & Co Pty Ltd* [1972] QWN 14 at 25, but cf *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158; *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134; and *McGregor-Lowndes v Collector of Customs (Qld)* (1968) 11 FLR 349 at 357 – 359.

[48] It is apparent that in so far as Ms Purse made statements in her report about past care, she was merely repeating what she was told by the appellant. The appellant swore to the accuracy of the facts set out in the report in her quantum statement. It may be accepted, I think, that by so doing the appellant was affirming the truth of the information in the report which she had provided to Ms Purse. Although the primary judge, as he was entitled to do, treated the relevant parts of Ms Purse's report and of the quantum statement as having probative force, he regarded the evidence as unreliable in respect of the period after 13 June 2009 and gave it little weight.

[49] The primary judge found it more probable than not that the services falling within s 59(1) would have been for less than six hours per week and thus not able to be claimed.[20] There is no evidence which falsifies these findings. Consequently, the award in relation to past care was not shown to be affected by error.

[50] The claim for future care and assistance is inconsistent with the primary judge's findings that: the appellant's injuries had resolved;[21] the causal influence of the appellant's injuries upon any incapacity to work had diminished significantly during 2010;[22] by 2010 "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 [the appellant] laid claim";[23] and the appellant was "fit to return to work by 1 November 2010".[24] As counsel for the respondent submitted, Ms Purse's evidence is also inconsistent with the evidence of the accepted experts in relation to the need for future care as a result of injury sustained in the subject accident.

[51] These findings were not shown to be wrong and provide further support for the primary judge's findings in relation to both past and future care. So too do the primary judge's findings as to the appellant's unreliability in the statement of her symptoms and his general acceptance of the evidence of Drs Burke, Toft and Weidmann.

[52] For the above reasons I would order that:

- the appeal be dismissed;
- the judgment given on 2 December 2011 be varied by substituting $142,037.32 for $140,594.32; and
- the appellant pay the respondent's costs of the appeal.

[53] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with his Honour's reasons and the orders which he proposes.

[54] **NORTH J:** I have read the reasons for judgment of Muir JA and agree with his Honour's reasons and the orders which he proposes.

[55] I wish to add some further observations concerning the issue of past and future care. The occupational physician, Dr Burke, gave relevant evidence upon this question.

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20 Reasons at [165].
21 Reasons at [152] and [167].
22 Reasons at [129].
23 Reasons at [108].
24 Reasons at [142].

In his report[25] Dr Burke recorded that he had interviewed the appellant, obtained a history, examined her and obtained from her her account of her current status. In his conclusions Dr Burke said:

> "(8) She was provided with limited care and assistance after the accident. Her husband took some time off work for a short period of time. Her parents have occasionally visited to help around the house. In the intervals she has been able to undertake all activities of personal care and domestic care herself. On balance it is likely she would have required some assistance with heavier household chores which would equate to around three hours per week for approximately three months post-accident. In addition she would have required assistance with gardening, lawn maintenance. This would equate to around three hours per month and I think this would have been reasonably provided for a two [month] period post-accident.
>
> (9) In my opinion, there should be no requirement for ongoing care and assistance."[26]

[56] When Dr Burke gave evidence he was challenged on his opinions including his assessment of the requirement for care[27] but notwithstanding his Honour accepted the evidence of Dr Burke as the reasons of Muir JA demonstrate.

[57] While it may be that the occupational therapist, Katherine Purse was only tangentially challenged upon her conclusions when she was cross-examined, it is notable that when Ms Purse conducted her assessment on 8 September 2009 she did not have available to her the reports of the doctors who the trial judge accepted.[28] When this and also the circumstance that Ms Purse's opinion was based in large measure upon the appellant's self reporting, his Honour was entitled to give her opinion "minor comparable weight" to that of the other expert witnesses.

[58] In the circumstances, on the evidence accepted by the learned trial judge, the appellant did not prove that services were provided for the hours or for the duration required by s 59(1) of the *Civil Liability Act* 2003 (Qld).

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25 Exhibit 6, AR 339.
26 See AR 344.
27 AR 96, T2-13 l45.
28 Drs Toft, Weidmann, and Burke.