SUPREME COURT OF QUEENSLAND

CITATION:	*McQuitty v Midgley & Anor* [2016] QSC 36
PARTIES:	**TAI RAYMOND MCQUITTY**, by his litigation guardians, **KATHARINA KIRGIS** and **ROBYN IRENE ATKINSON** (plaintiff) v **MIDGLEY** (first defendant) AND **SUNCORP METWAY INSURANCE LTD** ACN 83 075 695 966 (second defendant)
FILE NO:	BS3108/13
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	4 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27-30 April 2015
JUDGE:	Jackson J
ORDERS:	**The order of the court is that:** **1. The damages are assessed at $2,719,500.05.** **2. The parties are at liberty to make submissions in writing as to the further orders to be made within 7 days.**
CATCHWORDS:	DAMAGES – PARTICULAR AWARDS OF GENERAL DAMAGES – QUEENSLAND – where the plaintiff suffered a brain injury in a motor vehicle accident – where the plaintiff had a pre-existing personality issues, an anger problem and demonstrated anti-social behaviour – where there were multiple injuries – whether the plaintiff suffered a "moderate" or "serious" brain injury for the purposes of assessing an "injury scale value" under the *Civil Liability Regulation* 2003 (Qld) – whether there was aggravation of a pre-existing condition for the purposes of reducing the "injury scale value" – whether the injury scale value should be uplifted DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – where gratuitous care was provided to the

plaintiff by friends and family but there was conflicting evidence as to how many hours per day – where the plaintiff's pre-injury history may indicate an existing need for care – whether the evidence, including expert reports, demonstrated a past and future need for care of five to twelve hours per day

Butler v Egg & Egg Pulp Marketing Board (1966) 114 CLR 185; [1966] HCA 38, cited
CSR Ltd v Eddy (2005) 226 CLR 1; [1992] HCA 54, cited
Glen v Sullivan [2015] NSWCA 191, not applied
Grincelis v House (2000) 201 CLR 321; [2000] HCA 42, considered
Kriz v King [2007] 1 Qd R 327; [2006] QCA 351, applied
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20, followed
Mt Isa Mines Ltd v Pusey (1970) 125 CLR 383; [1970] HCA 60, cited
Purkess v Crittenden (1965) 114 CLR 164; [1965] HCA 34, not applied
Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208, cited
Smith v Gellibrand Support Services Inc (2013) 42 VR 197; [2013] VSCA 368, cited
Van Gervan v Fenton (1992) 175 CLR 327, considered
Waller v Suncorp Metway Insurance Ltd [2010] 2 Qd R 560; [2010] QCA 17, considered
Watts v Rake (1960) 108 CLR 158; [1960] HCA 58, not applied
Winters v Bishop [2014] QSC 312, considered

Civil Liability Act 2003 (Qld) ss 59, 61, 62, 69
Civil Liability Regulation 2003 (Qld) Sch 3, Sch 4 Pt 1

COUNSEL: J A Griffin QC with N Jarro for the plaintiff
R Lynch for the defendants

SOLICITORS: Richardson McGhie Solicitors for the plaintiff
Quinlan Miller and Treston for the defendants

[1] **JACKSON J**: The plaintiff was 20 years old when, on 28 August 2003, he was a passenger in a car that ran off the road at extremely high speed. He suffered multiple injuries. By far the most important was a head injury described by many of the expert witnesses and in contemporaneous medical records as a severe brain injury. The defendant admits liability for negligence that caused the plaintiff injury. Damages remain to be assessed in accordance with the principle that the plaintiff "should receive compensation in a sum which, so far as money can do so, will put him in the same position as he would have been in if … the tort had not been committed".[1]

[2] The difficulties, and there are difficulties, in assessing damages lie in making factual findings as to the past and future hypothetical facts. They must be compared

1 *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185, 191.

with the actual facts as to the plaintiff's past and present condition, over which there is also some contest. They too will have a significant impact on the assessment. There are significant differences of opinion between expert health professional witnesses as to the extent of the plaintiff's past and present disabilities, and his future needs.

Degree of probability

[3] Those difficulties must be overcome to make the comparison required for the assessment of damages between what has actually happened and the hypothetical scenario of what would have happened but for the injury suffered by the plaintiff. According to *Malec v JC Hutton Pty Ltd*,[2] the assessment of the past and future hypothetical facts is required to be done on the "degree of probability", meaning having regard to the possibilities between 0 per cent and 100 per cent. As the plurality said in that case:

> "… the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded … The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place."[3]

[4] There is no dispute that the plaintiff's present condition is such that he has a significant need for services by way of care. He has had that condition and need, to some extent, at least since he suffered his injuries. There is, however, a dispute about whether he had that need before the injuries he sustained on 28 August 2003. The expert witnesses gave a wide variety of opinions as to the extent of the care needed.

[5] There is also no dispute that the plaintiff's need for care has been and will be contributed to by his underlying personality disorder. Before injury, he regularly engaged in significant antisocial behaviour. He had a prejudicial childhood. He failed to complete Grade 10 at school and was expelled from more than one school. He lived on the streets for a period as a youth. He was a heavy user of amphetamines and cannabis and drank heavily in the years before the injury. He had at least two serious prior injuries in motor vehicle collisions in 1999 and 2001. He lacked ordinary social skills. He was quick to anger long before this injury. He got into frequent and sometimes physically damaging fights. He regularly came into contact with the criminal justice system, although mostly for minor offences.

[6] After the injury in 2003, when he had physically recuperated sufficiently, this behaviour pattern continued. In recent years it has changed to a significant extent. The plaintiff has grown older and may have matured to a degree. He has decreased both his alcohol and illicit drug use to a significant degree. However, he is still quick to anger, although not as destructively in more recent times. He and his friends say that has been more so after the injury than before, although there is some doubt in my mind about that. The experts agreed his injury contributes to his

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2 (1990) 169 CLR 638.

3 (1990) 169 CLR 638, 643.

inability to control his anger. His friends and carers have helped him to avoid confrontations, which might lead to adverse consequences from his disinhibition to anger.

[7] Some of the expert witnesses opined that the plaintiff needs care of up to 10 hours a day or more, so that a carer (he has had a long-time friend as a carer for some years) would be able to assist him to avoid episodes of acute anger and the trouble that the plaintiff might get into in the community.

[8] Be that as it may, the plaintiff has an underlying need for care of several hours per day, so as to assist him to maintain the performance of the tasks of everyday living. The problem is not a physical inability to do those tasks. It is the plaintiff's lack of executive mental functioning to remember or to be motivated to do them. It is not in dispute that this aspect of the plaintiff's loss of function was caused by his injury.

[9] The plaintiff says the compensation to which he is entitled includes the commercial cost of such care and that his pre-existing behaviours are not relevant to decrease the amount of the damages to be awarded. He submitted that his pre-injury condition should be left out of account because of the principle that a defendant must take a plaintiff as they find them. In particular he submitted that at the time of his injuries he was not receiving care to manage his aggression. At first blush, there is some apparent substance in those submissions. But are they really consistent with the assessment on the degree of the probabilities required under the principle of *Malec*? That is a significant and difficult question in the case.

[10] The appeal in *Malec* was against a finding of fact that the plaintiff would have suffered a particular disability by a particular date in any event, so that the injury was not a cause of loss under particular heads of damages, including past and future care provided to the plaintiff by his wife, after that time. The appeal was allowed by the High Court on the basis that it could not be concluded that it was 100 per cent certain that the plaintiff's pre-existing condition would have precipitated a similar outcome to that which in fact occurred.[4] There was a substantial chance that the plaintiff would not have suffered the actual condition. It was necessary to bear in mind also that more than one probability was involved. One was whether the plaintiff would have become unemployed in any event because of his pre-injury condition. Another was whether the unemployment would have precipitated the plaintiff's neurotic condition that created the need for care. The combination of the probabilities reduced the chance that the plaintiff would have suffered the loss in any event.

[11] Applying this approach in the present case, a relevant question would be the probability that the plaintiff's pre-injury condition would have generated his need for care to manage his aggression in any event. That degree of probability would reduce the damages assessed for his need for care otherwise assessed by the difference between his post-injury need for care and his actual pre-injury condition where he was functioning without any care.

[12] The plaintiff submitted that would be a wrong approach. He submitted that the correct approach is informed by *Watts v Rake*[5] and *Purkess v Crittenden*.[6]

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4 (1990) 169 CLR 638, 644.
5 (1960) 108 CLR 158.
6 (1965) 114 CLR 164.

[13] In *Watts*, the plaintiff had pre-injury conditions that might have manifested in a disability or disabilities of the kind that his injury did cause. Dixon CJ spoke of the defendant being required to do the disentangling and to exclude "the operation of the accident as a contributory cause".[7] Menzies J held that, prima facie, "where a defendant is in apparent good health before an accident and is in bad health thereafter, the change would be regarded as a consequence of the accident and that it is for the defendant to prove that there is some other explanation".[8]

[14] These statements do not sit well with the approach required under *Malec*.

[15] Similarly, in *Purkess*, Windeyer J followed Dixon CJ's approach in *Watts*. His Honour was careful to distinguish between the evidentiary onus of a defendant to raise the pre-injury cause of the alleged loss, noting that the persuasive onus of proof remained with the plaintiff. Yet the reasoning adhered to the presumptive approach that underlies *Watts* as to whether the pre-injury evidence was sufficiently precise and definite to displace an inference that the disabling condition was caused by the injury. It dismissed a suggestion that what is required is an apportionment of the post-injury condition into a part to be attributed to the accident, with the rest being attributed to other factors, as an "entangled and difficult proposition".[9]

[16] Again, in my view, that approach is not consistent, generally speaking, with *Malec*.

[17] That view in no way detracts from the principle that a defendant must take a plaintiff as they find them – the so-called "egg-shell skull rule".[10] It is in principle correct to say that it is irrelevant whether the injury caused by the defendant may not have caused the same loss or damage for a more robust plaintiff or one without some pre-injury disability, if the plaintiff would not otherwise have suffered the loss and damage.

[18] In my view, the point of *Malec* is different. It speaks directly to the correct approach in proof as to the assessment of the past and future hypothetical facts that is a necessary step in the assessment of loss or damage. To the extent that statements in *Watts* or *Purkess* appear to be in conflict with that approach, I regard them as overtaken by *Malec*, meaning that to the extent of the inconsistency they are overruled as statements of the common law.

[19] I am conscious that it seems almost heretical to say so. For example, in *Glen v Sullivan*,[11] decided as recently as 9 July 2015, the Court of Appeal of New South Wales indorsed the general approach supported by those cases. Sackville JA did acknowledge that "[i]n certain cases it is necessary to take account of the principle that, in assessing damages, the law takes account of hypothetical situations in the past and the chance of future events occurring."[12] But that is to create a categorisation of cases, divided between some cases where past hypothetical and future hypothetical facts are assessed in accordance with *Malec* and other cases where those facts are not assessed in accordance with *Malec*. In my view, as a matter of principle that divide does not exist. Even if it did, I am unable to find in

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7 (1960) 108 CLR 158, 160.
8 (1960) 108 CLR 158, 163.
9 *Purkess v Crittenden* (1965) 114 CLR 164, 171.
10 *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 406.
11 [2015] NSWCA 191.
12 [2015] NSWCA 191, [47].

authority where the criteria are set down for deciding when a case belongs in the category on one side of the divide or the other.

[20] The point I am considering has been considered and the resulting principles have been expressed to some extent at intermediate appellate court level on at least two occasions in *Seltsam Pty Ltd v Ghaleb*[13] and *Smith v Gellibrand Support Services Inc*.[14]

[21] In *Seltsam*, Ipp JA said:

> "What was said in *Watts v Rake* and *Purkess v Crittenden* now has to be qualified by these principles (cf *Commonwealth of Australia v Elliott* [2004] NSWCA 360 at [81]). *Malec* has an important bearing, for example, on the way in which a court must determine whether a defendant has discharged the "disentangling" evidentiary burden on it of showing that part of the plaintiff's condition was traceable to causes other than the accident and that, had there been no accident, the plaintiff would have suffered disability from his pre-existing condition.
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> Where a defendant alleges that the plaintiff suffered from a pre-existing condition, the evidential onus as explained in *Watts v Rake* and *Purkess v Crittenden* remains on the defendant and must be discharged by it. Nevertheless, to the extent that the issues involve hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring, the exercise of "disentanglement" discussed in those cases is more easily achieved. That is because the court is required to evaluate *possibilities* in these situations — not proof on a balance of probabilities.
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> Without intending to give an exhaustive list of possibilities, it may be that, had the defendant's negligent act not occurred, a pre-existing condition might have given rise to the possibility that the plaintiff's enjoyment of life and ability to work would have been reduced and to a susceptibility to further injury; in addition, other causes entirely unrelated to the defendant's negligent act might have contributed to the plaintiff's ultimate condition.
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> Appropriate allowances must be made for these contingencies. A proper assessment of damages requires the making of a judgment as to the economic and other consequences which might have been caused by a worsening of a pre-existing condition, had the plaintiff not been injured by the defendant's negligence. A pre-existing condition proved to have possible ongoing harmful consequences (capable of reasonable definition) to the plaintiff, even without any negligent conduct on the part of the defendant, cannot be disregarded in arriving at proper compensation.

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13 [2005] NSWCA 208.

14 (2013) 42 VR 197, 213-216 [64]-[73].

> As was pointed out in *Newell v Lucas* [1964-5] NSWR 1597 (at 1601 per Walsh J, with whose judgment Hardie and Asprey JJ agreed), the court must determine whether a comparison may be made between the plaintiff's condition prior to the injuries sustained by the defendant's negligence (including the plaintiff's economic and other prospects in that condition) and the plaintiff's condition and prospects after the injuries. Nothing in *Watts v Rake* and *Purkess v Crittenden* precludes the judge from carrying out this exercise."[15]

[22] That passage was set out by White JA in *Phillips v MCG Group Pty Ltd*[16] with apparent approval.

[23] The correct approach must conform to and is informed by the *Civil Liability Act* 2003 (Qld) ("Act"). There are two particular relevant aspects. First, there are provisions regulating the assessment of general damages based on the concept of an "injury scale value" assessed under that Act. Second, damages for gratuitous services may only be awarded in compliance with the provisions of the Act.

General damages

[24] A provision of the regulations made under the Act is directly relevant to the present discussion. In assessing general damages, the court must assess an injury scale value on a scale running from 0 to 100.[17] In assessing the injury scale value the court must assess the injury scale value under any rules provided under a regulation.[18] The court must also have regard to the injury scale values given to similar injuries in previous proceedings.[19]

[25] Section 7 of Sch 3 of the *Civil Liability Regulation* 2003 (Qld) ("Regulation") provides that it applies if an injured person has a pre-existing condition that is aggravated by an injury for which a court is assessing an injury scale value, abbreviated to "ISV". In considering the impact of the aggravation of the pre-existing condition, the court may have regard only to the extent to which the pre-existing condition has been made worse by the injury.

[26] In other words, s 7 positively requires the separation of the effects of the injury from the pre-existing condition in reaching the ISV. However, it does not specify a method. The ISV categories and items are based on an assessment of the physical extent of injury, the physical effect on function, the physical symptoms such as pain, and the resultant disabilities. Because of the structure of the ISV categories, a logical method to apply s 7 would be to assess the actual post-injury condition as an ISV and the pre-injury condition as an ISV, followed by subtraction of the pre-injury ISV to arrive at the net effective ISV.

[27] Neither of the parties in the present case followed such an approach. The plaintiff simply relied on *Watts* and *Purkess*. The defendant did not challenge that approach, and instead submitted that it had satisfied the evidentiary onus upon it. It did not

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15 [2005] NSWCA 208, [104]-[108].
16 [2013] QCA 83, [57].
17 *Civil Liability Act* 2003 (Qld), s 61(1)(a).
18 *Civil Liability Act* 2003 (Qld), s 61(1)(c)(i).
19 *Civil Liability Act* 2003 (Qld), s 69(1)(c)(ii).

refer any of the cases previously mentioned or submit that s 7 changed the approach required to assess damages where there is a pre-existing condition, although it did rely on s 7.

[28] The defendant submitted that the appropriate conclusion is that the plaintiff's condition should be categorised as falling within item 7 of Sch 4, and not serious enough to warrant the conclusion that it falls within item 6. I agree with this conclusion for the reasons that follow.

Serious or Moderate Brain Injury

[29] The general damages calculation provisions that apply are those prescribed during the period when the injury arose.[20] It was common ground they were in the Regulation.

[30] In assessing the ISV for an injury mentioned in the injury column of Sch 4 of the Regulation the Court must consider the range of ISVs stated in Sch 4 for the injury.[21] Item injury numbers 5, 6, 7 and 8 of Sch 4 Pt 1 deal with brain injury. There are four degrees of brain injury separately classified with different ranges of ISVs as follows:

5	Extreme brain injury	71 to 100
6	Serious brain injury	56 to 70
7	Moderate brain injury	21 to 55
8	Minor brain injury	6 to 20

[31] The plaintiff submitted that, based on the preponderance of medical opinion given in evidence, the plaintiff's acquired brain injury is a serious brain injury causing cognitive impairment with marked impairment of intellect and personality for the purposes of assessing an ISV. The plaintiff did not distinguish or address the differences between the characteristics of a moderate brain injury and a serious brain injury, as discussed below.

[32] The defendant submitted that the plaintiff's acquired brain injury was a moderate brain injury for the purposes of assessing an ISV.

[33] Nearly all of the medical witnesses called described the plaintiff as having suffered from a "severe brain injury". But none of them referred to or had their attention directed to the distinctions between a serious brain injury and a moderate brain injury within the meaning of items 6 and 7 of Sch 4 of the Regulation.

[34] The list of examples of factors which affect the ISV assessment in each of those categories is the same. However, the descriptive comments and examples about the appropriate level of ISV differ. So, for a serious brain injury, it is said that "the injured person will be very seriously disabled", whereas for a moderate brain injury it is said that "the injured person will be seriously disabled, but the degree of the injured person's dependence on others, although still present, is lower than for an item 6 injury."

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20 *Civil Liability Act* 2003 (Qld), s 62(1).

21 *Civil Liability Regulation* 2003 (Qld), Sch 3 Pt 2 s 2(1).

[35] An example given for a serious brain injury is:

> "cognitive impairment with marked impairment of intellect and personality".

[36] That is, neither a cognitive impairment nor an impairment of personality, per se, necessarily distinguishes a serious brain injury from a moderate brain injury. In the comments section of the table about the appropriate level of ISV in respect of a moderate brain injury it is provided that:

> "An ISV of 41 to 55 will be appropriate if there is no capacity for employment, and one or more of the following—
> - Moderate to severe cognitive impairment
> - Marked personality change…"

A difference between the texts of the two descriptions is that in the example a serious brain injury also involves a marked impairment of intellect.

[37] Accepting for the purposes of this case that a marked impairment of intellect would be enough to take what would otherwise be a moderate brain injury into the classification of serious brain injury, the evidence in the plaintiff's case does not support the finding that he suffered a marked impairment of intellect as a result of the injury.

[38] In my view, for that reason, and generally from the evidence that goes to several factors affecting ISV assessment, it follows that the plaintiff's brain injury should be assessed as a moderate brain injury under item 7 of the Regulation in the range of an ISV of 41 to 55. It is proved well beyond the balance of probabilities that he has a moderate to severe cognitive impairment and also proved on the balance of probabilities that he has a marked personality change and no capacity for employment.

[39] In *Winters v Bishop*,[22] Philippides J assessed the damages for a moderate brain injury under item 7 with an ISV between 21 to 25 on the footing that the plaintiff in that case had a reduced capacity for employment and a noticeable interference with lifestyle and leisure.[23] Her Honour held that because of the plaintiff's youth and the significant consequences of her injuries on the enjoyment and amenities of life, including the loss of her relationship with her husband and the possibility of commencing a family with him, the injury fell in the top of the range and a 25 per cent uplift from an ISV of 25 to an ISV of 31 was appropriate.[24]

[40] In my view, the plaintiff's ISV for his moderate brain injury, taken alone, should be assessed at 50 before consideration of any uplift by reason of the existence of multiple injuries under Sch 3 Pt 2 par 3 of the Regulation.

[41] As stated above, s 7 of Sch 3 of the Regulation applies where an injured person has a pre-existing condition that is aggravated by the injury for which the court is assessing an ISV. In those circumstances the court may have regard only to the extent to which the pre-existing condition has been made worse by the injury

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22 [2014] QSC 312.
23 [2014] QSC 312, [79].
24 [2014] QSC 312, [79].

considering the impact of the aggregation of the pre-existing condition. Within the meaning of s 7, I am not persuaded that the plaintiff had a pre-existing condition in the nature of his acquired brain injury.

[42] There is no doubt that the plaintiff's antecedents and pre-injury personality showed that he had significantly impaired prospects in life. There is some reference in the evidence to the possible effects of prior head traumas suffered by the plaintiff. But in the end, they were not relied on as justifying any particular conclusions, except to the extent I deal with them below in relation to Dr Hazelton's evidence.

[43] As mentioned previously and discussed further below, there were a number of other factors likely to have contributed to the plaintiff's pre-injury condition. Although he was a young man of 20, already his life was attended with a poor employment history, distinct anti-social behaviours and a noticeable record of low-level criminal behaviours. The plaintiff had a poor academic record and there were some extremely challenging aspects of his personality, at the least verging on a personality disorder, that may have made it quite unlikely that he would find gainful employment.

[44] But, in my view, it is another thing to say that an injured person has a "pre-existing condition" for the purposes of assessing an ISV that is aggravated by an acquired brain injury. I have not proceeded on that footing in this case. I do not deduct any part of the assessed ISV for a pre-existing condition.

Uplift for multiple injuries

[45] The plaintiff submitted correctly that he suffered multiple injuries. Apart from the head injury, they were:

(a) fractured C6 and C7 left facet joints;
(b) fractured C5 through the transverse foramen;
(c) injury to the right lung;
(d) left scalp laceration; and
(e) right 4th cranial nerve palsy.

[46] On 28 August 2003, after admission to the Royal Brisbane Hospital, the plaintiff was intubated and ventilated. An external ventricular drain was inserted to monitor inter-cranial pressure. His hospital recovery was complicated by pneumonia. After approximately 5 days, he was extubated and transferred to the neurological ward from intensive care.

[47] On 19 September 2003, he was transferred to the Caboolture Hospital, until an appropriate bed for rehabilitation became available.

[48] On 3 October 2003, he was transferred to the specialist Brain Injury Rehabilitation Unit ("BIRU") at the Princess Alexandra Hospital in Brisbane. He emerged from post-traumatic amnesia on 10 October 2003 after a duration of 44 days.

[49] On 16 or 17 October 2003, he was discharged from the BIRU.

[50] At the time of that discharge, he was physically able to carry out the tasks of daily living. He had a deficit in bilateral fine motor coordination, but incorporated the upper limbs into all activities of daily living tasks.

[51] As to function, it was assessed that he had demonstrated adequate sequencing and safety awareness to complete a basic hot drink and toasted sandwich task, noting his reduced forward planning and dual tasking ability for this basic level activity.

[52] The uncontested evidence of Dr Gillett, orthopaedic surgeon, was that the plaintiff does not have any remaining neurological compromise from the neck fractures and injuries summarised above. Dr Gillett assessed the plaintiff as having a 4 per cent impairment of upper extremity function at each cervical level equating to a 12 per cent impairment overall. Daily living tasks are not affected to any great extent. However, some minor discomfort occurs.

[53] This account does not sit consistently with the plaintiff's many reports to other expert witnesses. This is one example of the plaintiff as a poor reporter.

[54] Paragraph 3 of Sch 3 to the Regulation provides that, subject to par 4, the court must consider the range of ISVs for the dominant injury when assessing the ISV for multiple injuries and that the court may increase that ISV for multiple injuries as being higher in the range of ISVs for the dominant injury than the ISV.

[55] Paragraph 4 of Sch 3 to the Regulation applies if a court considers that the level of adverse impact of multiple injuries on a person is so severe that the maximum dominant ISV is inadequate to reflect the level of impact. The court may then make an assessment of the ISV for the multiple injuries that is higher than the maximum dominant ISV, subject to the limits that it must not be more than 100 and should rarely be more than 25 per cent higher than the maximum dominant ISV. If it is, the court must give detailed written reasons.

[56] The plaintiff submitted that the maximum dominant ISV for the plaintiff's dominant brain injury should be uplifted by 25 per cent. The defendant submitted that a total ISV of 30 would include compensation for his cervical spine injuries, but allowed no specific uplift for the multiple injuries.

[57] In my view, there should be an uplift, but not as great as 25 per cent because of the relatively quick healing that the plaintiff described to a number of the medical witnesses and the absence of any greater information as to the extent of the plaintiff's pain and suffering due to the cervical spinal injuries. I have allowed 20 per cent in arriving at a total ISV of 60.

[58] I have not specifically referred to the assessments by the various expert witnesses of the extent of the whole person impairment of the plaintiff. I have not left it out of account. By par 10 of Sch 3 of the Regulation it is an important consideration but not the only consideration affecting the assessment of an ISV. In this context, whole person impairment is defined to be an estimate expressed as a percentage of the impact of a permanent impairment caused by the injury on the injured person's overall ability to perform activities of daily living other than employment. I note that the expert witnesses agreed that the plaintiff's injury was not one that fell to be assessed under Sch 5 or Sch 6 of the Regulation as an assessment for a psychiatric impairment rating ("PIRS").

[59] Under the legislation that prevailed at the time,[25] an ISV of 60 amounts to general damages of $121,400.

Gratuitous services

[60] Under s 59 of the Act, damages for gratuitous services are not to be awarded unless the services are necessary, the need for the services arises solely out of the injury in relation to which the damages are to be awarded and the services are provided or are to be provided for at least 6 hours per week for at least 6 months.[26]

[61] In *Kriz v King*[27] the President of the Court of Appeal, with whom Jerrard JA and Helman J agreed, said:

> "Because s 59 restricts a claimant's previously unfettered common law right to seek damages for gratuitous services, the section should only be regarded as limiting that common law right if it does so clearly and unambiguously…"[28]

[62] Although it will be necessary to return to the question later, it is appropriate at this point to record that under the applicable principles at common law the relevant question for an award of damages, in relation to past or future care, is what the plaintiff needed or needs, not just what in fact has been provided to him.[29] This may be subject to a requirement under s 59(1)(c) of the Act that "the services are provided" in respect of past loss, which is discussed later. Nevertheless, the fact that the services supplied may have been more or less than was needed must be kept in mind, because it is the *need* for which compensation is ordered.

Pre-injury life

[63] In assessing the effect of the plaintiff's head injury sustained on 28 August 2003, the comparison is necessarily made between his pre-injury and post-injury conditions.

[64] I have referred to the plaintiff's extremely prejudicial childhood. For several years, as a young child, he lived with his father while his mother served a term of imprisonment. He suffered abuse from his father, including physical and sexual abuse. They have had no contact for very many years. He lived thereafter with his mother, but appears to have had a difficult relationship with her as well. The evidence supports the finding that during his teen years he lived on the streets for a time. He thus lived on and off again with his mother, at least from an accident he had in 1999.

[65] Before the injury, he was living in a share house. He may also have lived for a time with Ms Robyn Atkinson, one of the plaintiff's financial administrators and litigation guardians. None of the times for these events was clearly delineated by the evidence.

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25 *Civil Liability Act* 2003 (Qld), s 62; *Civil Liability Act* 2003 (Qld) (as at 28 August 2003), s 62(j).
26 *Civil Liability Act* 2003 (Qld), s 59(1).
27 [2007] 1 Qd R 327.
28 [2007] 1 Qd R 327, 332 [18].
29 *Van Gervan v Fenton* (1992) 175 CLR 327; *CSR Ltd v Eddy* (2005) 226 CLR 1.

[66] The plaintiff left school before completing year ten. He had attended a number of different secondary schools. They included Everton Park High School. He was expelled from one or more of them. One psychologist report records that "he was expelled from 3 high schools for noted physically aggressive and violent behaviour" and that the plaintiff reported to Centrelink that "he essentially left home at age 15 and lived on the streets until he was 18 years old".

[67] There were five witnesses who gave some evidence about the plaintiff's pre-injury condition. They were Gary Atkinson-Maul, Ms Atkinson, Craig Francis, Johannes Kirgis and Justin Horsley.

[68] Mr Francis, whom the plaintiff knew through primary school and at high school until he was about fifteen or sixteen, gave some evidence about the plaintiff up to that time. In the intervening years, though, he had not seen the plaintiff until well after the injury.

[69] One of the principal witnesses about the pre-injury period was Ms Atkinson, who painted a picture of the plaintiff's relative normalcy. Ms Atkinson is now one of the financial administrators for the plaintiff appointed under the *Guardianship Act* 2000 (Qld). She met the plaintiff in November 2002 and knew him before the injury until August 2003.

[70] She said that prior to the accident there was nothing about the plaintiff's behaviour that was unusual – he seemed to be just like one of the other boys. As to anger, she said there was nothing a normal person of his age in late teens wouldn't have had.

[71] Her son, Mr Atkinson-Maul, knew the plaintiff for 12 months before the injury. They became good mates playing poker at the local hotel and going out. He said the plaintiff had a temper beforehand but nothing like now.

[72] Ms Kirgis is now the other financial administrator appointed for the plaintiff. She did not meet the plaintiff until after the injury. Her son, however, who was some five years younger than the plaintiff, knew the plaintiff from about the middle of 2002. He described the plaintiff as a "nice bloke" and a "smart guy". They would play chess. They did not have arguments.

[73] Mr Horsley stated that he met the plaintiff "maybe a year" before the injury. They became friends and he would see the plaintiff "maybe" two or three times a week. He saw the plaintiff as a fun loving person, sociable and always outgoing and was not aware of any unusual problems that the plaintiff had.

[74] A number of the witnesses referred to the plaintiff cooking at barbecues as part of the social engagements they enjoyed with him.

[75] Although I am loathe to reject this body of evidence, it seems to me that the documentary records of the plaintiff's history in the years before the injury, particularly medical records, are inconsistent with the picture painted by that evidence. Some instances will illustrate the point.

[76] On 24 November 1999, the plaintiff was admitted to the Royal Brisbane Hospital after he was involved in a high-speed motor vehicle collision. The injuries suffered on that occasion are not of present significance but the history he gave on that occasion is consistent with the extremely prejudicial childhood he had experienced.

Hospital notes recorded that he also presented as frustrated and angry with his admission.

[77] Thereafter, he was convicted of a range of offences from time to time including possession of utensils or pipes. He was probably subject to a community service order at the time of the injury. There does not seem to be much dispute that he was regularly abusing methlyamphetamine and cannabis at this time, as well as alcohol. Some evidence suggests that he ceased methylamphetamine use before the injury, but other evidence suggests that he did not. Again, those events were not clearly delineated by the evidence. It is, however, more than clear enough that the plaintiff did not cease to use either cannabis or alcohol by the time of the injury.

[78] On 8 December 2001, the plaintiff was admitted to the Royal Brisbane Hospital after he was found on the road. It appeared that he had been struck by a car. Among other injuries he had a fractured left femur that was reduced and fixed with an intermedullary nail. The hospital notes recorded that at discharge he was aggressive.

[79] On 18 April 2002, the plaintiff was seen at the Handford Road Medical Centre. It was recorded that he appeared as an "angry young man".

[80] On 25 September 2002, he was seen at the Woodford Family Medical Centre. Hospital notes from around that time recorded that he was an "extraordinary [sic] angry young man". The medical practitioner recommended that the plaintiff ask his probation officer to get onto an anger management course.

[81] On 4 February 2003, the plaintiff was taken to the Caboolture Hospital after an incident where he came home in an aggressive state and then collapsed on his bed. He had a bite mark and a puncture wound on his arm. He was very probably heavily affected by alcohol. He was not able to be aroused. When he was aroused he became very aggressive. The Queensland Police Service were required to attend.

[82] These factual data points are consistent with the assessments of a number of the relevant expert witnesses as to the plaintiff's pre-injury condition. It is not surprising, therefore, that Dr Arthur described the plaintiff as having a "premorbid antisocial personality structure" and Drs Keane and Douglas jointly referred to his extensive pre-injury history including history of ADHD, anti-social tendencies and prejudicial childhood.

Hours of care – what was provided as a matter of fact

[83] The most contentious factual questions for determination are the extent of the hours of care provided to the plaintiff in the past, the extent of the hours of care he has needed, and the extent of the hours of care he will need in the future.

[84] The fact of what was provided is evidence that can, and often will, inform the assessment of the need.

[85] The plaintiff's claim is that his need is up to twenty-four hours per day. This was sought to be proved, in part, as the number of hours of care that he received in fact. The quantitative evidence as to the number of hours of care he received in fact came largely from Ms Helen Coles, an occupational therapist. Ms Coles had interviewed

the plaintiff, his mother and his carers on a number of occasions, beginning as early as 2 November 2006.

[86] Ms Coles' evidence was given, in part, on the basis that it was a matter within the field of expertise of an occupational therapist with appropriate qualification and training or experience to express an opinion as to the hours of care that a person such as the plaintiff might need. The defendant did not challenge her ability to express such an opinion as to that, and rightly so.

[87] However, Ms Coles did not confine herself to opinion as to the plaintiff's needs based on her assessment of the plaintiff's physical, mental and functional capacities. Instead, she purported to give evidence about the number of hours of care actually received by the plaintiff (from his mother) from his discharge from hospital in October 2003 until the time of her death in July 2008 and also subsequently, when he was living at or near the homes of Ms Atkinson, Mr Atkinson-Maul, Ms Kirgis and Mr Francis.

[88] In my view, there is a distinction between the evidence of opinion about the needs of a patient that an occupational therapist might give and the facts as to what care has been provided. The plaintiff's case was presented as if the two were part of the same question. However, the factual basis on which an opinion is based is to be distinguished from the opinion itself. A diagnostic health professional may make clinical observations of the physical condition of a patient and the observation itself may form part of their professional expertise. But where the observation is of a physical state of fact it remains separate from the opinion which it informs. Where there are differences in the physical observations, and there is a contest as to the true facts, the expert opinions will necessarily be dependent upon the factual observations made or assumptions made.

[89] A number of witnesses gave evidence as to the plaintiff's physical condition and abilities over the years after the injury and the care provided to him in fact. They were Gary Atkinson-Maul, Robyn Atkinson, Katharina Kirgis, the plaintiff, Michael O'Ryan, Lenny Hoekscma, Craig Francis, Johannes Kirgis and Justin Horsley.

[90] Their evidence was largely given about the periods commencing with the plaintiff living at Ms Atkinson's house or Ms Kirgis' house and afterwards. Mostly, it did not directly support the conclusion that the plaintiff in fact received care of either ten hours per day or seven hours per day during any extended period. Mr Horsley's evidence was an exception, but on this point he was not reliable. The method employed in the plaintiff's case was that Ms Coles opined on the hours of the care in fact provided by reference to the information that she had obtained in interviews with the plaintiff's mother and the witnesses (apart from Mr O'Ryan and Mr Hoekscma). The actual information was not clearly set out.

[91] On 16 or 17 October 2003, when the plaintiff was discharged from the BIRU, he was assessed as being independent in mobility and in activities of daily living, as previously stated. His mother informed Ms Coles that thereafter (and this was not objected to) that she cared for him as if he were a young child, providing food and clothes, doing his washing and ironing, and making his bed.

[92] Yet he was not bed-ridden or in need of physical care in all respects. He needed direction to have a shower, but physically showered and toileted without assistance.

I do not accept the plaintiff's contrary statements to Ms Coles. They are not supported by any other witness or document. He dressed himself. Nor was he house bound or under his mother's constant care. For example, the plaintiff and his mother clashed and he would at times live with others, including Ms Atkinson and Ms Kirgis.

[93] From October 2003, the plaintiff appeared to have lived mostly with his mother for about a couple of years and then off and on until her death on 13 July 2008. At the time of his mother's death, the plaintiff was on a trip to North Queensland with friends.

[94] There was not a great deal of detail about the care provided to the plaintiff by the relevant witnesses.

[95] For at least two periods he lived with Ms Atkinson, effectively as a boarder. He paid for accommodation and food. The first period was about two years after the injury, which was approximately 2006 and before his mother's death in July 2008. He slept in a caravan on her property and came into the house for meals and during the day. She said that was for about a year. The second period was between about 2009 and 2010. During the second period, he lived downstairs in a converted garage area. She said that was for about two years.

[96] From the first period, the plaintiff's routine was that he would come upstairs in the morning and make a cup of coffee for himself. He would then bring up any dirty clothes for washing and have a shower. He would then sit and watch Foxtel, either upstairs or downstairs, or take his dog for a walk. He would go upstairs for lunch and for dinner prepared by Ms Atkinson. After dinner, he would go down to the caravan to sleep.

[97] Ms Atkinson would look into the caravan from time to time to remove any dirty clothes for washing and to change the sheets. The plaintiff would accompany her to the shops and help her with the grocery shopping.

[98] The routine was similar during the second period.

[99] It appears that at the end of the second period Ms Atkinson kicked the plaintiff out. There is an explanation of their difference in Ms Coles' second report. The plaintiff got a van and a tent. He set up camp at a friend's property at Wamuran for a while. A storm wrecked the tent.

[100] Next, it appears that the plaintiff lived for a period with Ms Atkinson's son, Gary Atkinson-Maul and his son. There was little evidence about any care that the plaintiff received while living there for about six months. Some information was given to Ms Coles and appears in her second report.

[101] Mr Horsley was also living there during that time. He was then paid a carer's pension for looking after the plaintiff. It seems that Mr Horsley received a carer's pension for caring for the plaintiff from September 2011, but that may well have pre-dated the time when they both lived at Mr Atkinson-Maul's house. As at January 2013, the plaintiff is recorded in Ms Coles' second report as sleeping in a panel van parked in the yard of Mr Atkinson-Maul's house.

[102] The arrangements at Mr Atkinson-Maul's house came to an end because of clashes between the plaintiff and Mr Atkinson-Maul's six year old son. When the plaintiff was sleeping in the living room (I infer rather than in the panel van in the yard) the boy would turn the television on early in the morning, disturbing the plaintiff's sleep.

[103] There were also a number of periods when the plaintiff lived at Ms Kirgis's house. The evidence did not identify those periods in relation to the periods when he was living with Ms Atkinson or Mr Atkinson-Maul. She said there were a few periods, the last was about two years before the trial and they were of about six months' duration. There were a couple of periods before the plaintiff's mother died, including the period just before her death in July 2008 and again after that time.

[104] After the plaintiff's mother's death and another period when he had been living with Ms Kirgis in about 2008, Both Ms Atkinson and Ms Kirgis referred to a period when the plaintiff moved into a next door share house with friends, but that was unsuccessful and he returned to Ms Kirgis's house.

[105] Surprisingly, in evidence Ms Kirgis did not refer to the plaintiff living in her house in the months leading up to March 2015, as mentioned below. In any event, her son Johannes was a friend of the plaintiff. While the plaintiff lived at her house, Ms Kirgis worked eight days per fortnight. Johannes and the plaintiff would play chess and poker while she was at work.

[106] For approximately eighteen months to two years before the trial, the plaintiff lived in separated accommodation at the back of Mr Francis's house, referred to in the evidence as a granny flat. The period began after January 2013 but commenced before April 2014. Mr Francis and his partner were both employed and would leave early in the morning for work. They had three children. The children's grand-father would come to supervise them before school. The plaintiff was not involved in the household's organisation.

[107] Mr Francis and his partner would arrange for the plaintiff to have lunch and dinner, but not breakfast. She would also do the plaintiff's washing and "all the rest of it". Mr Francis would clean up out the back. Mr Francis took the plaintiff down to the shops, to Woodford or where he needs to go. If Mr Francis was too busy the plaintiff would use public transport.

[108] Mr Francis would leave the plaintiff on his own in the house for periods of two to three hours. The plaintiff sat out the back on his computer all day most days. He stayed up late and slept in, if left alone. He would go out with friends, such as Mr O'Ryan to play poker or Mr Hoekscma on his rounds for the day.

[109] In March 2015, the plaintiff was said to be living between Ms Kirgis' house in Woodford where he lived with Ms Kirgis' son (at this time she was living next door with her mother) and Mr Francis's house at Sandgate. One estimate was that the time was split evenly between them. This information was given to Ms Coles for her third report but was not referred to by the relevant witnesses in evidence.

[110] Mr Horsley's involvement in giving the plaintiff care spans periods when the plaintiff was living with Ms Atkinson, Ms Kirgis, Mr Atkinson-Maul and Mr Francis. For some period at Ms Atkinson's house, but more clearly when the

plaintiff was living with Mr Atkinson-Maul, Mr Horsley was living with the plaintiff. The evidence about the times when Mr Horsley was providing care was not clear and I formed the view that it was exaggerated. For example, although both Ms Atkinson and Ms Kirgis gave evidence about the plaintiff's care while he lived with each of them, neither mentioned or gave much importance to Mr Horsley's involvement. Nor did Mr Francis do so in evidence about the more recent period.

[111] However that may be, after the time when the plaintiff moved to live with Mr Francis, Mr Horsley's involvement decreased to a significant extent. First, there was a travelling distance between Woodford, where Mr Horsley lived, and Sandgate where the plaintiff lived with Mr Francis. Second, Mr Horsley had lost his licence for drink-driving for a period which was not identified in evidence (beyond that it was for a couple of years before the trial, and was referred to in Ms Coles' third report).

[112] While the plaintiff was living with Mr Horsley, the latter received a full-time carer's pension. That pension was later reduced to part-time, but the dates were not identified. At the time of living with the plaintiff, Mr Horsley said he would spend 10 to 12 hours per day with him.

[113] In April 2012, Mr Horsley applied for a carer's allowance, although he had received some allowance for the plaintiff's care from September 2011. In the 2012 application, he completed a form estimating the times it took to carry out different kinds of tasks for the plaintiff. The hours estimated by Mr Horsley were obviously excessive, because they added up to more than the total number of hours in a week. The addition to arrive at the impossible total is matter of simple arithmetic. That did not occur to Mr Horsley either before or during the evidence he gave orally. When he was asked about their accuracy he suggested that the individual allocations might be understated. It shows that little weight can be given to Mr Horsley's estimates of the times required for him to provide the plaintiff care, unless they are backed up by other evidence.

[114] In oral evidence, Mr Horsley said that when the plaintiff was staying at Ms Atkinson's house or Ms Kirgis' house, the period of time he would spend with the plaintiff would vary. Some days, he would stay overnight. Other days, it would be ten to twelve hours. He would make sure the plaintiff was looking after his personal hygiene, make sure he was eating and looking after his clothing, the house and the yard.

[115] I accept that Mr Horsley did these things and acted in way that supervised the plaintiff. Further, I accept that Mr Horsley or Ms Atkinson would take the plaintiff on the outings or appointments he needed to attend, such as to a medical practitioner or dentist and otherwise. But the identified tasks did not, in my view, require that Mr Horsley spend overnight or ten to twelve hours per day with the plaintiff.

[116] This picture of the plaintiff's actual living arrangements and care is not painted with the precision one might hope for. The lack of precise evidence affects the credibility of some statements made that were not supported by other evidence.

Ms Coles' sources of information

[117] Ms Coles provided three written reports and gave oral evidence. It is not necessary or of assistance to set out all of the information in them which she recorded. There is a measure of repetition from one to the next although there are significant additions as well.

[118] In the first report, dated 22 October 2007, she recorded having assessed the plaintiff on 2 November 2006. She took a detailed history or snapshot of the plaintiff's statements and perceptions. One telling statement of the plaintiff's perceptions was "the only girls I get with now know I'm getting a payout – they want to hold onto me because they think I'll get the money". The plaintiff has been all too aware for many years of the importance of his claim in this proceeding. His entitled attitude is recorded in some of the medical records or reports.

[119] As to his care, Ms Coles recorded that the plaintiff said that during his convalescence he was cared for by his mother who had helped him bathe and dress and to the toilet. Those statements seem inconsistent with the October 2003 notes of the BIRU that were made on the plaintiff's discharge to go to live with his mother.

[120] Ms Coles recorded that the plaintiff was referred to a home at Wooloowin, but that was a mistake for Woodford. The plaintiff said that his mother still monitored him (as at November 2006). However, it is not clear that the plaintiff was then still living with his mother, having regard to the evidence given by Ms Atkinson as to the first period when he lived with her.

[121] The plaintiff gave details to Ms Coles of other matters, including his employment history. From those details, the picture he painted was the he worked about fifty per cent of the time before the injury. That was wishful thinking, at best, or deliberate deception, at worst.

[122] Ms Coles interviewed the plaintiff's mother for the first report on an unstated date. She too referred to the plaintiff working, although she said he had not worked a long time before the injury. He had been on sickness benefits after the first accident (which was in 1999) and his leg injury (which was in 2001), then on unemployment benefits. Her description of the plaintiff's injuries in August 2003 was hyperbolic - "they were holding his brains". She referred to the plaintiff having seizures which do not seem to be recorded or referred to in the medical opinions in evidence. She emphasised the plaintiff's problem with anger after the injury but made no mention of (or Ms Coles did not record) any difficulties in that regard that the plaintiff had before the injury, which are consistently documented in the medical records.

[123] The plaintiff's mother gave an account of the care she provided to the plaintiff after his discharge from hospital that is set out in Ms Coles' report. She could not leave him alone to cook. He refused to shop. She did all the housework. It was a task to ask him to make his bed. She managed his affairs. He would forget to eat or shower and would sometimes disappear. He left for a few weeks to stay with a mate. She did not believe that he could live alone safely or with any quality of life.

[124] The information given to Ms Coles by the plaintiff's mother suggests that he was living with her up to at least November 2006 although she made reference to him leaving home for a few weeks and staying with a mate. There was no reference in the report to the plaintiff having lived with either Ms Atkinson or Ms Kirgis by that

time, although their evidence establishes that he had lived with each of them before his mother's death in July 2008. It is possible that was after November 2006 when the plaintiff's mother may have given information to Ms Coles. Either that, or the plaintiff's mother's account was inaccurate.

[125] Ms Coles, at 22 October 2007, expressed the opinion in her first report that the plaintiff's ongoing need for assistance would be dependent on psychiatric opinion as to his long term status, but that he then required virtually constant supervision of both a direct and indirect nature.

[126] Ms Coles' second report was dated 30 January 2013, about six years later. She saw the plaintiff for review on 11 January 2013. That was when the plaintiff was living with Mr Atkinson-Maul, his son and Mr Horsley, for about six months or so, before transferring to Mr Francis's house.

[127] Ms Coles interviewed the plaintiff, Mr Horsley and Mr Atkinson-Maul (for some of the time) and separately interviewed Ms Atkinson. Ms Coles did not review any additional medical reports for the purposes of her second report.

[128] The plaintiff gave an updated account of his life to Ms Coles, including earlier details, until January 2013. His account again portrayed the close involvement and monitoring of his mother until she died (July 2008). There was no reference to any period he had spent living with either Ms Atkinson up to that time. He estimated that Mr Horsley then spent about twelve hours per day with him.

[129] As at January 2013, he made reference to usually residing at Ms Kirgis' home.

[130] A relevant point to note is that Ms Coles recorded that on 11 January 2013 she saw the plaintiff in a supermarket, following her interviews. He later said that he had been driven there by Mr Atkinson-Maul to get credit on his mobile phone and his smokes.

[131] There was similar evidence as to the plaintiff's activities two years later, in March 2015, when he was living at Mr Francis's house. On those occasions he walked to the local shops in Sandgate, purchased items such as coffee and minor grocery items and got a haircut, all without supervision or an accompanying person. Ms Coles was shown that evidence for the purposes of her oral evidence at the trial.

[132] In January 2013, Ms Atkinson told Ms Coles that prior to the injury the plaintiff had a bit of a temper but could control it. She told Ms Coles that the plaintiff had lived with her for a period but they had a number of disputes, including that he refused to pay a reasonable rent, or pick up after his dog, and that he was abusive and threatening towards her. Mr Horsley took over the plaintiff's care.

[133] In her second report, Ms Coles expressed the opinion that whether the plaintiff would have needed care if not for his injury was a matter for psychiatric opinion but that since the injury he has required considerable assistance and monitoring. She opined further, as at January 2013, that the care provided by Mr Horsley was adequate, although not the living arrangements where the plaintiff was sleeping in a panel van.

[134] Ms Coles' third report is dated 17 March 2015. She reviewed the plaintiff on 13 March 2015 at her rooms at Wickham Tce. Ms Atkinson and Mr Horsley were also

interviewed. On 15 March 2015, Ms Coles interviewed Mr Francis by telephone. As well, for the purposes of her third report, Ms Coles perused a number of medical reports including the reports by the specialist psychiatrists, neuro-psychologists and a rehabilitation medicine physician.

[135] Many of the details recounted by the plaintiff in the first and second reports are repeated in the third report, notwithstanding some of the additional information provided in the further reports that Ms Coles perused. Of present relevance, the plaintiff appears to have repeated that Mr Horsley spent about twelve hours per day with him as at mid-March 2015. That cannot be accurate. The plaintiff was living at Sandgate, as recognised by the plaintiff's statement "but if it's not Juddie I'm at Sandgate". The plaintiff confirmed that at night he slept in the separated granny flat at Mr Francis's house while the family slept inside the house.

[136] The plaintiff expressed the view that he could be left alone but "things won't be done", referring to household tasks such as cooking, cleaning and washing. He said he felt anxious if left alone for long. He expressed the view that to make his life as normal as possible he would need twelve hours per day assistance. If financially able (as a result of the court award) he would like to get his own property and a few investment properties and "sit back".

[137] Ms Coles noted that, unlike previous interviews, the plaintiff was more cooperative on this occasion through most of the interview, although he became more agitated towards the end.

[138] Ms Coles' opinion in the third report, after speaking to the plaintiff and others and perusing other experts' reports, was that the plaintiff requires virtually constant availability of supervision for his physical and psychological well-being and safety.

[139] It is not clear to me how Ms Coles has the appropriate expertise to express such a wide ranging opinion. As to the plaintiff's physical abilities and capacities and the needs for assistance within the province of an occupational therapist, I fully accept her expertise both by qualifications and experience. And I accept that she may opine as to the functionality and sustainability of arrangements that may be proposed for the plaintiff's care. But the psychological well-being and safety of the plaintiff himself seems to me to be within the province of other experts. Further, as previously foreshadowed, there was another matter to which her evidence extended that became controversial.

[140] In evidence in chief, the plaintiff's counsel sought to lead evidence from Ms Coles as to her opinion about the extent of the hours of care that had in fact been provided to the plaintiff in the past. It was objected to as being not opinion evidence of an expert within expertise.

[141] The plaintiff sought to tender the evidence as Ms Coles relating what other people had told her and as expert opinion. Ms Coles' evidence that her estimate of the care that has been provided in this case was that it was a minimum of ten hours per day when the plaintiff's mother was alive (that is between 17 October 2003 and 13 July 2008) and a minimum of seven hours now, adding that the amount of care now was not optimal.

[142] Ms Coles' evidence was that she based this on many factors. First, she relied on the background information as to the plaintiff's injuries in the documents that were provided to her. I have looked at the documents referred to in her reports. They do not provide an insight as to time actually spent in providing the plaintiff care so far as one can see. Second, she relied on the extensive interview with the plaintiff's mother. That was an interview at an unstated time for the first report, possibly held around November 2006. The information set out in the first report about that interview is factual in content but did not include the number of hours per day. Third, Ms Coles relied on the information provided by the plaintiff. It has to be said that a close reading of the three reports does not reveal the plaintiff as an accurate provider of information, in general. And so far as the period before the plaintiff's mother's death was concerned, there was only one such interview before that period expired.

[143] Fourth, Ms Coles relied on what she described as the "very lengthy" home visit to Woodford when the plaintiff was living at Mr Atkinson-Maul's house. The plaintiff only lived there for a relatively brief period of six months or so. What particular advantage the home visit there provided as to the hours of actual care provided to the plaintiff is not discernible to me. Fifth, Ms Coles relied on the discussions she had with Mr Horsley, Mr Atkinson-Maul and Ms Atkinson during that visit. Sixth, Ms Coles relied on the further interviews she had in March 2015 with the plaintiff Mr Horsley and Ms Atkinson and the telephone interview she had with Mr Francis.

[144] All of the informants, apart from the plaintiff's deceased mother, gave evidence at the trial before Ms Coles gave evidence. None of them, apart from Mr Horsley, was asked for their recollection or estimate of the actual time they spent caring for the plaintiff in evidence. None of them, apart from Mr Horsley, gave time estimates to Ms Coles in the terms that Ms Coles sought to give her evidence, so far as Ms Coles' reports revealed. This was except for the plaintiff's estimates, as already mentioned. Ms Coles' own estimates were not in any of her reports.

[145] There was an unfairness in this evidentiary process. To the extent that Ms Coles' estimates were based on the things said by other persons, the defendant was not given proper notice either of the estimates themselves or of the basis of fact said to have been derived from those interviews. That is one of the reasons why r 427 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that an expert may give evidence in chief only by report unless leave is given. The plaintiff did not request leave.

[146] Ms Coles added that she had in excess of 40 years practising as an occupational therapist. She continued that an occupational therapist is very well placed to look at the nature of the care required. On that question, I do not doubt Ms Coles' evidence. But that is not the same thing as saying that the actual hours of care provided to a person over a number of years in particular living environments by particular individual people is a matter of expert opinion.

[147] However, when the plaintiff pressed Ms Coles' estimates on the strength of those matters (and without asking for leave to adduce the additional evidence in chief), the defendant withdrew its objection to the admissibility of the evidence.

[148] Even so, I have been unable to act on it as persuasive evidence of the actual hours of care provided. There was no evidence tendered which satisfied me that the exercise

is more than an intuitive guesstimate of what time the activities in the day by day management of the plaintiff's affairs had been as a matter of fact, based mostly on the oral histories given by the identified individuals.

[149] In my view, there is a distinction between the time in fact provided in giving care and an expert opinion as to what time would be required to give care to meet particular disabilities. Ms Coles' evidence on this point was not what would be required to give the relevant care – that is, the plaintiff's *need*. It was an estimate of what care was in fact provided as a matter of hours. As expert opinion evidence, I find it unpersuasive. If it is not expert opinion evidence, properly viewed, it is irrelevant.

[150] If I am wrong in that view, in any event, as far as I could tell there was no evidence that explained the difference between Ms Coles' estimate of ten hours per day of care that was actually provided to the plaintiff in the period before his mother's death in July 2008 and the seven hours per day of care that she estimated was actually provided between that date and the trial.

[151] Doing the best I can on the limited evidentiary materials that I have, I accept, however, that until 2011 the plaintiff received an average of about 5 or 6 hours of care per day by way of gratuitous services.

[152] From September 2011, I accept that the time spent by Mr Horsley with the plaintiff per day, on average, was that amount and more, at least until the plaintiff went to live at Mr Francis's house at Sandgate. Thereafter, for the times when the plaintiff was at Woodford I accept that Mr Horsley spent similar hours per day with him. Whilst at Sandgate, however, the time spent by Mr Horsley would not average even two hours per day. On the other hand, the combined support of Mr Francis and his partner and Mr O'Ryan and Mr Hoekscma would fill in the gap or difference, so it is possible to make a broad brush assessment that the plaintiff has overall received on average about 6 hours per day.

[153] In settling on this average of 5 or 6 hours per day, for past care provided, I am acutely conscious that the evidence, fairly assessed, gives only an impression of the hours of care needed by the plaintiff. I have read and re-read the evidence, in addition to hearing it at the trial. In many respects it is intractable because of the lack of precision I have referred to. In other respects it suffers from the circumstance that the relevant witness was giving evidence as a supporter of the plaintiff in a way that requires that it be treated with some care.

Past and future care - need

[154] If Ms Coles' opinion as to the hours of care provided to the plaintiff until his mother's death in July 2008 is tested as an ex post facto opinion by Ms Coles of the hours of care that the plaintiff needed when Ms Coles made her first report in October 2007, based on the assessment she made in November 2006, one might have expected Ms Coles' views to be expressed at the time in her report. In fact, she expressed the view in her first report was that "he currently requires virtually constant supervision of both a direct and indirect nature".

[155] In my view, the opinion expressed in the report as to the plaintiff's needs is the receivable statement of opinion that should be considered, subject to the

qualifications expressed in that report both as to the factual assumptions and the other relevant opinions that might affect matters. That is the opinion to be taken into account, rather than the ex post facto estimate as to the actual times taken to provide the plaintiff care, as expressed in Ms Coles' oral evidence in chief.

[156] Ms Coles' views did to some extent distinguish between the past care that she assumed had been provided and the plaintiff's need for care. As from July 2008, her assessment was that the care being provided was seven hours per day. In her second report made during that month, Ms Coles' opinion was that "the interaction and monitoring provided by Mr Horsley was adequate, but that his quality of living sleeping temporarily in a panel van as when seen was less than optimal."

[157] By the time of the trial, Ms Coles expressed the view that if she were the plaintiff's occupational therapist she would like to see his carer direct the plaintiff into other activities that would be more "meaningful", such as fishing, camping, having a vegetable garden, playing a bit of pool and playing poker.

[158] As to camping and fishing, on 13 March 2015 the plaintiff told Ms Coles that he can't go camping and fishing, which he used to do a lot before the crash. But there was no other evidence offered that really supported that assertion. Given the lengthy periods that the plaintiff and Mr Horsley, as his paid full time carer, have spent together, I don't understand what the impediment might have been. I am not prepared to infer that the plaintiff would now go camping or fishing.

[159] As to having a vegetable garden, although the plaintiff said to Ms Coles in November 2006 that he used to enjoy gardening, the plaintiff has never otherwise displayed any habits which suggest that he might be an incipient hobby gardener. While living with trusted friends, he has generally not cooperated willingly in attending to simple tasks of self-management or household contribution, including helping in the yard. He often prefers to ignore requests or battle with those requesting him to do so. This is at least one of the things that appears to have exhausted Ms Atkinson's preparedness for the plaintiff to continue to live with her.

[160] As to playing a bit of pool and playing poker, there was evidence as to the plaintiff's regular habit of playing poker in an organised game. Regrettably, when the cross-examiner sought to explore with Ms Coles whether some of the actual facts about the plaintiff's habit might affect the opinion she reached on information he had provided, her responses were calculated to test, not accept, the assumptions she was being asked to make as to those facts. The impression I got was that Ms Coles was responding as an advocate, not as an independent expert. The independence of an expert witness is a critical foundation on which the ability of a court to make an accurate assessment of expert evidence depends.

[161] Notwithstanding these points, Ms Coles' opinion is to be taken into account as to the plaintiff's needs, along with those of the other expert witnesses. In her third report, prepared about a month before the trial, Ms Coles expressed the opinion that the plaintiff required no less than 6 hours per day as jointly agreed by Dr Arthur and Prof Lawrence,[30] but opined that allowance must be added to that period for "a range of domestic tasks such as shopping, laundry, tidying, yard work (mowing and

[30] In fact, Drs Arthur and Lawrence agreed on 5 hours per day with an additional allowance for support to go into the community.

gardening), dwelling maintenance, exercising, feeding his dog and a range of incidental tasks which are part of normal day-to-day living. This would not include supervision by a carer in directing [the plaintiff] into meaningful leisure activities appropriate to his circumstances."

[162] As well, she opined that if the plaintiff's propensity "for outbursts is such that he requires an attendant for his safe community access, then it is reasonable that he have no less than 12 hours per week for same." Accordingly, she concluded that no less than 10 hours per day care is required, but preferably a companion overnight.

[163] I am unable to accept this construction. It appears to start from an assumption that none of the range of domestic tasks that Ms Coles identified was to be done during the period of no less than 5 hours per day allowed by Drs Arthur and Lawrence. If so, then I am unable to understand how that allowance was treated by Ms Coles or how the 10 hours per day was arrived at. As well, in my view, it proceeds from an assumption that the plaintiff's life otherwise would have fitted the model of what Ms Coles' view is of "normal day-to-day living" that I am unable to gauge or accept. In other words, Ms Coles was not apparently conscious that the assessment of the plaintiff's need might have to take account of the pre-injury need that the plaintiff had for a similar attendant for safe community access.

[164] Dr Arthur is a consultant psychiatrist of great experience who has a special interest in the management of the psychiatric comorbidities of acquired brain injuries. Initially he saw the plaintiff in 2004 on two occasions as a result of referral from of the director of the BIRU, Dr Hazelton. Following that, he saw the plaintiff on 5 February 2007 for the purposes of preparing his first report for this proceeding, dated 6 February 2007 and again on 14 November 2013 for the purpose of preparing his second report, dated 14 November 2013. There is a file note of opinions he expressed (and information provided to him) in a telephone call with counsel on 28 March 2014. He further participated in the preparation of a joint report with Prof Lawrence dated 23 May 2014. As well, in evidence in chief the plaintiff's counsel made reference to some further file note but it was not before the witness and was not tendered, so the evidence was of limited value.

[165] Prof Joan Lawrence is also a consultant psychiatrist of great experience. Her first report, dated 18 April 2011, was a desktop report based on the information contained in the medical records and other reports. That was because the plaintiff failed to attend for the scheduled appointment for the purposes of the report. She subsequently saw the plaintiff on 12 November 2013, leading to the preparation of her second report, dated 27 November 2013. There are two file notes of opinions she expressed in telephone conversations with lawyers on 18 March 2014 and 25 March 2014. Following those, Prof Lawrence participated in the preparation of the joint report with Dr Arthur dated 23 May 2014. After that, Prof Lawrence prepared a third report dated 16 February 2015, principally in response to a report from Dr Hazelton, with which she did not agree in stated respects. There are yet two further file notes of conversations that Prof Lawrence had with lawyers, dated 26 March 2015 and 15 April 2015.

[166] As previously mentioned, she participated in the joint report with Dr Arthur, dated 23 May 2014. In the joint report, Dr Arthur and Prof Lawrence opined that the then current level of care provided Ms Kirgis, Ms Atkinson and Mr Horsley was adequate and:

> "agreed that a reasonable model of care would include 5 hours per day divided over two blocks (3 hours in the morning and 2 hours in the afternoon) to ensure that [the plaintiff] rose at a reasonable time, attended [to] basic self cares, ate 2 meals a day and that house work was done as required. It was further agreed that an additional 5 hours per week of attendant care should be provided to give [the plaintiff] an opportunity to be escorted into the community for appointments or recreational activities."

[167] Prof Lawrence's oral evidence was consistent with the joint report. It was that apart from the five hours per day of care for the tasks of everyday living and transport and keeping appointments the plaintiff needs support for something to occupy interest and stimulate him including social interaction with people.

[168] Before proceeding further as to some of the other expert witnesses' evidence, I pause to observe that I have paid close attention to and accept the evidence of both Prof Lawrence and Dr Arthur. It was logical, the bases for the opinions were well exposed, and the approaches of both of them appeared balanced and impartial.

[169] In particular, in my view, they were right to separate the allowance to be made for care to assist with basic self-cares, meal preparation, house work and other tasks of every day living, on the one hand, and care for being escorted into the community for recreational activities, in particular, on the other hand. The evidence does support the conclusion that the plaintiff did not have a pre-injury need for care of the prior kind before the excessive lability and decrease in executive functioning that his frontal lobe injury produced in attending to those tasks.

[170] On the other hand, when dealing with the evidence of the comparison to be made between his post-injury need for care to avoid the difficulties he has in dealing with people in the community due to his behaviours and the difficulties of those kinds he had pre-injury, it is plain that the behaviours are not greatly different. The compensation for assistance in that context should only reflect the extent to which his injuries may have increased the need in that environment. It is not significant that the need was not met pre-injury.

[171] Dr Ronald Hazelton is an expert in rehabilitation, again of great experience. He was the director of the BIRU at the time of the plaintiff's admission to that unit under his care. However, he does not report on the details of any involvement at that time. On 13 February 2004, he wrote to the defendant's insurer about the plaintiff's rehabilitation treatment status and on 25 November 2005 he wrote to solicitors as to the plaintiff's status. He saw the plaintiff on 16 April 2012 for the purposes of the preparation of his first report for this proceeding dated 16 April 2012. He wrote a second report dated 21 October 2014 in response to the reports of Dr Arthur and Prof Lawrence and the report of Dr Keane, in particular, as well as the questions he was specifically asked to address. He did not again see the plaintiff for the purposes of this report. Instead, he relied on information selected from some of the reports provided to him.

[172] Dr Hazelton's analysis of the plaintiff's injury and initial progress is drawn from the contemporaneous medical records, although he was undoubtedly personally involved to a degree, as the BIRU records show. Dr Hazelton's first report rightly opined that the plaintiff's injury occurred in the context of a very complex pre-

injury psycho-social background as well as multiple injuries including a prior head injury.

[173] In my view, the evidence at the trial did not establish that the 1999 injuries sustained by the plaintiff included a significant head injury for the purposes of assessing his need for care from the injury suffered in 2003. Dr Hazelton appeared to have relied on a note made in the records of the Royal Brisbane Hospital at the time of the plaintiff's admission in 2003 that in the 1999 injuries the plaintiff sustained "a mild closed head injury" and that his mother reported that since the 1999 injuries the plaintiff's memory was down and his aggression was up. That is not proof enough, in my view, to find that the plaintiff's 1999 injuries were a significant contributing factor for the assessment of the effect of his 2003 injury.

[174] As to the effect of the plaintiff's psycho-social background, I prefer the evidence of other witnesses to that of Dr Hazelton, particularly the evidence of Drs Arthur and Lawrence. I have also paid close attention to Drs Keane and Douglas's evidence to which I will come later.

[175] Dr Hazelton's opinion of the plaintiff in his first report was negative. It included that:

> "despite the severe traumatic brain injury, [the plaintiff's] prospects in life are probably unchanged" and "[i]t is likely that he would have required long term pensionism even i[f] the motor vehicle crash of 2003 had not occurred, and a friend paid by Centrelink to assist [the plaintiff]."

[176] As to the requirement for a friend paid by Centrelink, this is a view not supported specifically by any of the other expert witnesses. In my view, it was a relevant question for Dr Hazelton to consider, but I have not accepted Dr Hazelton's views as to the extent of the hours of care needed. There is substance in the view that the plaintiff was a person who was unlikely to be employed in any event, and therefore would be supported by benefits, but that point is not of importance, because the plaintiff has not pursued a claim for damages for economic loss.

[177] Dr Hazelton's second report was even more adverse to the plaintiff. There are two substantial points. First, Dr Hazelton opined that the plaintiff had a reduced life expectancy. That would affect the period of the plaintiff's need for future care. Second, he opined that the plaintiff's need for care was not more than two hours per day.

[178] As to the hours of care which the plaintiff has needed or will need, Dr Hazelton was out of step with all the other opinions of the expert witnesses who gave evidence by report or orally. In arriving at this opinion, Dr Hazelton may have been affected by some of the history of the plaintiff at the BIRU. For example, he stated that whilst the plaintiff was an inpatient at BIRU the plaintiff "did not participate in more complex meal preparation as this did not interest him as he was relying post discharge on his mother." A number of the observations selected by Dr Hazelton from other reports were those that suggested that the plaintiff was more independent than he said he was. This view of Dr Hazelton was reflected in the statement that:

> "[t]here is evidence that [the plaintiff's] functional ability is greater than that portrayed."

[179] I accept the genuineness of Dr Hazelton's opinion and that there is some evidence of the kind he mentions. I have rejected some of the evidence as to the actual hours of care provided to the plaintiff. However, I do not accept that it reduced or reduces the plaintiff's need for care to a mere two hours per day.

[180] Second, while I also accept that whether the plaintiff's life expectancy is reduced is a relevant question, I reject the opinion that it is reduced to 20 years or less from October 2014. That is not to cavil with some obvious propositions. For example, that a person who is a smoker of tobacco and cannabis has a higher risk of lung cancer than a non-smoker. Or that the plaintiff's pre-injury medical history or lifestyle post injury affects his life expectancy.

[181] One point on which I depart from Dr Hazelton's analysis is in the application of a study by Prof Baguley and others entitled "Late mortality after severe traumatic brain injury in New South Wales: a multi-centre study" which used regression analysis over a study sample or group of 2,545 patients. The conclusion of the study was that there is an increased risk of death for eight years post-discharge. That is an inadequate explanation of the study, but it is enough to show that the plaintiff does not fall within the conclusion. Dr Hazelton recognised that after 11 years (as at 2014) the plaintiff "would be approaching a mortality risk of similar age-matched males in the population."

[182] Dr Hazelton then opined that "one would be surprised if severe traumatic brain injury cases did not have a further increased mortality risk". That might be so, but it affords no basis, in my view, for a quantitative assessment of the kind engaged in by Dr Hazelton, wrapping reductions for "lifestyle factors" into the assessment to arrive at a number of years. In my view, this is neither acceptable medical science nor acceptable clinical opinion.

[183] I was not surprised, therefore, that Prof Lawrence disagreed with it. However, the point sought to be made by Dr Hazelton about these concerns, as a matter of generality, was not the point of her departure or disagreement. Prof Lawrence accepted that there were a number of factors that might or would decrease the plaintiff's life expectancy "compared with a person of the usual timetables". But she disagreed that it could be said that it would be "five years or ten years or whatever".

[184] Returning to the question of the plaintiff's need for care, there were two additional important expert witnesses.

[185] Dr Lucille Douglas is a clinical psychologist with membership of the US National Academy of Neuropsychology. She interviewed the plaintiff on 2 April 2009 for the purposes of her report dated 26 June 2009. She also participated in the preparation of a joint report with Dr Keane that is undated but most likely prepared after April 2014. There is a further memorandum of opinions she expressed in a conference she had with lawyers on 7 April 2015.

[186] Dr Douglas, opined that the plaintiff's intellectual abilities on testing fell within expected limits for someone of his background. Testing supported the possible

presence of a reduction in the plaintiff's visual memory abilities but his testing of memory performances were tainted by lack of effort. Both her report and the subsequent memorandum are consistent with her view that the plaintiff's pre-injury abilities were impaired in terms of his decision making qualities and in particular in terms of his long history of anger, aggression and anti-social behaviour.

[187] Dr Shelley Keane is a clinical neuropsychologist who saw the plaintiff on 6 April 2010 for the purposes of her first undated report. She saw him again on 12 July 2010 for the purposes of her second report dated 20 July 2010. She provided a one page supplement to the earlier reports dated 6 December 2010. She participated with Dr Douglas in the undated joint report.

[188] Dr Keane's first report was affected by the plaintiff's presentation or mood on 6 April 2010. She found him difficult to assess because of the variability of his attention and motivation. It was unlikely that the test results on that day were a true indication of the plaintiff's cognitive function in the areas of attention, memory and learning. But there was little inconsistent with Dr Douglas's assessment in 2009.

[189] On 12 July 2010, the plaintiff attended on Dr Keane with Ms Atkinson. He was more co-operative. That enabled a better assessment for the second report. On that assessment the plaintiff's general level of cognitive functioning fell within the Average to Low Average range. That was consistent with his estimated ability suggesting no decline in his overall intellect. However, there were demonstrated cognitive weaknesses in attention and concentration, memory and learning and a severe impairment in executive functioning with emotional regulation, mental flexibility and abstract thinking.

[190] There was consistency in performance with the 2009 testing carried out by Dr Douglas. That is, both Dr Keane and Dr Douglas noted no decline in intellectual skills, language skills and language skills and information processing speed or basic attention abilities. However, the pattern of deficits elicited, of severe impairment in attention, memory and executive function, were consistent with those seen in the context of an acquired brain injury. There was a contribution from pre-injury factors. Importantly, the problems he was previously experiencing had been made worse by the injury and his ability to remedy these problems diminished by it.

[191] In her second report, Dr Keane's telling point was that the plaintiff had poor initial resources to cope with the aftermath of his injury and that both his pre-injury behaviour and family factors indicated a poor prognosis in any event. On top of that, the injury detracted from his ability to voluntarily remedy or change his lifestyle or behaviour because of the deficits elicited on assessment that were consistent with an acquired brain injury.

[192] The joint report of Drs Keane and Douglas stated their agreement with a number of the points from Dr Keane's second report including that the plaintiff's ability to remedy his pre-accident problems has most likely been diminished by the consequences of his injury.

[193] In oral evidence, Dr Keane dealt more specifically with the care needed by the plaintiff. She started from the pre-injury base line that the plaintiff was not receiving care and did not need care. From there, she opined that the plaintiff needed support in terms of his activities in daily living. However, she added that he

also needs support in terms of his emotional regulation. There is always a risk when he is interacting with others that he will get really angry and:

> "because of the head injury and the impairment of his executive functioning… his ability to manage these emotions is impaired… [H]e kind of needs an external executive functioning system… someone who will help him settle down, that will remind him to stay calm, remind him of the consequences if he gets agitated… [or] if he yells or plays loud music in the middle of the night or do[es] all the sorts of things that he would do on a whim".

[194] She supported the proposal that it would be desirable for the plaintiff's care to include someone to assist him to interact with the community. It is not as though the plaintiff is going to behave inappropriately all the time but it can't be predicted when he will do so.

[195] Dr Keane's evidence largely supported the opinions of Dr Arthur and Prof Lawrence. I observe, though, that there is an assumed base line that before the injury the plaintiff functioned without a need for similar support because he was not in fact receiving any such support. As a matter of fact, there can be no doubt that the plaintiff was not receiving any such support before the injury. However, I do not accept that he was functioning without incident of the kind that the proposed support in the community would assist him to avoid. It is one thing to say that the plaintiff's injury detracted from his ability to change his well documented pattern of angry and aggressive responses to situations in the community. It is another thing to start the assessment of the need for care from a position that he had no need for that support before the injury. That the plaintiff had a pre-existing need was supported by the oral evidence of Prof Lawrence and Dr Douglas.

[196] This analysis has another layer of assumption or assessment. The comparison is not to be made simply between the plaintiff's pre-injury need for care at the time of the injury and what his needs have been and will be from time to time after the injury. In making an assessment of the plaintiff's pre-injury need, it seems to me that some allowance must be made for the possible effect of him maturing after the age of 20. That possibility was indirectly referred to in Prof Lawrence's oral evidence.

[197] There is some indication of this in the evidence of what has actually happened. As stated above, the plaintiff is, in my view, an unreliable reporter. However, on many occasions he has said that his drug and alcohol use has decreased. He seems to be supported in that from other sources. Starting with methylamphetamine abuse, the plaintiff says that he ceased either from before the injury or shortly afterward. Next, he says that he has stopped drinking alcohol since his mother's death (in July 2008). Third, he says that he continued to abuse cannabis fairly heavily for a period after the injury, but depending on the occasion when he was making the report, he says that his cannabis abuse has decreased at least to a significant degree. There is no doubt that the plaintiff's regular appearances in court for minor criminal charges have decreased as well.

[198] In my view, this and other evidence show the plaintiff changing his habits to some degree through choice. Perhaps it could all be put down to the outside influences of his friends and carers. But I am not persuaded that it should be. It is also consistent with some of the changes in lifestyle one might sometimes expect to see from the

anti-social risk taking behaviours of a 20 year old young man to the behaviours of a maturer man in his 30s.

[199] For present purposes, my point is that in trying to assess the past and future hypothetical facts as to the plaintiff's condition the behaviours he exhibited as a teenager and through to the time of the injury as a 20 year old man are important. They show a need for support to avoid the pitfalls of his pre-existing emotional dysregulation, had he not suffered the injury. But it would be an error to assume that all of those behaviours necessarily would have continued into later years. In my view, this point tends to emphasise the correctness of Dr Keane's focus - the impairment that the plaintiff suffered as a result of his injury was a loss of the capacity for voluntary change, or some of that capacity.

[200] A summary of the expert evidence overall places Dr Hazelton at the lower end and Ms Coles at the higher end of the assessments of the extent of the plaintiff's need for care. Dr Arthur and Prof Lawrence are in the middle and the reasoning of Drs Keane and Douglas supports their conclusion that an appropriate allowance should be made, to a reasonable degree, for the plaintiff's need to be supported when he goes into the community.

Findings as to the hours of the need for past and future care

[201] As previously stated, I reject Dr Hazelton's opinion that the plaintiff's need for care has been and will be only for two hours per day. I also reject Ms Coles' assessment that the plaintiff has a need either for ten hours care per day or overnight or twenty-four hour care.

[202] I start from the opinion of Drs Arthur and Lawrence that a reasonable model of care would include 5 hours per day divided over two blocks (3 hours in the morning and 2 hours in the afternoon) to ensure that the plaintiff rose at a reasonable time, attended to basic self cares, ate 2 meals a day and that house work was done as required as well as some other matters.

[203] In adopting the period of five hours per day, I have not overlooked the evidence given by a provider of commercial caring services that travelling time would be charged if the time is broken into two periods. I consider the basis on which the value of the relevant care should be assessed later. But I do not accept that it should be calculated on the assumption that it will necessarily be at Woodford or that additional travelling time will have to be paid for.

[204] I also accept the opinion of all the expert witnesses who dealt with the subject matter, apart from Dr Hazelton, that the plaintiff requires care for outings in the community and that his need in this respect is greater than it would have been had he not suffered the injury. I have paid attention to the assessment of Drs Arthur and Lawrence of 5 hours per week on that account. But the evidence of Dr Keane in particular leads me to the conclusion that is not enough.

[205] Although I have been unable to rely on Ms Coles' opinions directly for the reasons previously expressed, I have paid attention to her descriptions of the tasks and activities that might be undertaken, as well as the evidence of the lay witnesses, and the video evidence of the plaintiff. The impression I formed of the plaintiff both through his evidence and what he has said to the various expert witnesses from time

to time (and to a minor degree the entries on his Facebook page) in reaching that conclusion. It is, however, largely a matter of impression.

[206] The conclusion I have reached is that the plaintiff's claim for damages for gratuitous services should not be assessed on the basis of a need for those services of 10 hours per day from the time of discharge from the BIRU to July 2008 or on the basis of 7 hours per day from then until the trial.

[207] I have instead arrived at an average need of 6.5 hours per day. This recognises that there is a need for a little more than 10 hours per week of care for support in the community for activities where the plaintiff is at the additional risk from his pre-accident condition by reason of his emotional dysregulation.

[208] Thus, in making the assessment of 6.5 hours per day on average, I do not accept that the plaintiff spent as much of the day being supervised in fact, on average, as some of the witnesses said in evidence. In any event, the true assessment of his need for past care turns on the extent to which the plaintiff has an additional need for that supervision in comparison to his pre-injury condition. Even if more time, in fact, was spent on average in supervising the plaintiff than I have assessed, in my view the plaintiff's need was not so great for the reasons that I have discussed.

Requirement of actual supply of services

[209] Although I have assessed the plaintiff's need for services as being 6.5 hours per day for the past, the defendant submitted that a threshold condition for an award of damages for gratuitous services under s 59 of the Act, is that for a period in the past the services "are provided", so that even if the plaintiff had a need for them he cannot receive an award of damages for services that were not in fact provided.

[210] The full text of the section is as follows:

> "(1) Damages for gratuitous services provided to an injured person are not to be awarded unless—
>
> (a) the services are necessary; and
>
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
>
> (c) the services are provided, or are to be provided—
>
> (i) for at least 6 hours per week; and
>
> (ii) for at least 6 months.
>
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
>
> (3) In assessing damages for gratuitous services, a court must take into account—
>
> (a) any offsetting benefit the service provider obtains through providing the services; and
>
> (b) periods for which the injured person has not required or is not likely to require the services

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

[211] In my view, it is not a requirement that the services in fact provided are equal in extent to the need for care for which compensation is awarded where the period is a past period. Section 59(1) is cast in a mix of tenses. The damages are to be for relevant services "provided". But the services include services include those that "are provided" and those "to be provided". The minimum threshold requirement is of six hours per week for at least six months. But that threshold could operate in relation to services that have not yet been provided.

[212] Having regard to what was said in *Kriz v King* set out previously, in my view, and subject to the operation of the minimum threshold requirement, the proper construction of s 59(1) is that it does not require that an order for damages can only be made for the services actually supplied as opposed to the need for those services.

[213] But if that were wrong, although I have not accepted the plaintiff's evidence as to the extent of the hours of care provided in the past as being ten hours per day until July 2008 and seven hours per day after that date, I would find that on average it has been about 5 or 6 hours per day, at least until the time when the plaintiff went to live with Mr Francis.

Rates of charge for care

[214] The plaintiff's claim is calculated on a series of assumptions. They include an hourly rate for the value of the gratuitous services to be assessed in accordance with the past and future need for care.

[215] The plaintiff's alleged rates for care as set out in the statement of claim are:

Period	Hourly rate claimed
2003	$26.00
2004	$26.50
2005	$29.00
2006	$29.90
2007	$30.90
2008	$31.85
2009	$33.00
2010	$35.00
2011	$40.50
2012	$40.90

2013	$42.95
2014	$44.25
2015	$44.25

[216] By applying those rates for 10 hours per day for the period from 16 October 2003 until the plaintiff's mother's death in July 2008 and thereafter for 7 hours per week for the period from July 2003 until the trial, the plaintiff claimed past gratuitous services in the amount of $1,202,588. For the future, the plaintiff claimed the sum of $4,156.16 per week on a basis that is not clearly pleaded or explained, but appears to have assumed a period of daily care in excess of 10 hours per week.

[217] The rates claimed by the plaintiff were based on the full cost of acquiring the services from a commercial agency who would provide those services. In putting it that way, the plaintiff's claim is counterfactual. The plaintiff and his financial guardians do not in fact propose that is what the plaintiff will do. On the contrary, the plaintiff's aim, with their agreement, is to acquire a house with the lump sum award and to live in that house with Mr Horsley, who is apparently prepared to do so, continuing their friendship and prior companionship as well as resulting in the plaintiff receiving Mr Horsley's care.

[218] But that is, of course, only the present plan. Plans do not always work out. And the plaintiff is to be compensated for his need for care, not just for the fact of the gratuitous services supplied or to be supplied to him.

[219] That view follows from *Van Gervan v Fenton*[31] and *Grincelis v House*.[32]

[220] In *Van Gervan*, a wife who had been employed as a nurse's aide gave up her employment to care for her husband who was in need of those services because of a brain injury that caused the husband to be unable to manage his affairs hour by hour because of his short term memory loss. She provided the services gratuitously. The court below held that the husband's entitlement to compensation for the need for the services, represented by the value of those services provided by the wife, should be valued by the sum that would have been paid to the wife for the employment she gave up as a nurse's aide.

[221] The majority of the High Court rejected that approach and said:

> "Contrary to the judgments [below]… the wages forgone by a care provider are not an appropriate criterion for determining the value of services provided gratuitously to an injured person. As a general rule, the market cost or value of those services is the fair and reasonable value of such services…
>
> Once it is recognized that it is the need for the services which gives the plaintiff the right to an award of damages, it follows that the

31 (1992) 175 CLR 327.
32 (2000) 201 CLR 321; (1998) 84 FCR 190.

> damages which he or she receives are not determined by reference to the actual cost to the plaintiff of having them provided or by reference to the income forgone by the provider of the services."[33]

[222] In *Grincelis*, the plaintiff suffered acute brain damage and was cared for by his parents. The question before the High Court was whether statutory interest was recoverable on an award of damages for past gratuitous services. However the court said:

> "In *Van Gervan v Fenton*, it was held that the true basis of a claim for damages with respect to care or services provided gratuitously to a person who has suffered personal injury is the need of the plaintiff for those services, not the actual financial loss suffered as a result of their provision. Accordingly, it was held in that case that a plaintiff's damages on this account are not to be determined by reference to the actual cost to the plaintiff of having the care or services provided, or by reference to the income foregone by the provider of the services, but, generally, by reference to the market cost of providing them. Neither party sought to reopen the decision in *Van Gervan*."[34] (footnotes omitted)

[223] The defendant sought to avoid the full commercial cost approach by relying on the remuneration that a person who might be employed by a commercial agency to supply the services would earn, as opposed to the rate that the agency would charge.

[224] The defendant relied on *Waller v Suncorp Metway Insurance Ltd*,[35] as supporting that approach. In that case, the plaintiff suffered severe brain damage and was left unemployable and in need of constant care. He could barely communicate and was ambulatory only with assistance. The primary Judge allowed damages by reference to an hourly rate for a permanent employee as opposed to a casual rate.

[225] Chesterman JA said:

> "There is, I think, a fallacy in the submission, which is that it equates 'the agency rate' per hour of providing a carer with the cost of hiring a carer. The appellant urges the Court to adopt what would be in practice an arbitrary rule. In those cases in which a plaintiff, by reason of his injuries, cannot himself engage the carers he needs the market cost of providing the services will be that which an employment agency would charge; in other cases where a plaintiff can engage the carers the market cost will be the amount paid to the carers. Such a basis for distinction is not, I think, realistic and is too inflexible to allow for assessments to be made in particular cases. It is unrealistic because the appellant is incapable of engaging carers on either basis, either by himself or by engaging an employment agency to provide him with carers. Both tasks must be performed by someone on his behalf. If that person can reasonably engage carers directly and so avoid the 'agency fee'

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33 (1992) 175 CLR 327, 331, 333.
34 (2000) 201 CLR 321, 327 [9]; and see (1998) 84 FCR 190, 198E-F, 207D-G.
35 [2010] 2 Qd R 560.

> there is no reason I can see in fact or principle why damages should be assessed by reference to the higher rate."[36]

[226] It is difficult to avoid the conclusion that there is some tension between the High Court cases and *Waller*. The difficulty is caused by mixing the actual scenario with the hypothetical scenario. The actual scenario in these cases is that the services are being provided by a family member gratuitously. The hypothetical scenario is that compensation for the need for the services is to be assessed by reference to their market value. If the market is one in which some participants can get a better price than others, it seems reasonable to say that may be taken into account in assessing overall value. But it does not seem particularly attractive to say that if one plaintiff (who is not in fact going into the market to acquire the services) might be able to get a better price if they did go into the market than some other plaintiff (who also is not in fact going into the market to acquire the services) the assessment of market value should reflect that possibility. To do so moves away from the hypothesis of compensating a plaintiff for a loss which is a need for the services by assessing the value of the services, irrespective of whether they are in fact supplied or paid for.

[227] What seems to be causing the problem is the proposition that if the particular plaintiff went into the market to acquire the services they may be able to get a better price than the commercial short term rate. As a matter of logic about value in a market, there is no objection to evidence about that value from more than one possible source of supply. But, in my view, the hypothetical market value of the services that represents the need being compensated as the loss in a case like the present should not turn ordinarily on a particular plaintiff showing how they would price the services if they engaged in the counterfactual hypothesis or a defendant pointing to the possibility that the plaintiff could pursue such an alternative.

[228] Alternatively, the plaintiff submitted in the present case that there was no evidence to show that the services would be available to the plaintiff on a commercial basis at Woodford for the cost of employing someone directly as opposed to retaining an agency to supply the services. It is true that there was no evidence to support the conclusion that the services would be available on a commercial basis for the cost of employing someone as a carer.

[229] The conclusion I have reached is that the appropriate basis for the assessment is the commercial cost of an agency supplied carer.

[230] The evidence of the agency rate for the hourly values of the services over the relevant periods for past care is provided in the following table. These figures have been derived by adapting from the weekly costs set out in a quote from "Quality Lifestyle Support", which was an exhibit tendered at the trial. The comparison between those rates and the rates claimed by the plaintiff is as follows:

Period	Hourly rate proved	Hourly rate claimed
2003	$29.15	$26.00
2004	$29.71	$26.50

[36] [2010] 2 Qd R 560, 567 [27].

2005	$32.51	$29.00
2006	$33.52	$29.90
2007	$35.45	$30.90
2008	$36.70	$31.85
2009	$38.00	$33.00
2010	$40.44	$35.00
2011	$46.79	$40.50
2012	$47.26	$40.90
2013	$49.62	$42.95
2014	$51.13	$44.25
2015	No value	$44.25

[231] To the extent that the proved rates exceeded the claimed rates I will adopt the claimed rates. The plaintiff gave no notice of intention to amend the claimed rates.

Period of loss

[232] As to the hours claimed, the plaintiff proceeds on the footing that the period is from the date of the plaintiff's discharge from the BIRU on 16 October 2003 up to the present day, for past loss, and from the present day until the end of the plaintiff's life expectancy for future loss. The plaintiff relied on about 48.5 years at the trial which would be about 47 years as at the present date. Having regard to the previous discussion, I will adopt 47 years.

Calculation

[233] Accordingly, the calculation of past loss is as follows:

Period	Calculation	Amount
2003	$26.00 x 6.5 hrs x 76 days	$12,844.00
2004	$26.50 x 6.5 hrs x 366 days	$63,043.50
2005	$29.00 x 6.5 hrs x 365 days	$68,802.50
2006	$29.90 x 6.5 hrs x 365 days	$70,937.75
2007	$30.90 x 6.5 hrs x 365 days	$73,310.25
2008	$31.85 x 6.5 hrs x 366 days	$75,771.15
2009	$33.00 x 6.5 hrs x 365 days	$78,292.50

2010	$35.00 x 6.5 hrs x 365 days	$83,037.50
2011	$40.50 x 6.5 hrs x 365 days	$96,086.25
2012	$40.90 x 6.5 hrs x 366 days	$97,301.10
2013	$42.95 x 6.5 hrs x 365 days	$101,898.88
2014	$44.25 x 6.5 hrs x 365 days	$104,983.13
2015	$44.25 x 6.5 hrs x 365 days	$104,983.13
2016	$44.25 x 6.5 hrs x 63 days	$18,120.38
Total		$1,049,412.00

[234] Adopting a similar approach to the future care need of the plaintiff, the calculation inputs are as follows:

Period	Calculation	Amount
2016 - 2063	$44.25 x 6.5 hrs x 7 days x 961.5 (47 yrs x 5% discount table factor)	$1,935,860.06

[235] The total of these amounts is plainly a large amount. The difficulties in the assessment of the plaintiff's loss leave the scope for a large variability in the possible justifiable outcomes. In the end, a detailed reading and re-reading of the evidence coupled with some firm impressions of particular witnesses has not made the task much less intractable.

[236] In a case like the present, where the principal actors upon the stage are not sophisticated people who have kept good records and the expert witnesses must do their best to unravel a set of causes that will not readily separate for the purpose of analysis, the court must do its best when presented with inexactness in the proofs. It is of no assistance to complain that they might have been better.

[237] Neither of the parties made submissions about any discount of the future loss for what are sometimes described as the "usual" contingencies.[37] In a post *Malec* world, in my view a separate discount of that kind must be treated with care, to avoid double discounting. However, in the analysis so far, the model I have arrived at compares the future hypothetical cases of the plaintiff's condition on the assumption that the plaintiff had not suffered injury in October 2003 with that on the basis of his present actual injury and disabilities.

[238] In the particular circumstances of this case, there is added uncertainty relating to the hypothetical future case that assumed no injury and the hypothetical future case assessed with the actual injury. The plaintiff's life expectancy is one unknowable factor. Another is that if the plaintiff lives until the age of 70, it seems slightly unrealistic to postulate that he would still need a carer to be able to go into the

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

community without the risk of getting into unacceptable confrontations or arguments with people, as he has in the past as a younger man. The prospect that, quite apart from the injury, the plaintiff's life might have had a turn of events that would have overtaken the need for care as a result of the injury is yet another uncertainty, as was once reflected in the discount for the "usual" contingencies.

[239] Of course, contingencies are not necessarily only one-sided. But the discount for them reflects the low degree of confidence that can be attached to predictions based on assumptions for more than twenty years in to the future. In the particular circumstances of this case, in my view, the better approach to these matters is to adopt a global discount of the damages assessed for the future loss, including the matters that were once reflected in the discount for the "usual" contingencies in a relatively high global value, namely 20%. Therefore the amount for future care set out above as $1,935,860.06 should be discounted to $1,548,688.05.

Future medical expenses

[240] The plaintiff claimed a "global" amount for future medical expenses. No basis was advanced to support it in the evidence. None of the expert witnesses opined that the plaintiff should undergo any further treatment for any loss caused by his injuries.

[241] Yet, the plaintiff in written submissions submitted that he will require medical treatment, psychiatric attention, counselling and medication in the future. So he might. But there was no correlation made in the evidence between that and the plaintiff's injuries sustained on 28 August 2003.

[242] I make no allowance for those expenses on the basis of a global claim.

Special damages

[243] The plaintiff did not pursue the pleaded claim for special damages.

Conclusion

[244] For those reasons, I assess the plaintiff's damages in the sum of $2,719,500.05 calculated as follows:

General damages	$121,400.00
Past gratuitous services	$1,049,412.00
Future gratuitous services	$1,548,688.05
Total	$2,719,500.05

[245] I will hear the parties as to the orders to be made.