

SUPREME COURT OF QUEENSLAND

CITATION: *Reitano v Shearer & Anor* [2014] QSC 44

PARTIES: **Monica-Leigh REITANO**
(Plaintiff)

v

Charmaine Joy SHEARER
(First Defendant)

and

RACQ Insurance Limited ABN 50 009 704 152

FILE NO: S52/2011

DIVISION: Trial

PROCEEDING: Civil

ORIGINATING COURT: Supreme Court, Mackay

DELIVERED ON: 14 March 2014

DELIVERED AT: Townsville

HEARING DATE: 15, 16, 17 July 2013

JUDGE: North J

ORDER: **1. Judgment for the plaintiff against the second defendant in the sum of \$139,026.**
2. Within 14 days the parties make submissions in writing upon the question of costs.

CATCHWORDS: DAMAGES – PERSONAL INJURIES – MOTOR VEHICLE ACCIDENT – QUANTUM – where plaintiff suffered personal injuries in rear end collision – where liability admitted – assessment of damages pursuant to the *Civil Liability Act 2003* (Qld) – ISV assessment – where assessment of general damages, past and future economic loss and damages for care and services in issue

LEGISLATION: *Civil Liability Regulation 2003*
Civil Liability Act 2003

CASES: *Land v Dahliwal & Anor* [2012] QSC 360
Malec v J.C. Hutton Pty Ltd (1990) 169 CLR 638

March v E & M H Stramare Pty Ltd (1991) 171 CLR 506

COUNSEL G F Crow SC with P W Moore for the plaintiff

K Howe for the defendants

SOLICITORS: Eureka Legal Pty Ltd for the plaintiff

Cooper Grace Ward for the defendants

- [1] The plaintiff claims to have been injured in a motor vehicle accident that occurred on 18 January 2008. She was then 17 years old (date of birth 7 May 1990). At the time of the trial she was 23 years old. The second defendant has admitted liability for the accident and the issue for determination is the quantum of damages.
- [2] As a consequence of the accident the plaintiff in her statement of claim claims she sustained:
- (a) a thoracic prolapse at the T10/T11 level;
 - (b) a chronic musculo-ligamentous strain to the thoracic spine;
 - (c) a chronic musculo-ligamentous strain to the lumbar spine;
 - (d) a chronic adjustment disorder with depressed and anxious mood; and/or
 - (e) a pain disorder.
- [3] In evidence the plaintiff said that she was stationary behind another vehicle in a line of vehicles at an intersection with a roundabout when the vehicle she was driving was hit from behind by a four wheel drive with a bull bar. The vehicle she was driving¹ was propelled forward by the forces of the collision and, by her estimate, “at least five metres” and towards the left into a bicycle lane.
- [4] Much of the plaintiff’s evidence-in-chief concerning the injuries she sustained and the consequent pain and suffering and other effects upon her amenity of life and her employment was given in the form of a signed written statement by her that was tendered into evidence when she gave evidence before me.²
- [5] In that statement she said:
- “6. I experienced some mild initial lower thoracic back pain but was able to get out of the vehicle and exchange details. The Queensland Police attended.
 7. My car was towed away and subsequently written off. My father took me to the Mater Hospital Mackay.
 8. I then went home and rested, having one full week off work and working half days for a further two weeks.
 9. My pain increased in severity in the thoracic spine and radiated into the front of my chest.
- ...

¹ See exhibit 11.

² Exhibit P1, statement dated 15 July 2013.

Symptoms from accident through to the present

13. I continued to suffer from ongoing symptoms. I had thoracolumbar pain radiating into the chest area and a persistent burning pain in my thoracic spine and through to the front of my chest and just under my chest. This pain was fairly constant but worsened when I was active. In particular it became worse with bending, lifting and twisting and also with prolonged sitting and standing. It was characterized by intermittent spasm.
14. During spasms the severe burning in the thoracic spine became more intense and more sharp. I suffer different types of spasm in my back. During a bad spasm it would extend into my shoulders, my arms or even my legs. This was usually followed by episodes of nausea and vomiting. I also suffered panic attacks related to the same and a strong sensation that I was going to die when they occurred.
15. I also had intermittent numbness and tingling in the toes of my right foot and leg. This was aggravated by long periods of sitting.
16. I had occasional sleep disturbance due to nightmares and pain. I found it difficult getting off to sleep due to pain and discomfort, and anxiety weighed on mind.

Restrictions

17. My symptoms were generally aggravated by sitting, standing or walking for long periods; bending, stooping or twisting; reaching over head height; as well as heavy manual handling activities. As a consequence I tended to avoid activities requiring those actions. If I anticipated that I must undertake, or I had performed, such an activity then I dosed myself with anti-inflammatory or pain killing medications.
18. I continued to complete some chores around the home but was limited by ongoing aggravation of my symptoms. My symptoms were particularly aggravated by long periods of standing with vacuuming, sweeping, mopping; bending and stooping with cleaning the bathroom and toilet; hanging out and retrieving washing from the line; as well as assisting with heavier outdoor yard maintenance tasks. I was forced to break my chores up into smaller sections and to spread my work out over the course of the week in order to better manage my symptoms. I was reliant on support from my family members to complete chores as required.
19. I found that should I overexert myself, my back muscles became sore and could lead to spasm. I was then confined to bed rest. The pain was eased by medications and my mother who often gave me back massages.

20. It was discovered that I ground my teeth in my sleep. I often woke up with a sore jaw in the morning. I obtained a plate from my dentist in order to stop the grinding down of my teeth.

Impact on career choices

21. I have also had to deal with the loss of my future career goals due to my injuries. Prior to sustaining the injuries in question, I had intended to study for Bachelor of Journalism at James Cook University with the intention of becoming a foreign correspondent journalist. I made that career choice during year twelve when I attended an open day at JCU in Townsville arranged by the school and JCU. As I really wanted to study psychology until then I sat in on some psychology lectures and listened to the lecturers who spoke of their profession. I was not that excited by what I heard. It was not all that I had hoped for. I then happened upon presentations from the Journalism Department. It was an exciting career and the speakers were engaging and passionate. I determined then and there to pursue journalism as a career.
22. As a result of the injuries sustained in the accident I discovered that I was no longer suited to work in the sort of journalism I had aspired to. I therefore changed my plans and accepted a place externally in a Bachelor of Psychology course through Central Queensland University. I was sad that I would not be able to fulfil my ambition as a foreign correspondent.
23. Since the incursion of my injuries, numerous symptoms have developed which have affected my enjoyment of my social and sporting life.
24. Prior to the accident, I enjoyed sport, socializing with my friends, going out to see music, watching movies and being active. My capacity to enjoy these activities was substantially reduced by my injuries. I avoided going out nightclubbing with my friends as I have difficulty standing or sitting for long periods of time. I still used to go to some music festivals but would lie down or sit when listening to acts and would sometimes return to my tent and rest between acts. I avoided going out to dinner as sitting for long periods made my legs and feet become numb. My relationships with friends and my partner suffered as a consequence.
25. My relationships with my friends suffered. I grew distant from and lost many of my friends since the incident because I was unable or unwilling to pursue previous recreational and social activities with my friends. As a result contact, and eventually friendships, dropped away.

Improved injury management/coping

26. I had to reduce the number of physical activities that I participated in. During high school I attended gym and enjoyed sporting

activities like kick-boxing. Due to my injuries I can no longer be as active as I would like to be and, as a result, I have gone up two dress sizes and have suffered substantial weight gain. This has severely damaged my self esteem.

Current symptoms

27. I continue to suffer from ongoing symptoms. I still have thoracolumbar pain radiating into the chest area and a persistent burning pain in my thoracic spine and through to the front of my chest and just under my chest. As described above, this pain remains fairly constant but worsens when I am active or sit for long periods. In particular, it becomes worse with bending, lifting and twisting and also with prolonged sitting. It is characterized by intermittent spasm.
28. I also have intermittent back spasms and also numbness and tingling in the toes of my right foot and leg. This is aggravated by long periods of sitting.
29. Sleep disturbance due to nightmares and pain continues. I find it difficult getting off to sleep due to pain and discomfort, and anxiety weighed on mind".

- [6] When giving evidence the plaintiff described back spasms that she often suffered from sometimes would induce vomiting and require her to seek medical attention including the administration of morphine³. She also described pins and needles sensations in both legs more severe on the right.⁴ She said that there were occasional days when she could not get out of bed suffering from what she described as "withering pain".⁵ She said that subsequent to the accident she attempted to return to work but had difficulties performing her duties because of pain.⁶ She further complained that she had difficulty continuing with gym attendances and her exercise because of pain⁷ and that she had put on weight since the accident⁸. In evidence she said that she'd attempted to return to work performing receptionist and sales duties in her mother's business between February 2009 and June 2010. She said that nominally her employment was full time but that she had pain at the end of the day and that she could only manage four to five hours a day or less sometimes.⁹ At the time of trial she was enrolled in a Master's degree of management in human resources that she hoped to finish by July 2014. Her employment plan was to seek part time employment working in human resources and perhaps using the psychology learning she had obtained as part of her

³ T 1-42 1 12 – T 1-43 1 25.

⁴ T 1-43 1 35.

⁵ T 1-42 1 13.

⁶ T 1-19 1 29-36.

⁷ T 1-20 1 25-46.

⁸ T 1-22 1 5-10.

⁹ T 1-22 1 24-35.

Bachelor's degree.¹⁰ She said that she took Endone but that affected her concentration, Brufen which tendered to upset her stomach and also Panadol Osteo.

- [7] In cross-examination of the plaintiff a number of matters were raised that bore upon the consistency of her self reporting, the account of her life and the effects of the accident upon her that ultimately put in issue her credit. To a number of doctors on different occasions she had described the effects of the accident upon her personal life with the result that at least one formed the conclusion that the plaintiff had become socially avoidant. But a different picture emerged in evidence. The plaintiff admitted that she told doctors that she had become scared to go out¹¹ but it was plain from her evidence and from other documentary sources that the plaintiff attended music festivals, events at hotels, and that she had been a bridesmaid¹². The plaintiff admitted that she had not told the doctors that she had at a time contemplated travelling to England or that she had attended music festivals.¹³ The plaintiff told doctors that she had broken off a relationship with a boyfriend as a result of the accident but she admitted in evidence to having a long term "on/off" relationship since the accident.¹⁴
- [8] There were other examples of a preparedness to either misstate the facts or consciously confabulate. The plaintiff admitted that she had caused a letter signed by her mother to be sent to the university when applying to enter the Master's course in human resources that significantly exaggerated the extent of the duties she performed at her mother's business and that the reason for the falsehoods was to obtain admission to the course.¹⁵ There was also evidence of the plaintiff creating what was described as a "false persona" in her communications or correspondence with others on various social media sites.¹⁶ In particular there is a reference to a false trip to the United Kingdom¹⁷ and related false job offers¹⁸ and a false claim to have made an offer to purchase on a house.¹⁹ In evidence the plaintiff said that her ambition had been to become a journalist and to travel and work overseas as a journalist. She claimed that the effects of the injury had denied her that opportunity. Yet in cross-examination it was pointed out to her that in her application for university admission journalism was recorded as a third preference²⁰ and she admitted under cross-examination that when she "blogged" as a school girl her expressed ambition was to be a psychologist.²¹ In cross-examination the plaintiff admitted that in the years subsequent to the accident she made no applications nor made any attempts to obtain any jobs, placements or work experience as a journalist with any prospective employer.²²

¹⁰ T 1-22 l 37 ff.

¹¹ T 1-41 l 15; T 1-50 l 19.

¹² See generally T 1-59 l 40 – 1-63 l 33, T 1-66 l 7 – 24 and T 1-67 l 40 ff.

¹³ See T 1-41 l 30 and T 1-41 l 27.

¹⁴ T 1-41 l 26 and T 1-45.

¹⁵ T 1-27 l 7 – 23.

¹⁶ See T 1-40 l 25 – 30.

¹⁷ See exhibit D1, tab 35, p 85.

¹⁸ T 1-46 l 14 – 25.

¹⁹ T 1-45 l 7 – 14.

²⁰ Ex D1 vol 1, tab 20, p 4.

²¹ T 1-27 – 1-28

²² T 1-29 l 30 - 1-30 l 10 and T 1-30 l 23. It might also be noted in this respect that the plaintiff made no attempts or applications to obtain employment or pursue a career as a psychologist notwithstanding that that discipline was one of the majors in her bachelors degree; T 1-31 l 24 – 43 ff.

- [9] There were other examples of inconsistencies. The plaintiff admitted that when she was examined by Dr Wallace (orthopaedic surgeon) for the purposes of an expert report in connection with her claim she made no mention of severe spasms or numbness in her legs nor of severe bruising or stabbing sensations in her mid thoracic spine.²³ Dr Simon Journeaux (orthopaedic surgeon) examined the plaintiff on behalf of the defendant on 7 October 2009. In his report²⁴ he noted “inorganic signs” on her presentation which to him indicated “significant psychological factors” were present.²⁵
- [10] When the plaintiff gave evidence there were occasions when I formed the view she had an indifference to the significance of giving evidence under oath amounting to a supercilious regard for the truth. There were occasions when her demeanour strongly suggested this.²⁶ In fact when giving her evidence when confronted with her “false persona” the plaintiff seemed to have no concern for suggestions that her evidence was inaccurate or even perhaps untruthful and she laughed.²⁷
- [11] At the time of the trial I formed the firm impression that the plaintiff could not be relied upon to give an accurate account of the effects of the accident upon her and the aspects of her work, education and day to day life that were affected by the accident. I have not overlooked that some of the confabulations or inaccuracies recounted by the plaintiff in her “conversations” recorded on the social media sites (tendered into evidence by the defendant) might be attributable to the vagaries of youthful and forgivable exuberance or indiscretion. But having reflected upon the evidence and the impression the plaintiff made upon me I have reached the firm view that the plaintiff’s self-reporting of her pain and suffering and the extent to which that has affected her enjoyment of life cannot be accepted.
- [12] One of the issues debated before me that is important to the assessment of damages is whether the plaintiff sustained an injury to her thoracic spine and importantly a prolapse at T10/11. In his report Dr Wallace²⁸ expressed the opinion that the plaintiff had sustained an acceleration/deceleration injury to her spine and that investigations had revealed a disc protrusion at T10 and T11 and some changes consistent with pre-existing Scheuermann’s disease. In evidence Dr Wallace said that he saw the plaintiff on one occasion, that he could not recall her after four years, that he did not record her complaining of severe back spasms or numbness into her legs (he would have recorded that if he had been told) and that he relied upon the veracity of the plaintiff’s self reporting in reaching the opinions expressed in his report.²⁹ To a large extent the plaintiff and the defendant relied upon the opinions stated in the report and evidence of Dr Toddman (for the plaintiff)³⁰ and the reports and evidence of Dr Journeaux (for the defendant)³¹. Dr Toddman expressed the opinion that the protrusion that could be seen in the MRI and other

²³ See for example her cross-examination at T1-52 l 23 ff; cf the evidence of Dr Wallace at T 1-55 l 25, T 1-55 l 43, T 1-54 – 55 and the evidence at T 1-57 l 10.

²⁴ Exhibit D1, vol 1, tab 14, p 1; dated 14 October 2009

²⁵ See report at p 10.

²⁶ For example the occasion of her evidence recorded at T 1-28 l 16 – 20; her explanation when giving evidence at about T 1-28 l 40 and when giving evidence, the evidence recorded at pages T 1-38 – T1-39.

²⁷ See T 1-40 l 25.

²⁸ Exhibit P6.

²⁹ See generally T 1-54 – 55.

³⁰ Report dated 16 November 2010, exhibit P7; evidence T 2-14 ff.

³¹ Reports exhibit D14 14.10.2009; exhibit D15 20/3/2012 and T 1-72 l 1 – 79 l 45.

scans taken post accident was likely to be “related” to the accident as were also the symptoms the plaintiff complained of.³² In evidence Dr Toddman conceded that he relied in part upon the truthfulness of the plaintiff³³ and he also estimated the plaintiff had a need for care and assistance at approximately five hours per week.³⁴ Dr Journeaux’s evidence was that the plaintiff had suffered a sprain injury to her spine in the motor vehicle accident, that the disc prolapse was caused by a degenerative process in her spine and that the motor vehicle accident had only occasioned a temporary aggravation of her condition. Dr Journeaux also noted “inorganic” signs upon examination.

- [13] Both Drs Toddman and Journeaux gave evidence in a rather combative manner. I was left with the distinct impression that both were advocating for competing theories concerning the medical or scientific cause of disc prolapses or protrusions in the context of the thoracic spine. The evidence is that the plaintiff was seat belt restrained. In that circumstance I accept the evidence of Dr Journeaux that it would be highly unlikely for an injury of the nature detected by the MRI and other scans to have been caused in an accident as described in the context of a healthy thoracic spine. But the evidence is that the plaintiff’s spine was degenerate or had pre-existing disease at the time of the accident. When considering questions of causation the expert evidence of scientific or medical opinion upon such matters and related studies and investigations or theories can be received, borne in mind and considered but ultimately causation is to be approached with the common sense of matters in mind³⁵. With that in mind I consider the opinion of Dr Journeaux that the pre-existing disease or degeneration caused the prolapse or protrusion rather than the effects of the accident is unattractive. I therefore conclude that the prolapse or protrusion the doctors spoke of was occasioned as a result of the forces upon the plaintiff’s spine generated by the collision with the defendant’s motor vehicle. However that outcome was occasioned in the context of, as I find it, the plaintiff suffering from pre-existing disease or degeneration in her spine that made it vulnerable to such injury. Further I am prepared to infer from the evidence of Dr Journeaux that the plaintiff’s pre-existing condition would necessarily have been quite advanced because it was unlikely that significant forces were applied to the plaintiff’s spine in the accident.
- [14] The findings I have made concerning the plaintiff’s credit worthiness however affect the issue of whether I should accept the evidence of the orthopaedic surgeons and others who have given evidence in the plaintiff’s case concerning her physical limitations. Plainly the expert opinion evidence the plaintiff relies upon has its foundations in the acceptance in large measure of the plaintiff’s reporting. Because of my findings concerning the plaintiff I find myself unable to accept the balance of the expert opinion evidence from Drs Wallace and Toddman.
- [15] Similar considerations apply in relation to the issues of whether the plaintiff has suffered a chronic adjustment disorder or a pain disorder or any other psychological or psychiatric illness as a consequence of the accident³⁶. The plaintiff relied upon

³² Dr Toddman’s evidence upon this issue of causation can be seen at T 2-22 l 10 as an example.

³³ T 2-20 l 20.

³⁴ T 2-16 l 35.

³⁵ *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506

³⁶ The evidence of Dr Douglas (exhibit D16 p 71; Report 6/4/2010 and T 2-59 l 25 ff) of a pain disorder proceeds upon an assumption, contrary to my finding, that the plaintiff did not sustain a physical injury to her spine.

the expert opinion evidence of Dr Jennifer Lockwood (psychiatrist)³⁷ however Dr Lockwood records that the plaintiff told her that she had lost all her friends since the accident, that she had no recreational activities other than watching television and playing cards with her grandmother, that she rarely went to social events and was not involved in social activities or recreational activities other than watching television or playing cards with her grandmother. This led Dr Lockwood to express the opinion in her report that the plaintiff had become socially avoidant and quite reclusive. In light of my earlier findings³⁸ I conclude that Dr Lockwood's opinions are based upon false premises as a consequence of inaccurate reporting by the plaintiff and I do not accept the opinion evidence in her report. The defendant relied upon expert opinion evidence from Dr Catherine Oelrichs³⁹. In general Dr Oelrichs' opinion was more guarded than that of Dr Lockwood but as with Dr Lockwood it was based upon the plaintiff's self reporting including that she had been in a relationship with her boyfriend which had broken up, that the plaintiff did not go out socially any more. In view of my findings concerning the plaintiff's reliability I am not prepared to conclude that the plaintiff has suffered from any significant psychiatric or psychological disturbance as a consequence of the accident.

- [16] I now turn to the assessment of damages under particular heads.
- [17] In light of my findings concerning the injuries sustained by the plaintiff I consider that she has suffered an injury that comes within item 92 of the relevant schedule to the *Civil Liability Regulation 2003*. In my view an ISV of 8 is appropriate. I am not prepared to make any findings in respect of any other spinal injury in light of my findings concerning the plaintiff's credit. In the circumstance the relevant assessment for an ISV of 8 (with no uplift) is \$8,600.
- [18] The assessment of damages for past and for future economic loss is difficult. I am prepared to accept that the plaintiff suffered from pain and suffering for some days and perhaps some weeks post accident which would have significantly interfered with her capacity to work in the job that she had at the time of the accident. I am also prepared to conclude that her injury would have occasioned her pain and restrictions that would have interfered at times with her capacity to work in other part time or full time employment that she may have attempted. For example she may have been adversely restricted in her capacity to work as a receptionist at Powerhouse Ford where she worked for a period from March to May 2008.
- [19] But I am not prepared to conclude that the plaintiff's injuries significantly interfere with her capacity to pursue a career as a journalist as she would have it. The evidence of Mr Gordon makes it clear that career paths within journalism are difficult to secure and to pursue in current times. The plaintiff has made no attempt to pursue such a career and I do not regard the prospect of that career as anything more than a notional fancy on her part.
- [20] Without belabouring the point the evidence of those doctors and other experts⁴⁰ of their opinions concerning the plaintiff's physical incapacities and their effect upon her capacity to earn income is based upon the plaintiff's own account. I do not regard those opinions as helpful.

³⁷ Exhibit P10, report dated 13/3/2010.

³⁸ See para [11] above.

³⁹ Report dated 28 April 2011, exhibit D17 p 82 and the file note exhibit D52 dated 1 July 2013.

⁴⁰ For example Mr Ng.

- [21] The plaintiff has seemingly successfully negotiated a university course leading to a degree with a major in psychology. She has enrolled in and is pursuing a Master's qualification in human resources. I do not consider that the plaintiff's injury or disability caused by the accident will significantly interfere with her capacity to pursue such a career if she is minded so to do.
- [22] Nevertheless the plaintiff sustained a not insignificant injury to her spine as a consequence of the accident. While I accept the evidence of Dr Journeaux that this occurred in the context of pre-existing spinal disease and degeneration⁴¹ I conclude that on the balance of probabilities it is likely that the plaintiff's injury and disability has caused her to lose income in the past by preventing her from taking up some job opportunities while she studied. It may be as well that the effects of the injury have affected her studies so as to slightly delay the completion of her course. Further with respect to the future it is possible that the effects of the injury may cause her intermittent pain and suffering into the future that will occasionally be productive of lost income. The injury is, in the view I take, one that is likely to cause pain and restriction at work and in life from time to time although the precise measure of the loss of earning capacity cannot be calculated in monetary terms with precision.
- [23] While the plaintiff's pre-accident physical condition as I have found it to be meant that an injury such as the one she sustained was a possibility in the future or that her degenerate spine might have become a source of pain and suffering for her the evidence does not permit me to make a precise finding either of proportionate contributions as between the effects of the accident and the pre-existing degeneration nor as to the time within which matters may have been accelerated nor the extent of the aggravation caused by the effects of the accident. However in the consideration of economic loss I regard the hypothetical that the plaintiff might have suffered from a painful condition in her thoracic spine in any event as not so small as to be far fetched or fanciful.⁴²
- [24] In respect of past economic loss I see no alternative other than to make an assessment of an amount which represents an assessment, as best as I can make in the state of the evidence I accept, of the extent to which the injuries sustained by the plaintiff has been productive of economic loss in the past. That amount is \$30,000. In addition the plaintiff is entitled to a component of interest at the agreed rate of 1.61% per annum for the 6.17 years since the accident. I calculate that as \$1,751.⁴³ The plaintiff is also entitled to a component to reflect her lost superannuation entitlements. At 9% I calculate that figure at \$2,700.
- [25] A similar lump sum or global assessment for future economic loss is also indicated for the same reasons. The plaintiff is a young woman and has approximately 44.5 years before a notional retirement age at 67. In my view there is a probability that the plaintiff's injury will be productive of economic loss in the future though I do not consider that the loss will be significant in terms of the capacity to perform the sort of work to which her tertiary education is directed. In the circumstances I assess that loss at \$75,000. In addition I calculate the lost superannuation entitlements (at 11.3%) at \$8,475.

⁴¹ Recall paras [12] and [13] above.

⁴² *Malec v J.C. Hutton Pty Ltd* (1990) 169 CLR 638

⁴³ After making allowances for the receipt of net weekly compensation benefits.

[26] The plaintiff claims for damages for gratuitous services both past and into the future. At the time of the accident s 59 of the *Civil Liability Act 2003* provided:⁴⁴

“59 Damages for gratuitous services

- (1) Damages for gratuitous services are not to be awarded unless—
 - (a) the services are necessary; and
 - (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
 - (c) the services are provided, or are to be provided—
 - (i) for at least 6 hours per week; and
 - (ii) for at least 6 months.
- (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
- (3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person’s household.
- (4) In assessing damages for gratuitous services, a court must take into account—
 - (a) any offsetting benefit the service provider obtains through providing the services; and
 - (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution".

[27] In addition to the plaintiff’s evidence evidence in support of her claim for gratuitous services was given by Mr Ng⁴⁵, the evidence of Dr Toddman of the plaintiff’s need for care⁴⁶, inferentially the evidence of Dr Wallace and also evidence given by the plaintiff’s mother.

[28] For the reasons I have given I am unable to accept the plaintiff’s evidence. Both Mr Ng and Dr Toddman rely, as the foundation for their opinions, to a substantial extent upon the accuracy of the plaintiff’s self reports,⁴⁷ consequently I am unable to accept their expert opinion evidence upon this issue.

⁴⁴ Reprint no. 2A.

⁴⁵ Report 12 March 2010; exhibit P8.

⁴⁶ T 2-16 l 35.

⁴⁷ See for example Mr Ng’s report of 12 March 2010, exhibit P8, at p 8, paragraph [57].

[29] The plaintiff's mother gave evidence touching upon this issue. I found her evidence confusing.⁴⁸ It was difficult to ascertain from her evidence what services were provided by Mrs Reitano to the plaintiff as care arising out of or because of the effects of her injuries as opposed to services that were provided replacing those that had been performed for Mrs Reitano and other members of the family by the plaintiff before the injury.⁴⁹ Further I am not persuaded by the evidence of Mrs Reitano or the other evidence which I have accepted that it has been established that the plaintiff either had a need for services⁵⁰ or that they were provided as a consequence of her injuries at any time for at least six hours per week for at least six months. Consequently the plaintiff has not proven an entitlement to an award of damages for care or services either in the past or into the future.

[30] There was little dispute with respect to special damages between the parties in addresses. In the circumstances I decline to make any award for chiropractic or massage therapy but following the submissions from counsel special damages will be assessed at \$12,261. In addition interest calculated at 1.61% upon those damages that are out of pocket expenses should be allowed. Most expenses have been met by health funds, WorkCover or are for drugs or other medications bought using social security benefits. In the circumstances I will assess special damages including interest at \$12,500.

[31] Therefore in summary the damages assessed will be:

General damages	\$8,600
Past economic loss	\$30,000
Interest	\$1,751
Past loss of superannuation	\$2,700
Future economic loss	\$75,000
Future loss of superannuation	\$8,475
Special damages (including interest)	<u>\$12,500</u>
Total	<u>\$139,026</u>

[32] Subject to any miscalculation, there should be judgment for the plaintiff in the sum of \$139,026.

[33] I will give the parties the opportunity to check my calculations and make submissions as to costs.

⁴⁸ See for example T2-48 1 41 – T 2-49 1 23.

⁴⁹ Consider s 59(3); cf *Land v Dahliwal & Anor* [2012] QSC 360 per Daubney J at [97] ff and the cases referred to.

⁵⁰ See s 59(1)(a) and (b).