SUPREME COURT OF QUEENSLAND

CITATION:	*AAI Limited v McQuitty* [2016] QCA 326
PARTIES:	**AAI LIMITED trading as SUNCORP INSURANCE** ABN 48 005 297 807 (appellant) **v** **TAI RAYMOND McQUITTY by his litigation guardians, KATHARINA KIRGIS and ROBYN IRENE ATKINSON** (respondent) **STUART ARTHUR MIDGLEY** (first defendant/not a party to the appeal)
FILE NO/S:	Appeal No 3253 of 2016 SC No 3108 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 36
DELIVERED ON:	6 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2016
JUDGES:	Gotterson and Morrison JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. Appeal dismissed.** **2. The appellant is to pay the respondent's costs of and incidental to the appeal, to be assessed on the standard basis.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – NON-PECUNIARY DAMAGES – PAIN AND SUFFERING – where the respondent suffered multiple injuries in a car crash, the worst of which was a closed head injury and severe traumatic brain injury – where the evidence at trial did not particularly focus on whether the respondent had a personality disorder before the accident – where the trial judge did not deduct any part of the assessed injury scale value for a pre-existing condition – whether the trial judge erred in not taking into account the respondent's 'pre-injury challenging and permanent personality traits' as a pre-existing condition within the meaning of s 7(1) of Schedule 3 to the *Civil Liability Regulation* 2003 (Qld) – whether the trial judge erred in not having regard to relevant

factors in fixing the injury scale value pursuant to s 9 of Schedule 3 to the *Civil Liability Regulation* 2003 (Qld)

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – PAST CARE – where the respondent was cared for by friends and family after the accident – where the trial judge awarded compensation for past care on the basis of what was needed by the respondent at the commercial cost of care – where the Court will not interfere with findings of fact – whether the trial judge erred in not awarding damages for past care on the basis of what had actually been provided, rather than on the basis of what was needed – whether the trial judge erred in awarding compensation based upon the commercial cost of care

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – FUTURE CARE – where the trial judge awarded compensation for the future care of the respondent – whether the trial judge erred in using agency rates to calculate the compensation of future care – whether the trial judge erred in assessing the respondent's life expectancy

Civil Liability Act 2003 (Qld), s 61(1)(a)
Civil Liability Regulation 2003 (Qld), Schedule 3

CSR Ltd v Eddy (2005) 226 CLR 1; [2005] HCA 64, considered
Purkess v Crittenden (1965) 114 CLR 164; [1965] HCA 34, cited
Shaw v Menzies & Anor [2011] QCA 197, cited
Teubner v Humble (1963) 108 CLR 491; [1963] HCA 11, cited
Thatcher v Charles (1961) 104 CLR 57; [1961] HCA 5, cited
Van Gervan v Fenton (1992) 175 CLR 327; [1992] HCA 54, considered
Waller v Suncorp Metway Insurance Ltd [2010] 2 Qd R 560; [2010] QCA 17, distinguished

COUNSEL: R J Douglas QC for the appellant
J A Griffin QC, with N R Jarro, for the respondent

SOLICITORS: Quinlan, Miller & Treston for the appellant
Richardson McGhie for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Dalton J and with the reasons given by her Honour.

[2] **MORRISON JA:** I have read the reasons of Dalton J and agree with those reasons and the orders her Honour proposes.

[3] **DALTON J:** This is an appeal from an assessment of damages for personal injuries. The respondent (plaintiff) was the front seat passenger in a car crash on 28 August

2003. He suffered multiple injuries, the worst of which was a closed head injury and severe traumatic brain injury. He was 20 years old at the time of the accident and 32 at trial.

Ground 1: General damages

[4] One of the difficulties in assessing damages was summed up neatly by Dr Arthur, one of the psychiatrists who examined the respondent:

> "Since his injury your client has displayed significant cognitive impairments and behavioural disturbances which include affective lability and extreme aggression/violence. These symptoms occur on a substrate of premorbid antisocial personality structure, poor academic performance and a history of polysubstance abuse."

[5] After a prejudicial childhood the respondent had failed to complete Grade 10 and was homeless as an adolescent. He was a user of amphetamines, cannabis and alcohol from this time. His premorbid personality was such that he was very angry; engaged in violence, and had suffered injury in fights and a previous car accident. This history was recognised by those acting for the respondent at trial: there was no claim for any economic loss.

[6] Section 61(1)(a) of the *Civil Liability Act* 2003 (Qld) (the Act) provides that general damages are to be assessed according to an injury scale value taken from Schedule 4 of the *Civil Liability Regulation* 2003 (the Regulation). Schedule 4 to the Regulation provides the ranges of injury scale values to be applied in any given case. Schedule 3 Part 2 to the Regulation is headed "How to use schedule 4" and makes the following provisions relevant to this case:

> "**2 Injury mentioned in sch 4**
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> (1) For an injury mentioned in the injury column of schedule 4, schedule 4 provides the range of injury scale values for the injury to be considered by a court in assessing the injury scale value ("ISV") for a similar injury.
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> (2) The range of ISVs for the injury reflects the level of adverse impact of the injury on the injured person.
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> **3. Multiple injuries**
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> (1) Subject to section 4, for multiple injuries, the range of ISVs for the dominant injury of the multiple injuries is to be considered by a court in assessing the ISV for the multiple injuries.
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> (2) To reflect the level of adverse impact of multiple injuries on an injured person, the court may assess the ISV for the multiple injuries as being higher in the range of ISVs for the dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only.
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> …
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> **7. Aggravation of pre-existing condition**
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> (1) This section applies if an injured person has a pre-existing condition that is aggravated by an injury for which a court is assessing an ISV.

(2) 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.

…

9. Other matters to which court may have regard

In assessing an ISV, a court may have regard to other matters to the extent they are relevant in a particular case.

Examples of other matters –

- the injured person's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life
- the effects of a pre-existing condition of the injured person
- difficulties in life likely to have emerged for the injured person whether or not the injury happened
- in assessing an ISV for multiple injuries, the range for, and other provisions of schedule 4 in relation to, an injury other than the dominant injury of the multiple injuries

…"

[7] The trial judge assessed the plaintiff as suffering from a moderate brain injury.[1] This yielded a range of injury scale values between 21 and 55. This was not challenged. He then assessed the injury scale value at the top of that range – 50 – having regard to s 3 of Schedule 3 to the Regulation. This was challenged; it was said the trial judge erred in applying ss 7 and 9 of Schedule 3 to the Regulation. As to s 7 of Schedule 3 to the Regulation the trial judge said:

"[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 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

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1 Item 7 to Schedule 4 of the Regulation.

> 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."

[8] The appellant challenged this decision. It argued that s 7 of Schedule 3 to the Regulation required the trial judge to take into account the respondent's "pre-injury challenging and permanent personality traits"[2] as a pre-existing condition within the meaning of s 7(1), or alternatively, under the provisions of s 9 of the schedule. It was said that the respondent's personality traits, apart from the injury, would have impacted negatively on his enjoyment of life and the amenities of life.

[9] In interpreting the words of ss 7 and 9, it is as well to begin with the consideration of the purpose of an award for general damages. Luntz refers to *Phillips v London & South Western Railway Co* where Field J spoke of "the pain and suffering to [the plaintiff]" and what would be "fair compensation for the pain, inconvenience and loss of enjoyment which he has sustained." On appeal Cockburn CJ spoke of "the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent."[3] Luntz goes on to refer to *Teubner v Humble* in the High Court as to the object of general damages, in Windeyer J's words, "Insofar as the possession of money can in a particular case give pleasure or provide comfort, money can properly be said to compensate for pain and suffering."[4]

[10] Apart from his closed head injury, Mr McQuitty fractured his C5 and C6 vertebral facet joints and fractured part of the C5 vertebra itself. He had a palsy of the fourth cranial nerve which affected his vision, although that subsequently resolved. He was hospitalised, required intubation and ventilation, contracted pneumonia, and suffered post-traumatic amnesia for 34 days. He spent time in the rehabilitation unit at Princess Alexandra Hospital. His evidence at trial was that he still suffered difficulties with his neck – t 1-58 and his eyesight – t 1-60. There could be no contention that his personality disorder was something which ought to have been taken into account to reduce the amount awarded for this physical pain and suffering, either pursuant to s 7 or s 9 of Schedule 3 to the Regulation.

[11] Loss of enjoyment of life is, "the non-economic consequences of the destruction or diminution, permanent or temporary, of a faculty, which deprives the injured person 'of the ability to participate in normal activities and thus to enjoy life to the full and to take full advantage of the opportunities that otherwise it might offer'".[5] The law

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2 Appellant's outline of argument on appeal, paragraph 5.

3 Luntz H, "Assessment of Damages for Personal Injury and Death", 4th ed, [3.1.l] citing *Phillips v London & South Western Railway Co* (1879) 4 QBD 406; and (1879) 5 QBD 78 on appeal.

4 Luntz, above, [3.1.2] citing *Teubner v Humble* (1963) 108 CLR 491, 507.

5 Luntz, above, [3.3.1] citing *Teubner v Humble* above, 506 per Windeyer J.

awards damages under this head having regard to the subjective feelings of the plaintiff[6] with the consequence that when it comes to awarding compensation under this head no "two injuries are really the same; and the consequences of apparently similar injuries vary infinitely for different individuals."[7] What enjoyment or amenities any particular plaintiff has lost will be a question of fact, in any particular case. The cases and text are replete with examples: the loss of a leg will cause more loss of enjoyment of life to a ballet dancer than to a scholar.[8]

[12] In assessing general damages in a case where a plaintiff has a pre-existing condition, whether at common law, or having regard to ss 7 and 9 of Schedule 3 to the Regulation, the Court compensates only for the additional loss, or aggravation, which the defendant proves is caused by the accident. Once a plaintiff makes a *prima facie* case that incapacity has resulted from a defendant's negligence, the defendant bears the onus of proving that the incapacity was wholly or partly the result of some pre-existing condition.[9] It was accepted by the appellant that in accordance with this principle the onus lay on it to show what part of Mr McQuitty's loss was not caused by it.[10]

[13] Section 7 of Schedule 3 to the Regulation uses the words "pre-existing condition". They are familiar in this area of the law – see eg, the High Court judgment in *Purkess v Crittenden*.[11] They are not technical words. Similarly, aggravation is an ordinary English word commonly used in cases dealing with this area of the law. I do not think it should be given an artificially narrow interpretation. Before the Act, the Courts had regard to what Luntz terms "aggravating and mitigating features"[12] in assessing what enjoyment and amenities had been lost. In personal injuries law, the idea of an injury aggravating a pre-existing condition is a familiar one: degenerative lumbar discs may be aggravated by a back injury; arthritis may be aggravated by a knee injury; a plaintiff who had lost one leg will no doubt find his or her condition aggravated by a loss of the other leg. To some degree the propositions relevant to assessment of general damages in this case seem unfamiliar because they deal with a pre-existing disorder of the mind, rather than of the body. I cannot see that this changes the task which the Court must perform.

[14] In the example concerning the ballet dancer and the scholar, it is the scholar's mental pre-disposition, or personality, which mitigates the loss of amenities of life. A plaintiff whose self-esteem and satisfaction in life came predominantly from the practice of a profession, might well suffer a greater loss of enjoyment from an accident which prevented him or her working, than a happy-go-lucky loafer, whose reaction to a similar accident was to exploit and enjoy time away from work. A pessimistic plaintiff might well suffer psychological sequelae to an accident when an optimistic plaintiff might not. In each case it is personality which aggravates or mitigates the loss of enjoyment of life, and consequently impacts upon the award of general damages. Yet in none of these cases would we refer to these personality factors as "conditions", let alone conditions which are "made worse by the injury". These personality factors are relevant to the assessment of general damages, and

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6 Luntz, above, [3.2.3] citing *Skelton v Collins* (1966) 115 CLR 94.

7 Per Windeyer J in *Thatcher v Charles* (1961) 104 CLR 57, 71-2, cited in Luntz at [3.1.5], and see Windeyer J in *Bresatz v Przibilla* (1962) 108 CLR 541, 548.

8 Luntz, above, [3.3.6], and the cases noted there.

9 *Watts v Rake* (1960) 108 CLR 158; *Purkess v Crittenden* (1965) 114 CLR 164.

10 Written submissions on trial, paragraph 28.

11 Above, 168.

12 Luntz, above, [3.2.6], footnote 99.

accordingly within the bounds of s 9 of Schedule 3 to the Regulation, but they do not, in my view, fall to be considered in terms of s 7.

[15] However, once a personality is so abnormal as to amount to a psychiatrically diagnosable clinical entity, viz., a personality disorder, I think that it does amount to a condition within the meaning of s 7. I do not think there is any doubt that psychiatric illnesses fall within the statutory term "condition". Thus, if a plaintiff suffered from clinical depression or anxiety before injury, s 7 might apply to the assessment of general damages. In my opinion it follows that if Mr McQuitty did suffer from a personality disorder before the subject accident, he did suffer from a pre-existing condition within the meaning of s 7 of Schedule 3 to the Regulation.

[16] The difficulty is that neither the plaintiff nor the defendant particularly focussed on this issue at trial. It is recited in some of the medical reports for trial that someone (it appears a psychologist) had purported to diagnose Mr McQuitty with an antisocial personality disorder at some stage before the car accident. Two psychiatrists examined him post-accident. Dr Lawrence noted the past diagnosis[13] but she did not diagnose personality disorder, merely "Oppositional, antisocial, rebellious traits".[14] Dr Arthur originally spoke in terms of "premorbid behavioural problems"[15] and, like Dr Lawrence, did not diagnose a disorder but merely "Premorbid Antisocial Personality Traits".[16] However, in his later report Dr Arthur gave the view that Mr McQuitty did most likely have an antisocial personality disorder premorbidly.[17]

[17] Neither witness was cross-examined about this issue and neither counsel was concerned to ask for a finding as to this, notwithstanding it is specifically pleaded in the defence. The trial judge did not make a specific finding about this matter and in the absence of cross-examination of the witnesses, he was not well-equipped to do so. At different points in his judgment he refers to the defendant having an "underlying personality disorder" – [5] and at other points he refers to "anti-social behaviours" – [43].

[18] The terms of the notice of appeal and the appellant's outline of argument on appeal in effect concede that there was no proper basis on the evidence for a finding that Mr McQuitty had a personality disorder, rather than personality traits. In my view, in the absence of a sound evidentiary basis for concluding that premorbidly the plaintiff had a personality disorder, as opposed to personality traits, the trial judge was correct in his view that there was no pre-existing condition within the meaning of s 7 of Schedule 3 to the Regulation.

[19] On the other hand, it seems to me that the plaintiff's premorbid personality traits were relevant when it came to assessing what injury scale value was selected, ie, his personality traits ought to have been considered having regard to s 9 of Schedule 3 to the Regulation.

[20] The appellant's submission is that before the accident, because of his personality traits, Mr McQuitty had lived, and was likely to continue to live, a life where he was mostly unemployed; did not gain satisfaction or enjoyment from work; came into conflict with the other people he encountered in his life more than an average person would, including coming into violent contact with them, and not sustaining long-term relationships with them. He was also likely to abuse illicit drugs and alcohol and commit

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13 Report 27 November 2013, paragraph 5.1.3.
14 Report 27 November 2013, paragraph 24.1; and see paragraph 25.11.1.
15 Report 6 February 2007, p 3.
16 Report 6 February 2007, p 15.
17 Report 14 November 2013, pp 12 and 13.

crimes. In these circumstances the submission was that general damages for loss of enjoyment of life had to be assessed on the basis that, accident apart, because of his personality, Mr McQuitty's life was likely to be less happy than many other lives.

[21] There is no doubt that the trial judge appreciated the plaintiff's personality pre-accident. He described it as follows:

> "[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."

[22] The trial judge noted that the effect of the accident was that the plaintiff could no longer live independently but needed care – [8] of the judgment below. The trial judge found that there was no evidence that the plaintiff suffered a marked impairment of intellect as a result of the injury – [37]. Although he did not discuss the evidence as to the plaintiff's enjoyment of life before and after the accident in the section of his judgment concerning general damages, the trial judge certainly analysed it in detail later in the judgment, beginning at [63], as he analysed matters bearing upon his enjoyment of life after the accident, at [95] ff.

[23] While the trial judge did not expressly discuss s 9 of Schedule 3 to the Regulation in the way he discussed s 7, that is hardly surprising in all the circumstances given that s 9 merely directs the Court to have regard to relevant matters in fixing the injury scale value. In my view, there is no serious basis to contend that the trial judge did not have regard to relevant factors in fixing the injury scale value. In my view ground 1 of the appeal must fail.

Ground 2: Past Gratuitous Care

(a) Amount of Care Provided

[24] Mr McQuitty suffered injury to his frontal lobes so that he had relatively poor control of his impulses and emotions; was prone to irresponsible and impulsive behaviour and mood swings and, in particular, he was very quick to become very angry. He suffered problems with his memory after the accident. He seemed not to suffer any particular intellectual deficit, and suffered no physical effects which prevented him caring for himself. However, he had no motivation or initiative in respect of the ordinary activities of daily living. Thus, he had to be reminded to prepare food and eat it; to have a shower; to change his clothes, and to do the washing. After the accident Mr McQuitty lived with his mother who cared for him. However, she died. Rather remarkably, having regard to what was asserted to be his premorbid personality, Mr McQuitty was then well cared for by friends who allowed him to live either in their houses or very close by – for example, in a caravan or granny flat. This type of

care was ideal for Mr McQuitty: he had no need for constant supervision, but needed to be in touch with caring people who could ensure that his needs were met. The Court also heard from witnesses who were in regular contact with Mr McQuitty to organise outings for him. One friend took him out, for example to play poker, another gentleman regularly picked him up and took him out and about as he attended to his work commitments. This meant that Mr McQuitty had some social life and interaction with the wider world.

[25] The trial judge accepted the evidence of the psychiatrists that Mr McQuitty required five hours care per day in two blocks: three hours in the morning and two hours in the afternoon. As well he required some time for someone to attend and occupy him with activities, as his friends had done in the past – [167], [202], [204] of the judgment below. He arrived at a conclusion that Mr McQuitty needed an average of 6.5 hours of care per day, and had done so since the accident – [207] of the judgment below. The trial judge awarded damages for past gratuitous care on the basis that that amount of care had at all times been necessary, not on the basis of the care which had in fact been provided. As to the latter, he said that he rejected the plaintiff's evidence that 10 hours of care had been provided from the accident until July 2008 and then seven hours per day after that date. The trial judge thought that on average five to six hours per day had been provided until 2011, and after that perhaps more hours of care per day were provided – [213] of the judgment below.

[26] It was said that the trial judge erred in not awarding damages for past care on the basis of what had actually been provided – an average of 5.5 hours per day – rather than on the basis of what was needed – an average of 6.5 hours per day.

[27] The judgments in *Van Gervan v Fenton*[18] might reasonably give rise to the view that the High Court supported the approach taken by the trial judge, particularly the statements that *Griffiths v Kerkemeyer* damages were to be assessed on the basis of need, and not as special damages. Nonetheless, the comments which the High Court made in that case were in the context of re-examining the basis for awarding *Griffiths v Kerkemeyer* damages – need, rather than the legal or moral obligation to pay persons who had provided services before trial. And in *CSR Ltd v Eddy*[19] it does seem that the High Court interpreted the statements in *Van Gervan v Fenton* as meaning that compensation is limited to services in fact provided to a plaintiff, notwithstanding that there was an unfilled need for services before trial. These latter statements are *obiter*, so it seems to me that there is uncertainty about the law in this respect. This point need not be determined in this case for if the primary judge erred, the discrepancy was a small one and based on factual findings which were themselves conclusions of "best-fit" on evidence which was based on estimation rather than precise calculation. This Court should not interfere.[20]

(b) Rate applicable to Past Care

[28] The rate at which past care was assessed was also challenged. The trial judge awarded compensation based upon the commercial cost of care, rather than say, the amount which the care agencies paid their workers. The appellant based this ground of appeal on its interpretation of *Waller v Suncorp Metway Insurance Ltd*.[21]

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18 (1992) 175 CLR 327.

19 (2005) 226 CLR 1, [20] per Gleeson CJ, Gummow and Heydon JJ, Callinan J agreeing at [122].

20 *Elford v FAI General Insurance Company Limited* [1994] 1 Qd R 258.

21 [2010] 2 Qd R 560.

[29] The proper basis to assess compensation for services to be provided to an injured person is the market value of those services. That will in every case be a question of fact.[22] There are no arbitrary rules.[23] In *Waller* there was evidence that carers could be engaged directly, ie, not through an agency, for a price which was lower than the agency rate. *Waller* was a case where constant care was needed. In both these respects the facts proved in *Waller* were unlike the facts proved in this case. While there was cross-examination as to the amounts which the agency paid its carers, this evidence did not establish that Mr McQuitty could have employed carers by paying them that rate, much less that he could have employed them regularly and reliably for the times he required them. The trial judge's decision as to the rate at which past services ought be compensated was correct. He did not mistake the onus of proof, but made a decision based on all the evidence before him.

Ground 3: Future Need for Care

(a) Rate applicable to Future Care

[30] The evidence was that Mr McQuitty intended to buy a home with the judgment sum awarded to him and that he had arranged for one of the gentlemen who had cared for him in the past to continue to care for him and live in that home. There was no evidence as to whether this carer would be paid by Mr McQuitty. The existence of this plan was argued by the appellant to justify an award for future care based, not on the agency rate, but upon a lesser value.

[31] This proposition must be rejected. The trial judge referred to the uncertainty attending the duration of the proposed arrangement for the future, and in this regard similar comments were made in *Shaw v Menzies & Anor*.[24] Even aside from that uncertainty, how Mr McQuitty spends money he is awarded as compensation is a matter for him, and his guardians and administrators. It does not determine the measure of his loss. This evidence was no basis for departing from the market value of the care which Mr McQuitty could be expected to need for the remainder of his life as the proper measure of his loss. The trial judge used agency rates to calculate the compensation of future care in an entirely orthodox way which, in my opinion, was correct on all the evidence before him.

(b) Life Expectancy

[32] Lastly, it was contended by the appellant that the trial judge erred in assessing Mr McQuitty's life expectancy at 47 years as at the date of trial. This was in accordance with the Australian Bureau of Statistics Life Expectancy Tables.

[33] In this regard the evidence before the trial judge from Dr Hazelton was that the plaintiff's life expectancy was 20 years from October 2014. Dr Lawrence said that it was not possible to be precise about the matter. Although, in general, she accepted that the plaintiff would have a reduced life expectancy compared to an average person, having regard to the fact that his injuries, and indeed his pre-existing lifestyle predisposed him to illness (smoking, drinking and drug-taking) or injury (impulsive and unwise decision-making). She said that she agreed with Dr Hazelton's statement, "As a result of Mr McQuitty's documented head injuries and pre and post August 2003 lifestyle, he has a significantly increased premature mortality risk compared to age matched males in the general population." – AB 402.

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22 *Van Gervan v Fenton* (above) cited in *Waller* (above), [22], [24].

23 *Waller* (above), [27].

24 [2011] QCA 197, [77].

[34] The trial judge rejected Dr Hazelton's analysis while accepting, in general terms, that the plaintiff's pre-injury medical history and his lifestyle after the accident would affect his life expectancy.[25]

[35] The plaintiff had pleaded, and made written submissions at the trial that the assessment should be on the basis that the plaintiff had a life expectancy of 30 years from trial. It was unclear where the 30 year figure came from. In submissions the respondent's counsel attributed it to Dr Lawrence, but it was not her view so far as I can see on the evidence; Dr Lawrence refused to make any particular estimate.

[36] The trial judge discounted future care first by five per cent, and then by an additional 20 per cent for contingencies. The 20 per cent discount for contingencies effectively meant that damages for the future were awarded on the basis of a 37 year life expectancy. It is true that life expectancy was not the only contingency, other factors no doubt had to be considered, one was that as the plaintiff aged he might need less support to go about in the community without the risk of getting into unacceptable confrontations and arguments – [238] of the judgment below. However, in my view the evidence justified an expectation of about 37 years. This was nearly twice the estimate of the defendant's expert; seven years higher than the plaintiff's pleading and submission, and yet still involved a real reduction of his statistical expectation in accordance with Dr Lawrence's evidence. The appellant has shown no grounds to interfere with this finding.

Disposition

[37] I would dismiss the appeal, with the appellant to pay the respondent's costs.

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25 [180]-[183].