SUPREME COURT OF QUEENSLAND

CITATION:	*Campbell v Jones & Anor* [2002] QCA 332
PARTIES:	**KELLY ANNE CAMPBELL** (plaintiff/respondent) **v** **DAVID SAMUEL JONES** (first defendant) **AUSTRALIAN ASSOCIATED MOTOR INSURERS LIMITED** ACN 004 791 744 (second defendant/appellant)
FILE NO/S:	Appeal No 11496 of 2001 SC No 30 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	3 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	16 April 2002
JUDGES:	McMurdo P, Fryberg and Mullins JJ; Joint reasons for judgment of Fryberg and Mullins JJ; separate reasons of McMurdo P, dissenting in part
ORDERS:	**Appeal allowed. Set aside the judgment of the Trial Division. In lieu enter judgment that the second defendant pay to the plaintiff the amount of $62,557.40 and her costs of the proceeding to be assessed. Grant leave for the solicitors for the respondent to file submissions and/or affidavits in accordance with the reasons for judgment of Fryberg and Mullins JJ as they may be advised within 14 days. Adjourn the question of any order in relation to those solicitors for further consideration.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – GENERAL PRINCIPLES –PERSONAL INJURY OR DEATH CASES – where respondent injured in car accident – where liability not in issue – where primary judge found respondent suffered significant impairment of

her capacity to engage in employment – where primary judge preferred opinion evidence of one of two orthopaedic surgeons – where finding open – whether primary judge erred in assessment of general damages, damages for future economic loss and damages for gratuitous services.

EVIDENCE – ADMISSIBILITY AND RELEVANCY – IN GENERAL – OTHER – where primary judge admitted witness evidence as to gratuitous services – where respondent did not claim she required gratuitous services in statement of loss and damage – whether primary judge erred in giving leave to admit evidence under r 548 (4)(c) *UCPR*

EVIDENCE - ADMISSIBILITY AND RELEVANCY – IN GENERAL – OTHER – where primary judge admitted witness evidence as to future economic loss – where respondent did not provide proof of evidence from witness – where appellant counsel did not object to evidence – where evidence given by consent

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – OTHER MATTERS – COSTS - where respondent made offer to settle of $40,000 plus costs on the Magistrates Court Scale – where award exceeded offer but remained below monetary limit of the Supreme Court – where appellant contends award would not exceed offer if appeal successful – where appeal only successful in part – whether primary judge erred in discretion in ordering costs on an indemnity basis

Evidence Act 1977 (Qld), s 92
Queensland Law Society Act 1952 (Qld), s 48I
Uniform Civil Procedure Rules 1999 (Qld), r 360, r 547, r 548, r 549

Parr v Bavarian Steakhouse Pty Ltd [2001] 2 Qd R 196, considered

COUNSEL: J Douglas QC, with M Drew, for the appellant
D McMeekin SC for the respondent

SOLICITORS: S. R. Wallace & Wallace for the appellant
Macrossan & Amiet for the respondent

[1] **McMURDO P:** Kelly Anne Campbell was injured in a motor vehicle accident on 23 May 2000 when Mr Jones' vehicle drove across the path of the vehicle in which she was a passenger. Liability was not in issue and after a one day trial on 29 November 2001, the learned Northern Judge, in ex tempore reasons, assessed damages inclusive of interest at $70,057.40. His Honour ordered the respondent

recover her costs from the defendant on an indemnity basis and indicated that the action was one which "plainly ought to have been brought in the District Court".

[2] The appellant appeals first against the learned primary judge's finding that the respondent, Ms Campbell, suffered a significant impairment of her capacity to engage in employment, preferring the opinion of Dr White to Dr Toft and ignoring other evidence. Second, the appellant appeals against the assessment of general damages, damages for future economic loss and damages for gratuitous services. Third, the appellant appeals against his Honour's exercise of discretion in admitting evidence under UCPR r 548. Finally, the appellant contends his Honour erred in ordering costs on an indemnity basis. These far-ranging grounds of appeal require a review of the significant evidence in the case.

The evidence

[3] Ms Campbell was aged 20 at the time of the accident. She was the front seat passenger in a car returning from a volleyball match in which she had participated. Before the accident, she had no lower back or neck pain and only the occasional headache. After the accident, she suffered from headaches, neck pain and lower back pain. The motor vehicle accident involved a "pretty heavy" impact and she immediately felt pain to her neck. She was taken by ambulance to the Mackay Base Hospital and released later that night. She felt sick and tight in the chest though that went away with time. The next morning she had a severe headache and her whole body ached. She felt sick and had back and neck pain.

[4] She did not return to her work at Hatfields Supermarket, Mackay, for a couple of days. She had commenced her employment at Hatfields on 22 February 2000, only a few months before the accident. She described her work as quite physically arduous. Prior to the accident, she had no difficulty doing her job but after the accident she had to ask for help, she was constantly sore and found it hard to lift heavy items. She did not complain to her employers for fear of losing her job.

[5] The neck pain persisted until trial and she described her neck as "still sore, tight, real strained … It's always there. … It's just always still sore", and is aggravated by standing for long periods at the checkout. Her back pain has improved and some days it is not as sore as others. She experiences frequent headaches which did not occur before the accident.

[6] She has had extensive physiotherapy and also gets relief from massages performed by her boyfriend, Mr Gander, who massages her back and neck for about 20 minutes when it is aggravated. He also provides assistance to her in the house. His efforts, which were unnecessary before the accident, total about 1½-2½ hours per week.

[7] She was injured at work on 19 February 2001, about 10 days before she signed her statement of loss and damage, when she lifted a 25 litre container of potting mix. The injury affected her leg, foot and hip area. She was on workers' compensation for one week but fully recovered from that injury. She did not mention this in her statement of loss and damage.[1] The appellant's orthopaedic surgeon, Dr Toft, reports that she told him she had had no accidents or injuries other than the car accident but neither Dr Toft nor Dr White saw this injury as significant.

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[1] Since then UCPR r 547(3)(g) has come into force.

[8] The appellant relied on a video, portions of which were played during the trial and the appeal. This showed Ms Campbell talking with her friends and moving freely, during a break from work, with no restriction of the neck or obvious pain. On the other hand the video did not show the respondent undertaking heavy physical activity.

[9] Orthopaedic surgeon Dr David White examined the respondent on 16 January and on 23 July 2001. He formed the opinion that it was too early to state with any certainty the respondent's prognosis in relation to the injury to her cervical spine. In view of the time since the injury, the persistence of her complaints and the x-rays, which showed, consistent with her complaints, inappropriate positioning of the spine, the statistical probability has increased that she has a five per cent whole person impairment as a consequence of the injury to her cervical spine in the motor vehicle accident. The neck pain could resolve over the next six months but occasionally such pain worsened. Where a patient has symptoms two years after the trauma, only 12 per cent of patients are free of symptoms after ten years. By July her lower back symptoms appeared to be less marked although there was a slight restriction of all movements compared with January. Dr White considered the impairment of the respondent's lower back also represented a whole person impairment of five per cent. He regarded her as currently unsuitable for work involving heavy physical labour, prolonged standing, sitting, lifting, bending or maintenance of the head and neck in fixed positions, all activities involved in her current occupation; modification of her tasks may well be required in the longer term. Dr White viewed the video but did not regard it as significant; it did not alter his opinion.

[10] On the other hand, Dr Toft examined the plaintiff at the request of the appellant on 28 June 2001 and concluded that despite her persisting symptoms in the cervical and lower spine, she had no permanent impairment; her symptoms will improve with time and will not interfere with her future working capacity, daily living or sporting activities. Dr Toft viewed the video which confirmed his opinion.

[11] After the accident and on the advice of her general practitioner, Ms Campbell was treated regularly at the Mackay Physiotherapy Centre from 25 May 2000 to 22 December 2000 when she was much improved on her initial presentation, showing good range of movement but still with some irritability of her symptoms.

[12] Richard Gander, the respondent's boyfriend, confirmed the respondent appeared to have significant neck pain after the accident. To give her pain relief, he performs a full body massage on her, concentrating a little on the neck and back for about 20 minutes or half an hour, two or three times a week. Prior to the accident he did this only once a week. Since the accident and because of her injuries he has been required to assist her more in household duties; he estimated the extent of this assistance at about an hour per week. He was approached to give evidence about 10 days before the trial.

[13] Ms Knight, a 25 year old packer at Hatfields Supermarket, works with Ms Campbell. She described the work at Hatfields as "pretty heavy". Prior to the accident Ms Campbell did not have difficulty lifting boxes but now she asks for assistance and has difficulty with packing, lifting and sweeping. Ms Campbell occasionally asks for help and Ms Knight tries to assist her because of her obvious

discomfort. Ms Knight was first approached to give evidence about three or four weeks before the trial.

The finding as the to significance of the plaintiff's injury

[14] The learned primary judge accepted the plaintiff's complaints of pain and discomfort in her upper and lower spine and that these were caused by the accident and aggravated by her work. His Honour preferred the opinion of Dr White which was supported by the x-rays. His Honour was entitled to prefer Dr White's evidence and to accept the evidence of the plaintiff which was also supported by the frequency of the respondent's physiotherapy treatment. Although his Honour did not refer to the video, his acceptance of the evidence of Dr White, who did not regard the video as significant, makes the video of little weight. The first ground of appeal is without substance.

General damages

[15] The respondent was 20 years old at the time of injury and 22 at trial. She suffered an injury to her neck causing severe neck pain and associated headaches which had not resolved at the time of trial and, on the evidence accepted by the learned primary judge, on the balance of probabilities would not resolve and would leave her with a five per cent whole body impairment. There was, however, a 12 per cent possibility she may completely recover. Some further discounting of damages should be made for what is commonly referred to as the vicissitudes of life. Her injuries affect her ability to do housework, her general enjoyment of life and have curtailed her sporting activities. The appellant submitted at trial and on this appeal that an award of general damages of $21,000 was appropriate.

[16] I am not persuaded that the award of $27,500 was manifestly excessive.

Future economic loss

[17] The plaintiff has limited qualifications. She left school in Grade 10 and has no other particular training or skills apart from those involved in her current employment. She has applied for other jobs and traineeships but has so far been unsuccessful. The judge's acceptance of Dr White's evidence means that this respondent will be disadvantaged in the work place as an employee in the fields in which she could presently expect to work. She does not currently have promising prospects of alternative work without retraining. His Honour was cognizant of the respondent's youth and the long working life ahead of her which is likely to be impaired by her neck injury. It is probable that she will be unable to work for as long hours or in as heavy an occupation as she may have been but for the accident. Whilst the award of $30,000 for future economic loss was generous on the evidence, I am not persuaded it was manifestly excessive.

[18] It follows that the loss of future superannuation calculated on that $30,000 sum is also not manifestly excessive.

Should the evidence of Mr Gander and Ms Knight have been admitted under the UCPR?

[19] The appellant contends that Mr Gander's evidence as to gratuitous services and Ms Knight's evidence as to future economic loss should not have been admitted because their evidence did not comply with the UCPR which relevantly provided:

> **"Plaintiff's statement of loss and damage**
> **547(1)** The plaintiff must serve on the defendant a written statement of loss and damage, signed by the plaintiff, within 28 days after the close of pleadings.
> **(2)** The statement must be served before a request for trial date is filed.
> **(3)** The statement must have the following information –
> …
> (f) the documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss (including economic loss) or treatment.
> …
> **Plaintiff's statement must identify particular documents**
> **548(1)** Without limiting rule 547(3)(f), a plaintiff's statement of loss and damage must identify the following documents –
> **…**
> (e) any other documents about the plaintiff's claim for damages.
> …
> **(3)** If the plaintiff intends to rely at the trial on evidence of the plaintiff's injury, loss (including economic loss) or treatment (including future treatment) not in a report that, if it were in a report, would be required to be identified under sub-rule (1), the plaintiff must, before the request for trial date is filed, serve on the defendant the evidence in the form of a report, or a proof of the evidence.
> **(4)** At the trial, the plaintiff may call or tender evidence not identified in the plaintiff's statement of loss and damage or not given to the defendant in this part only if –
> …
> (c) the court for special reason gives leave."

Mr Gander's evidence as to gratuitous services

[20] Ms Campbell claimed she required gratuitous services in her statement of claim[2] but she did not do so in her statement of loss and damage. When her counsel at trial opened Mr Gander's evidence and claimed damages of $17,000 for gratuitous services, counsel for the appellant objected to the admission of that evidence.

[21] A statement from a witness supporting the plaintiff's claim for damages is a document within *UCPR* r 548(1)(e) and must be included in the plaintiff's statement of loss and damage. *UCPR* r 548(3) does not have application to Mr Gander's evidence because that sub-rule is plainly intended to apply only to information of the type to be included in a report.

[22] The only evidence as to whether any proof of evidence existed as "a document" under UCPR r 548(1)(e) came from Mr Gander who stated in cross-examination that he gave the details of his evidence in court to the respondent's solicitor about 10 days before trial. On balance, and in the absence of competing evidence, it seems that the respondent's solicitors probably had some sort of proof of evidence from that time, although it is not absolutely clear when or if a statement or document

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2 Para 8, statement of claim.

came into existence. It seems that the learned primary judge drew this inference, which was reasonably open.

[23] The respondent contends that UCPR r 548(4) only has application to evidence within r 548(1)-(3). As I am satisfied on balance that Mr Gander's evidence was in a document in the possession of Ms Campbell's lawyers prior to trial[3], it is unnecessary to finally decide that point. I note, however, that Part 2 of Ch 14 of the UCPR applies to personal injury and fatal accidents and is plainly intended to require full and early disclosure by the parties of all evidence relevant to quantum. This is to encourage early settlements of actions and to avoid trial by ambush.[4] The effect of r 548(4) is certainly that evidence under UCPR r 548(1)(e) not identified in the plaintiff's statement of loss and damage or provided to the defendant under Part 2 of Ch 14 will not be admissible, unless it comes within one of the three exceptions to r 548(4).

[24] It seems the learned primary judge interpreted r 548 in this way but gave leave for special reason under r 548 (4)(c) allowing Mr Gander's evidence to be led and directing that the respondent provide the appellant with a copy of the proof of that evidence. Whilst not identifying any "special reason", his Honour referred to "the narrowness of the claim, and its relative modesty".

[25] "Special reason" is not defined under the UCPR. The Macquarie Dictionary relevantly defines "special" as "1. of a distinct or particular character. 2. … 6. distinguished or different from what is ordinary or usual: *a special occasion*. 7. extraordinary; exceptional; exceptional in amount or degree; especial: special importance."

[26] Whilst I recognise the wide discretion involved in determining what constitutes "special reason", the matters referred to by his Honour could not be said to be "special". His Honour's discretion miscarried. The respondent has not identified any other matters which could constitute "special reason". Mr Gander's evidence should not have been admitted.

[27] The only other evidence supporting the plaintiff's claim for damages for past gratuitous services came from the plaintiff and as that was not in her statement of loss and damage,[5] that evidence was also inadmissible. It follows that there was no evidence supporting the plaintiff's claim for damages under this heading and the award of damages should be amended to exclude the amount of $7,500 for gratuitous services and interest.

The evidence of Ms Knight as to future economic loss

[28] The appellant contends that the learned primary judge erred in allowing the respondent to call evidence from Ms Knight which was also not disclosed in her statement of loss and damage. The appellant's difficulty is that, unlike Mr Gander's evidence, no objection was taken at trial to the evidence of Ms Knight. Before she was sworn, the appellant's counsel stated that he had no proof of evidence from her. The respondent's counsel said he could not provide a proof and thought the judge's earlier direction only referred to providing Mr Gander's proof of evidence. His

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3 *UCPR* r 547(3)(f) and r 548(1)(e).

4 *Parr v Bavarian Steakhouse Pty Ltd* [2001] 2 QdR 196, paras [13], [22].

5 See UCPR r 547(1) and (3)(d).

Honour noted: "Well, I suppose that was specific – I think this is within the rules, but, well we're here now and will do what we can."[6] Ms Knight was then sworn and examined without objection or further argument.

[29] His Honour's observation that Ms Knight's opened evidence was "within the rules" may not have been accurate but the matter was not canvassed or taken up by the appellant's counsel. In effect, Ms Knight's evidence was given by consent and UCPR r 548(4)(a) provided for its admission.

Costs

[30] On 25 July 2001, four months before the trial, Ms Campbell made an offer under the UCPR to settle the action for $40,000 plus costs on the Magistrates Court scale. Notwithstanding the plaintiff's preparedness to accept such an offer, she continued to prosecute her action in the Supreme Court of Queensland. At least from that time, the plaintiff cannot have contemplated an award beyond the monetary limit of the District Court and it is most regrettable the resources of the Supreme Court were used on such a claim.

[31] Nevertheless, Ms Campbell obtained a judgment in excess of her offer to settle and, under UCPR r 360, the court must order the appellant to pay her costs, calculated on the indemnity basis unless the appellant shows another order for costs is appropriate in the circumstances.

[32] The appellant made no submissions before the primary judge that another order for costs was appropriate.

[33] In ordering costs on the indemnity basis, his Honour indicated that "the action is one which plainly ought to have been brought in the District Court and I leave to the officer assessing costs to give whatever weight or effect he thinks possible and appropriate to this view when assessing costs on an indemnity basis".[7]

[34] Because the award was within the District Court monetary jurisdiction, the effect of his Honour's order was that Ms Campbell can only recover costs assessed as if the proceeding had been started in the District Court.[8]

[35] The appellant has obtained leave of the learned primary judge to appeal from the costs order. The appellant contends that the reason the award exceeded the $40,000 offer was only because of the damages awarded for gratuitous services and future economic loss which turned on information not disclosed as required under the UCPR. That argument is meritorious as to the damages for gratuitous care which must be excluded from the award, reducing it to $62,557.40, an amount still well in excess of the offer. But as for economic loss, this was raised both in the reports of Dr White which were disclosed under UCPR Part 2, Ch 14 and in Ms Campbell's statement of loss and damage in which she claimed $200,000 damages for future economic loss.[9]

[36] The judge's reasons do not directly turn on Ms Knight's evidence and suggest that even in the absence of her evidence, the judge would have accepted the evidence of

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6 Transcript p 95, lines 44-46.
7 Reasons for Judgment, appeal book 116.
8 UCPR, r 698(1).
9 Statement of loss and damage, pp 3-5.

Ms Campbell and Dr White as to future economic loss. That evidence, even in the absence of Ms Knight's evidence, was sufficient to allow the judge to find as he did. The appellant has not satisfied me that the primary judge erred in the exercise of his discretion in declining to be persuaded that an order for costs other than indemnity costs was appropriate in the circumstances; those costs will, as required by the rules, be assessed on the District Court scale.[10]

[37] In the course of this appeal, it emerged that Ms Campbell's claimed costs in this matter, a straightforward, moderate one-day quantum case which should never have been brought in the Supreme Court of Queensland, are $30,764.95, comprising outlays, itemised professional costs and a 35 per cent "general care and conduct" component under the client agreement she signed with her solicitors. On the face of it, such fees are extraordinary, especially in the light of the imperfect conduct of the case in bringing the claim in the Supreme Court, in failing to disclose the material as required by the UCPR and in failing to remit the matter to the District Court, at least once the offer to settle had been made. These observations are not directly pertinent to the merits of the appeal, but as Fryberg and Mullins JJ raise in their joint reasons, this court may have the power to order that the respondent's solicitors not recover from the respondent any more than the amount of costs recoverable by the respondent from the appellant. I agree that the respondent's solicitors should be given the opportunity to file relevant submissions and affidavits on this issue within 14 days.

[38] I would allow the appeal and order that the judgment entered at first instance be set aside and instead order that the second defendant[11] pay to the plaintiff the amount of $62,557.40 and that the second defendant pay the plaintiff's costs of the action to be assessed on an indemnity basis on the District Court scale.

[39] Although the respondent was successful on only one of a number of issues raised on this appeal, in the circumstances I am satisfied that the appellant is entitled to its costs of the appeal to be assessed.

[40] I would also allow the respondent's solicitors 14 days to file submissions and affidavits relevant to the power of this court to make an order as to the costs recoverable by them from the respondent and as to the merits of any such order.

[41] **FRYBERG and MULLINS JJ:** The material facts are set out in the reasons for judgment of the President.

The domestic assistance claim

[42] The respondent was injured on 23 May 2000. She commenced her action in the Supreme Court on 5 March 2001. Her statement of claim is dated 2 March 2001, and was filed on the same day as the claim. In it she alleged that as a result of her injury, she "has required and may require in the future, nursing and domestic care". She did not plead that this requirement entitled her to any damages. On the contrary, the pleading tabulated the heads of damage for which damages were claimed and it contained no reference to nursing or domestic care. The claim as

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10 See fn 8.

11 Judgment should be entered only against the second defendant: *Motor Accident Insurance Act* 1994 (Qld), s 52(4).

tabulated totalled $287,449.05. The appellant admitted liability but denied that the respondent required nursing or domestic care.

[43] On 1 March 2001, before the claim was filed, the respondent signed a statement of loss and damage pursuant to r 547 of the *Uniform Civil Procedure Rules*. It is unclear when that document was served on the appellant. Presumably that was done within the 28 days allowed by the rules following the close of pleadings on 23 April 2001.[12] That statement contained no reference to nursing or domestic care.

[44] A request for trial date was filed on 20 September 2001 and the action came on for trial in Mackay on 29 November 2001. In the course of his opening counsel for the respondent said that her evidence was "largely reduced to a quantum statement", a document signed by her which he tendered. It was admissible under s 92 of the *Evidence Act 1977* on the basis that she would be called. The statement was dated 29 November 2001, which was presumably the date it was signed, but an endnote demonstrates that it was prepared on 19 November. Counsel for the appellant objected to paras 49-55 of the statement on the ground that they propounded a claim based on the need for domestic assistance. It is now apparent that only paras 49-51 and 55 propounded such a claim. Counsel for the respondent pressed the tender and argument ensued. It revolved around whether the evidence was to be excluded under r 548(4) of the *Uniform Civil Procedure Rules*. In the course of the argument it emerged that the respondent also intended to call evidence from Mr R G Gander on the same topic.

[45] After hearing argument from counsel for the respondent, the learned trial judge said to counsel for the appellant:

> "Well Mr Drew, the scope of the evidence seems to be very narrow. I mean what's the problem about - I mean if I directed proof of this evidence to be given, what's the problem about meeting a claim of this kind based upon that sort of very limited activity and given the relative smallness of the claim. What's wrong with meeting that?"

His Honour repeated that question a little later and it is clear from the context that he asked it in relation to the question whether he should give leave under r 548(4)(c). Counsel for the appellant maintained the objection that the evidence should not be allowed at that late stage. His Honour then gave the following ruling:

> "Well I must say very reluctantly, but given the narrowness of the claim, and its relative modesty, I propose to allow the claim to be advanced. I direct the defendant - the plaintiff to provide to the defendant a copy of - or a proof of the evidence of the plaintiff's partner which will be led in support of the claim."

[46] The respondent was the first witness. Her evidence in chief occupied about seven pages of the transcript. The last five questions were directed toward the question of domestic assistance. No separate objection was taken to them, perhaps not surprisingly in view of his Honour's ruling. Counsel for the appellant cross-examined the respondent on the topic at some length.

[47] Mr Gander was called during the course of the afternoon. By that time, the respondent's legal advisers had complied with the judge's direction in relation to his

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[12] As to the close of pleadings, see r 169.

proof of evidence. It emerged in cross-examination that he had provided the information for his evidence on 19 November, 10 days before the trial. Inferentially, that was the date on the proof of evidence.

Rule 548(4)

[48] The rule was in these terms:

> "(4) At the trial, the plaintiff may call or tender evidence not identified in the plaintiff's statement of loss and damage or not given to the defendant under this part only if—
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> (a) the evidence is called or tendered by consent; or
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> (b) the evidence is called or tendered in cross-examination; or
>
> (c) the court for special reason gives leave."

It has not been carefully drafted. It is not in terms a rule of exclusion of evidence, but that must be its intended effect. In terms it applies to all evidence not identified in the statement of loss and damage or not given to the defendant under the relevant part of the rules. It obviously cannot be applied literally, or a plaintiff would be prohibited from tendering evidence on liability. Presumably it must be implied that the rule has application only to evidence which was required by the rules to be either identified in the statement of loss and damage or given to the defendant. The next problem is that the rules creating such a requirement do not in terms apply to "evidence". Rule 547(3) requires the statement to have (not to "identify") "information" of various descriptions. Rule 548(1) requires it to "identify" certain documents and r 548(2) obliges the plaintiff to give the defendant copies of documents.[13] Presumably, r 548(4) is intended to refer to evidence of that information or of the contents of the documents, whether the evidence be itself in the form of testimony or documents.

[49] Did the evidence of the respondent and Mr Gander answer that description? Rule 547(3) had two paragraphs describing information which the statement of loss and damage was required to have. They were:

> "(d) details of any other amount sought as damages;
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> …
>
> (f) the documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss (including economic loss) or treatment."

Rule 548(1) had one paragraph describing documents required to be identified in the statement of loss and damage:

> "(e) any other documents about the plaintiff's claim for damages."

[50] It was not argued on behalf of the appellant that the respondent was in breach of either r 547 or r 548 when the statement of loss and damage was delivered. Such a proposition could not have been maintained because there was no evidence that at that time the respondent sought anything as damages for domestic assistance, nor that the "quantum statement" and the proof of evidence of Mr Gander existed.[14]

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13 This contrasts with r 549(3) which in terms requires the plaintiff to give the defendant the documents themselves. Query if it is to be interpreted literally.

14 The question whether the documents were in the possession or under the control of the respondent therefore did not arise. However another drafting anomaly may be noticed: such possession or control is required under r 547(3)(f), but not under r 548(1). Whether the latter requires a plaintiff

However, r 548(4) is in our judgment concerned with the position at the time of trial, not at the time of service of the statement. It is at the time of trial that the evidence referred to in that sub-rule must be "identified" in the statement. For these purposes "statement" must include any supplement to the statement served pursuant to r 549(2). There was no such supplement in this case, nor was there any evidence to suggest that the respondent had ever been under an obligation to serve one. The evidence suggests that the respondent did not decide to seek damages for domestic assistance until 10 days before the trial. Once that decision was made, the respondent should have confronted the difficulty posed by r 548(4): the rule permitted evidence of information in the form of details of this claim only if the statement of loss and damage had that information.

[51] The simplest action for the respondent to have taken would have been to have provided the appellant with copies of the "quantum statement" and Mr Gander's proof of evidence (at least in draft) and requested it to consent to the evidence being called or tendered notwithstanding its absence from the statement of loss and damage. By doing so, she would also have complied with her obligation under r 549(3)[15]. Such a request could have been accompanied by notice that in the event that consent was not forthcoming, an application would be made on the morning of the trial for leave to amend the statement to include the relevant details.[16] Alternatively the notice could have foreshadowed an application for leave under r 548(4)(c). In each case it would have been necessary for the respondent to have applied for leave to amend the statement of claim.[17] If either course had been followed, the appellant would not have been taken by surprise. Given the lateness of the application it probably would have mattered little which alternative was chosen. An application for leave to amend at such a late stage would have required powerful supporting evidence and imposed a burden not far short of showing "special reason".[18] Either application would have enabled attention to be focused on the need for the respondent to explain why the claim arose so late, why she had not complied with r 549(3) and the importance of the claim in the respondent's case; and would have afforded the appellant the opportunity to put forward evidence of any prejudice which granting the application might have caused. Both sides could have put forward any other relevant evidence in a considered way.

[52] But the respondent followed neither course. Her solicitors notified the solicitors for the appellant on the day before the trial that a claim for domestic assistance would be made, but withheld the evidence, sought no amendment of the statement of loss and damage, waited until there was an objection to the evidence and then sought an order under r 548(4)(c) without first applying to amend the statement of claim. They proffered no explanation for why the claim arose so late, nor did they explain their failure to comply with r 549(3). Even as the point was argued they withheld

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to identify documents not in his or her possession or under his or her control is a question which can await determination on another occasion.

15 The documents were "about the plaintiff's claim for damages" within the meaning of r 548(1)(e) as it then stood: *Parr v Bavarian Steakhouse Pty Ltd* [2001] 2 Qd R 196.

16 Rules 380, 375.

17 Rule 556.

18 Although even at a late stage, it is preferable for things to be done in accordance with the ordinary procedure (i.e. the details of a new claim to be included in the statement of loss and damage re-signed by the plaintiff) than for the rule to be dispensed with. An application for leave under r 548(4)(c) should show (among other things) why the leave should be given instead of requiring the plaintiff to amend the statement of loss and damage.

Mr Gander's statement. As a result the trial judge had no notice of the point and was forced to decide it in the context of a ruling on evidence "on the run". He was on circuit and was anxious to finish the case in the day assigned to it. It was not a situation where the trial could be adjourned for a few hours to enable consideration of the issues. Counsel for the appellant was booked to leave town on an evening plane. His reluctance to incur additional costs in respect of what was obviously a small claim was understandable.

[53] Unlike many decisions on the admissibility of evidence, a decision under r 548(4)(c) involves an exercise of discretion. "Special reason" is not a term of art; it carries no received technical connotations. What is special may be influenced by the context and flavour of the trial, a matter which the trial judge is in a particularly favourable position to assess. We are extremely reluctant to interfere in decisions involving an exercise of such a discretion. However we have come to the conclusion, reluctantly, that in this case the decision made by the judge was simply not open to him. The facts that a claim is narrow and modest could not by themselves constitute special reason within the meaning of the rule. A direction for the respondent to deliver a copy of Mr Gander's proof of evidence could not change that, particularly in circumstances where the direction added nothing to the respondent's existing obligation under r 549(3). The decision cannot stand.

[54] It was not suggested that if the Court overturned that decision, it should not re-exercise the discretion itself. Mr McMeekin SC submitted that the following constituted special reasons for allowing the evidence to be called and tendered:

(a) the head of damage was pleaded;
(b) no particulars of the head of damage had been sought by the appellant;
(c) the head of damage had been mentioned at a without prejudice conference, i.e. the appellant knew it was being claimed;
(d) the appellant did not suggest that it required an adjournment;
(e) there was no apparent injustice to the appellant in allowing the respondent to proceed;
(f) there would be considerable injustice to the respondent in depriving her of a legitimate head of loss.

[55] This submission may be disposed of shortly:

(a) It is not in our view accurate to say that the head of damage was pleaded. The respondent pleaded that she had required and may require domestic care in the future as a result of the injury. However she pleaded no consequence of this allegation of fact. In particular, in the following paragraph, where her statement of claim listed the heads of damage under which she claimed, the column headed "HEAD OF DAMAGE" contained no reference to domestic care.
(b) In these circumstances it was hardly significant that the appellant sought no particulars of the requirement for domestic care. It may well have reached the conclusion that the reference to nursing and domestic care occurred because the paragraph was a standard paragraph inserted by a word processor, from which no one had bothered to delete the irrelevant portions.
(c) The claim that the matter had been disclosed at a "without prejudice" conference was simply an assertion made to the judge below by counsel for the respondent from the bar table. The date of the

conference and the terms of what was said were unstated. Had there been any substance in this point, evidence should have been led. Its absence demonstrates one of the difficulties of proceeding in the manner selected by the respondent and deprives the submission of any weight.

(d) and (e) The fact that the appellant did not apply for an adjournment might indicate no more than that it felt that an adjournment would cause it even greater prejudice than continuing. Adjournments necessarily cause parties prejudice. Only sometimes is it balanced by orders for costs or otherwise.

(f) In the circumstances it is impossible to measure whether refusing to allow the claim would cause the respondent considerable injustice. It is perfectly conceivable that the respondent's conduct was such that justice required the disallowance of the claim. There is also a tension between this submission and the submission made to the judge below that the claim was not a large issue at the trial, a submission which led to the judge's reference to its "relative modesty".

These factors do not, individually or collectively, constitute special reason within the meaning of the rule.

[56] It follows that evidence of the claim for domestic assistance should have been excluded. Consequently, there was no basis for including an amount under this head in the respondent's damages.

The evidence of Ms Knight

[57] The respondent called oral evidence from Ms Knight, a co-employee who knew the respondent before her accident. She gave evidence relating to the nature of the respondent's duties at the supermarket where they were both employed and her observations of the respondent in carrying out those duties. That evidence related directly to the respondent's claim for damages for loss of earning capacity and indirectly to her claim for pain and suffering and loss of amenities, both of which were referred to in the statement of loss and damage. It also corroborated the evidence of the respondent and thereby enhanced her credibility.

[58] Those claims had always been part of the respondent's case. However the respondent's solicitors never provided the appellant with a copy of Ms Knight's proof of evidence and it was not identified in the statement of loss and damage. It is quite conceivable that it did not exist when that statement was served and that it did not come into existence between then and the setting of the trial date. There is therefore no basis for concluding that its omission from the statement constituted a breach of the *Uniform Civil Procedure Rules*. However even if there were no such breach, the respondent was in breach of r 549(3). That rule required the respondent to give any further documents mentioned in r 548(1) to the appellant as soon as practicable. The latter rule included "(e) any other documents about the plaintiff's claim for damages". Ms Knight's proof of evidence fell within that description. The trial judge drew this to the attention of counsel for the respondent during his opening. Counsel submitted that the witnesses' statement was not covered. Counsel for the appellant then said:

> "MR DREW: Your Honour, I am not in a position - I have no idea - the first time I've ever heard of Ms Knight. I don't know what she is going to say. I may object to what she's got to say."

His Honour then required counsel for the respondent to finish opening Ms Knight's evidence. Then he commented, "Well, it sounds to me as though it shouldn't be an insurmountable obstacle, Mr Drew." The opening then continued.

[59] Later in the day counsel for the respondent called Ms Knight. The following exchange then took place:

> "MR DREW: I've had no proof of evidence from this witness, your Honour.
> HIS HONOUR: Well -----
> MR CROW: Your Honour, I can't provide one now. I thought the only direction was to provide Mr Gander's evidence, and that's been done.
> HIS HONOUR: Well I suppose that was specific - I think this is within the rules, but well we're here now and we'll do what we can."

[60] It is clear from Mr Drew's statement during the respondent's opening, that no objection was taken to Ms Knight's evidence at that point. When Ms Knight was called Mr Drew complained that he had no proof of her evidence. It was by then after 3.30 pm. When Mr Crow announced that he could not then provide one, Mr Drew was in a difficult position. To have pressed for a copy might have resulted in an adjournment to enable the copy to be procured; and time was pressing. On the other hand he had not sought a direction for delivery of the proof when the evidence was opened and by reason of the opening, he knew in broad terms what Ms Knight was going to say. It is true that his Honour gave his ruling without inviting further submissions from Mr Drew, but counsel was not disabled from making an objection under r 548(4). It seems to us that he chose not to do so having regard to the exigencies of the trial.

[61] We would not construe that decision as consent to the calling of Ms Knight's evidence. However r 548(4) is a rule of evidence. Notwithstanding the prohibition which it contains, if a party in breach of the rule calls evidence of the type described in it without objection, the breach cannot found an appeal. Once the evidence was admitted it was open to the judge to use it in making his assessment of damages.

General damages

[62] We agree with the President that it was open to the learned trial judge to prefer the opinion of Dr White to that of Dr Toft when determining the effects and future prognosis of the respondent's injuries. On the basis of that medical evidence and that his Honour (perhaps generously) accepted the respondent's evidence about her suffering after the accident, the award for general damages of $27,500 is not grossly disproportionate.

Future economic loss

[63] The appellant challenges the assessment of the respondent's future economic loss at $30,000 and loss of future superannuation entitlements at $2,400 on the basis that the assessment was manifestly excessive, as the respondent did not lead evidence to the appropriate standard of proof that she would suffer any significant future

economic loss. It is apparent from his Honour's reasons that the assessment of $30,000 was global. It took into account the respondent's age and lack of training and qualifications and the evidence which his Honour accepted about the likelihood of her suffering a permanent impairment which would make her unsuitable for work involving heavy physical labour, prolonged standing, prolonged sitting, lifting, bending or maintenance of the head and neck in fixed positions for extended periods of time.

[64] The respondent gave evidence of her limitations since the accident in carrying out the heavier duties of her employment and was supported in this by the evidence of her fellow employee Ms Knight. The respondent was absent from work after the accident for two days only and had suffered no other economic loss prior to the trial.

[65] It cannot fairly be said that the respondent did not lead evidence relevant to her future economic loss. The issue raised by this aspect of the appeal is whether the evidence that his Honour did accept relating to future economic loss could justify a global assessment of $30,000. That sum could not be described as a nominal sum, but his Honour was intending by his reasons to award the respondent more than a nominal sum. His Honour was satisfied that there was a diminution in the respondent's future earning capacity, even though she had continued working after the accident until the trial.

[66] Although we consider that the award of $30,000 for future economic loss for the respondent is higher than we would have awarded, even on the basis of the evidence accepted by his Honour, we cannot conclude that the award was wholly unreasonable.

Costs on the indemnity basis?

[67] On 25 July 2001 the respondent offered pursuant to the *Uniform Civil Procedure Rules*[19] to settle her claim for $40,000 plus costs and outlays to be assessed on the standard basis on the Magistrates Court scale. That offer was not accepted and it lapsed after 14 days. Both at first instance and on appeal she will have obtained a judgment no less favourable than that offer. Unless the appellant shows that another order for costs is appropriate in the circumstances, the Court must order it to pay her costs up to judgment calculated on the indemnity basis.

[68] At the time of the offer the respondent was claiming $200,000 for future economic loss. The appellant was entitled to conclude on the face of the statement of loss and damage that this claim was ridiculous. The fact that it was made reflected on the respondent's bona fides, and the appellant was entitled to take that into account. The statement detailed the disabilities which the respondent alleged, but there was no corroboration of them by way of statements from friends or workmates or from her boyfriend Mr Gander, with whom she cohabited. She alleged that she suffered injury to her lower back, but she had not immediately made complaints about her lower back. She alleged that she was unfit for work involving heavy physical labour and required assistance at work in order to perform heavy lifting. However there was no intimation that this need was to be corroborated by a workmate, and there was no claim that she needed assistance for heavy tasks at home. (The trial

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19 Rule 360.

judge ultimately relied on Ms Knight's description of the work to find some of it was "heavy".) It was against that background that the appellant had to assess the respondent's offer. Plainly the respondent's credibility was going to be in issue. It is scarcely any wonder that the offer was allowed to lapse.

[69] From the appellant's point of view, the outlook for the respondent's claim for loss of earning capacity remained bleak up to the day of trial. Then things changed radically. Ms Knight and Mr Gander gave direct evidence of the respondent's disabilities, Mr Gander described her need for assistance at home and Ms Knight described her work and her need for assistance with it. The evidence of Ms Knight and Mr Gander was particularly important. Not only did it support the respondent's action, it also reinforced her credibility. Had they not been called it is unlikely that the trial judge would have accepted her evidence to the extent that he did, particularly having regard to the videotape evidence tendered by the appellant. Had her evidence not been accepted to the extent that it was, the amounts awarded for both loss of earning capacity and for pain and suffering and loss of amenities would probably have been considerably less.

[70] There is no apparent reason why statements from Ms Knight and Mr Gander should not have been available at the time the statement of loss and damage was delivered. They should certainly have been available before the request for trial date was filed on 20 September 2001. The respondent's solicitors do not appear to have appreciated that they were entitled to sign the request only if the respondent was "ready for trial" as defined in r 469(5). She was ready for trial only if all her necessary witnesses were going to be available. In fact Ms Knight was not approached to give evidence until three or four weeks before the trial. Everything points to the probability that proper consideration was not given to the case before the request was signed. Members of the profession should realise that r 469 requires preparation for trial to take place *before* a request is signed. As a general rule the responsible solicitor should obtain an advice on evidence from counsel or prepare his own "advice" (if he has the necessary skill and experience in litigation), and implement the advice before signing the request. A solicitor who fails to obtain or prepare such an advice is exposed to the risk of paying any costs thrown away or worse, paying damages for negligence.

[71] In the present case the relevant statements were withheld from the appellant even after they were obtained by the respondent. By the time they were obtained it was too late for the appellant to accept the respondent's offer to settle, but it was not too late for it to make an offer of its own, even one in identical terms. It was entitled to have the material necessary to enable it to make an informed decision as to whether it should make such an offer and if so, for how much. The respondent's conduct deprived it of the opportunity to make such a decision and caused the other embarrassments already described. That is a relevant consideration in determining whether the respondent should have her costs on any indemnity basis.

[72] There is a further matter relevant to that question. This action should never have been commenced in the Supreme Court. On the face of the statement of loss and damage there was no possibility of the respondent's recovering an award in excess of the jurisdiction of the District Court. There was every chance that the award would not exceed the jurisdiction of the Magistrates Court, as the offer to settle showed. This was not a case where it emerged only after the action was commenced that it could have been brought in the District Court. The statement of

loss and damage was signed before the claim was filed. No evidence was put before us to explain the commencement of the action in the Supreme Court and no justification of that course was advanced in argument. We have not been told precisely what professional costs the appellant has incurred, but there is every possibility that they are more than they would have been had the action been one in the District Court. That is unfair.

[73] For these reasons we have reached the conclusion that the appropriate order for costs in the circumstances of this case is that the second defendant should pay the plaintiff's costs of the action on the standard basis. By operation of the rules they will be assessed as if the proceeding had been started in the District Court.[20]

The respondent's costs as between solicitor and client

[74] The evidence is that the total amount charged by the respondent's solicitors for costs and outlays is $30,764.95. Of this, $19,013.22 is for the solicitor's own costs exclusive of GST, which was treated as an outlay.[21] When GST is included the amount is presumably of the order of $20,900.00. On 31 July 2000 the respondent signed a client agreement with her solicitors. Clause 1 of that agreement was as follows:

> "1. The work
>
> Pursuant to the information and instructions provided by the Client, the Firm will perform the following work:-
>
> Investigate claim for damages for personal injuries - Motor Vehicle Accident."

[75] It seems that no subsequent costs agreement was made expressly to cover the event of litigation. That may mean that the maximum amount of fees and costs which the firm may charge and recover from the respondent is the amount calculated in accordance with the scale of costs for the District Court under r 690(2).[22] On the other hand it may be that the agreement should be interpreted to cover litigation in respect of the claim. By cl 6 of the agreement the firm estimated the total of its costs and outlays to complete the work at between $5,000.00 and $15,000.00 "depending upon whether the Defendant admits liability and negotiates a settlement of the claim or contests both liability and quantum." The amounts and the language suggest that litigation was envisaged. For the moment we shall assume that the latter interpretation is correct.

[76] Clause 3 of the agreement set out a scale of costs which the solicitors would charge. Generally speaking the item charges are substantially higher than the corresponding amounts allowed as between party and party on the District Court scale. Indeed counsel for the respondent informed the court that he suspected that the scale was at an item rate which was higher than the Supreme Court scale of costs. That clause further provided:

> "In addition to the item charges the firm is entitled to charge a general care and conduct component at the rate up to but no more

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20 Rule 698(3).

21 It is unnecessary for us to consider whether it is correct for solicitors to treat GST in this way.

22 *Queensland Law Society Act 1952*, s 48I.

than 35% based on the total itemised professional costs taking into account the following matters:-

- ☐ the complexity of the matter, difficulty or novelty of the issues raised or any of them
- ☐ the importance of the matter to the party
- ☐ the interest of the parties
- ☐ the amount of money involved
- ☐ the skill, labour, specialised knowledge and responsibility involved therein on the part of the Solicitor
- ☐ the number and importance of the documents prepared or perused without regard to length
- ☐ the time expended by the Solicitor
- ☐ research and consideration of questions of law and fact
- ☐ efforts by Solicitor to expedite the matter or to ensure that Court proceedings are avoided by skilful negotiations or any other relative matters not set out in the scale, which should be reflected in the Solicitors professional costs
- ☐ general care and conduct of the proceedings including administration of the file."

In a tax invoice dated 30 November 2001 and addressed to the respondent, care and consideration has been charged to the respondent at 35%. How the maximum charge is justified for this item having regard to the listed criteria is not a matter which was addressed in the appeal.

[77] Where does this leave the respondent? She has been or may be sent bills for more than $30,000 for a simple, one day personal injuries action in which the amount recovered is $62,557.40. When she signed the client agreement, the total of costs and outlays was estimated by the solicitors at maximum of $15,000, and that included investigation of the claim. Much of the $30,000 she will not recover from the appellant when party and party costs are assessed. Her failure to recover costs on an indemnity basis is the result of her non-compliance with the rules, but that may or may not be due to her personal default. The circumstances call for further investigation.

[78] What should be done? During the hearing counsel for the respondent asked that the solicitors be given the opportunity to consider if they wish to be heard in the event that any adverse comment might be made about them. The possibility has now arisen that the Court might comment adversely about the foregoing circumstances and might order that the solicitors not recover from the respondent more than the amount of costs recoverable by the respondent from the appellant.[23] They should have an opportunity to file any submissions and affidavits relating to those circumstances and possible order. They should be filed within 14 days.

The first defendant

[79] The respondent concedes that she cannot retain the judgment entered against the first defendant at the end of the trial judge's ex tempore reasons for judgment. Counsel ought to have drawn his Honour's attention to the relevant legislative prohibition.[24]

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23 The Court would seem to have jurisdiction to make such an order: *Myers v Elman* [1940] AC 282; *Knight v F. P. Special Assets Ltd* (1992) 174 CLR 178.

24 *Motor Accident Insurance Act 1994*, s 52(4).

Orders

[80] The orders of the Court should be:

Appeal allowed. Set aside the judgment of the Trial Division. In lieu enter judgment that the second defendant pay to the plaintiff the amount of $62,557.40 and her costs of the proceeding to be assessed. Order the respondent to pay the appellant's costs of the appeal to be assessed. Grant leave for the solicitors for the respondent to file submissions and/or affidavits in accordance with the reasons for judgment of Fryberg and Mullins JJ as they may be advised within 14 days. Adjourn the question of any order in relation to those solicitors for further consideration.