SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Topp & Anor* [2002] QSC 341
PARTIES:	**WENDY KAYE SMITH** (plaintiff) **v** **JENNY TOPP** (first defendant) **and** **SUNCORP-METWAY INSURANCE LTD** ACN 075 695 076 (second defendant)
FILE NO/S:	SC No 3175 of 2002
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane
DELIVERED ON:	22 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	29, 30 May 2002
JUDGE:	Ambrose J
ORDER:	**I give judgment for the plaintiff in the sum of $147,243.28.**
CATCHWORDS:	DAMAGES – assessment of damages – claim for damages for personal injury – where plaintiff injured in car accident – where liability not contested at trial – calculation of damages *Griffiths v Kerkemeyer* (1977) 139 CLR 161
COUNSEL:	R J Lynch for the plaintiff P Hastie for the defendants
SOLICITORS:	McInnes Wilson for the plaintiff Walsh Halligan Douglas for the defendants

[1] **AMBROSE J:** On 11 September 1998 the plaintiff while driving a motor vehicle on a roadway, brought it to a halt; the first defendant drove another vehicle into the rear of her stationary vehicle.

[2] There is no contest on the issue of negligence in this case which has been defended on quantum only.

[3] Upon collision the plaintiff immediately suffered pain in her neck and in the lumbar region of her spine. She had some pain in the ribs also, resulting presumably from her contact with her seatbelt.

[4] The plaintiff saw Dr McArthur in Caboolture on the day of her injury. She complained to him of pain in the areas of her body to which I have referred.

[5] In fact it emerged that on 4 September 1998 she had consulted that doctor with respect to pain resulting from what he diagnosed as a lumbar muscle strain. Dr McArthur said that he prescribed ultrasound treatment for the strain; the pain had abated sufficiently by the day of her accident to permit her to return to work that day. On the day of her injury she was again given ultrasound treatment for her lower back pain and was given voltarin for shoulder pain.

[6] Dr McArthur next saw her on 15 September 1998 when she was complaining of headaches and tenderness of the S1 vertebra and also tenderness about the C3 level. She was again prescribed rest and given heat treatment for this condition.

[7] On 16 September 1998 she complained of pain in her sacrum and Dr McArthur considered whether it had been fractured. However, he said that he did not diagnose a fracture and she continued to have treatment throughout September and was still tender over the L5-S1 vertebrae when he saw her on 28 September 1998. In October 1998 she received treatment for pain in the left thorac and a degree of paraesthesia. She received some physiotherapy but notwithstanding this was still suffering from pain in her lumbar region.

[8] In October 1998 a CT scan was performed but did not disclose anything relevant to the pain of which she complained.

[9] On 26 October 1998, her solicitors arranged for her an examination by Dr Pentis an orthopaedic surgeon for the purpose presumably of litigation.

[10] Dr Pentis found that the plaintiff had tenderness in the musculature of the left shoulder and pain in her neck and shoulder. X-ray imaging of the spine, chest and shoulder and CT scanning disclosed no major pathology. At that stage the plaintiff was diagnosed as being "in the acute stage" following an accident in which she had sustained soft tissue injuries to the neck, thoracicolumbar, shoulder and chest regions. All those injuries had caused her pain and she was advised to take gentle exercises, abstain from strenuous activities, and avoid heavy work involving bending and twisting. At that stage it was Dr Pentis' view that it would take a couple of months for her pain eventually to abate. He took the view at that stage that it was unlikely that she would require any significant or major "management". He said that it would take up to a year before a more definitive prognosis of her condition could be given.

[11] Dr Pentis examined her again about a year later. By that stage the plaintiff was undergoing hydrotherapy and physiotherapy for her lower back problems. She was still complaining of problems with her cervical spine. She complained that it hurt her when she sat on her tailbone. She then said that she could not drive a motor vehicle significant distances and had difficulty lifting loads greater than four kilograms. Bending and twisting caused a sharp pain in her back. She could stand for about an hour. She was complaining of some pain in the right knee and Dr Pentis attributed this to the way she was standing and walking as a consequence of

the pain she was suffering in one leg, resulting from her lower back condition. At that stage it was Dr Pentis' view that she was progressing reasonably well in recovering from her injuries and that no major treatment would be needed. Physiotherapy and hydrotherapy would give her relief. It was his view then that she should be able to carry out most light duty jobs, but should avoid jobs that required repetitive lifting and straining of the spine, and that when driving a motor vehicle she should take a break from driving every half hour.

[12] He said that there were no signs of nerve root or spinal cord pressure and that no operative treatment would be required. He expressed the view that she then had an incapacity which was about 7.5% loss of the efficient function of the spinal process as a whole and that this might be the long term result of her injury.

[13] Dr Pentis examined the plaintiff for a third time on 5 December 2001 – roughly 12 months after the previous examination and more than three years after the collision in which she suffered injury. At that stage the plaintiff said that her condition had not changed much over 12 months. She still had difficulty sitting for lengthy periods of time and driving longer than 20-30 minutes. She still had difficulty lifting, bending and twisting; she found that the hydrotherapy she undertook gave her some relief. At that stage Dr Pentis examined further x-rays and CT scanning which for the first time apparently showed some "bulging at L5-S1".

[14] At that stage the plaintiff was still not working and was taking analgesics for the relief of pain.

[15] On examination Dr Pentis found tenderness in the right cervicoscapular musculature with a decreased range of neck movement to the right. She had some tenderness in the left buttock and in the lumbosacral region with some numbness in the sole of her left foot. There was normal motor and sensory function otherwise in both legs.

[16] Dr Pentis took the view that the plaintiff had then recovered from her injuries sustained in the accident to the extent that she was going to.

[17] He attributed symptoms from which she suffered in her left leg to an "aggravation" of the L5-S1 disc and lumbosacral region. He said that the effect of this "aggravation" was not enough to warrant operative treatment and that gentle exercise, care and living "within her limits" was all that was required for her treatment. He expressed the view that she should "limit any heavy lifting and any repetitive bending and twisting". He expressed the view that at that stage she had been left with a residual incapacity which would approximate a 12.5% loss of the efficient function of her spine as a whole. He said that this incapacity would affect her lifting, bending and twisting and that she should limit lifting as much as possible. He said that operative treatment was not necessary and was unlikely to become necessary in the future.

[18] He expressed the view that the "incapacity" that she had to her shoulder, chest and knees would approximate "somewhere in the vicinity of 3% loss of the efficient function of her body as a whole".

[19] On 23 March 1999 the plaintiff was examined by Dr Weidman a neurosurgeon.

[20] At that stage she was complaining of episodic recurrences of back pain. On examination the plaintiff's lumbar spine was tender at the L5 level with some loss

of movement in all directions. However, she was still able to bend forward to touch below her knees and there were no neurological abnormalities in her lower limbs. On examination her cervical spine was tender at the C7 level and neck movements were slightly limited in all directions. However, there were no neurological problems in her upper limbs. In Dr Weidman's view an x-ray taken a couple of days after her injury on 16 September 1998 showed no apparent injury to her cervical spine although it suggested a "problem" at C5 level. A CT scan performed on 19 September 1998 was normal.

[21] According to Dr Weidman on his interpretation of x-rays of the lumbar spine taken on 16 September 1998 they showed the spinal processes within normal limits for the age of the plaintiff and they did not show any specific abnormality. A CT scan of the lumbar spine taken a month later was within normal limits.

[22] Dr Weidman also looked at x-rays and films of her lumbar spine taken on 4 September 1998 – one week prior to her injury in the motor vehicle collision when a lumbar muscle strain was diagnosed. The plaintiff informed him that they were taken because she was experiencing "period pain" which was of a kind different from that which she was suffering on his examinations.

[23] In Dr Weidman's opinion the plaintiff suffered flexion/extension injuries to her cervical and lumbar spine in the motor vehicle collision on 11 September 1998. He said that the symptoms in her back of which she had complained since that time were all consistent with this type of injury and there were no objective neurological or radiological abnormalities. In his view her related symptoms were worse than he would have expected following this sort of injury. However, he said that only six months had elapsed since her accident at that time, and that he would expect further improvement. He said that it was unlikely that the plaintiff would need surgery and that she did not require any assistance with self-care. He took the view that it was likely that the plaintiff would soon be fit enough to return to full time work as a catering manager.

[24] Dr Weidman again examined the plaintiff on 27 July 2000, about one year and four months after his first examination. On that examination the plaintiff was still complaining of leg pain and stiffness, particularly on the left side. She said that neck pain eventually developed into headaches which were variable in intensity. She suffered headaches that lasted for several days every two or three weeks. This pain was controlled by analgesics. She told Dr Weidman that she had continued "to experience some discomfort in her lower back" which became worse with her menstrual cycle. A laparoscopy disclosed no abnormalities. She was still experiencing some pain radiating down her left leg and some spasms in her buttocks. She told the doctor that her condition at that stage was stable and said that she had not had any of those symptoms prior to the motor vehicle accident. She informed the doctor that she had not been able to return to work as a caterer with her former employer. She had tried to work at a Coles supermarket but was unable to manage to do that work. Dr Weidman said that a plain CT scan of the lumbar spine taken on 25 May 2000 about one year and eight months after the injury she suffered in the collision, showed "a minor central and left sided disc bulge at L5-S1". He expressed the view that this protrusion "could well be the result of her injury or could equally well have predated the injury". However on 23 March 1999 when he examined x-rays taken on 16 September 1998 they showed no apparent abnormality to her cervial or lumbar spinal vertebrae; neither apparently did x-rays taken of her

lumbar spinal processes on 4 September 1998. He found on examination that she had tenderness over the lower lumbar spine with some diminution in back movements. There was "a generalised tenderness" to the back of the neck and slight limitation in neck movements. There were no objective neurological abnormalities.

[25] Dr Weidman adhered to his former opinion that the plaintiff had suffered soft tissue injuries to her cervical and lumbar spines and would not benefit from any further investigations or treatment and would not require any surgery. At that stage he took the view that her condition was stationary and stable and that she "may have difficulty with heavy work such as catering but should be fit for any lighter form of employment". He observed that she was presently "doing courses in the hope of finding further employment in the future".

[26] He expressed the view that she had a 4% - 5% partial permanent impairment of the whole person as a result of the soft tissue injuries to the cervical and lumbar spines.

[27] Dr Weidman next examined the plaintiff on 22 November 2001. He reviewed the medical reports and a physiotherapy report on that occasion. He expressed the view that the plaintiff's symptoms were much the same as they were when he had seen her a little more than 12 months previously. She was still complaining of neck pain, headaches and lower back pain on that occasion. She was still complaining of occasional throbs in her left leg that were not really painful and a feeling of numbness from time to time under her left foot. He observed that she was taking pain killing tablets and anti-inflammatory medication and was still undertaking some hydrotherapy. He noted that she had not returned to any employment since the accident but had spent her time looking after her four children. He said that she appeared to move freely without any apparent discomfort and he found that there was a mild tenderness in her neck and that her neck movements were diminished by about 25% in all directions, although there was no neurological abnormality in her upper limbs. He said that there was diffuse tenderness in the area of the lumbar spine and that movements were moderately limited and she could bend forward and touch just below her knees. There were no neurological findings in her lower limbs.

[28] Dr Weidman looked at a CT scan of the lumbar spine taken in June 2001 (about 2 years and nine months after her injury in the collision). He said that this showed a moderate, central and left-sided L5-S1 disc bulge. It disclosed much the same as did the scan taken in 2000; what was disclosed in 2000 and 2001 was not evident in the scan taken in October 1998.

[29] He expressed the view looking at all this material that it was likely that the plaintiff had suffered a soft tissue injury to the cervical spine and that her ongoing symptoms and headaches would be consistent with the nature of an injury of this kind. He said that it was also likely that she had suffered a soft tissue injury to her lumbar spine. He observed that she then had a minor lumbar disc herniation which was probably the result of pre-existing degenerative changes "as well as the accident in question". He said that from a neurological standpoint she did not require any further investigation or treatment and that it would be best if she avoided surgery to her lumbar spine. He said that she was overweight and that the major requirement for her treatment was for her to lose weight and increase her general fitness.

[30] He expressed the view that at that time the plaintiff had a "4% partial permanent impairment of the whole person as a result of the soft tissue injury to her cervical

spine". In addition he expressed the view that she had an 8% partial permanent impairment of the whole person as a result of her lumbar spine condition. He said, however, that half of the lumbar spinal condition was attributable to pre-existing and ongoing degenerative changes in the L5-S1 vertebrae. He expressed the view that the plaintiff would have difficulty returning to previous employment as a caterer although she would be medically fit for any light form of work that did not require bending, lifting or prolonged standing or sitting.

[31] On 7 November 2001 the plaintiff attended a back stability clinic for treatment of bilateral back pain radiating into her left leg. The assessment made in that clinic was consistent with clinically detectable wasting at the L4-L5 level and a hypomobility of the L2 and L4 levels.

[32] Dr Boys an orthopaedic surgeon first examined the plaintiff on 21 April 1999. He then described the plaintiff as a "short obese woman" who then weighed 96 kilograms. He found that her gait was normal and that her cervical spine was not tender and her neck seemed normal. He found that there was a full painless range of movement in the neck and a similar movement in both shoulders with no neurological abnormality upon examination of her upper limbs. He said that the plaintiff was able to flex her thoraco-lumbar spine to touch her mid shin. Neurological examination of her lower limbs showed intact muscle power. In his view radiographs and a CT scan of her cervical spine, sacrum and coccyx taken at September 1998 disclosed no abnormality. A CT scan of her lumbosacral spine taken in October 1998 also disclosed no abnormality. It was Dr Boys' opinion that the plaintiff may suffer "a degree of non-specific muscle strain symptoms" and these reflected "her current level of fitness and obesity".

[33] On 8 February 2002 the plaintiff was again examined by Dr Boys, The plaintiff then advised Dr Boys that her neck complaints had improved although from time to time she suffered from headaches and "strain symptoms" on the left side of her neck.

[34] Dr Boys observed that this neck discomfort occurred with protracted static positioning of the neck after sitting or standing for long periods of time. It settled with movement. She complained to him of pain in the lumbosacral junction radiating to the left buttock and left posterior and upper thigh. He said that she did not complain of sciatica but described paraesthesia extending to the sole of the left foot. She suffered no weakness in this part of her body. She could sit comfortably for about 30 minutes and stand comfortably for about 20 minutes. She said she was able to walk for about 25 minutes before any symptomatology occurred. She told the doctor that she avoided bending at waist level and that she tended to squat to a lower level. She said she experienced some lumbar discomfort when she straightened up from lower levels. She was able to manage lifting light day to day items but suffered "some lumbar strain" lifting heavier than normal shopping bags for example. She said that she was unable to perform former physical activities in which she engaged prior to the injury. She was able to perform most normal domestic activity although it took a little longer than it had previously. Her husband now helped out cleaning the bathroom and toilet.

[35] Dr Boys found that the plaintiff was still overweight, with a height of five feet four inches, her current weight was 89 kilograms. He found that her cervical spine was not tender and that she had a full movement of the neck without pain. Shoulder

movements were full and painless and neurological examination detected no abnormalities.

[36] Dr Boys said that her thoracicolumbar spine was straight and the plaintiff complained of some discomfort "with palpitation at the lumbosacral junction in the mid-line". She said that strain was also present in the thoracicolumbar flexion. He found that lateral flexion and rotary movements of the spine's lumbosacral area was full and painless, although extension produced some lumbosacral discomfort. He found that muscle power was preserved.

[37] Dr Boys expressed the view that the CT scan of the plaintiff's lumbosacral spine taken on 25 May 2000 indicated a "posterior annular bulge" at the L5-S1 level which was slightly asymmetrical to the left side. He commented that a better quality CT scan taken on 1 June 2001 confirmed the earlier CT scan that there was a local bulge at the L5-S1 level to the left.

[38] Dr Boys expressed the opinion that the plaintiff experienced intermittent postural musculo-ligamentous neck strain. She experienced mechanical low-back pain with a consequence of solid pathology at the L5-S1 disc space. He said that her complaints of paraesthesia in the left foot were consistent with a degree of left S1 nerve root irritation and that a soft tissue injury to her neck and lower back and an aggravation of the L5-S1 discal degeneration would be consistent with the mechanism of the injury she suffered in the collision. He said that the plaintiff's complaints were stable and permanent and that she suffered from a "minor disability attributable to her neck". His view was that she manifested no assessable impairment of bodily function referable to the cervical spine applying an American diagnoses related schedule for cervical injuries.

[39] He expressed the view that her lower back complaints were associated with "impairment". He assessed the impairment of bodily function using the same American guideline for lumbar injury at 8%. He expressed the view that it would be "reasonable" to apportion half of the assessable impairment to constitutional degenerative change. He expressed the view that 4% only of the lumbar pathology should be ascribed to the aggravation of that spinal condition received in the collision.

[40] Dr Boys expressed the view that none of the plaintiff's injuries would preclude sedentary employment although she might receive "symptomatic exacerbation" in the course of any employment which involved repetitious bending and lifting.

[41] He expressed the view that her "medical management" should involve significant weight reduction and a program of muscle conditioning to strengthen the musculature of the lower back and abdomen. He said that use of a lumbosacral support in the workplace might also be considered.

[42] He expressed the view that there was no physical condition evident which prevented her from resuming paid employment. He said that an early resumption of work "might be facilitated by a more aggressive exercise program to improve her fitness". He said that her symptoms would probably also be improved "with work hardening associated with resumption of duties". He expressed the view that further physiotherapy treatment would be a waste of time and that the best treatment for the plaintiff would be for her to engage in a program of aerobic exercises and to considerably reduce her weight.

[43] At the time of her injury the plaintiff was a little over 32 years of age. At the date of trial she was a little over 37 years of age. She had lived a fairly active life prior to the time of her injury. As a younger woman she had ridden horses, and had gone camping, bushwalking etc. She had even trained young children in football.

[44] She had been employed in the fast food chain Red Rooster from 27 February 1996 to 2 July 1996 during which time her weekly tax paid salary was between $315 and $330, in that period of time she earned a net income of $5,455.80.

[45] From 9 July 1996 to 24 June 1997 she earned a net income of $18,531.52. During this period her average weekly income varied between $335 and $360.

[46] Between 15 July 1997 and 30 June 1998 she earned a net income of $16,549.88. Her weekly income varied between $361 and $450.

[47] She had obviously had time off in this period and between 24 March and 30 June 1998 her weekly income was variable and significantly less than the level of her previous normal weekly income.

[48] Between 7 July 1998 and 6 October 1998 she earned a net taxable income of $2,332.35. Her average weekly salary seemed to vary between $133 as a minium and $393 as a maximum. The total sum received during this period included a leave loading when she ceased work in September 1998. With the leave loading included her net taxable income for this period was $2,561.70.

[49] Eventually her position at the Morayfield Red Rooster food outlet was filled by a lady named Garrard. She gave evidence that at date of the trial she was receiving a net weekly income of $457. I will assume that had the plaintiff been working at the date of trial in a Managerial position with the food chain that would have been her average net weekly income.

[50] Subsequent to her injury the plaintiff attempted to work at Coles presumably as a shop assistant or packer. She felt unable to continue to do this work. It is not clear on the material just when she attempted to work at Coles although it must have been prior to July 2000 when she advised Dr Weidman of this fact.

[51] According to the medical evidence given by Dr Weidman the plaintiff was fit for light work on 29 March 1999.

[52] According to Dr Boys she was fit for light work by about September 2000. For the purpose of assessing damage I find that the plaintiff was probably fit for light work which did not involve heavy lifting and bending by about March 2000.

[53] I will assess damages therefore on the basis that as a consequence of her injuries she was unable to earn any income for about one and a half years. During this period she could have earned a weekly income of about $485.00 which after tax would amount to $345.00. In arriving at these figures I have regard to the content of the past economic loss calculations of the accountant Kerry Armstrong to the extent that it states the gross wages which the plaintiff would have received during this period to which I have applied the PAYG tax tables for that period. I have not otherwise relied upon this report or calculations in it which I find unsupported by the facts and unpersuasive. I assess her loss of income for this period at a loss of $345 per week for 78 weeks which amounts to $26,910. I assess interest on this

sum as follows: 5% P.A. for 1.5 years which is $2,018.25 and 10% P.A. for 2.5 years which is $6,727.50, totalling $8,745.75.

[54] I am satisfied that from about March 2000 she would have been able to earn an income although probably not as much as she could have earned had she remained in employment as a catering manager or a district manager – doing the sort of work that Ms Garrard commenced to do within a year or two of her commencing employment.

[55] From about March 2000 until date of trial I find that the plaintiff could have earned an income of about $300 per week net. With respect to this second period had she obtained employment to do work which on the medical evidence she was capable of doing, she would have received a lesser income than that which she probably would have earned had she retained her position as catering manager with Red Rooster. With respect to this period therefore she has lost net income in the sum of about $45 per week for about two years and seven months which I assess at $5,985. I assess interest on this sum at 5% for 2.6 years which is $778.

[56] With respect to her future loss of income I conclude on the medical evidence that in any event her degenerative spinal condition to which Dr Weidman and Dr Boys referred would have left her with her present incapacity within about eight years of her accident – which I will assume would be by about October 2006.

[57] I propose therefore to calculate her future loss of earning capacity for a period of four years from date of trial.

[58] Her loss of income over this period I will assume would be the sum which Ms Garrard was earning at date of trial – $457 per week net less about $341 per week; the sum which I find the plaintiff could have earned in the clerical/secretarial fields or one of the other fields which she advised her occupational therapist Ms Stephenson she was interested in pursuing. This loss amounts to $116 per week.

[59] She advised Ms Stephenson of a number of occupations in which she was interested. One was a job as counsellor – apparently counselling over a telephone – this however would require training at home over a couple of years and the course would cost approximately $12,000. I have some reservations about capacity of the plaintiff to pursue successfully such a course. Undoubtedly there would be a limited number of opportunities for her in this field but having regard to her age, her family commitments and to her lack of any training so far to pursue this course and the fact that it would take several years of distance training by various institutions I have some reservation as to the likelihood of her earning an income in this occupation.

[60] If she did earn an income in this occupation she might earn something in the vicinity of $800 per week. I am unpersuaded really on the material that this hope or expectation is well based. There is no evidence as to precisely how much she might earn if she did get the necessary qualifications and obtain a position as counsellor as she hopes she would – conducting her counselling by telephone from her home.

[61] One business that she told Ms Stephenson she would very interested in pursuing in Caboolture was one which sold various commodities in bulk. Apparently she is familiar with such business activities in New South Wales where customers bring a container with them and purchase whatever quantity they desire from bulk material

held in store – presumably at a discounted price. She said that she was familiar with businesses of that sort conducted in New South Wales and that they did very well financially. She advised Ms Stephenson that if she were in a financial position to do so in the future she would be keen to pursue this option.

[62] While she had worked in secretarial positions previously she feels that she would need to take a secretarial course to qualify her to now pursue such a position. She found that such courses were only available in Brisbane and her domestic situation would make it difficult for her to travel to and from Brisbane each day to attend classes from 9:00am to 4:00pm five days per week. The courses apparently take between 16 and 18 weeks. She said the cost of such a course was about $2,500. At the moment she is unable to afford to undertake such a course. She is also inquiring to see whether she can do such a course on a part time basis. She is also interested in taking a course to be a travel agent. She says that she would not be able to cope with full time secretarial work because of the amount of sitting involved. However I think also an additional consideration must be the four young children for whom she cares and has cared since her injury four years ago. This to my mind is probably a significant contributing factor to her unemployment for so many years in spite of the medical opinion that she was capable of doing light work within 18 months of the collision.

[63] In my view it is reasonable to treat as compensable the plaintiff's need for retraining from about March 2000 to qualify her to obtain employment or to conduct a business which her disability will accommodate. I award her $3,000 towards the cost of such retraining.

[64] I am unpersuaded on the medical evidence that the plaintiff is able to work for a maximum of only 20 hours per week. The extent to which she has limitations in sitting or standing or walking to my mind depends upon her version of these symptoms albeit that upon the medical evidence they would be consistent with her spinal condition. In any event if she employs herself or is employed either in small business of the sort that she said she was interested in or in a travel agency or in part time secretarial duties it seems to me that she would be able to earn well in excess of 50% of what she could have earned had she remained on as manager at Red Rooster earning at the moment perhaps $457.40 net. As manager she would also of course have had the use of a mobile telephone for her private use – with some limitation undoubtedly; she would also have the benefit of using a motor vehicle supplied by her employer when it was not required for her work. She would at least have been able to drive to and from her business activities at Red Rooster at no cost to herself. I am unpersuaded that the use of the motor vehicle and telephone in the circumstances would have a value to her of more than $50 per week. I assess this loss of benefit to trial in the sum of $10,400. Interest thereon at 5% P.A. for four years is $2,080. I assess the future loss of those benefits for four years (50 x 119) at $5,950.

[65] It is unclear to me that she would receive the benefit of such a motor vehicle and telephone were it not provided to her as catering manager. However in the circumstances on the evidence I think it is likely that the reason Ms Garrard is not involved in catering, is that she did not have the ability or experience in the catering side of the fast food business which the plaintiff had and which of course she had commenced and was developing with the approval of her employer at the time of injury.

[66] While I am unpersuaded that the plaintiff's capacity to do light work in the future is restricted to twenty hours per week, I am persuaded that due to her spinal condition she does have some limitations on the sort of physical activity including standing, sitting, walking etc which may lessen the number of employment opportunities available to her. I am also persuaded that she would not at her age and with her degenerative spine – accepting that the condition was exacerbated by the motor collision in September 1998 – be able to do the sort of heavy lifting work etc which she was required to do as catering manager and which in fact she had done prior to her injury on 11 September 1998.

[67] The activity in which she had to engage as catering manager must have placed great stress and strain on her spinal processes. She gave evidence that she was required to lift heavy loads, and push loads up on to a company vehicle. Sometimes the warming ovens that she had to push uphill with assistance from others were so heavy that they rolled back towards her and she had to jump out of their way. I note that only one week before the accident she attended Dr McArthur, for a muscle strain in the lumbar region.

[68] I have taken this into account in concluding on the balance of probabilities that she would not have worked at this sort of occupation beyond September 2006. Indeed in my view on the medical evidence it was on the cards that she would have subjected herself to the sort of trauma in the course of her work which would have accelerated or exacerbated her degenerative spinal condition to produce her post collision disability any time after September 1998. The very fact that only one week before the collision she had one week off work with ultra sound treatment for her lumbar spine to overcome a strain, suggests to me that the work that she was doing did place significant strain on that part of her back which was affected by degenerative changes.

[69] I find it difficult in this case to do more than speculate as to what the future may hold for the plaintiff once this action proceeds to judgment. It may well be that with some capital available to her which she does not have at the moment, she will be able to set herself up in one of the occupations she told Ms Stephenson she was keen to pursue. That would seem to me to be the most probable course she will take. Whether she will earn more or less money than she earned as catering manager in conducting such a business it is impossible to say on the evidence. She expressed confidence in doing quite well in the Caboolture area conducting a bulk distribution business but there is just no evidence as to what weekly income such a successful business in the Caboolture area would generate.

[70] On the other hand she is rather hopeful that she might earn $800 per week as a counsellor. This plan however probably would take a couple of years to come to fruition after she had received whatever training is required for the qualifications she might need to be employed to earn this sort of income.

[71] I have taken into account the award wages for clerical employees on an hourly rate of pay contained in page 17 s 7 to appendix 6 of the report of the accountant Kerry Armstrong. If she worked as a level 1 clerical employee for 40 hours per week at the hourly rate of $12 she would earn about $480 gross per week at casual rates.

[72] After tax this would amount to $341.00 per week.

[73] With respect to the calculations made in 7.20 of s 7 of that report I assume that the estimated future earnings of $216.42 net per week is based on the assumption she will work for only 20 hours per week.

[74] Doing the best I can therefore in the rather unsatisfactory state of the evidence I conclude that her future economic loss up to October 2006 should be fixed at about $116 per week net.

[75] I therefore assess her future economic loss attributable to injury to her spinal processes in September 1998 at the loss of $116 per week for 4 years. Using the 5% tables (116 x 190) this amounts to $22,040.

[76] I reduce this by 15% for contingencies to $18,734. I therefore assess her future economic loss as a result of disabilities she suffered in the sum of $18,734.

[77] According to the medical evidence to which I have referred the plaintiff is left with a relatively minor impediment of neck function.

[78] By far the most serious incapacitating injury is the aggravation of the degenerative condition of her lumbo-sacral spinal area. I accept the evidence of Dr Boys that the aggravation or exacerbation of her degenerative spinal condition attributable to the collision of 11 September 1998 is about 4%.

[79] In other words about 50% of her back problem at the time of his estimate was attributable to the exacerbation of her degenerative condition and the acceleration of the onset of symptoms from it. It does not necessarily follow that for the rest of her life she will suffer from a 4% loss of function of the lumbar spinal processes which is attributable only to the collision. It does mean that for a period of eight years to which I have already referred that condition should be considered to be attributable to the collision which both exacerbated and accelerated the onset of symptoms from the degenerative condition of her lumbar spinal processes.

[80] On the medical evidence it may well be however that she would have developed precisely the same symptomology well before the expiration of 8 years. I adopt however a period of eight years in respect of which the acceleration or the exacerbation of her pre-existing degenerative condition is compensable.

[81] Taking into account the significant pain and inconvenience that she suffered for a couple of years and the fact that at the present time, four years after injury, the level of her disability has been greatly reduced, and the medical evidence that she is now able to work and earn income I assess general damages in the sum of $40,000. Of that sum I assess pre-trial loss of amenities in the sum of $20,000. I assess interest on the pre-trial award for loss of amenities at 2% on $20,000 for a period of four years which amounts to $1,600.

[82] With respect to special damages I accept the cost of services referred to in the schedule described as Ex 5 in the folder which is Ex 2 in this action. I am unpersuaded that all 40 visits paid by the plaintiff to Caboolture Medical Centre between 5 February 2000 and 29 May 2002 were reasonably necessary treatment for the injury she suffered in the collision of 11 September 1998. I keep in mind the observations of all doctors who gave evidence in this case. I allow 20 visits in the period claimed which amounts to $426.

[83] I award special damages therefore in the sum of $3,425.45. I award interest at 10% per annum on $426 of that sum for seven months which is $24.85.

[84] I assess interest on the sum of $1,324.80 of that sum for 3.5 years at 5% per annum which is $231.84.

[85] I assess the cost of pharmaceuticals purchased pre-trial in the sum of $2,522.96.

[86] I assess interest on this sum for a period of four years at 5% per annum in the sum of $504.60.

[87] I assess travelling expenses in the sum of $5,753.80. I assess interest on that sum for a period of four years at 5% which is $1,150.76.

[88] I assess housekeeping expenses in the sum of $1,444. I assess interest on that sum for three years at 10% which is $433.20.

[89] I make no allowance for lawn mowing expenses.

[90] I assess damages for child care while the plaintiff attended medical appointments in the sum of $102.50.

[91] I assess interest on that sum at 10% per annum for three and a half years which is $35.87.

[92] With respect to loss of past and future superannuation contributions I propose to treat loss of employer contributions for superannuation in a way similar to loss of net wages payable by an employer. Under the Superannuation Legislation 15% of employer contributions is taken for tax. I have received no submissions as to the amount if any of taxation payable upon ultimate receipt of the balance of employer contributions and I therefore give no consideration to that matter.

[93] I propose therefore to assess the plaintiff's pre-trial loss of superannuation benefit at 85% of the money contributed by the plaintiff's employer which is 85% of 7% of her pre-tax income lost during the first 1.5 years of her disability. Adopting the gross wage contained in the calculation of Kerry Armstrong of about $485 the net loss of superannuation contribution is $28.85 per week. I assess the loss of that benefit for 1.5 years at $2,250.30. I assess the loss of superannuation contribution for the following 2.6 years on the basis of a loss of contribution of $3.30 per week, on the loss of $485 per week, in the sum of $435.60.

[94] I assess total loss of past superannuation benefits in the sum of $2,685.90.

[95] I propose to assess loss of superannuation benefit on future lost income at 85% of 9% of the sum calculated for loss of future income of $116 per week for four years which is $22,040 (*vide para* 74); that assessment is $1,686.00.

[96] With respect to *Griffiths v Kerkemeyer* damages I take the view on the medical evidence that the plaintiff probably did not require the provision of any special care after seven months of her sustaining her injury and subsequent to her ceasing to obtain the assistance of a housekeeper.

[97] With respect to the need for special services prior to that time I take into acceount the evidence of Dr Weidman that by March 1999 the plaintiff did not require any assistance with her self care and that by mid 2000 she was fit for light work.

[98] I find that the plaintiff needed no more than one hour's care and attention per day compensable under *Griffiths v Kerkemeyer* from 11 September 1998 to about 23 March 1999 – a period of say 7 months.

[99] During this period I find that for the first four months (September – December) she needed about seven hours per week (in addition to the housekeeping assistance with respect to which allowance has already been made). This would cost about $84 per week for a period of 16 weeks which is $1,344.00.

[100] I find also that she needed about three and half hours per week for the second three month period (January – March 1999). This would cost $42 per week for a period of 12 weeks which is $504.

[101] I assess damages under *Griffiths v Kerkemeyer* all told in the sum of $1,848.00.

[102] I assess interest on the sum of $1,848.00 at 10% for a period of 3.5 years in the sum of $646.80.

[103] In summary therefore I assess the plaintiff's damages as follows –

Award of Damages		**Interest thereon**	
Damages for pain and suffering and loss of amenities of life	$40,000.00	Interest thereon	$1,600.00
Special damages	$3,425.45	Interest thereon	$ 24.85 $231.84 $256.69
Cost of pharmaceuticals	$2,522.96	Interest thereon	$504.60
Travelling expenses	$5,753.80	Interest thereon	$1,150.76
Housekeeping expenses	$1,444.00	Interest thereon	$433.20
Childcare expenses	$102.50	Interest thereon	$35.87
Lost superannuation benefits – 1.5 years 2.7 years	$2,250.30 $ 435.60 $2,685.90	Interest thereon	$564.00
Loss of future superannuation benefit for 4 years	$1,686.00		

Past *Griffiths v Kerkemeyer* damages	$1,848.00	Interest thereon	$646.80
Past loss of wages for a period of 78 weeks	$26,910.00	Interest thereon 1.5 years Interest thereon 2.5 years Total	$2,018.25 $6,727.50 $8,745.75
Past loss of income for 2 years and 7 months	$5,985.00	Interest thereon 2.6 years	$778.00
Loss of benefit of car and mobile telephone to date of trial 4 years at $50.00 per week	$10,400.00	Interest thereon	$2,080.00
Future loss of those benefits for 4 years	$5,950.00		
Future economic loss	$18,734.00		
Retraining	$3,000.00		
Total	**$130,447.61**	**Total**	**$16,795.67**

[104] I give judgment for the plaintiff in the sum of $147,243.28.