SUPREME COURT OF QUEENSLAND

CITATION:	*Rodger v Johnson* [2013] QSC 117
PARTIES:	**TAMARA JANE RODGER** (plaintiff) v **SANDRIA JOHNSON** (first defendant) AND **SUNCORP METWAY INSURANCE LTD** **ABN 83 075 695 966** (second defendant)
FILE NO/S:	BS 1801 of 2012
DIVISION:	Trial
PROCEEDING:	Claim
DELIVERED ON:	6 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13 - 15 November 2012
JUDGE:	Jackson J
ORDERS:	**The judgment of the court is that:** **1. the plaintiff do recover the sum of $400,566.37 from the defendants;** **2. the defendants pay the plaintiff's costs of and incidental to the proceeding up to and including 16 August 2012 to be assessed on the standard basis on the District Court scale; and** **3. the plaintiff pay the defendants' costs of and incidental to the proceeding on and from 17 August 2012 to be assessed on the standard basis on the Supreme Court scale.**
CATCHWORDS:	DAMAGES – PERSONAL INJURIES – QUANTUM – Where dispute as to various heads of damages – general damages - ISV of multiple injuries - future loss of earning capacity - appropriate methodology for prospect of improvement - 6 month threshold for gratuitous past care – future medication and treatment expenses *Civil Liability Act* 2003 (Qld), s 51, s 61, s 62 *Civil Liability Regulation* 2003 (Qld), s 6, schedule 3,

schedule 4

Allianz Australia Insurance Ltd v Kerr [2012] NSWCA 13, cited
Backo & Anor [2006] QSC 129, cited
Ballesteros v Chidlow & Anor [2005] QSC 280, cited
Clement v Carroll v Comber and Anor [2006] QDC 146, cited
Johansson v Hare and Anor [2006] QSC 223, cited
Malec v GC Hutton Pty Ltd [1990] HCA 20; (1990) 169 CLR 638, followed
Munzer v Johnstone [2008] QSC 162, cited
Reardon-Smith v Allianz Australia Insurance Ltd [2007] QCA 211, cited
Wynn v New South Wales Insurance Ministerial Corporation [1995] HCA 53; (1995) 184 CLR 485, cited

COUNSEL: RC Morton for the plaintiff
RJ Lynch for the defendants

SOLICITORS: McInnes Wilson Lawyers for the plaintiff
Jensen McConaghy Solicitors for the defendants

[1] **JACKSON J**: At about 6:15 pm on 4 June 2009, when the plaintiff Ms Rodger's motor scooter collided with the motor car driven by the first defendant, the plaintiff's injuries appeared minor. As it has turned out, they were more significant than first thought, both physically and psychologically. Much of what has ensued is not in dispute. In assessing the quantum of damages for her injuries as damages for negligence, it remains to determine how extensive her remaining impairments are and what the possibilities are for the future.

[2] At the time of the collision, the plaintiff was almost 27 years old. She had completed secondary school in 1999 and obtained an OP 13 level for matriculation. She was an overseas exchange student for the year following. On return to Australia, I infer in 2001, she commenced a Bachelor of Arts university degree course but did not progress there beyond six months. Some time after that she enrolled in a TAFE course described as a Certificate IV in Music Industry Business which she almost completed. From 2001, she worked for Ozaccom, an events management company, leaving there in 2004. She went overseas on a working holiday. On her return in 2005, she worked again for Ozaccom for approximately 5 months. Later in 2005, she worked as a sales assistant in a Sanity Music shop in the Australia Fair shopping centre in Southport.

[3] In 2006, she started work as an "assistant conveyancer" at Conveyancing Works on the Gold Coast. Although throughout the evidence the word "conveyancer" was used to describe her positions in law offices, her work was of a para-legal kind. She obtained no legal qualification and was not admitted to practise as a conveyancer in any jurisdiction. She was promoted to "conveyancer" after a period and on changing employer in 2008, her position was styled "senior conveyancer" by Hartnett Lawyers, where she was working full-time at the time of the collision.

[4] Following the collision, the plaintiff was unable to work for about 9 months. She returned to work on restricted duties as a conveyancer in March 2010. From May to July 2010, she appears to have resumed duties as a "senior" conveyancer, although her hours were no more than 25 hours per week. On 30 July 2010, her position was reduced to "assistant" conveyancer and her hours were agreed to be reduced to 25 hours per week. In November 2010, she resigned her employment at Hartnett Lawyers.

[5] Commencing on 26 May 2011, the plaintiff started employment again at Ozacomm, where she worked in different roles until the time of the trial. Her hours were approximately 15 hours per week, although variable depending on work availability or requirements as well as her ability to work.

[6] Summarising, the respective positions of the parties and the differences are as follows:

Head of damage	Plaintiff	Defendant	Difference
General Damages	$18,000.00	$11,000.00	$7,000.00
Past earnings	$93,728.98	$87,451.50	$6,277.48
Interest on past earnings	$3,441.73	$3,706.10	-$264.37
Future earnings	$435,000.00	$104,560.00	$330,440.00
Past superannuation	$8,460.00	$7,970.63	$489.37
PS Interest	$878.54	$0	$878.54
Future superannuation	$49,155.00	$11,825.45	$37,329.55
Past gratuitous care	$7,412.50	$0	$7,412.50
Future paid care	$50,000	$5,000.00	$45,000.00
Fox v Wood	$0	$2,940.00	-$2,940.00
Future treatment	$83,115.04	$29,782.00	$53,333.04
Special damages	$17,858.23	$17,858.23	$0
SD Interest	$504.44	$507.43	-$3.01
Totals	**$767,554.46**	**$282,601.34**	**$484,953.12**

Future Economic Loss – two erroneous positions

[7] Two of the most substantial differences in amounts between the parties lie in the claims for damages for future earnings and future superannuation. As might be

expected, the different assumptions which each side makes as to the plaintiff's future employment drive the differences.

[8] The plaintiff's case adopts a multiplicand for the calculation of future loss of earning capacity of $425 net per week. It applies that weekly loss for a period of 37 years discounted on the five percent table (multiple 895) and then further discounts the amount arrived at by 12 percent for "contingencies". The result is $335,000.

[9] The plaintiff also claims an additional amount of $100,000 "for the impairment to her general earning capacity". The factual basis for that contention is that her current employment is more favourable than it would be on the open labour market, where it is contended she would have a restricted potential for promotions and her employment opportunities have been narrowed. It is also contended that her present depressive illness may result in long term work disability. Further, it is submitted that her young age means she will carry this impediment to her earning capacity for some 36 years, that she may be forced into premature retirement, and that it is likely she will be required to absent herself from her employment in the future. No discount for contingencies is made to the claim for an additional amount of $100,000. The total of $335,000 and $100,000 is $435,000 for future loss of earning capacity.

[10] The plaintiff claims $49,155 for loss of future superannuation based on the amount of $435,000 multiplied at the agreed rate of 11.3 percent.

[11] The defendants' contentions as to future economic loss are based on a multiplicand of future loss of earning capacity of $350 net per week. The defendants submit that the plaintiff will improve to the point that she is capable of full-time work over two years, which using the five percent table results in $34,650.

[12] The defendants then submit that there is a possibility on the evidence that the plaintiff's condition will not improve or that if she improves she may not retain her pre-accident earning capacity and that a global award of $70,000 should be allowed for that possibility. The total of $34,650 and $70,000 is $104,650.

[13] The defendants also apply the rate of 11.3 percent to future superannuation. Future superannuation is therefore calculated as $104,650 multiplied by 11.3 percent which equals $11,825.45.

[14] Except in a case where a "global"[1] amount is arrived at or an award is made by way of a "buffer" for future economic loss as described in the New South Wales cases[2], I am unable to accept the defendants' methodology. No doubt unintentionally, the first part of it reflects the approach which was rejected by the High Court in *Malec v GC Hutton Pty Ltd*[3]. In that case, the Full Court of the Supreme Court of Queensland had accepted a conclusion that by a particular future date the plaintiff would have suffered from a condition which was accelerated by his injuries in any event, with the consequence that no damages for loss of earning capacity were payable after that date. The High Court held that it was an error to conclude, on the balance of probabilities, whether the future event would happen by the relevant date with the consequence that loss of earning capacity for the period after that date did

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1 *Reardon-Smith v Allianz Australia Insurance Ltd* [2007] QCA 211 at [40].

2 For example, *Allianz Australia Insurance Ltd v Kerr* [2012] NSWCA 13 at [6] – [9], [30] and [67].

3 [1990] HCA 20; (1990) 169 CLR 638.

not occur. Rather, the future hypothetical event was to be approached according to the possibilities with the plaintiff entitled to the relevant proportionate amount of the prospect that loss of earning capacity would continue after the relevant date into the future and until the end of the plaintiff's expected working life.

[15] In any event, on the evidence in the present case, there is no sound basis for a conclusion that the plaintiff will have returned to full-time work in two years. The plaintiff could not say so. The expert evidence was optimistic but guarded both as to the extent of the plaintiff's improvement and as to any time period over which it might occur.

[16] However, the defendants' error in approach was no greater, in my view, than the plaintiff's error of a similar kind. As stated, the plaintiff started from a multiplicand of $425 net per week and applied it over the whole of the balance of the plaintiff's expected remaining working life of 36 years. In doing so, the assumption was made that the plaintiff's condition would not improve and she would not return to full-time employment at any stage. The only contingencies for which allowance was then made were the "usual" contingencies[4]. And then an additional amount was claimed for the alleged further "global" species of economic loss.

[17] This approach was inconsistent with the evidence that the plaintiff's current disabilities include an adjustment disorder, which is a likely factor preventing her from being able to return to greater employment than she currently has. The medical evidence was guarded but supports an expectation that the plaintiff will be able to increase her hours at work and may be able to return to full-time employment following treatment over a couple of years.

[18] It is necessary, in the circumstances, to consider the evidence more closely. It is appropriate to do so having regard to a chronological account of the plaintiff's injuries, her recovery to date, and the consequences which sound in the assessment of damages, by reference to the particular injuries.

Wrist fractures and a rare suspected neurological injury

[19] At the point of collision, it is likely that neither the motor scooter nor the motor car were travelling at high speed, although later the plaintiff said she had been travelling at 60 kph before the collision. The collision halted the scooter and projected the plaintiff over the motor car. She hit the car on the way through, but exactly on which part or parts of her body is not clear, looking at all the evidence. She landed on the road surface, face down. Some of the impact was taken by her left wrist, although both arms and legs were involved. Her hands and knees were sore immediately afterwards. Her full faced helmet was scratched or damaged on and in the vicinity of the visor. She suffered a relatively minor cut.

[20] The plaintiff phoned her father who was driving his cab about 3 or 4 kilometres away. The Queensland Ambulance Service attended the scene. The father arrived before the ambulance service. The plaintiff was examined by the ambulance officers, but not taken to hospital. Instead, they permitted her to go to her home in the company of her father.

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[4] Luntz, *Assessment of Damages for Personal Injury and Death*, [6.4.6]; *Wynn v New South Wales Insurance Ministerial Corporation* [1995] HCA 53; (1995) 184 CLR 485.

[21] On 5 June 2009, the next day, the plaintiff's wrist was sore. She attended Robina Hospital and was examined. The wrist was X-rayed. It was recorded that she had not experienced headache or focal tenderness. Two minor fractures of her left wrist were identified. A plaster cast was applied to the wrist. She was given a medical certificate and analgesia and sent home.

[22] On 6 June 2009, she went on an outing with friends. She felt ill and returned home.

[23] On 7 June 2009, she went for a drive with her mother's partner. She felt ill and they returned home. She presented to Robina Hospital again on that day, this time with strange uncontrollable jerking movements, starting in her right shoulder, with nausea, vertigo and eye twitching. She was admitted to Robina Hospital. A CT scan was taken of her head. No acute pathology was identified.

[24] On 10 June 2009, she was discharged from Robina Hospital.

[25] On 12 June 2009, an MRI was taken and X-Rays of the plaintiff's cervical spine were taken. They were unremarkable.

[26] On 16 June 2009, the plaintiff attended an outpatients' medical clinic. Her symptoms were worsening with accompanying emotional stress. She was prescribed medication and a follow up appointment was made for a week later.

[27] On 22 June 2009, the plaintiff was referred to Dr Williams, an experienced neurologist, for review. Previous prescriptions of a muscle relaxant and an anticonvulsant were continued.

[28] Between 22 June and 29 June 2009, it is likely that she was seen by Dr Williams. On 29 June 2009 the referring doctor noted that he didn't understand the "latency between the accident and the onset of the [jerking] movements".

[29] Thereafter, her treatment for the jerking movements was managed by Dr Williams, who provided reports which were tendered in evidence under s 92 of the *Evidence Act* 1977 (Qld). Dr Williams died before the trial. Dr Williams' diagnosis of the jerking movements was of a proprio-spinal myoclonus.

[30] On 16 July 2009, the plaintiff was examined by Dr Reid, another experienced neurologist.

[31] On 9 October 2009, the plaintiff was reviewed by Dr Reid. By this time, it appeared that the jerking movements had settled.[5]

[32] On 6 November 2009, Dr Cameron, a third neurologist, examined the plaintiff. He viewed the diagnosis of proprio-spinal myoclonus as "very suspect in this setting".

[33] On 24 November 2010, Dr Campbell, a fourth neurologist, examined the plaintiff. He was not prepared to conclude that the tremors were related to the collision, describing them as a very unusual presentation for a head injury or spinal injury especially with normal MRI scans of the brain and spine and a normal EEG. He concluded that the tremors were of an undetermined aetiology.

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[5] On later occasions and in evidence the plaintiff referred to minor later episodes happening occasionally.

[34] In the result, it is not necessary to resolve these differences in order to assess the plaintiff's entitlement to damages. That is because whether the jerks were of organic or psychological origin, the defendants do not dispute that they were caused by the collision.[6]

[35] The plaintiff submitted that the organic aetiology should be preferred because of the absence of any prior symptoms, evidence that the plaintiff lost consciousness and Dr Williams' status as the plaintiff's treating neurologist. In my view, the absence of prior symptoms speaks to the causal link to the collision rather than to the specific aetiology of the symptoms. Secondly, whether the plaintiff lost consciousness momentarily or not does not seem to have affected the medical opinions on this point. In the absence of medical opinion giving that point significance, it is inappropriate to prefer an organic aetiology based on a conclusion one way or the other as to a momentary loss of consciousness. Thirdly, not only is Dr Williams not available for cross-examination, but also there are two other well qualified opinions which are sceptical or to contrary effect. In my view, there is not a satisfactory basis to draw a positive factual conclusion that the plaintiff suffered from a proprio-spinal myoclonus.

[36] The plaintiff's evidence was that after about 3 or 4 months the jerking stopped being every day and "started to become episodic". Over the 12 months prior to the trial she "probably had five or six episodes". On 29 October 2011, she appears to have told Dr Byth, for the purposes of a forensic psychiatric report, that she still had "episodes of tremors and turns about once each month". Other contemporaneous evidence suggests an earlier and better resolution. On 9 October 2009, she said to Dr Reid that it appeared to have settled. On 15 October 2009, Dr Williams recorded that it "has eased all but completely, except for the occasional right shoulder twitch when she is horizontal".

[37] I find that for practical purposes the jerking has eased all but completely, except for the occasional twitch. It has no impact on her ability to function in the future in employment. The same is true of the remaining discomfort and any remaining weakness in her wrist, which is minor.

A suspected head injury, neck pain and headaches

[38] Over the week or so following the collision, the plaintiff also began to experience neck pain and headaches.

[39] The plaintiff alleges that the collision occurred "at or about 6:15 pm". Although both her impression and that of her father was that there was a delay in the ambulance service's attendance, the plaintiff was assessed at 6:44 pm according to the attendance note. The note records: "**Nil LOC**, GCS 15, **denies neck pain**, SOB or nausea…" (emphasis added). I infer that LOC is loss of consciousness, GCS is Glasgow Coma Scale and SOB is shortness of breath.

[40] On 5 June 2009, the day after the collision, when attending at Robina Hospital for her wrist injury, the plaintiff was noted to have muscular neck tenderness. As previously noted, it was also recorded that she had not experienced headache or focal tenderness.

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6 Notwithstanding Dr Campbell's view.

[41] On 7 June 2009, when attending again at Robina Hospital for the on-set of the jerking movements, the plaintiff said she did not have a headache or retrograde amnesia and no soft tissue injury was identified.

[42] On 16 June 2009, Dr Moukit at the Outpatients Medical Clinic recorded: "no spinal head injury reported".

[43] On 1 July 2009, the plaintiff's symptoms in the preceding weeks were taken up by Dr Williams in a report of that date. He described the episodes on 6 and 7 June 2009 referred to above and continued that "soon after the accident she did notice a dull pain involving the right frontal region" but "without nausea or vomiting" and "since then these headaches have persisted but have not been all that severe and not associated with any phono or photophobia and thus do not really satisfy the International Headache Society criteria for the diagnosis of migraine…". The emergence of the plaintiff's headaches is thus first recorded.

[44] He recorded the plaintiff's neck pain as follows: "she also has a pain in the occipital region of her neck but this has been present intermittently since the age of 12 or thereabouts". [7] Further, he said: "…sometimes neck pain can be migrainous".

[45] On 16 July 2009, when the plaintiff was examined by Dr Reid, that doctor did not (and still does not) share Dr Williams' diagnosis of the plaintiff's headaches and some other ailments, attributing her symptomology in those respects to a non-organic cause. When she saw Dr Reid, the plaintiff had "many other complaints, including: poor memory and impaired concentration, aching frontal headaches, episodes during the day in which she feels nauseous, photophobic and phonophobic, constant neck and back ache, insomnia and poor balance". These complaints were viewed by Dr Reid as "clearly functional and not an organic sequelae of the accident". Dr Reid recorded that the plaintiff on examination had "a full range of neck and back movements in all directions".

[46] By 24 July 2009, the headache component of the plaintiff's ailments had progressed. On that day, Dr Williams reviewed the plaintiff and wrote a further report in which he said: "from her migraine disease she is a lot worse", describing the migraine problem as "the biggest problem". He said "following the accident she has had a fluctuating dull frontal occipital and upper neck pain". And "just before her birthday on the 4th July, she had a severe pounding headache associated with phono and photophobia, nausea but no vomiting causing her to lie still… this lasted for almost 24 hours…". He went on to describe further symptoms which were "all prominent migrainous features".

[47] On 27 July 2009, the plaintiff was admitted to the Gold Coast Hospital to receive a subcutaneous lignocaine infusion to break the migraine cycle. An unrelated complication during her admission was that she had infected wisdom teeth at the same time, ending in the extraction of all four wisdom teeth on 10 August 2009. Other drug treatment was also prescribed, targeted at the jerking or spasming movements.

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[7] Other references in the evidence to pre-existing pain in the plaintiff's back suggests it was lower back pain.

[48] On 19 August 2009, she was discharged from Gold Coast Hospital. The hospital notes on discharge record that "headaches were partially responsive to lignocaine infusion and the Topirimate and increased dose of [Efexor XR]".

[49] On 3 September 2009, Dr Williams reviewed the plaintiff and wrote a report describing her as appearing "to be heaps better". He referred to her wisdom teeth infection and treatment and stated that the plaintiff "at that time went through a lot of pain". He also described the headache as "improve[d] somewhat but it did take a long time".

[50] On 9 October 2009, the plaintiff was reviewed by Dr Reid, who noted in a report dated that day that "her attention and concentration were not impaired". She continued that "unfortunately, Miss Rodger has now acquired a diagnosis of migraine and a host of other symptoms which she appears to be asserting are post-concussive in origin", but opined that "in the absence of a documented history of head injury I do not accept that Ms Rodger's ongoing symptoms can be regarded as a direct sequelae of the subject accident".

[51] On 15 October 2009, Dr Williams reviewed the plaintiff and wrote a report. He said that "since last reviewed, Tamara has made significant progress but is still somewhat disabled". He said that the "headaches unfortunately still persist but certainly not as severe…" and were "more a nuisance headache".

[52] On 6 November 2009, when the plaintiff was examined by Dr Cameron, he wrote a report dealing, inter alia, with the plaintiff's suggested head and neck injuries and headaches. He recounted that the plaintiff said that "she recalls hitting the car, blacking out and then waking on the ground". That is the first occasion in the evidence when loss of consciousness was recorded. It is apparently contrary to the plaintiff's prior accounts to ambulance officers, hospital staff and other medical practitioners, so far as they recorded them.

[53] Dr Cameron "could not palpate any specific muscle spasm or focal tenderness about her neck or back. She had a full range of neck and shoulder movements and was able to touch her toes." He recorded that "she continues to experience neck and low back pain" and opined that he "could not find any evidence of neurological impairment to account for her ongoing symptoms and incapacity" but that "she may have suffered soft tissue injuries to her neck…". However, he "would not relate a headache disorder of this nature to any injuries sustained in this accident."

[54] On 23 December 2009, Dr Todman, neurologist, wrote a forensic report for the plaintiff's injuries. I assume he examined her shortly beforehand. He described the collision, as she related it to him. Curiously, he said at two points that she "landed on her back", which is contrary to the account given to other medical practitioners and given by the plaintiff in evidence. He also expressed the view that "it is likely that she was at least briefly knocked unconscious", contrary to Dr Reid's reports, and the ambulance and early medical records.

[55] Dr Todman opined that there had been both head and spinal trauma. For the head trauma, he relied on impact of the plaintiff's head on the side of the vehicle, the loss of consciousness and that the plaintiff was dazed afterwards. For the spinal trauma, he relied on the chronic neck pain with restrictions in movements, which on examination he recorded as "approximately 30 degrees in each direction". Dr

Todman referred to the structures "which may be affected", presumably because none of the imaging or other evidence to that point supported any pathology which pin-pointed the cause of the "chronic musculo-ligamentous strain" he found to the cervical spine. He recommended weekly physiotherapy which did not occur.

[56] There is no satisfactory explanation for the difference between that range of movement observed by Dr Todman on examination on 23 December 2009 on the one hand and Dr Reid's examination of a "full range" of movements on 9 October 2009 and Dr Cameron's examination of "a full range of neck and shoulder movements" on 6 November 2009.

[57] On 14 January 2010, Dr Williams reviewed the plaintiff and wrote another report of that date. He opined that the "migraine disease is now episodic. She will be fine for about two weeks and then for a couple of days feels exhausted associated with headache, some nausea and some other migrainous features. These migrainous features include being confused, aphasic and so on...". He expressed the view that the plaintiff will suffer from "…attacks of migraine for the rest of her life or for the large part of it…".

[58] As previously mentioned, up to this time, the plaintiff had not returned to work. During March 2010, she returned to work part-time. Over a couple of months the hours were increased. She says that she worked for up to 25 hours per week. Her employer wanted her to work full-time. At end July 2010 they agreed in writing that her position would be downgraded and that the required hours would be reduced to 25 hours per week. By November 2010, notwithstanding the reduced hours and position she resigned her position and ceased work as a conveyancer altogether. She was then unemployed until May 2011.

[59] On 15 November 2010, Dr Todman reviewed the plaintiff. He recorded her as saying that the headaches "range in frequency from about two to four times per week". She had "continuing neck pain". She said she "is not coping with work because of her ongoing pain and associated symptoms and will be finishing work shortly". He recorded on examination "restricted cervical spine movements by 30 – 40 degrees in each range of movement. There was tenderness and muscle spasm bilaterally and spasm over both trapezius muscles". He opined "[t]here has been both a closed head injury and injury to the cervical spine in this accident." He recommended "continued physical therapy to her cervical spine". On the evidence, the plaintiff was not then being treated by a physiotherapist. She was receiving massage or some other treatment to her neck on occasions.

[60] On 11 March 2011, Dr Campbell, neurosurgeon, examined the plaintiff in relation to her injuries. He recorded that "she was briefly knocked out". She complained of headaches that "occur most days of the week and rate up to 9/10 on the visual analogue scale" and that "neck pain occurs daily and rates up to 9/10". On examination she showed a decreased range of movement of the cervical spine by 10 to 20 per cent in all directions with tenderness and guarding over the cervical mid-line. He opined that the plaintiff had "sustained a head injury, neck injury and fractured left wrist… as a result of the… accident…". Curiously, although Dr Campbell was provided with Dr Todman's report dated 23 December 2009, it does not appear that he was provided with any of Dr Reid's reports or Dr Cameron's report.

[61] No doctor gave evidence that he or she has examined the plaintiff in relation to her headaches or neck injury since March 2011. During May 2011, she commenced part-time employment which continued to the time of the trial.

[62] Dr Reid and Dr Todman gave oral evidence. Neither departed from their earlier views.

[63] The plaintiff gave evidence of the collision, including that her head hit the side of the car and that the next thing she remembers is being on the ground and seeing feet alighting from the vehicle. The plaintiff submitted that it should be inferred that there was delay between these two points from which it should be inferred that she was briefly rendered unconscious, but I consider that the plaintiff's evidence is reconstructed to the extent that it might be relied upon to support a contention of unconsciousness. Given her apparently inconsistent reporting on the point at different times, it does not seem to me to be appropriate to infer a loss of consciousness. The plaintiff's contention on this point also involves an assumption that but for a head injury it might be expected that she would remember more of that few seconds in time. That assumption is neither supported by any evidence nor does it seem to me to be obviously correct.

[64] However, the issue on this point seems in the end to be a dispute without consequence, unless a finding of a "closed head injury" would affect some other finding in the case. Significantly, none of the neurologists supported a diagnosis that the plaintiff's symptoms constituted a post-concussive syndrome. Some things are clear. The plaintiff did suffer a head knock. She was dazed. She did suffer a sore neck, as reported from not long afterwards. She did suffer from headaches from a few days after the collision with full blown migrainous features from a month later.

[65] The plaintiff also sought to advance the likelihood and extent of concussive head injury by reference to the reports of Dr Byth and Dr Mariani. I was not particularly assisted by their evidence on those points. Dr Byth is a consultant psychiatrist. He was not the best qualified or experienced specialist medical practitioner to express opinions on that question or on the question whether the diagnosis of proprio-spinal myoclonus was correct, but purported to do so. Similarly, Dr Mariani is a neuro-psychologist. The neck and head injury medical diagnosis is best made, in my view, within the areas of expertise of the many neurologists whose opinions were tendered.

[66] It is important that the defendants do not contend that the plaintiff is making a deliberately false claim of neck pain or headaches. The differences between the cervical spine ranges of movement on examination observed by the neurologists are a troubling feature of the evidence,[8] but do not ultimately call for a particular finding.

[67] What findings should be made about the headaches and neck injury? Given the plaintiff's inconsistent reporting, and the contrary medical opinions, the appropriate findings are not as straightforward as one might reasonably have expected.

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[8] I found Dr Todman's explanation of the inconsistency at T 2-16.20 unconvincing, in a context where range of movement is utilised to assess impairment.

[68] I accept that the plaintiff suffered a soft tissue injury to her neck. As to the evidence that she had pre-collision symptoms in relation to her neck, I also accept that the plaintiff's symptoms after the collision have been of a different order. Her complaints are not in substance of a pre-existing condition.

[69] I also accept that, although the aetiology is a little unclear, the plaintiff's migrainous headaches were a symptom caused by the collision. Dr Williams had postulated a connection between the headaches and neck pain as early as 1 July 2009. Dr Todman also possibly favours that connection. The plaintiff's own evidence was that there "definitely… seem[s] to be [a] relationship between the neck pain and [the] headaches", although not all her migraines were in her view caused by her neck pain.

[70] To the extent that their opinions are inconsistent with those findings, I do not accept the opinions of Drs Reid and Cameron. I do accept that they had a reasonable basis for concern whether the plaintiff's injuries in these respects are organic or non-organic in basis. There is agreement between the parties that the plaintiff suffers from an adjustment disorder with anxiety and depressed mood. It is not critical, in the circumstances, and there is not a clear basis in my view, to prefer the opinions of Drs Todman and Campbell on the one hand to the opinions of Drs Reid and Cameron on the other hand, except to the extent that I reject the possibility that the plaintiff's neck pain and headaches were not caused by the collision.

[71] Beyond the findings that I have made, I do not consider that it is appropriate in the circumstances to infer that the plaintiff had a more significant "closed head injury". The contemporaneous statements and medical investigations do not support such a finding in my view, and I do not accept that the finding should be made ex post facto based on the extent of the plaintiff's symptoms. To do that would be to prefer an organic explanation for which there is little evidence to the non-organic explanation, which in my view was not excluded.

[72] I infer that the plaintiff will continue to suffer from neck pain and from migrainous headaches from time to time in the future. I will return to the extent to which those matters will affect her ability to function in the future in employment.

Adjustment disorder with anxiety and depressed mood

[73] Although the parties are agreed that the plaintiff suffers from an adjustment disorder with anxiety and depressed mood as a result of the collision and her injuries, they remain in dispute as to its extent.

[74] Each of the parties called a psychiatrist. Dr Byth was called by the plaintiff. Dr Chalk was called by the defendants. Each produced a report in the first quarter of 2011 and supplementary reports or notes. Although the diagnosis each made was the same, viz adjustment disorder with anxiety and depressed mood, they took quite different views of the extent of the plaintiff's symptoms and their likely consequences as well as the prognosis.

[75] Dr Byth saw the plaintiff as having pre-morbid obsessive compulsive personality traits, but without personality disorder. Similarly, Dr Chalk described her as not describing the presence of obsessive compulsive personality disorder although she said she was something of a "perfectionist".

[76] However, Dr Chalk concluded that there was no evidence of psychomotor retardation, while Dr Byth stated that the plaintiff complained of symptoms of psychomotor retardation. Dr Chalk noted no pain behaviour. Dr Byth described the plaintiff as appearing to be in discomfort from her neck during his interview.

[77] Both described the plaintiff as anxious, Dr Chalk mildly so and Dr Byth moderately so. Dr Chalk observed no disorder in the form, stream or possession of her thought. Dr Byth observed that her thought content involved preoccupation with pain in her neck and headaches along with some photophobia and episodic twitching.

[78] Dr Byth described her recall of recent and remote events as mildly to moderately slowed by her social withdrawal and some psychomotor retardation from depression. Dr Chalk observed that she was a reasonable historian who related without difficulty and was not markedly labile or tentative.

[79] It is unnecessary to recount other differences in observation or history on which Drs Byth and Chalk relied. Already what I have recounted provides some explanation for their differing views as to the extent of the plaintiff's depressed mood. Dr Byth viewed her anxiety and depression in the moderate range of severity, whereas Dr Chalk viewed her mood one of mild depression "at best", in context meaning at the highest.

[80] Both Dr Byth and Dr Chalk recommended treatment, continuing the anti-depressant Efexor XR, which had first been prescribed by Dr Williams in 2009 and has been continued since. Both expected improvement in her condition following return to work[9] and the resolution of the litigation. Dr Byth also recommended regular consultations with a specialist psychiatrist for counselling and review of appropriate drug therapy for up to two years.

[81] Notwithstanding his recommendations and expectation of improvement, Dr Byth opined that the plaintiff is likely to be left with chronic moderately severe anxiety and depression and that the ongoing problems with neck pain and headaches are likely to continue to generate anxiety and depressed moods in the longer term. Dr Chalk was more optimistic, expecting after the resolution of the litigation that the plaintiff would be left with a very small permanent impairment, given her mild symptomology.

[82] As to employment, Dr Byth opined that her early 2011 psychological state indicated her usual work in conveyancing would be moderately impaired.[10] Dr Chalk then thought she could return to some form of gainful employment and supplemented that later by reference to full-time employment. Dr Chalk does not believe the plaintiff will never get back to full-time work.

[83] Each of Dr Byth and Dr Chalk made a PIRS assessment. Some matters of detail may be noticed although most do not matter.

[84] In the category of self-care and personal hygiene, Dr Byth assessed the plaintiff as having a class 2 mild impairment because she may look unkempt occasionally and miss meals. Although the video-surveillance of the plaintiff taken by the defendants did not assist greatly in many respects, it showed the plaintiff at regular intervals

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9 She had not returned to work at the dates of the initial reports.

10 She had ceased to work as a conveyancer in November 2010.

walking her dog in the early mornings and leaving her residence and travelling on occasions. There was nothing unkempt about her appearance on any occasion. Nor was there any evidence given that she missed meals. Dr Chalk made an assessment of class 1 little or no impairment because the plaintiff did not describe any psychiatric difficulties in this domain. I prefer his view.

[85] Secondly, in the category of travel Dr Byth assessed the plaintiff as having a class 2 mild impairment because she could travel without a support person but only in familiar areas. The evidence did not support this view either at early 2011 or afterwards. I prefer Dr Chalk's assessment of class 1 little or no impairment based on the absence of any anxieties. There was no evidence to the contrary.

[86] Thirdly, in the category of adaptation Dr Byth assessed the plaintiff as class 3 moderate impairment, describing the plaintiff as having been sacked from her employment as a conveyancer, which is inaccurate. The true picture appears to have been that in July 2010 the plaintiff's employer wished her to resume full-time hours. Because of the difficulty she was then having coping with her remaining symptoms from the collision, it was agreed that the plaintiff reduce her agreed employment hours to 25 hours per week. They also agreed to a work role with reduced responsibility. Thus her employer agreed to reduce her hours and duties, but as matters turned out the plaintiff considered that the employer expected the same work from her and she decided to leave. There was no sacking.

[87] Dr Chalk referred to the plaintiff returning to part-time work in 2010 but allowed for an ongoing impairment. His view seems to be supported by the plaintiff's part-time employment since May 2011. Dr Byth adheres to the view that the impairment is class 3 on the basis that the plaintiff could not return to work as a conveyancer, even part-time. That was not established by the evidence, overall.

[88] Fourthly, Dr Byth described the PIRS assessment of Dr Mariani as too low because of a number of factors. They included the plaintiff's "problems with being dependent on her mother since she was injured". Before 21 January 2011, the date of Dr Byth's report, the plaintiff had been living independently of her mother since moving to a share house at Mermaid Waters at the Gold Coast in late February or early March 2010 when she returned to work part-time at Hartnett Lawyers. And by "13th of January" 2011 she had moved to "[her] place in Annerley" in Brisbane to live. After Dr Byth's report, in May 2011, she commenced part-time employment with Ozaccom. I take the dependence referred to by Dr Byth to be a reference to the ongoing financial support of the plaintiff's mother, not a physical dependence.

[89] I will return to the potential impact of the plaintiff's adjustment disorder on her future employment.

Cognitive deficits - concentration and memory

[90] From shortly after the collision the plaintiff has complained of difficulty in concentrating for various tasks and of being forgetful.

[91] A striking example is that she says that she has experienced difficulty in trying to play the piano. She has had difficulties in concentrating, in reading sheet music and in remembering pieces which she used to know.

[92] These complaints did not figure significantly in Dr Williams' reports, except for a reference on 24 July 2009 that "she continues to have this sort of headache with phono and photophobia, alterations in mood and her memory becomes impaired" and a further reference on 15 October 2009 that "her short term memory has improved out of sight but she still has some problems with concentration".

[93] From July 2009, Dr Reid did not accept that the plaintiff's difficulties in concentration or forgetfulness, as symptoms, had any organic cause and doubted the plaintiff's bona fides. However, malingering is not part of the defendants' case.

[94] Dr Cameron saw no indication of impairment of concentration on examination and noted that the plaintiff was able to give a good sequential history of her symptoms. He did not find evidence to account for her ongoing symptoms and incapacity.

[95] Dr Todman would appear to have concluded that these symptoms form part of a pain related impairment or result from the medication that the plaintiff is on, and in his written notes of a conference that a post-concussive explanation of those symptoms is unlikely, although he did consider in his written report that the plaintiff being dazed was consistent with a mild concussion.

[96] Dr Campbell did not mention these aspects.

[97] Dr Mariani saw the plaintiff on 22 November 2010. At that time, the plaintiff reported that she had impaired cognitive abilities of attention and concentration and impaired short term memory, manifested in different contexts which had affected her by feelings of stress, frustration and in other ways. Functionally, she was independent with her personal activities of daily living and the instrumental activities of daily living, but limited by fatigue and to a degree by weakness in her left wrist.

[98] She reported to Dr Mariani that she commenced a Bachelor of Agribusiness and Bachelor of Applied Science degree course in the second semester of 2010. By the time of the trial, she had passed some subjects and failed other subjects in that course. She had difficulty concentrating and keeping up with her studies while working in 2010.

[99] Dr Mariani administered a range of tests of the plaintiff's cognitive functioning and assessment of her mood and personality. The plaintiff's general level of cognitive functioning was generally consistent with her estimated pre-morbid intellectual functioning as measured by her education and work history, but there were discrepancies. Some test results suggested that her "working memory abilities (low average range) are significantly poorer than her verbal comprehension, perceptual reasoning and processing speed abilities (all of which fall in the average range)."

[100] The summary conclusion was that the plaintiff had "mildly impaired performance on tests assessing phenomic verbal fluency, focussed attention and concentration". But she had "moderately-severely impaired performance on tests assessing sustained visual attention, incidental visual recall of complex visual information and aspects of her executive function (specifically, verbal suppression and divided attention (for visual tasks)). She also had difficulty self-monitoring her errors and was somewhat vulnerable to the effects of pro-active interference".

[101] As previously mentioned, Dr Mariani ventured into whether the cause of the plaintiff's cognitive weakness was related to symptoms of depression or a mild head injury "consistent with post-concussional syndrome" this is not an area where I rely on her opinion, as opposed to the opinions of the neurologists.

[102] On the other hand, her conclusions as to the plaintiff suffering from depression were consistent with the opinions of the psychiatrists and may be accepted. Dr Byth disagreed with her assessment of a 5% whole person impairment using PIRS, but her view of the quantitative assessment was consistent with the assessment of Dr Chalk of a 5% final whole person impairment, although with a higher rating for the category of "concentration, persistence and pace".

[103] Alongside the medical evidence, the plaintiff, her mother and father, and her current employer gave evidence about her concentration and memory pre-collision and post-collision. To a degree, the evidence on these points was inevitably bound up with other evidence about symptoms of headache or pain and mood.

[104] It is unnecessary and would be unhelpful to recount or analyse all of the evidence on these subjects. However, a number of points should be made. First, the plaintiff has maintained throughout that she believes that she is affected on these points. Secondly, there is an obvious truth that the plaintiff's concentration and ability to function will have been significantly affected while experiencing significant headache or neck pain and from the medication she uses from time to time. Thirdly, despite those points, the plaintiff appeared in the witness box as alert, reasonably intelligent and with good recall in general. That is the impression she created during reasonably lengthy examination and cross-examination. It is no disrespect to say that she was the verbal jousting equal of the cross-examiner, anticipating where the questions were going, giving a good account of most subject matters she was asked to recall, and ready to cross swords upon subject matters where she did not consider that the defendants had any business to make inquiry. Fourthly, contrary to the plaintiff's submission, this was not some extraordinary or out-of-character performance in the witness box. It is perfectly clear that Dr Reid, Dr Cameron and Dr Chalk did not consider that she was experiencing significant difficulties in concentration or recall when they examined her in 2009 and 2011.

[105] On the other hand, it is difficult to completely reconcile either the evidence of the plaintiff's mother and father or that of her current employer with the mild or moderate assessments of the plaintiff's impairment of concentration or memory. For example, Ms Watt, the principal or chief executive officer of her present employer, said that the plaintiff had "lost the capacity to think quickly", "loses concentration and loses logic in concentration" and "can't front the public like she used to". And her mother said that "she has trouble thinking about what she's doing and she has trouble coordinating her thoughts". Also, the plaintiff's father said that she always seems to get tired.

[106] The plaintiff's own evidence was that from the time when in March 2010 she returned to work as a conveyancer, her hours gradually built up to about 25 hours per week. I infer that was over a couple of months, as Mr Hoey, an occupational therapist, recorded in his report. However, she found it difficult. Her office manager, Ms Purdy saw that she appeared to be in pain and the plaintiff said to her that she couldn't cope. As previously mentioned, on 30 July 2010, the plaintiff's hours of work and responsibilities were reduced. However, her evidence was that

she was expected to do much the same work and have the same responsibility, notwithstanding the lower hours and remuneration. I infer that she left because she felt she was "getting treated so badly", as well as because she felt that the work was too much.

[107] As also previously mentioned, in early 2011 the plaintiff moved from the Gold Coast to Brisbane to live. She commenced employment by Ozaccom on 26 May 2011 and has worked part-time for that company since then, in the position description of "travel organizer". The plaintiff described her employment during this period as having three roles: first working in the "travel" area "taking bookings, either by form or by phone and sending out their confirmation following by email or fax". Secondly, she moved to "sales and marketing". Thirdly, she moved to a role as personal assistant to Ms Watt, which she "find[s] a lot easier". However, she still "sort of shuffle[s] back and forward". Of those roles, she found travel "really difficult because I had to be concentrating a lot and I found it really hard to concentrate for long periods of time because it was a lot of numbers and checking my work". Expanding, she said "I just find these days that my concentration levels are very poor" and that her memory now is "very poor, very poor".

[108] Immediately after the plaintiff gave evidence about her memory being very poor, she was asked about the university course she commenced in the second semester of 2010. Although she appears to have passed a number of subjects and failed others, she was unable to recall which subjects or whether she had in fact passed or failed some of them. This lapse of ability to recall her progress in her university course is to be contrasted with the general accuracy and detail which the plaintiff was able to give in recall of most other events in her life over the relevant period. Naturally enough, the evidence generally was focussed on events relevant to the collision and its impact upon her, but it ranged over a good many topics without vagueness or inability to recall most relevant matters. I was left with the suspicion that the plaintiff's inability to recall the subjects of her ongoing degree course and whether she had passed or failed them might have been intended by the plaintiff to illustrate her "very poor" memory. I am therefore not prepared to act on that evidence as illustrating her poor memory.

[109] That said, I do accept the plaintiff's evidence that when she has worked longer hours her neck pain levels have gone up and that contributes to her irritability and affects her concentration.

[110] What then is to be made of this body of medical, expert and lay evidence as to the plaintiff's abilities to concentrate and remember things? Overall, I accept that there is some impact in those areas. Dr Mariani's report and evidence are a firm foundation for that finding as well as the lay evidence mentioned above. However, I do not accept in its entirety the degree or extent of the impact described in the evidence of the plaintiff, her mother or Ms Watt. Having regard to the evidence of the plaintiff's adjustment disorder and paying close attention to both the plaintiff and her mother in the witness box, I was not convinced that either was an objective chronicler of the degree of the plaintiff's difficulties in concentration or memory, putting aside when she is affected by migraine or medication taken to manage it. Ms Watt was clearly loyal to the plaintiff. And the direct comparison Ms Watt makes of the plaintiff's skill set from May 2011 with impressions of what she was like when she worked for Ozacomm before October 2005 has some potential difficulties, in my view.

[111] One other aspect requires comment. Mr Hoey saw the plaintiff's concentration and memory difficulties as further impeding the plaintiff's ability to successfully pass her studies as at April 2011. I do not accept that as a conclusion of expert opinion or as an inference of fact which should be drawn. At that time, the plaintiff had completed two subjects of the combined Bachelor of Agribusiness/Applied Science degree part-time as an external student. She enrolled in those two subjects in the second semester of 2010 while struggling with her hours in getting back to work at Hartnett Lawyers. Granted that she experienced difficulties with her neck in sitting at a computer in the second half of 2010 and the assessment of Dr Mariani of her cognitive deficits during that semester, it does not follow automatically as a matter of inference, in my view, that the reason for the plaintiff failing one subject and passing another was that she had difficulty in concentration or memory impairment. If that view were taken, what would explain the pass? There are many things which may have affected the outcome in the single subject in question and I am loath to accept as expert opinion a broad generalisation of that kind without further explanation of its basis or analysis as being within expertise.

[112] The outcome is not entirely clear. Perhaps that is the product of the plaintiff's adjustment disorder, but it will not help in my view to speculate further. For the purposes of the assessment of the damages I intend to proceed on the basis of a finding that the plaintiff does suffer from some difficulties in concentration and memory but the extent to which those matters will affect her ability to function in the future in employment is a little speculative.

Past loss of earning capacity

[113] As previously set out, there is only a relatively minor difference between the parties as to the plaintiff's loss by way of past loss of earning capacity. Again, the difference is represented by different assumptions in the calculations of each side.

[114] The first fact which appears to drive the difference is the plaintiff's contention that if the collision had not occurred by February 2010 her earnings as a conveyancer would have increased upon a promotion to the position of head of department at Hartnett Lawyers, thus earning about $790 net per week. The evidence of that employer's representatives did not support that assumption of fact.

[115] Secondly, the plaintiff contends that if the collision had not occurred, from November 2011 she would have earned $855 net per week either in the conveyancing position or at Ozacomm. Similarly, the evidence did not support that assumption of fact.

[116] Accordingly, I find that the defendants' assumption that the plaintiff's earnings would have been approximately $750 net per week is appropriate to adopt. It represents some increase in pay and tax concessions over the approximate amount of $705 net per week the plaintiff was earning as at the date of the collision.

[117] The defendants' calculation of loss of earning capacity was carried out until the end of November 2012, two weeks beyond the trial date. That was 181 weeks at $750 net per week, namely $135,750. Subtracting the actual earnings to that date of $48,298.50, the result is that I assess the damages for the plaintiff's past loss of earning capacity at $87,451.50.

Interest on past earnings

[118] Interest on past earnings is calculated upon the difference between $87,451.50 and $14,021.45[11] which was the amount the plaintiff received from Workcover Queensland, namely $73,430.45.

[119] Under s 60 of the *Civil Liability Act* 2003 the rate of interest is the relevant rate for the relevant 10 year Treasury bonds. It was agreed that rate was 3.4%. I assume that the loss on past earnings was evenly spread over the period from the collision to the trial.

[120] Thus the calculation was $73,430.45 x 3.4% x 3.942[12] x .5 = $4,920.87.

Past superannuation

[121] The defendant's calculation of past superannuation is based on the amount of past earnings of $87,451.50 which I have assessed as the amount of the past earnings multiplied by the rate of 9%. The rate is not disputed. The result according to my calculation is $7,870.63. I assess the loss of past superannuation at $7,870.63.

Interest on past superannuation

[122] The plaintiff sought interest on the loss of past superannuation. It is not obvious that an amount should be allowed. No evidence was led as to the superannuation fund into which the plaintiff's superannuation contributions would have been deposited. I assume that it would have been an accumulation fund. During the period from 2009 to the trial no assumption could safely be made as to the level of earnings of such a fund. Common knowledge is that many superannuation funds did not increase in value over that time.

[123] I do not assess any amount as lost interest on past superannuation.

Loss of earning capacity – future loss

[124] As to the plaintiff's future loss of earning capacity, some of the matters previously discussed may be illustrated by what were internal contradictions in the plaintiff's submissions. As previously mentioned, the plaintiff's case theory of her loss of future earning capacity has two parts. The first part is reflected by the calculation of the present value of the difference between the estimated pre-collision level of earnings and the estimated post-collision earnings as presently employed over her expected working life. The second part is that a further substantial amount should be added to reflect the plaintiff's risk on the open labour market.

[125] On the other hand, the plaintiff accepted that "the removal of the litigation will reduce the plaintiff's stressors", submitting that, as Dr Chalk said, the "litigation may make some difference" to increase her capacity to work but that the extent is "very difficult to say". Accordingly, the plaintiff submitted that the way to approach the matter was to infer that the slightly longer hours which the plaintiff worked in 2012 should be seen as having "more than accounted for any (such)

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[11] The plaintiff referred to the deduction of $11,407.66 paid by Centrelink but as the defendant did not deduct it in the calculation I have not done so either.

[12] From 4 June 2009 to judgment.

prospective benefit". This is unsound in my view. The benefit, which Dr Chalk envisaged but was guarded in predicting, was a possible return to full-time work. And it was a benefit from the resolution of the litigation and future treatment. It is illogical to treat the plaintiff's 2012 work history without those things having happened as a measure of their potential benefit.

[126] It is also a little illogical, in my view, for the plaintiff on the one hand to accept that the evidence supports future improvement but on the other hand to contend for a substantial additional award on the footing that it is more likely than not that there will be deterioration of the plaintiff's present position if she were on the open labour market. The plaintiff relied for this contention on the report of Mr Hoey and the evidence of Ms Watt and, to some extent, Ms Purdy.

[127] As to Mr Hoey's report, I was again left unpersuaded on this point. It may be accepted that the plaintiff's neck pain and headaches can cause and have caused the plaintiff occupational restriction. But Mr Hoey's discussion of employers erecting invisible barriers to employment to previously injured workers is not something to which I consider much weight should be given. Similarly, I do not consider that Mr Hoey's opinion that an adjustment disorder is prohibitive to employment to be of much assistance, in the plaintiff's case. She has been employed in the way which he foresaw as prohibited, albeit part-time and with mixed reviews from her employer.

[128] The plaintiff sought a finding that if she lost her present employment at Ozacomm she would be unemployable. Even Mr Hoey did not go so far in his report, which rested at "I believe her to be significantly more vulnerable on the labour market than she was pre-accident". His cross-examination, based on the assumption of the plaintiff's employment at Ozacomm since his report was prepared, was more optimistic. None of the other expert evidence supported the plaintiff's contention. I reject it and decline to make that finding.

[129] A more rational approach, in my view, is that although future improvement in the plaintiff's work capacity to work may be anticipated, the extent of it is unclear and she will in any event be left with the impacts of her ongoing neck pain and vulnerability to migrainous headaches. Thus, Dr Byth saw that "her ongoing problems with neck pain and anxiety are likely to continue to generate anxiety and depressed moods in the longer term".

[130] Dr Chalk saw that "with further time and re-entry into the workforce, her current level of symptomology will diminish and her need for antidepressants will probably continue for a further 12 months or so" and that there was "no compelling evidence to suggest that her psychiatric symptomology was of such moment as to preclude her from gainful employment which she had continued to do in the aftermath of this accident". More recently, he opined that since "Ms Rodger is studying and working part-time [he] would anticipate that within a year or so she would be able to increase her work hours and [he] would anticipate that if she continues to have treatment over time Ms Rodger will slowly improve and be able to get back to work full-time".

[131] Dr Chalk also saw that the removal of the litigation stress as having an effect on the plaintiff's capacity to work although as to the extent of the difference "it was very difficult to say". He also saw that any increase in her capacity to work as a result of

treatment was "an informed guess" but that he "would expect that there would be some improvement".

[132] Thus in my view it should be found that the plaintiff has a loss of future earning capacity which is ongoing but the extent of the loss will decrease into the future by an uncertain and unclear amount. The assessment to be made is one according to the possibilities.

[133] In my view, an appropriate methodology for assessing the plaintiff's future economic loss in this case is taken in two steps. First, it is appropriate to calculate the difference between the plaintiff's pre-collision level of earnings adjusted for any expected changes and her post-collision earnings up to the time of the trial to obtain a provisional hypothetical loss of earnings on the assumption that things don't change from the time of the trial into the future. Secondly, it is appropriate to discount the measure of that difference not only for the usual contingencies but also for the prospect that the plaintiff's earning capacity will improve over time, gauged upon the possibilities. There is no useful methodology which informs the assessment of the discount, although the "usual" contingencies alone would ordinarily be about 10%. The assessment I have reached is that the discount overall should be 35%.

[134] As discussed in relation to past earnings, the plaintiff's full-time earnings as a conveyancer would have been about $750 net per week. At the time of trial, the plaintiff's earnings at Ozacomm were on average $412.82 for the prior 18 weeks. Thus, it may be accepted that at the time of trial the level of plaintiff's loss of earnings was about $350 net per week. The plaintiff contended for a higher amount for the future, based on a higher hypothetical earnings as head of department at Hartnett Lawyers or as a full-time employee at Ozacomm, but as previously stated I do not accept those assumptions.

[135] Thus the calculation of the amount for loss of future earning capacity is $350 per week for 37 years discounted on the 5% table (multiple 893.6) and further discounted by 35%. The product is $203,294.

Future superannuation

[136] The parties agreed 11.3% as the rate. The product, applying that rate to future economic loss found of $203,294 is $22,972.

General damages

[137] Where a plaintiff has suffered multiple injuries the assessment of general damages under ss 51, 61 and 62 of the *Civil Liability Act* 2003, s 6 of the *Civil Liability Regulation* 2003, ss 2, 3, 4, 8, 9 and 10 of Schedule 3 of the *Civil Liability Regulation* 2003 and Schedule 4 of the *Civil Liability Regulation* 2003 proceeds first from the identification of the injuries.

[138] The relevant item numbers in Schedule 4 and parties positions about the relevant injuries were as follows:

Item from Schedule 4	**Plaintiff**	**Defendants**

107 – Moderate wrist injury; or 108 - Minor wrist injury	Left ulnar styloid and scaphoid fractures	Left ulnar styloid and scaphoid fractures
88 – Moderate cervical spine injury	Chronic musculoligamentous strain to cervical spine	Soft tissue cervical spine injury
	Migrainous headaches	Post-traumatic headaches
9 – Minor head injury	Proprio-spinal myoclonus or something which caused the same symptoms	Minor head injury
12 – Moderate mental disorder	Adjustment disorder with anxiety and depressed mood	Adjustment disorder with anxiety and depressed mood

[139] The plaintiff submitted that the dominant injury was the moderate cervical spine injury which carries a maximum ISV of 10. The defendants conceded an ISV of 10, either for the moderate cervical spine injury or for the moderate mental disorder as the maximum ISV for item 88 or item 12. I accept that 10 is the ISV of the dominant injury on that basis. I would select the moderate cervical spine injury as the dominant injury.

[140] The plaintiff contends for an increase in the ISV for the multiple injuries to 18, based on alternative methodologies. First, she submits that the maximum ISV of 10 for the moderate cervical spine injury under item 88 can be uplifted (as is provided for under s 4 of Schedule 3 to the *Civil Liability Regulation* 2003) by 75% and rounded up to the next whole number (a whole number is required) to reflect the serious impact of the multiple injuries.

[141] The other two methodologies were identical, except that they substituted one of the other injuries as the dominant injury. It is unnecessary to deal with them, except that I consider that the minor wrist injury is not the dominant injury.

[142] Although Dr Pentis assessed the plaintiff's whole person impairment by reason of her wrist fractures at 7.5%, which could possibly lead to an ISV of 9 or 10 under item 107 of Schedule 4, the criticism was validly made by the defendants that Dr Pentis "doesn't agree with the way that AMA5 has arrived at the impairment values in particular with respect to this injury". I also do not consider that Dr Pentis' reports complied with s 11 of Schedule 3 to the *Civil Liability Regulation* 2003.

[143] Dr Journeaux, who assessed the plaintiff's impairment from her wrist fractures as negligible, did follow the AMA5 criteria for assessment. Section 12(2) of Schedule 3 of the *Civil Liability Regulation* 2003 provides that the court must give greater weight to a medical assessment of whole person impairment which is so based than to one which is not.

[144] As the plaintiff did not submit that the wrist injury was the dominant injury, it may not be necessary to take this analysis further, but if it were necessary I would not accept Dr Pentis' view of the extent of the plaintiff's whole person impairment.

[145] While it may be right to say that an impairment based on range of movement may present an incomplete assessment, my impression was that Dr Pentis had over-assessed the extent of the plaintiff's ongoing impairment due to her wrist fractures. His evidence in cross-examination showed hints of justification. One answer seemed to be directed to suggesting that the plaintiff might experience difficulty at work from handwriting. It was quickly pointed out that the plaintiff is right handed. Another area where the video-surveillance evidence was of some use was that it showed the plaintiff using her left hand to lead her dog and to carry a shopping bag. When challenged about that, the plaintiff said she was doing so to exercise her wrist to strengthen it. I doubted that. In any event, she did not appear to be in any discomfort using her left wrist on the video.

[146] The plaintiff relied on a number of cases as supporting her contention that the ISV should be increased from 10 to 18.[13] With the exception of McMeekin J's succinct summary of the operation of the relevant provisions in *Munzer v Johnstone* [2008] QSC 162 at [7] – [14], I do not find that they assist much.

[147] Nevertheless, I do consider that the multiple injuries experienced by the plaintiff are a reason to make an assessment of the ISV higher than the maximum ISV for the dominant injury of 10. In particular, in my view the combination of the debilitating nature of the plaintiff's moderate cervical spine injury, the impact on her mood of her moderate mental disorder and the initial serious symptoms of her minor head injury warrant the ISV being higher. The statutory direction that the ISV for the multiple injuries should rarely be more than 25% higher than the maximum dominant ISV is a contextual indicator as to what the extent of such an increase might be.

[148] In the range of cases, in my view, this case is not one where the multiple injuries indicate a significant increase which approaches the rare case where an uplift of more than 25% is warranted. In the circumstances, I assess the ISV for the multiple injuries at 13, being the nearest whole number. Under the part of Schedule 6A of the *Civil Liability Regulation* 2003 applying to an injury that arose before 30 June 2010, that results in an assessment of general damages in the amount of $15,200.

Past gratuitous care

[149] The plaintiff's claim for damages for past gratuitous care reflects the care she received from her mother between the date of the collision on 4 June 2009 and approximately 12 March 2010, when the plaintiff was living in a house she shared with others at Mermaid Waters when on her return to work. In "late February 2010", the plaintiff's mother relocated her place of residence to north of Brisbane. The claim was based on a period of 296.5 hours of care over a period of just over 9 months.

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[13] *Ballesteros v Chidlow & Anor* [2005] QSC 280; *Clement v Backo & Anor* [2006] QSC 129; *Carroll v Comber and Anor* [2006] QDC 146; and *Johansson v Hare and Anor* [2006] QSC 223.

[150] Under s 59(1)(c) of the *Civil Liability Act* 2003, damages are not to be awarded for gratuitous care provided to an injured person unless the services are "necessary" and the services are provided "for at least 6 hours per week… and for at least 6 months".

[151] The plaintiff's evidence of the services provided by Mrs Rodger to the plaintiff given by the plaintiff was extremely brief. Mrs Rodger's evidence was not much more. It may be doubted whether the services were provided for more than 6 months. They consisted of washing, cleaning and cooking (mostly cooking and cleaning up after meals) in the household which Mrs Rodger was already running. The only services specifically related to the plaintiff's injuries were organising the dispensing of the plaintiff's daily medications and taking her to medical appointments. Mrs Rodger's evidence of the time taken to do this was exaggerated, in my view. That theme continued with a suggestion that the plaintiff insisted that her clothes be washed separately.

[152] But any greater analysis would be beside the point. Although 296.5 hours are claimed over the 40 weeks between the relevant dates, which represents approximately 7.4 hours per week, there was no evidence led in the plaintiff's case which supported that as the amount of time spent by Mrs Rodger in providing necessary services to care for her daughter, except for exhibit 5 which was prepared as an estimate of time spent. However, no record was kept "over that time of what [Mrs Rodgers] was having (sic) to do for [the plaintiff]". Notwithstanding that exhibit 5 "seem[ed] to [Mrs Rodger] to be about right", I do not accept that it is a record of "necessary" care, or if it is that the estimate is reasonable. Having regard to the terms of exhibit 5, my impression was that this claim was overreaching, and none of the specific oral evidence dispelled that view.

[153] Further, the evidence of Mrs Rodger that by "November into December" 2009 the plaintiff was at her "most stable than she's been at any time" suggests that the plaintiff could by then do what she has unarguably done since February 2010, namely take care of herself without gratuitous care being provided. The care provided by Mrs Rodger from November 2009 was not "necessary" in the sense required by the Act.

[154] I assess the damages for past gratuitous care at nil, because in my view the threshold under s 59(1)(c) was not met.

Future care

[155] The plaintiff claims $50,000 for future paid care. The calculation was two hours per week over the plaintiff's life expectancy of 58 years, amounting to "a little over $50,000". The plaintiff relied upon Mr Hoey and Dr Todman's reports. She gave general evidence as to some of the difficulties she experienced, but nothing which could form the basis of a conclusion that she requires some hours per week of future care.

[156] Mr Hoey appears to have expressed the opinion that the plaintiff's ability to complete many domestic tasks is interfered with, viz "ongoing difficulties around the home (detailed in the body of this report)" which "will give rise to a requirement for assistance from time to time". He opined that "an allowance of 2 to 3 hours per week seems appropriate".

[157] What he referred to in the body of his report dated 11 April 2011 was set out in paragraph [21], which related the plaintiff's account of her experience living in the share house in Mermaid Water with two flat-mates.

[158] It is clear that was not where the plaintiff was living when Mr Hoey's report was prepared in April 2011. She had moved to live in Brisbane over the Christmas period in 2010 and was living at Annerley from 13 January 2011.

[159] I do not consider that any reliance can be placed on Mr Hoey's report in this respect. It was not accurate or up to date when prepared in the first place. It is clear he can not have made any inspection or detailed assessment of how the plaintiff was managing then. By the time of the trial, another 18 months had passed without review. The plaintiff had returned to work with Ozacomm and plainly was negotiating every day life and part-time work.

[160] Although too much weight should not be placed on the extent of the video-surveillance evidence, it does not support the picture of "ongoing pain and functional restrictions adversely affect[ing] her ability for" chores. Overall, there is little or no objective evidence which supports the claim that the plaintiff needs 2.5 hours per week of care or assistance.

[161] While Dr Todman said in his 15 November 2010 report that he considered that the plaintiff "requires assistance for heavier domestic activities and home maintenance of up to 5 hours per week", nothing was said in evidence by him as to the basis of that assessment or to bring that assessment up to date as at the time of the trial, except "I understand that there is some video-surveillance of Ms Rodger which shows her walking the dog… travelling on public transport… [and] carrying some shopping" and that "none of that is inconsistent with… any of the matters which I have set forth in my reports". It might be said that this amounts to a restatement of the opinion that the plaintiff requires assistance of up to 5 hours per week. If that were to be taken as its meaning, I would not accept that statement. First, that is because the basis of the initial assessment is unstated. Secondly, it does not seem to me that Dr Todman had viewed the video. That is an unsatisfactory basis on which to opine as to its potential impact on the plaintiff's ability to manage everyday chores.

[162] The defendants submitted that a global amount of $5,000 should be assessed for future care, on the basis of an allowance for the heaviest of domestic duties for which the plaintiff may require occasional assistance. Although there is no particularised basis for that amount, the submission does recognise that there is evidence to support an inference that the plaintiff has some ongoing impairment in carrying out heavy domestic tasks that may cause her future pecuniary loss. I am prepared to accept that fact. And in the absence of any other satisfactory basis in the evidence to assess the amount, I assess it at the amount conceded by the defendants of $5,000.

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[163] The defendant concedes $2,940 for this component. I assess the amount as $2,940.

Future medication and treatment

[164] This is the remaining item of significant dispute. The evidence was extremely unsatisfactory.

[165] Another table best summarises the plaintiff's position:

No	Item	Interval	$ per unit interval	Total period	Amount
1	Topomax	Monthly	$33.30/mth	59 years	$7,726.08
2	Efexor XR	Monthly	$33.30/mth	59 years	$7,726.08
3	Zomig	Monthly	$27.50/mth	59 years	$6,468.58
4	Physio/Occupational therapy	Yearly	$450/year	59 years	$8,701.90
5	Osteopathic treatment	Monthly	$175.10/mth	59 years	$40,642.40
6	Occupational Rehab	One off	$2,450	n/a	$2,450.00
7	Multi clinic	One off	$3,400	n/a	$3,400.00
7	Counselling	On off	$6,000	n/a	$6,000.00

[166] Item numbers 6, 7 and 8 are not disputed by the defendants.

[167] As to item numbers 1, 3 and 4, the defendants concede the need for the item, the monthly amount and the overall period, but submit the amount should be discounted by 25% for contingencies. I take that to mean the contingency that the relevant drug or unspecified physiotherapy or occupational therapy won't be needed at some point in the future.

[168] As to item number 2, the defendants submit that the period of prescription of Efexor XR should be limited to two years, thereby limiting the amount conceded to $760.

[169] As to the period of 59 years, there was no evidence that the plaintiff would be expected to require any of the treatments or medications over that period which would be to the end of her life expectancy.

[170] In particular, I can see no reason to assume that she will require physiotherapy or occupational therapy for that long, or to assume that she will require Topomax or Efexor XR for that long. Topomax has been prescribed prophylactically for the jerking motions. It does not appear that the plaintiff has been reviewed by a neurologist since 2011. No medical practitioner said that they expected that it would continue indefinitely. Dr Williams originally prescribed Efexor XR. The plaintiff said she believes it is prescribed prophylactically for migraine. No medical practitioner supported that as its current basis of prescription. Both Dr Byth and Dr Chalk viewed its current prescription as an anti-depressant. Zomig is for

treatment of migraine when suffered. No medical practitioner gave any opinion as to the likelihood of the level of its continued need, although it seems reasonable to infer that continued prescription will be required for the continuing level of headaches.

[171] Osteopathic treatment was not supported by any medical evidence. Given its obvious potential to overlap with other treatments and the substantial amount claimed this was a serious omission in the plaintiff's case. I reject it outright as not proved to be necessary.

[172] On the other side, there was no apparent basis for the defendants' allowance of a 25% contingency against items 1, 3 and 4. However, on the basis of the concessions made, I assess them as those amounts. I reject the defendants' limitation of the prescription of Efexor XR to two years. I think it is likely that it may be required on and off over a longer period. But there is no clear evidentiary basis for another period. In the absence of any evidence, I will discount the amount claimed by 50%.

[173] The result is as follows:

No	Item	Amount assessed
1	Topomax	$5794.56
2	Efexor XR	$3863.04
3	Zomig	$4351.43
4	Physio/Occupational therapy	$6526.42
5	Osteopathic treatment	$0.00
6	Occupational Rehab	$2,450.00
7	Multi clinic	$3,400.00
7	Counselling and other treatment	$6,000.00

which totals to $32,385.45.

Special damages

[174] Special damages are agreed at $17,858.23. I assess them in that amount.

Special damages interest

[175] The calculation is on the relevant part of the special damages as follows: $10,053.07 x 3.4% x 3.942 x .5 = $673.69.

Summary

[176] Summarising, the assessment of damages I make is as follows:

Head of damage	Plaintiff	Defendant	Assessment
General Damages	$18,000.00	$11,000.00	**$15,200.00**
Past earnings	$93,728.98	$87,451.50	**$87,451.50**
Interest on past earnings	$3,441.73	$3,706.10	**$4,920.87**
Future earnings	$435,000.00	$104,560.00	**$203,294.00**
Past superannuation	$8,460.00	$7,970.63	**$7,870.63**
PS Interest	$878.54	$0.00	**$0.00**
Future superannuation	$49,155.00	$11,825.45	**$22,972.00**
Past gratuitous care	$7,412.50	$0.00	**$0.00**
Future paid care	$50,000.00	$5,000.00	**$5,000.00**
Fox v Wood		$2,940.00	**$2,940.00**
Future treatment	$83,115.04	$29,782.00	**$32,385.45**
Special damages	$17,858.23	$17,858.23	**$17,858.23**
SD Interest	$504.44	$507.43	**$673.69**
Totals	**$767,554.46**	**$282,601.34**	**$400,566.37**

[177] The parties agreed as to the final calculations of interest on past economic loss and special damages for the judgment and as to the orders for costs that were to be made to give effect to the assessments I have otherwise made.

[178] It follows that the plaintiff is entitled to a judgment against the defendant, based on the assessed amount of damages of $400,566.37, that the defendants should be ordered to pay the plaintiff's costs of and incidental to the proceeding up to and including 16 August 2012 to be assessed on the standard basis on the District Court scale; and that the plaintiff should be ordered to pay the defendants' costs of and incidental to the proceeding on and from 17 August 2012 to be assessed on the standard basis on the Supreme Court scale.