

# DISTRICT COURT OF QUEENSLAND

CITATION: *Evans v Williams & Anor* [2018] QDC 210

PARTIES: **MARIE MIRELA DANIELLE EVANS**  
(plaintiff)

**v**

**SUE WILLIAMS**  
(first defendant)

and

**ALLIANZ AUSTRALIA INSURANCE LIMITED**  
**ABN 15 000 122 850**  
(second defendant)

FILE NO/S: BD 3922/17

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: Brisbane

DELIVERED ON: 19 October 2018

DELIVERED AT: Brisbane

HEARING DATE: 4 and 5 October 2018

JUDGE: Jarro DCJ

ORDER: **Judgment for the plaintiff in the amount of \$42,364.27.**

CATCHWORDS: DAMAGES – Personal injuries – Quantum – Where the plaintiff was injured in a car accident – Liability admitted – Dispute as the consequence of the injuries caused by the car accident – Whether the plaintiff has suffered or will suffer loss of earnings as a result of the accident caused injuries

COUNSEL: RA Myers for the plaintiff  
RC Morton for the defendants

SOLICITORS: Shine Lawyers for the plaintiff  
McInnes Wilson Lawyers for the defendants

- [1] On 24 September 2015 then 51 year old kitchenhand, Ms Marie Evans, was injured in a motor vehicle accident at the intersection of William Berry Drive and Morayfield Road, Caboolture South. As Ms Evans was attempting to turn right at the intersection, the first defendant, who was travelling in the opposite direction and covered by a policy of insurance with the second defendant, failed to give way and collided with the front right hand side of the vehicle being driven by Ms Evans.

- [2] Ms Evans claims to have suffered a musculo-ligamentous lumbar spine injury, bilateral hip injuries and a psychiatric injury as a consequence of the motor vehicle accident. The defendants dispute the nature and extent of Ms Evans' claimed injuries. Liability for the accident has otherwise been admitted.
- [3] Ms Evans was born in Mauritius, educated to grade 11 and came to Australia in 1986. She comes from a family of 11 children. Ms Evans has occupied a number of jobs throughout her working life in Mauritius and Australia and it was only when her children (who are now aged 32, 29 and 24) were growing up that she was unable to maintain steady employment. Her youngest child has Asperger's syndrome. Ms Evans lost her second husband from cancer about 9 years ago.
- [4] Following the motor vehicle accident, Ms Evans returned to work the next day. She called in sick the following day because her pain "*was getting really bad*".<sup>1</sup> She described pain increasing following the accident and that it had "*pretty much remained the same since*". There has been no time following the accident when she had felt "*completely free of pain*".<sup>2</sup> She rated her pain as "*three out of ten*" as a base line, but described experiencing "*ten out of ten*" pain approximately every fortnight.<sup>3</sup> Despite this level of pain, Ms Evans did not seek medical assistance until some considerable time after the motor vehicle accident and has not sought physiotherapy or chiropractic treatment.<sup>4</sup>
- [5] Ms Evans' first attendance upon a medical practitioner occurred on 4 March 2016 when she saw General Practitioner Dr Ihsaan Peer (Medicross Rochedale) about problems with her left ear. There is no documented reference on that occasion to any complaints of back or hip pain or to the car accident.<sup>5</sup>
- [6] Ms Evans said that she did not tell her then employer (RSL Care) about the motor vehicle accident for fear of losing her job. She did not mention any concerns regarding any symptomatology arising from the motor vehicle accident for fear that her employment with the organisation (and subsequent employers) would be in jeopardy.<sup>6</sup> She said she could manage her duties "*but on a slower pace*".<sup>7</sup> After the accident, she adjusted her hours. For example she would start work early in order to commence meal preparation – sometimes she would commence work at 3:45am or 4:30am for a 6:00am start; sometimes she would "*finish a little later*".<sup>8</sup>
- [7] Ms Evans accepted that following the motor vehicle accident, but just before her resignation with RSL Care, she completed a 76 hour fortnight (13 April 2016 – 26 April 2016).
- [8] On 28 April 2016 Ms Evans resigned from her employment.<sup>9</sup> Her resignation letter stated as follows:

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<sup>1</sup> T1-21.46.

<sup>2</sup> T1-35.40.

<sup>3</sup> T1-35.43 – T1-36.5.

<sup>4</sup> T1-41.10 – T1-41.17.

<sup>5</sup> Exhibit 1, page 59.

<sup>6</sup> See for example T1-42.18, T1-44.11 and T1-45.25.

<sup>7</sup> T1-22.10.

<sup>8</sup> T1-22.20 – T1-22.27.

<sup>9</sup> Exhibit 1, page 175.

*“I’d like to thank you for the opportunity to work with RSL Care for the last few months.*

*But it is with regrets that I had to hand in my resignation due to having to start work at 4:30 AM for a 6 AM start.*

*I am not the only staff member putting in extra hours for free.*

*Other staff members are very hesitant to mention this for fear of losing their jobs and this happens on a regular basis.*

*The time allotted for the task is not sufficient without being under duress and which creates a stressful work environment not only for the staffs and this impact on the services we provide to the residents.*

*It has been a pleasure to work with you and meet great peoples.”*

- [9] No mention was made to any issues regarding her back or hip.
- [10] Ms Evans first sought medical treatment for lower back pain on 13 May 2016, some seven and a half months after the accident. On that occasion she attended upon General Practitioner Dr Fara Wilson (Medicross Rochedale).<sup>10</sup> Dr Wilson was unable to recall the specific consultation. Among other things, Dr Wilson’s contemporaneous note records the following:

*“Kitchen worker – early starts and long days on her feet all day  
Quit job last week as was fed up  
3days ago developed low back pain – initially left buttock, then more  
central lumbar region  
No preceding trauma  
...  
Imp: mechanical back pain.  
...  
Reason for visit:  
Low back pain”*

- [11] Dr Wilson gave evidence that her usual practice was to record the entry into the computer system after a consultation from notes which were taken during the consultation with a patient. When asked in cross-examination whether Dr Wilson recalled any difficulties in communication with her patient at the time, Dr Wilson denied it. She could not recall whether or not Ms Evans was of foreign extraction.
- [12] Ms Evans’ next attendance upon a medical practitioner occurred on 8 June 2016 when she attended upon General Practitioner Dr Lourens Steenberg (Medicross Rochedale).<sup>11</sup> Dr Steenberg had no recollection of the actual consultation and was required to consider the notes he took on the day of the consultation. He, similarly, had no recollection of the consultation that took place with Ms Evans the following day on 9 June 2016. Dr Steenberg indicated that his usual practice was to record the

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<sup>10</sup> Exhibit 1, page 60.

<sup>11</sup> Exhibit 1, pages 60 - 61.

notes simultaneously during the consultation onto the computer system for Medicross Rochedale. Relevantly on 8 June 2016, his notes record:

*“Subjective: C/O lower back pain and left hip pain at times for last year or so. Had to quit her work*

*...*

*Reason for visit:*

*Back pain, lumbo-sacral*

*...*

*Actions:*

*....*

*lower back pain X 1year. Did heavy lifting for a long time...”*

- [13] There is no specific reference to a motor vehicle accident. Instead the note of 8 June 2016 reveals what is described as lower back pain for about one year and Ms Evans *“did heavy lifting for a long time”*. Ms Evans was sent for an x-ray and returned the following day. The x-ray *“showed some minor spurs”*. A referral for physiotherapy was given.<sup>12</sup>
- [14] Ms Evans saw her solicitors on 8 September 2016. On 13 September 2016, she attended upon Dr Peer whose notes link her lower back pain and the motor vehicle accident.
- [15] Following her resignation from RSL Care, Ms Evans worked for a period of time as a tea lady for the Logan City Council. She found pushing the tea trolley difficult given the trolley would need to be pushed over carpet.<sup>13</sup> The role was made redundant on 26 April 2017.<sup>14</sup> Thereafter Ms Evans worked for Logan City Council in the disaster recovery services section, answering telephones in the wake of Cyclone Debbie. She did not find this work physically taxing given she could stand, sit and change desks.<sup>15</sup> This, however, was a short-term role.
- [16] Ms Evans was then on Centrelink benefits for a small period of time before commencing with her current employer on 4 December 2017. She is now a support worker with the disability support organisation known as Homelife and assists people with disabilities – for example Ms Evans attends to showering them; preparing morning meals for the clients of the service; getting them dressed; and assisting some with their medication. She does *“day to day things in life they can’t do”*. She described difficulty in performing physiotherapy for one particular client of the service. Hoisting is required at times.<sup>16</sup>
- [17] Ms Evans has self-modified her duties and has a sympathetic employer who only became aware of the motor vehicle accident after the employer was approached by the solicitors for Ms Evans.
- [18] Regarding the psychological consequences following the motor vehicle accident, Ms Evans described herself as a once happy person and now things have changed. She said she no longer wants to associate with others and she feels as though she is

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<sup>12</sup> Exhibit 1, page 61.

<sup>13</sup> T1-23.

<sup>14</sup> T1-23.

<sup>15</sup> T1-24.5.

<sup>16</sup> See generally T1-24 – T1-25.

*“the wet blanket”*.<sup>17</sup> Her pre-accident interests included: painting; dancing; tenpin bowling; and salsa teaching. Now, due to the accident and her *“excruciating pain”*, she is unable to wear heels.<sup>18</sup>

- [19] Ms Evans conceded that between the date of the accident and 4 March 2016, she did not seek any medical treatment.<sup>19</sup> She explained the reasons for this were that she *“didn’t like going to doctors”*, *“taking medication”*, or *“having needles”*.<sup>20</sup> I reject that explanation on the basis of the cross-examination of Ms Evans by Mr Morton of counsel, who appeared for the defendants, revealing that Ms Evans attended medical practitioners from as early as 2002 for what I consider to be relatively minor ailments and blood tests.<sup>21</sup> This evidence, which I prefer, causes me to doubt the reliability of some of Ms Evan’s evidence regarding her injuries and the sequelae arising from the motor vehicle accident. It begs the question: why didn’t Ms Evans see medical practitioners in the immediate aftermath of the accident? Ms Evans’ evidence, in addition to a dislike of going to the doctors, taking medication or having needles, was that she did not seek treatment in order to *“maintain her job”*. However I do not accept the veracity of that claim in light of the overwhelming medical entries which predate the motor vehicle accident and indeed the negligible ones sometime after the accident. It begs another question: why would she seek medical treatment for relatively minor issues if she thought she would jeopardise her employment and future employment prospects?
- [20] In fact it was not until after Ms Evans saw her solicitors on 8 September 2016, that there is a record demonstrating a potential causal link in the medical entries between her symptoms of back pain and the motor vehicle accident.<sup>22</sup> Additionally the entries following the motor vehicle accident, to me, do not accord with someone experiencing intensity of pain in the region of *“ten out of ten”* every few weeks following the accident.
- [21] As such, whilst I do not reject the entirety of Ms Evans’ claims, I doubt the reliability of some of her evidence regarding the extent of her accident related injuries and the sequelae arising from it. Notably it is the lack of contemporaneous medical reporting; Ms Evans’ lack of reporting to her then employer (RSL Care) about complaints of pain following the accident (notwithstanding her apparent reason for not doing so); and her resignation letter not identifying any accident related complaints, all against a backdrop where, not too infrequently, Ms Evans rated her pain at *“ten out of ten”*.
- [22] Furthermore, I consider these difficulties in Ms Evans’ evidence cannot be bolstered by the lay witnesses called on her behalf, who, in various forms, describe their own unique observations of Ms Evans pre and post-accident. In this regard, Mr Morton highlighted the statement made by Gotterson JA (with whom Dalton and Burns JJ agreed) in *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2016] QCA 247 at [57] (footnote omitted) that:

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<sup>17</sup> T1-26.31.

<sup>18</sup> T1-27.10 – T1-27.23.

<sup>19</sup> T1-41.16.

<sup>20</sup> T1-48.5 – T1-48.47.

<sup>21</sup> See for example T1-41.22 – T1-42.36; T1-46.18 – T1-48.18; and T1-66.1 – T1-78.26. See also and generally Exhibit 1, pages 139 – 171.

<sup>22</sup> See for example the entry on 13 September 2016 at exhibit 1, page 61. There is no reference to any alleged bilateral hip pain.

“This submission employs the assumption that because an event occurs after another, that event must have been caused by the other. Reasoning on the basis of such an assumption, as the appellant does here, is flawed in logic. The flaw is deepened when the reasoning is sought to be used to exclude any other preceding event from having had a causal relationship with the event which occurs later in time.”

- [23] Ms Marie Summers is Ms Evans’ eldest sister. She came to Australia from Mauritius in about November 2009. Ms Summers indicated that two to three days after the accident, she received a telephone call from Ms Evans who told her that she had been involved in a motor vehicle accident and was “*suffering*”.<sup>23</sup> Ms Summers helped her sister after the accident. Ms Summers said that prior to the accident her sister was “*a very happy woman, joking, laughing, ready to help do things*” but now she has “*change[d] a lot*”.<sup>24</sup> Ms Summers has observed Ms Evans’ standards decline following the accident.
- [24] Another of Ms Evans’ sisters, Ms Jenny Rose, gave evidence. Ms Rose is the director of a disability support service company known as Goldborough House. She, like her sisters, was born in Mauritius. She came to Australia in 1979 and has been employed in the health industry for a significant period of time. She said that Ms Evans, when she first came to Australia, initially moved in with her. She was a “*very sociable, hardworking, happy person*”.<sup>25</sup> For a period of time in the mid 90s, Ms Evans worked for Ms Rose who, at the time, ran a restaurant in Caboolture. Ms Evans was employed as a waitress/kitchen hand. Ms Rose described her sister’s work ethic as “*good*”.<sup>26</sup> Ms Evans has not worked for Ms Rose since then. Ms Rose gave evidence that she would not be inclined to employ her sister in her current condition given disability support service clients can, at times, be “*aggressive*” and the work is classified as “*heavy work*”. She explained that her sister “*is a risk for me...because she would have to lift sometimes and, you know, with her condition I don’t think she can*”.<sup>27</sup>
- [25] Ms Rose recalled the motor vehicle accident back in 2014.<sup>28</sup> She saw Ms Evans two days after the accident.<sup>29</sup> Ms Evans was “*in tears*” and said to Ms Rose that she “*wasn’t sleeping*”. She indicated that Ms Evans complained of a “*sore back – lower sore back and things like that*”.<sup>30</sup> She had to massage and support Ms Evans. Ms Rose said her sister is now “*very anti-social*”.<sup>31</sup>
- [26] On an occasion when Ms Evans was still employed with RSL Care, Ms Rose indicated that she saw her sister “*doubled up in pain*” after working, but she is “*very stubborn*” and “*very determined*”.<sup>32</sup> Since the accident, Ms Evans has been complaining of a sore back.<sup>33</sup>

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<sup>23</sup> T1-83.44.

<sup>24</sup> T1-84.25 – T1-84.38.

<sup>25</sup> T2-6.39.

<sup>26</sup> T2-6.45.

<sup>27</sup> T2-7.22 – T2-7.30.

<sup>28</sup> The accident occurred in 2015.

<sup>29</sup> T2-8.3.

<sup>30</sup> T2-7.34.

<sup>31</sup> T2-8.43.

<sup>32</sup> T2-9.47 – T2-10.3.

<sup>33</sup> See T2-7.32 ff.

- [27] Ms Evans would house sit for a Mr Murray Callaway from about January 2015. Mr Callaway's then work commitments meant that he was travelling a lot and he needed someone to look after his house whilst he was away.<sup>34</sup> He recalled on the day of the accident getting a phone call as he was in Melbourne about to return back to Brisbane. He was collected from the Brisbane airport by Ms Evans (who was en route in Mr Callaway's car to collect him when the accident occurred) and described Ms Evans' condition as "*very shaken*".<sup>35</sup> He said she was "*very apologetic*" and worried about the accident having caused damage to Mr Callaway's car. He said that she was complaining about soreness in the first couple of days.<sup>36</sup> About three days after the incident, he observed she was "*finding it difficult to stand up*" and he thought it was "*more muscular than anything, like, long term*".<sup>37</sup> Mr Callaway said: "*[a]nd again it was minor. It was just little tiny things. It didn't really take a major notice in my head at the time, but they gradually got worse and worse and worse and worse.*"<sup>38</sup>
- [28] The house sitting arrangements came to an end in about August/September 2017 given Mr Callaway was spending more time in Queensland. Mr Callaway's observations of Ms Evans were that prior to the accident, Ms Evans did everything around the house with energy, which included mopping, cleaning, gardening and cooking, but after the accident although she still performed it, Ms Evans was no longer energetic.<sup>39</sup> He observed that she was struggling and described her being about five to ten times slower with the household activities.<sup>40</sup> Mr Callaway produced photographs of a garden which was created by Ms Evans at around the time of the accident. Photographs were also produced following the accident suggestive that the gardening no longer being maintained due to Ms Evans' inability to do so.<sup>41</sup>
- [29] Ms Evans' current employer is Homelife. Homelife's Manager Ms Margaret Vermeij-Irvin gave evidence that Ms Evans was offered a support worker role in early December 2017. She described Ms Evans as "*a loyal [and] good employee*" who "*has a fantastic work ethic*".<sup>42</sup> She said that Ms Evans "*fills in, covers when she is able*".<sup>43</sup> Ms Vermeij-Irvin knew nothing of the motor vehicle accident until she received a phone call from the solicitors for Ms Evans. She said Ms Evans "*is very careful in her movement, almost guarded in her movement*".<sup>44</sup> Homelife has a no lift policy.<sup>45</sup> There was a recent probation review completed on Ms Evans, that described her in "*glowing terms*".<sup>46</sup>

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<sup>34</sup> T2-13.20.

<sup>35</sup> T2-13.36. The damage sustained to Mr Callaway's car required Ms Evans to obtain alternative transportation through a close relative so that Mr Callaway could be collected from the airport.

<sup>36</sup> T2-13.3.

<sup>37</sup> See for instance T2-14.5 – T2-14.16.

<sup>38</sup> T2-14.17 – T2-14.19.

<sup>39</sup> T2-16.41.

<sup>40</sup> T2-16.30

<sup>41</sup> Exhibit 4.

<sup>42</sup> T1-95.32 – T1-95.34.

<sup>43</sup> T1-95.35.

<sup>44</sup> T1-97.26.

<sup>45</sup> T1-96.11.

<sup>46</sup> T1-100.31. See also Exhibit 1, pages 266 – 271.

- [30] Expert evidence was received by Orthopaedic Specialists Drs Shaw and Boys and Psychiatrists Dr De Leacy and Professor Whiteford. Their respective expert opinions were not all that far apart.
- [31] I will deal first with the orthopaedic evidence.
- [32] Dr Shaw provided two reports dated 23 May 2017 and 19 September 2018. His opinion was that the injuries sustained in the motor vehicle accident were:
- (a) musculoligamentous lumbar spine injury aggravating mild lumbar spondylosis; and,
  - (b) left hip injury with posterosuperior labral tear.
- [33] Dr Shaw assessed Ms Evans as suffering a whole person permanent impairment of 11% - being 5% due to the lumbar spine under DRE lumbar category II and a 6% whole person impairment to the left hip under Table 17-3 of the AMA5 Guides.
- [34] Dr Shaw accepted the proposition that if in truth the back and hip pain arose nine months after the motor vehicle accident, it was “*very, very unlikely*” that the pain was linked to the accident.<sup>47</sup>
- [35] Dr Boys’ evidence was that when he saw Ms Evans on 3 July 2017, she relayed to him discomfort across the lower back, commencing the night after the motor vehicle accident. Thereafter this symptomatology continued and had not settled. In those circumstances he formed the view, on balance, that Ms Evans could be reasonably assessed as suffering the effects of a soft tissue injury at the lumbar spine (with aggravation of age-related degenerative change) as a consequence of the motor vehicle accident. At that point in time, his opinion was based upon:
- (a) a continuum of symptomatology in her central lower back from the time of the accident to the time she saw him; and,
  - (b) an absence of any pre-existing symptomatic condition.
- [36] Dr Boys’ assessed the lumbar spine injury under DRE category II and, like Dr Shaw, considered a 5% whole person impairment.
- [37] Dr Boys considered the complaints to the left hip reflected the constitutional condition which would have existed notwithstanding the motor vehicle accident.
- [38] Dr Boy’s view was that if Ms Evans had central lower back pain after the motor vehicle accident but at some point after the accident it resolved completely for, say, a period of a month or more, then in light of her degenerative lower back condition, it would not be possible to say that the car accident was related to the subsequent onset of central lower back pain. If, for instance, Ms Evans was not suffering lower back pain on March 2016 when she saw Dr Peer, but subsequently developed it at about the time she saw Dr Wilson on 13 May 2016, then in his view, there was no connection between the motor vehicle accident and lower back pain experienced by Ms Evans at that time and subsequent to the accident. In his view, in order to implicate the motor vehicle accident in Ms Evans’ current complaint, it was necessary that there was a continuum of symptomatology. Resolution for a short period might still enable a connection to be drawn, but if at some point after the

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<sup>47</sup>

T1-65.5 – T1-65.18.



motor vehicle accident Ms Evans became asymptomatic for more than a month, then in his opinion, it was not possible to say that the motor vehicle accident made any contribution to subsequent lower back pain. That would be the product, in his view, of Ms Evans' degenerative lumbar spine condition, together with other factors such as work or lifestyle that may have an effect upon it. In his view, such a condition however, would not be caused by the motor vehicle accident.<sup>48</sup>

- [39] Insofar as a psychiatric injury, Dr De Leacy gave evidence in respect to his report of 28 November 2017 following an examination of Ms Evans on 23 November 2017. Dr De Leacy's evidence was that at the time of his assessment, Ms Evans had a permanent impairment for the foreseeable future. He accepted that there was not a significant difference with Professor Whiteford's opinion. Their only difference was in respect of one category under the PIRS system.
- [40] Under cross-examination Dr De Leacy accepted that assessments can vary at the relevant time of the assessment. He acknowledged that at the time of his assessment Ms Evans was not employed. He accepted that when Professor Whiteford saw Ms Evans, she was employed. He indicated that it was assumed that the source of pain was the motor vehicle accident and if the motor vehicle accident did not cause a physical condition, then a psychiatric injury is probably not a result of the accident. He also indicated that some psychological problems were not mentioned to him at the time of his assessment, namely Ms Evans' son's health issues which, he accepted, would be a stressor but Dr De Leacy, properly in my view, was not able to provide an indication as to how much. He diagnosed Ms Evans with an Adjustment Disorder with mixed anxiety and depressed mood and provided a PIRS rating of 5%.
- [41] Professor Whiteford accepted the proposition that if physical symptoms relating to Ms Evans' back and hip were not related to the accident, then there would be no psychiatric injury arising as a consequence. Not dissimilar to Dr De Leacy, he too diagnosed the condition of Adjustment Disorder with depressed mood and assessed a 4% PIRS rating. However Professor Whiteford said the Adjustment Disorder was not permanent because Ms Evans has not had the benefit of any treatment.

***Findings in relation to the nature and extent of the injuries***

- [42] Mr Morton submitted that irrespective of any question of Ms Evans' honesty, her evidence of suffering symptoms in her lower back and/or one or other of her hips from the time of the motor vehicle accident was:
- (a) not consistent with any contemporaneous record;
  - (b) unreliable; and,
  - (c) ought not be accepted.
- [43] Mr Morton highlighted that Ms Evans did not make any complaint of lower back pain or hip pain until 13 May 2016 at the earliest and even then did not link it to the motor vehicle accident. Further, the allegation that Ms Evans' ailments had their genesis in the motor vehicle accident was not made until after she saw her solicitors on 8 September 2016, nearly one year after the motor vehicle accident. He submitted that Ms Evans may well have back pain and hip pain. However if she

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<sup>48</sup> Exhibit 1, page 52.

does, it is not caused by the accident. Accordingly, Ms Evans suffered no loss in the motor vehicle accident and damages should be assessed at \$nil.<sup>49</sup>

[44] Whilst I accept some of those matters, I do not accept that Ms Evans' damages ought be assessed at \$nil. To do so, I would need to reject the entirety of Ms Evans' evidence and the evidence called on her behalf. However after observing Ms Evans give her evidence, I formed the impression that she is a stoic lady who attempted to address her levels of pain without immediately seeking assistance. I do not consider Ms Evans to be lacking in credit however, as indicated earlier in these reasons, there are anomalies within her own evidence which cause me to question, in some respects, her reliability such that it impacts upon the level of damages to be assessed. The fact remains that Ms Evans was involved in a motor vehicle accident and suffered personal injury.

[45] Consequently and consistent with the opinions of the experts, I find that as a consequence of the accident, Ms Evans sustained the following injuries:

- (a) musculo-ligamentous injury of the lumbar spine; and,
- (b) a psychiatric injury in the form of an Adjustment Disorder with Depressed Mood.

[46] I do not find Ms Evans sustained bilateral hip injuries (as pleaded). I do so on the basis of an absence of any complaints regarding hip pain following the accident until about 8 June 2016.<sup>50</sup> I am persuaded by the opinion of Dr Boys who considered Ms Evans' complaints to the hip were constitutional in nature which would have existed notwithstanding the motor vehicle accident.

### **What Damages are Recoverable?**

#### *General Damages*

[47] On the basis of the evidence, and the findings I have made above, I accept the submission of Mr Myers of counsel, who appeared for Ms Evans, that a moderate lumbar spine injury attracting an assessment pursuant to item 93 of the *Civil Liability Regulation* 2014 is appropriate to reflect the dominant injury.

[48] Given the multiplicity of Ms Evans' injuries (namely back injury and the psychiatric condition) and their impact upon her, an injury scale value of 10 points is appropriate. The consequence is an award of general damages of \$15,750.00.

#### *Past Economic Loss*

[49] Ms Evans was 51 at the time of the accident, working as a kitchenhand for RSL Care. She is now 54 and works as a support worker for a disability support service.

[50] The taxation records do not reveal any significant drop in her earnings following the accident.

[51] Ms Evans said that she took a day off work two days after the accident.<sup>51</sup>

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<sup>49</sup> In this regard, Mr Morton referred to the approach taken in *Myers v Thomas & Anor* (Unreported, 24 November 2017, Clare SC DCJ).

<sup>50</sup> This was only after an earlier complaint of onset of lower back pain.

<sup>51</sup> See also Exhibit 1, page 199.

- [52] It is submitted on behalf of Ms Evans that at the time of the accident she was earning approximately \$515.00 net per week. Initially there was no loss of income because she compensated for the effects of her injury by working longer hours. She resigned on 28 April 2016 when she could no longer cope with her back and hip pain, albeit citing the exigencies of the job in her letter of resignation. An award of \$43,000.00 (approximate) is sought based on her departure from RSL Care to the time of her commencement with her current employer on or about 4 December 2017, less the actual earnings received during that period of time.
- [53] I do not accept that Ms Evans resigned because of back and hip pain. The reason for her resignation is made abundantly clear in her letter of resignation.
- [54] In a personal injuries action, a plaintiff needs to prove that “but for” her injury, she would have continued in her employment. In *Farnham v Pruden & Anor* [2015] QDC 141, Dorney QC DCJ at [27] to [41] dealt with a similar problem concluding that in those circumstances, notwithstanding the plaintiff’s assertions to the contrary, the plaintiff’s resignation from her employment was not causally related to the motor vehicle accident (because the “but for” test prescribed by s 11 of the *Civil Liability Act* 2003 had not been met).<sup>52</sup>
- [55] After resigning voluntarily from RSL Care, for reasons which I do not accept were related to the accident, Ms Evans’ role at the Logan City Council became redundant. There was no sufficiently persuasive evidence suggestive of any employment available to her from the time she ceased at Logan City Council until now which Ms Evans did not obtain, or could not perform, because of her injury.
- [56] In the circumstances, I will allow one day for past economic loss. Adopting the net weekly figure submitted by Mr Myers at the time of the accident, I will allow \$103.00.

*Interest on Past Economic Loss*

- [57] Interest on past economic loss at 1.34% over 3 years is \$4.14.

*Past Loss of Superannuation Entitlements*

- [58] Allowing 9.25% for superannuation on the above award for past economic loss, I calculate \$9.53.

*Future Economic Loss*

- [59] Under s 55(2) of the *Civil Liability Act* 2003, the court may only award damages in the event it is satisfied that the person has suffered, or will suffer, loss having regard to the person’s age, work history, actual loss of earnings, any permanent impairment and any other relevant matters. This involves a consideration of whether Ms Evans has demonstrated, on the balance of probabilities, that her earning capacity has been diminished by reason of the accident-caused injuries and, if so, whether that diminution in earning capacity is or may be productive of financial loss.<sup>53</sup> It remains with Ms Evans to show that her earning capacity has been diminished by

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<sup>52</sup> Dorney QC DCJ referred to the decision of Byrne SJA in *Balnaves v Smith* at [2012] QSC 192 at [100].

<sup>53</sup> See generally *Allianz Australia Insurance Ltd v McCarthy* [2012] QCA 312 at [47]-[51] per White JA.

the accident-caused injury and “that diminution is or may be productive of financial loss.”<sup>54</sup>

- [60] It was submitted on behalf of Ms Evans that an appropriate, albeit modest, award of damages for future economic loss is warranted. A figure of \$90,000.00 was sought. The claim was formulated on \$200.00 per week over 13 years (multiplier 502) less 10% for contingencies, or alternatively a global claim of that amount reflecting the restrictions on Ms Evans’ ability and her vulnerability in the open labour market.
- [61] The defendant submitted an award of \$10,000.00 on a global basis ought be made.
- [62] It seems clear to both parties, and I find, that Ms Evans is entitled to an award for future economic loss as I am satisfied that she will suffer loss having regard to her age, work history and her permanent impairment (especially in relation to the back). Ms Evans is 54 years of age. She has worked for a significant part of her life in part-time employment earning a modest amount. She continues to work in, what is at times, a physically challenging role. Ordinarily she has another 13 years part-time working history life ahead of her before normal statutory retirement age. She is also from Mauritius.
- [63] I note Dr Boys gave the opinion that although Ms Evans would be capable of employment as a cook exercising appropriate back care practices she has, however, a propensity to mechanical low back pain in the course of activities which may require repetitious low level bending or lifting. Dr Shaw has maintained a view that the back pain (and left hip pain) will restrict Ms Evans to light part-time work where she has the opportunity to sit at regular intervals.
- [64] Professor Whiteford considered the Adjustment Disorder has not prevented Ms Evans from returning to remunerated employment. His overall view, which I prefer to that of Dr De Leacy, is that Ms Evans’ condition is not permanent because she has not yet received treatment.
- [65] Reflective of all of these matters and the fact that it is impossible to precisely calculate this head of damage given there is no defined weekly loss, I will allow \$20,000.00 as a global award for future economic loss.

*Future Loss of Superannuation Entitlements*

- [66] Allowing 11% for superannuation on the above award, I calculate \$2,200.00.

*Past Special Damages*

- [67] In accordance with the submissions made by Mr Myers and Mr Morton, I will allow \$1,773.08 for past special damages.
- [68] Interest on the non-Medicare component (\$610.03) at 1.34% over 3 years is \$24.52.

*Future Special Damages*

- [69] Ms Evans sought a global claim of \$8,760.00 based on ongoing medical attendances, pharmaceutical expenses for analgesics and pain medication and

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<sup>54</sup> *Nucifora & Anor v AAI Ltd* [2013] QSC 338 at [30].

psychiatric treatment as recommended by Dr De Leacy. The defendant submitted a small global allowance of \$500.00 be awarded.

- [70] In light of the opinions expressed by both psychiatrists regarding the need for treatment, together with the orthopaedic evidence regarding the need for analgesia and other anti-inflammatory medication, as a global amount I will allow \$2,500.00.

### Conclusion

- [71] I award the following damages to Ms Evans:

General Damages	\$15,750.00
Past Economic Loss	\$103.00
Interest on Past Economic Loss	\$4.14
Past Loss of Superannuation	\$9.53
Future Economic Loss	\$20,000.00
Future Loss of Superannuation	\$2,200.00
Past Special Damages	\$1,773.08
Interest on Past Specials	\$24.52
Future Special Damages	\$2,500.00
<b>TOTAL</b>	<b>\$42,364.27</b>

- [72] I will hear the parties as to costs.