SUPREME COURT OF QUEENSLAND

CITATION:	*Ballesteros v Chidlow & Anor* [2005] QSC 280
PARTIES:	**MICHELLE THERESE BALLESTEROS** (plaintiff) **v** **HERBERT HUGH CHIDLOW** (first defendant) **RACQ INSURANCE LIMITED** ACN 009 704 152 (second defendant)
FILE NO/S:	BS No 10080 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20 and 25 May 2005
JUDGE:	White J
ORDER:	**1. Judgment for the Plaintiff in the sum of $99,891.** **2. The Second Defendant pay the Plaintiff's costs of and incidental to the action to be assessed on the standard basis on the District Court Scale applicable to matters in which the sum recovered exceeds $50,000.** **3. It is certified, pursuant to Item 27(3) of the District Court Scale of Costs, that the Registrar may allow a higher amount for Item 27 costs that the Registrar considers proper in the circumstances.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – REMOTENESS AND CAUSATION – OTHER MATTERS – where plaintiff a passenger in a car accident – where plaintiff resigned from employment after accident – where rent money was owed at the time of resignation – where accrued leave benefits paid upon resignation – whether as a matter of common sense and experience resignation can properly be seen to have been caused by the accident DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – REMOTENESS

AND CAUSATION – MEASURE OF DAMAGES – PERSONAL INJURIES – METHOD OF ASSESSMENT – GENERALLY – calculation of injury scale value ("ISV") pursuant to requirements of the *Civil Liability Act* 2003 – where multiple injuries – where each injury defined and assessed – where dominant injury identified – whether an uplift of 25 per cent in the ISV assessment appropriate

Civil Liability Act 2003 (Qld), s 51, s 60, s 61, s 62
Civil Liability Regulation 2003 (Qld), s 6, schedule 3, schedule 7
Motor Accident Insurance Act 1994 (Qld), s 55B, s 55D, s 55E
Personal Injuries Proceedings Act 2002 (Qld), s 54

Coop v Johnston [2005] QDC 079, cited
Grice v State of Queensland [2005] QCA 272, followed
Medlin v State Government Insurance Commission (1994-1995) 182 CLR 1, applied

COUNSEL: Mr M Grant-Taylor SC with him Mr P Feeley for the plaintiff
Mr R J Douglas SC for the defendants

SOLICITORS: McInnes Wilson for the plaintiff
Hunt & Hunt for the defendants

[1] The plaintiff was injured when the Toyota Corolla sedan driven by her mother, Mrs Glenice Croft, struck the motor vehicle driven by the first defendant at an intersection at Dutton Park on 18 February 2003. The plaintiff, then aged nearly 35 years, was a back seat passenger. The first defendant has admitted liability for the collision.

[2] The principle issues for resolution are the extent to which the injuries sustained by the plaintiff were the cause of her resignation from her employment as an administrative officer in the Queensland Public Service, her present and future employment prospects, and the quantum of her claim for past and future domestic assistance.

The motor vehicle accident and its immediate consequences

[3] The collision was severe and of the kind described as a T-bone collision. The Corolla in which the plaintiff was travelling was written off as a total loss. It occurred at an intersection when the first defendant drove across the front of the car in which the plaintiff was travelling. The plaintiff was travelling in the rear passenger seat restrained by a seat belt next to her young son restrained in a child seat. She recalled hitting her head against the roof of the car as she was thrown backwards and forwards and her left foot was jammed underneath the passenger seat in front. Subsequently, she became aware that she had cracked a tooth. The plaintiff managed to extract herself and her son from the car. Her mother was screaming and very distressed, concerned that the car would ignite.

[4] Initially the plaintiff was dazed and felt pain in her head and stiffness around her should and neck on the left side. She was treated at the scene by ambulance officers and later at the Royal Brisbane Hospital where x-rays were taken. She was released home that day. After several days during which she felt stiff and in great pain she consulted with her own general practitioner. She received physiotherapy treatment.

[5] At the time of the motor vehicle accident the plaintiff was employed in the Queensland Public Service as an Administrative Officer in the Department of Education and Training at Southbank TAFE. The plaintiff returned to work after three weeks. She described her problems during that three week period as follows

> "I didn't get much sleep.
>
> Why didn't you sleep? What was the problem? -- It was to do with the stiffness in the upper part of my body and with my back as well. And also there was – I think may have been from this area here, there was a bit of heaviness, tightness.
>
> ...
>
> MR GRANT-TAYLOR: Yes. Just pausing there, Miss Ballesteros, when you were describing the heaviness and tightness just a moment ago, you reached up with your right hand and indicated the upper part of the left side of your chest and the lower part of your neck; is that so? -- Yes, that's correct. That's where the – I was on that side of the car, and that's where the seat belt was.
>
> I think you also touched your left shoulder? -- Yes.
>
> Was that also an area of concern for you? -- It was. It was very hard for me to lie on that side.
>
> ...
>
> It was very hard to – when I would go – try and go to sleep, it was hard to actually sleep on the left side, and I would be constantly waking up, feeling quite tired and exhausted and just crying because I was just so tired and just – the pain, it was excruciating. It was totally out of my control. I wasn't able to do the things I was doing before. I don't just jump up and just attend to my children or do anything else. I just felt like everything was falling apart, basically, and just – headaches and from the next, and not sleeping, and forgetting things, and having to really rely on my mother to help me. It's very hard for me because I've always been very independent. Yeah.
>
> Now, were you any better by the time you did get back to work? -- I still wasn't sleeping, but I wanted to try and just get on with everything and I wanted to get on with my life, get back to the way things were before the accident, get back to work and be around

other people, and I wanted to move on with other things as well, such as divorce. ..." t/s 54-5.

Plaintiff's life prior to the motor vehicle accident

[6] The plaintiff had completed the first year and a half of a Certificate in Applied Arts at the Queensland College of Art after she had completed her secondary education. After a year or so freelancing as a graphic artist she joined the Queensland Public Service. Her work at Southbank TAFE involved secretarial tasks with teachers, class preparation, setting up meetings and secretarial duties for the board of management. The plaintiff married in 1997. Her first child, Cecille, was born on 7 August 1997. The plaintiff stopped work for about six weeks prior to the birth on paid leave and then was away for almost a year on unpaid leave. She had a permanent position in the Public Service and returned to her job with the same seniority in approximately the middle of 1998. The plaintiff's duties by then had changed to include front desk duties, helping with student orientation and assisting teachers with enrolments and setting up courses.

[7] The plaintiff's son Aarden was born in September 2001. As with her daughter, the plaintiff ceased work about six weeks before he was born and returned to work in about April or May 2002.

[8] In 2001 before her son was born the plaintiff became aware of her husband's infidelity and realised that the marriage was over. The plaintiff had been able to return to work after the birth of her daughter because she had the support of her mother who lived in the house with her as well as her husband. Mr Ballesteros worked at the Convention Centre most evenings. He continued to live in the rented family home at 22 Glenhaven Street, Kedron but he and the plaintiff had effectively separated. The plaintiff proposed to divorce her husband and on the day prior to her accident had applied for a loan for $3,000 (which she obtained) to assist her to do so. On the day of the accident she had an appointment to see a family lawyer.

The plaintiff's condition after returning to work

[9] The plaintiff had been a very energetic young woman in good health prior to the motor vehicle accident. She greatly enjoyed her work at Southbank which allowed her to incorporate a number of her artistic and media skills. She was also a very well organised young mother relying upon her mother and wider close knit family only for the actual care of her children and for some driving as she did not have a licence. She herself attended to all the household tasks including washing, ironing, marketing, cooking and cleaning.

[10] When the plaintiff returned to work with Ms Hoffman as her immediate superior she found the work quite difficult. She said she used to forget things like phone messages and entering some of the dates about student enrolments. She constantly asked for assistance in setting up course details, something which previously she had found quite easy. She experienced neck and back pain sitting at her desk and answering the telephone. She then had to attend to the domestic needs of her family when she returned home which she found very difficult and was reliant on her mother and the family.

[11] The plaintiff's biggest problem was an inability to sleep because of the pain in her neck and constant headaches. She thought that she would manage better if she could work for one person and successfully applied for a position as assistant to Ms Suzanne Jordan, the director of education and training, with a promotion to a level AO3. Had she not had these problems the plaintiff said that she would not have changed positions because she enjoyed where she was working and had a number of friends with whom she socialised, built up over eight years in the position.

[12] The work with Ms Jordan was essentially secretarial assistance to a board of academics and other boards of management at Southbank TAFE. The plaintiff was required to maintain Ms Jordan's diary including arranging her appointments with Ministers, meeting venues, correspondence, including emails of which she received about 100 per day and telephone answering. Ms Jordan described the position as a very busy one with approximately 85 to 90 per cent of it at the computer. Unfortunately the plaintiff found that her symptoms remained much the same and she needed to take quite a lot of time off work. Between 18 February and 4 August 2003 when she resigned she had taken 45 sick days. The plaintiff found that she could not keep up with her work. She forgot to book appointments for Ms Jordan as well as cars to take her to meetings, which was a complete contrast to her efficiency prior to the motor vehicle accident.

[13] The plaintiff's mother and sister, Ms Erin Croft, who lived nearby, supported the plaintiff extensively during this period.

[14] Just prior to tendering her resignation the plaintiff was on sick leave having consulted with her general practitioner complaining of fatigue, sleep problems, neck pain and headaches on 24 and 29 July 2003.

The plaintiff's resignation

[15] The plaintiff resigned from her employment on 30 July 2003 effective from 4 August 2003. In her separation notice (Exhibit 22) she wrote as her reason for leaving

> "Domestic and other pressing necessity. *Memo attached. Recently involved in car accident going through divorce and facing financial hardship and facing eviction [from] rental property."

In her attached memo the plaintiff wrote

> "This is a formal request to access my Long Service Leave for Domestic and Other Pressing Necessity.
>
> The following has lead to this request;
> - I am currently going through a separation and divorce to follow within the next month as my marriage has failed due to financial hardship and lies.
> - My ex has left me with an outstanding rent debt of $3,760.00 and I need to vacate the premises, as I do not have access to the money to pay the outstanding amount. As of 1st August.

- I still have injuries that are still being attended to by doctors & physio and I am currently on sick leave as of 23/7/03 to 1/8/03 for neck pain. This is a long process with lawyers and RACQ third party insurance and is very stressful and will not be finalised until March 2004.
- The stress of these circumstances has left me totally drained and my injuries are worst due to lack of sleep and nerves. I need to stress the importance of this approval as I am at a loss of what else to do and I need to get my life together for my two little children and me."

[16] The plaintiff's superiors were satisfied with her work but for the lengthy absences because of health problems and sorry to see her leave. Ms Jordan discussed with the plaintiff, prior to receipt of her written notice, the possibility of her taking a period of leave without pay or even a move to some other position in the Public Service on a part-time basis. Ms Jordan recalled that the plaintiff told her that her continuing health problems plus her added problems with her husband made it too difficult for her to cope with her children and with work.

[17] Until July 2003 Mr Ballesteros had been responsible for payment of the rent of the home at Glenhaven Street to the landlord. The plaintiff gave him money towards the rent and he provided the balance. Mrs Croft, the plaintiff's mother, did not contribute to the payment of rent. The landlord approached the plaintiff sometime in July 2003 with a notice of breach. He told her that he understood from conversations which he had with Mr Ballesteros that their relationship had "broken up" and that he did not really live at the home. The amount of rent outstanding was $3,760. The landlord wanted the arrears of rent paid. The plaintiff understood then that if the rent was not paid she would have to vacate the house. She spoke to Mr Ballesteros about the matter but he made no comment. She said that there was no one to whom she could turn for a loan to assist her to pay the landlord except for one person whom she was too embarrassed to ask. She said in answer to a question by Mr Douglas SC whether the anxiety about the need to vacate the home was a source of great stress and strain, that she was already stressed and strained and was already considering leaving work "but this was something I just didn't need to deal with" t/s 124.

[18] The plaintiff agreed that thereafter she saw her long service leave entitlements as a source of funds to enable her to meet the outstanding rent but did not agree that that was the reason she resigned her employment. She agreed that immediately prior to tendering her resignation she wanted to spend more time with her children during the period of the divorce and that it was important to her to mother her two young children but she explained that her children needed her "to be the person I was, that I was no longer" t/s 134. She had already been considering resigning from work so that she could get better and stronger so that she could be the kind of mother to her children that she had been before sustaining injury in the motor vehicle accident. She was clearly very proud that she was regarded as a very "good" mother whilst working full-time.

[19] The plaintiff received just under $5,500 by way of accrued leave benefits which she utilised in part to pay the outstanding rent.

[20] The defendants contend that they have "disentangled" the facts pertaining to the various contributing factors going to the plaintiff's resignation from her employment and that the conclusion must be that whether or not the plaintiff was injured she would have resigned from her employment. The plaintiff's case is that she was subject to a number of stressors but it was the motor vehicle accident and its aftermath which overwhelmed her and brought about her resignation.

[21] As Deane, Dawson, Toohey and Gaudron JJ observed in *Medlin v State Government Insurance Commission* (1994-1995) 182 CLR 1 at 6

> "For the purposes of the law of negligence, the question whether the requisite causal connection exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience."

Their Honours concluded that that remained so in a case where the question of the existence of the requisite causal connection was complicated by the intervention of some act or decision of the plaintiff or a third party which constituted a more immediate cause of the loss or damage. In such a case, their Honours concluded the "but for" test, while retaining an important role as a negative criterion, was inadequate as a comprehensive positive test.

[22] In *Medlin* the plaintiff was involved in a motor vehicle accident in which he sustained serious injuries and at the time of the appeal years later continued to suffer continuing pain that was a source of constant discomfort. At the time of the accident the plaintiff was Foundation Professor of Philosophy at Flinders University. Before the accident he had been very active in the intellectual life of the University, in community affairs and was very fit. His University duties included lecturing, research, participation in seminars, supervision of postgraduate students and routine administrative duties. The plaintiff returned to work and struggled to continue. He usually did not require medication for pain relief but if he overexerted himself his pain could become quite intense. The plaintiff took early retirement from the University because he wished to devote as much time as possible to research and creative philosophy untroubled by his teaching and administrative duties which had become burdensome. He believed that he was not performing at the high level he thought desirable and should resign although there were no complaints about his teaching or administrative capacities within the University community. He was unsuccessful in his claim for loss of earning capacity at trial and in the Full Court of the Supreme Court of South Australia.

[23] Their Honours said at 6

> "The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing

> cause of the intervening act or decision. It will be seen that, on the plaintiff's evidence, the present was such a case."

[24] Their Honours said, at 7, that the question of causation of damage in a negligence action cannot be automatically answered by classification of operative causes as "pre-eminent" or "subsidiary"

> "Regardless of such classification, two or more distinct causes, without any one of which the particular damage would not have been sustained, can each satisfy the law of negligence's common sense test of causation. This can be most obviously so in a case where a "subsidiary" cause operates both directly as a cause of the particular damage and indirectly as a contributing component of a pre-eminent cause."

[25] They concluded that since Professor Medlin's tiredness and his inability to carry out his duties as a teacher and administrator to his high academic standards was caused by his injuries, his decision to take early retirement in order to devote more time to research was a product of the injury sustained in the motor vehicle accident.

[26] McHugh J concluded that the plaintiff was entitled to damages for loss of earning capacity because the act of retirement was not unreasonable, the reasons for it were the result of the plaintiff's injuries and his loss was causally related to the defendant's negligence.

[27] I have dwelled on the facts of *Medlin's* case rather more than simply referring to the principle because it has close parallels to this case. It is common sense to conclude that the plaintiff, on the probabilities, would not have resigned her employment with the Queensland Public Service with its many benefits had she been the fit, energetic and very competent young woman she was before the accident merely to access the sum of $3,760 and to spend more time with her children. Prior to the accident she had an arrangement with her mother and other family which allowed her to work full-time and still be a loving and capable mother and house-keeper. This had been the case since prior to her son's birth in 2001. Any distress which she felt about the break-up of her marriage, I accept, as she said, was well and truly in the past. Had the plaintiff not been in that vulnerable condition brought about by her injuries she may have been able to negotiate an arrangement with the landlord to pay the overdue rent in instalments. He was a sergeant of police and there was no suggestion that he wanted only to evict her and her family. Even had that been the case, she could readily have looked for other accommodation or sought a commercial loan. Her capacity to see clearly what was in her best interests is likely to have been compromised by her fatigue and pain and distress at her increasing failure both at work and with her children. As she said, she needed to remove the stress of work to attempt to restore herself so that she could be a competent and loving mother to her children again.

The plaintiff's ongoing symptoms

[28] After the plaintiff stopped work in mid 2003 for a period her symptoms remained much the same. She was heavily dependent on her mother to do household tasks and look after the children. She said, and her mother agreed, that she needed her mother's assistance to work out her finances each week – to pay rent and other bills

– and to do her shopping list. The reason for this was she was very tired through lack of sleep and she could not concentrate. Sometimes she said her neck would be sore and sometimes her back.

[29] After a time the plaintiff noticed some improvement so that sometimes she had "good days". From about the middle to the end of 2004 she found she was able to function a little better although she was still dependent on her sister and her mother to go with her on outings and to assist with the grocery shopping, her finances and with the children. She said that on some days she was physically "fine". She said that she could do some things around the house and once or twice a week she went with her sister to the shops to have coffee as a social outing. When the weather was colder she felt the chill in her neck and "only this week my neck was stiff again and I found it hard to sleep. So I have good and bad days, but my only problem now is I still find it hard to remember things and to have a really good night's sleep" t/s 61.

[30] At the time of giving her evidence the plaintiff said that she continued to experience difficulty sleeping, her neck becomes tight when cold and, although the pain in her back was not as severe as it was, she constantly felt exhausted. If she overtaxed herself doing repetitive things like sweeping or bending her back became sore. She said

> "But the thing is, my pains have not been consistent. They are getting better, but when they are – I don't get sleep and the injuries are nagging me, and I'm trying to rest, that's when I have a bad day and I can't function normally. I can't get things in perspective in my mind because my head is hurting so much." t/s 117

The plaintiff said that her headaches were not now as frequent but were quite severe if she had little sleep. She continued to experience difficulty managing her children and remembering things. She felt completely dependent on other people, and with this her mother and sister agreed. The plaintiff said

> "I'm not like I used to be and I'm sick and tired of always having to call upon someone to help me. I don't even feel secure in myself walking out the door by myself, just coming here and not having someone else with me. I have felt so petrified and so scared, when generally anytime I walk out the door I'm not with someone . And I totally depend on them, because I'm lost if I don't have someone else with me to help me with things." t/s 118

[31] Mr Douglas revisited with the plaintiff in cross-examination the progress of her symptoms. She agreed that from the middle of 2004 her symptoms of pain and discomfort started to improve and that it was possible for her to undertake some daily domestic activities at a greater level than had been the case before.

[32] The plaintiff said that she bought non-prescription medication to help ease her pain but tended to try alternate remedies such as yoga stretches, warm baths and hot and cold packs. There were days when she suffered no pain at all and her neck was often pain free.

[33] One of the chief residual problems the plaintiff complained about was her inability to remember things such as domestic requirements when shopping and how to

manage her money. In answer to the question "Why do you forget things?" she answered

> "I don't know. This is something that's never been addressed, and I feel like I am being persecuted because I've had injuries from the physical side, but there is nothing else to help in any shape or form. I've had hardly any sleep, and I don't know how I've come to this state that I'm in where I can't function properly, or I can't recall things, and I forget things all the time. I've become so dependent on my mother and sister and I ..." t/s 153-4.

The plaintiff said that the quality of her sleep had improved over time and she now slept more soundly. When pressed, she said she could do most domestic tasks now for herself and the children but they would take much longer and would need to be "spread out" but that she had not had to do so.

[34] The plaintiff makes no claim based on any psychiatric or psychological injury arising out of her physical injury but even so, it must be accepted that each person's response to physical injury is different. Mr Stephen Hoey, an occupational therapist in private practice, had concluded that the plaintiff had a poor understanding of the mechanisms of her injury and its treatment. Mr Hoey discussed the likely physical explanation for the plaintiff's poor sleep pattern. He explained that the small muscles in the spine which are injured in a flexion/extension injury support a person asleep and because they no longer operate effectively the spine gets into awkward positions causing the pain that wakes a person. He said the inability to get a good night's rest was a common complaint in persons who had injured their back or neck. The condition was difficult to manage and that management was aimed at trying to reduce muscle spasm through the day. Mr Hoey said that techniques could be learnt at pain clinics such as was offered at the Wesley Pain Clinic.

[35] By the time of trial the plaintiff had started painting again at home working at her own pace. She has made enquiries at the Brisbane City Council about part-time casual work and has resumed contact with people she worked with previously in the Department of Education and Training. She spoke of contacting a guidance officer to direct her about improving her skills having been out of the workplace for some years. She also wishes assistance with her sleeping problems and memory deficits. Although the plaintiff clearly found giving evidence a distressing and difficult experience and at times during cross-examination appeared resignedly compliant when agreeing with counsel's questions, my impression was that she was an honest person who was very anxious to resume a more personally productive life. She seems to need the skills of professionals to assist her to do this.

Video Evidence

[36] The plaintiff was the subject of covert surveillance recorded on video on 7 July and 7 and 8 December 2004, (exhibit 15). After viewing well over an hour of footage taken of the plaintiff getting into and out of a car, climbing stairs, walking around a shopping centre, shopping, sitting with others and having refreshments none of the medical specialists for the plaintiff or defence were disposed to alter their opinions.

[37] Nothing shown was inconsistent with the plaintiff's evidence that since the middle of 2004 her symptoms of which she had complained for about a year following the

accident had eased. She is not shown doing things which she said she is unable to do. Her movements, as shown on the videos, are fairly slow and deliberate and she is not seen bending and twisting repetitively or lifting/carrying heavy weights. She is shown carrying some shopping parcels of not any obvious heaviness. On the other hand, she is not shown to be in any physical discomfort or to be experiencing physical restriction.

Medical Opinion

[38] Mr Hoey assessed the plaintiff on 3 February 2004. She reported a range of physical difficulties which revolved largely around activities which aggravated her neck and back pain and/or left leg pain. As at the date of testing he concluded that she had occupational restrictions of the following kind:

- Decreased tolerance for long periods of sitting or standing;
- Unfit for lifting general loads greater than 10 kg;
- Reduced capacity for handling loads on a repetitive basis;
- Restrictions with forward bending (stooping);
- Restrictions with holding the head and neck in fixed postures.

He concluded that the plaintiff was then capable of occupations in the sedentary to light range only and her maximum capacity for occupational activity then to be in the order of 4 days per week and her major difficulty was the sedentary nature of her work. He thought that she would be assisted by a rehabilitation provider such as a cognitive behaviour based pain clinic at a cost of $2,800. If the plaintiff could utilise a writing slope and special typing chair Mr Hoey thought she may be assisted in employment of the kind she had previously.

[39] He gave helpful and sensible evidence about the difficulty of translating the plaintiff's assessed physical capacity into commercial employment. He has had extensive experience in attempting to place injured workers in employment. The reality, be it the present Queensland Public Service with short-term contracts or in private enterprise, he said, made it very difficult for injured applicants to be offered positions if they were honest about their special equipment needs and physical limitations.

[40] Mr Hoey had not examined the plaintiff for well over a year but he had a more robust approach to the plaintiff's capacities, particularly if she learnt some techniques, than some of the medical specialists and without disregarding the expertise and opinions of the specialists, I found his evidence of greatest assistance. This was largely due to his practical expertise in actually placing persons with back/neck injury in the workplace.

[41] The medical specialists were rather divided in their opinions about the cause of the residual pain from which the plaintiff suffers and its likely resolution or otherwise. They all characterised the plaintiff as an honest historian not given to unwarranted exaggeration. Dr David White, orthopaedic specialist, suggested that the different opinions between the specialists might be explicable by reference to the level of pain the plaintiff was experiencing on the day of consultation.

[42] Dr Don Todman, a neurologist, saw the plaintiff on 4 February 2004 and possibly 9 September 2004. He has provided three reports, exhibits 2, 3, and 4, and gave

oral evidence at the trial. The symptoms conveyed to Dr Todman by the plaintiff were consistent with her oral evidence. In his report of 4 February 2004 he concluded that the plaintiff had suffered a whiplash injury to the cervical spine which had damaged the muscles and ligaments of the spine. He thought it was likely that she had also sustained left sided cervical facet joint injury which would account for her ongoing symptoms. He said that the headaches were of a muscular tension type and associated with muscle spasm in the cervical spine.

[43] He agreed that her treatment had been appropriate but that she needed to maintain a physiotherapy program for a further six months and would benefit from muscle strengthening exercises. He concluded that her current symptoms had stabilised and were likely to represent a permanent state of affairs. According to Dr Todman the literature on whiplash injuries suggested that symptoms present on average after 12 months were likely to be permanent. On this basis he estimated a 10 per cent whole person impairment relating to the cervical spine injury using the AMA Guidelines 5th edition. He had added some 2 per cent because of the intensity of the pain and the frequent headaches not features of the Guidelines. He concluded that the plaintiff might cope with part-time administration work up to 20 hours per week provided there were good ergonomics available but that it would be a further one to two years before she could be engaged in full-time work in that capacity. In his last report, without having seen the plaintiff again, he concluded that she would be unlikely ever to return to work full-time. The plaintiff's own evidence of real improvement since mid 2004 suggests that Dr Todman was unduly pessimistic. As at February 2004 Dr Todman concluded that the plaintiff required seven hours domestic assistance per week.

[44] Dr White saw the plaintiff on 3 August 2004 and regarded her lumbar spine condition as stable and stationary and assessed a five per cent impairment of the whole person. He thought that she was likely to remain unfit for work involving significant physical labour, prolonged standing, prolonged sitting, lifting, repetitive bending or maintenance of the head and neck in fixed positions for extended periods of time but could do administrative work if able to vary the tasks. He agreed in cross-examination that a person with residual problems two years post injury could still improve over the following year.

[45] The plaintiff was seen by Dr Morgan, orthopaedic surgeon, on 6 May 2004. He concluded that the plaintiff may have sustained a flexion extension acceleration injury of the cervical segment of her vertebral column and that the natural history for that type of injury was for gradual healing with a return to symptomatic normality. He noted that the plaintiff's condition had improved and although she had some bilateral cervical spinal pain she had regained the full range of motion. He accepted a causal link between her symptoms and the accident but he expected that she would continue to improve and return to functional normality. Dr Morgan quantified the plaintiff's loss as one per cent of bodily function because of her ongoing vertical column pain by reference to the AMA Guidelines 5 ed. Dr Morgan thought that the plaintiff was *physically* capable of the duties required of her as a clerical assistant and was a capable of independent domestic living. He did agree in cross-examination that his assessment made no allowance for the plaintiff's fatigue in affecting her ability to function normally.

[46] Dr Michael Weidmann, neurosurgeon, saw the plaintiff on 17 June 2004. He, too, concluded that the plaintiff had suffered multiple soft tissue injuries as a result of

the motor vehicle accident including bruising which had subsided. He noted her ongoing symptoms relating to her cervical and to a lesser extent her lumbar spine. He commented that the intensity of her ongoing symptoms "is greater than one would expect for injuries of this nature and severity". In his opinion the plaintiff's condition was stable and stationary.

[47] Whilst Dr Weidmann thought the plaintiff would have difficulty with work of a heavy physical nature he concluded that she was medically fit for any work of a lighter non-physical nature which would include her previous job as an executive/administrative officer and would not require any modifications of the workplace. He assessed her as having a two per cent partial permanent impairment of the whole person as a result of the injury. He did not think she required any domestic assistance. Dr Weidmann noted that the medical guidelines did not include pain or fatigue as factors for percentage disability and he observed, what is well known, that it is difficult to measure pain but questioned the reliability of the plaintiff's levels of fatigue as reported.

[48] I had no doubt about the plaintiff's honesty but suspect that without some assistance of the kind referred to by Mr Hoey for dealing with her ongoing symptoms that she will continue to see herself as a dependent person which will inhibit her rehabilitation. She has been fortunate in many respects in having her mother and sister and other members of family supporting her through this period. But bearing in mind the kind of personality and character the plaintiff demonstrated prior to injury, she may very well have managed the domestic side of her life with more facility than she thought she could had she been compelled to do so. Without the assistance of any psychological assessment I can venture no further comment.

Domestic care and assistance

[49] Prior to sustaining her injury and although in full-time employment, the plaintiff undertook the bulk of the domestic work relying on her mother only for the actual care of her young children. Generally the plaintiff would get the children dressed, give them their breakfast and prepare their meals and clothes for the day. As Cecille became older and went to school her school needs would be attended to. Mrs Croft looked after the children during the day and, when Cecille went to school would often take her. As soon as the plaintiff returned home she would take over and do all accrued domestic tasks such as washing up or tidying from the day's activities as well as the preparation of the evening meal. She did the cleaning and the washing and ironing.

[50] After sustaining her injuries Mrs Croft helped the plaintiff get the children their breakfast in the morning, dressed, did the ironing and washing up and cleaning throughout the day. In effect, the plaintiff said that her mother took over all the tasks which she, the plaintiff, had been accustomed to doing. From time to time she was assisted by the plaintiff's brother and wife who lived in the house for a short time and other family members who lived nearby.

[51] Damages for gratuitous services are governed by ss 55B and D of the *Motor Accident Insurance Act* 1994. The latter provides that damages may only be awarded if the services are necessary and may not be awarded if provided or to be provided for less than 6 hours a week and for less than 6 months. The Court of Appeal has recently construed the same legislative formula in *Grice v State of*

Queensland [2005] QCA 272 as it then appeared in s 54(2) of the *Personal Injuries Proceedings Act* 2002. The court concluded, contrary to the appellant/insurer's contention, that a plaintiff would only be disentitled to gratuitous damages under s 54(2) if both (a) – less than six hours per week, and (b) – for less than six months duration were met. Here the wording of s 55D is precisely the same as in *Grice*. There is no discernible difference in the context and it was not contended by counsel that there was.

[52] The defence has accepted the plaintiff's claim that she required domestic and personal assistance of 20 hours per week until August 2003 – more than 6 hours per week for 6 months. Thereafter the claim is made for seven hours a week to trial/judgment and six hours per week for the future but discounted to 2.5 hours per week to take account of the fact that the children will not require so much care and for other contingencies. I will consider the hours below. I have concluded after considering the plaintiff's own evidence that there were a number of domestic tasks that she could have done that were done for her by her mother or some other family member as a continuation of their care for her in the aftermath of the accident, and that the plaintiff remained overly and unnecessarily dependent upon her mother and sister from mid 2004.

[53] I have concluded that the plaintiff required care and assistance for four hours per week from June to December 2004. Thereafter as matters were improving for her the necessity for the care and assistance diminished even though it was still offered and accepted. Assistance for heavy cleaning and carrying into the house heavy shopping and the like is allowed at two hours per week until December 2005. This anticipates that the plaintiff will have undertaken a course at a pain clinic and learnt some techniques. Thereafter, reflecting the plaintiff's evidence, the "necessity" for that assistance has not been demonstrated.

Assessment of damages

(a) Pain, suffering and loss of the amenities of life past and future

[54] The *Civil Liability Act* 2003 ("CLA") applies to the assessment of the plaintiff's damages.

[55] Section 51 of the CLA defines "general damages" as damages for

> "(a) pain and suffering; or
> (b) loss of amenities of life; or
> (c) loss of expectation of life; or
> (d) disfigurement."

[56] Section 61 provides

> "(1) If general damages are to be awarded by a court in relation to an injury arising after 1 December 2002, the court must assess an injury scale value as follows—
>
> (a) the injured person's total general damages must be assigned a numerical value (***injury scale value***) on a scale running from 0 to 100;

(b) the scale reflects 100 equal gradations of general damages, from a case in which an injury is not severe enough to justify any award of general damages to a case in which an injury is of the gravest conceivable kind;

(c) in assessing the injury scale value, the court must—

(i) assess the injury scale value under any rules provided under a regulation; and

(ii) have regard to the injury scale values given to similar injuries in previous proceedings.

(2) If a court assesses an injury scale value for a particular injury to be more or less than any injury scale value prescribed for or attributed to similar particular injuries under subsection (1)(c), the court must state the factors on which the assessment is based that justify the assessed injury scale value."

[57] Section 62 of the CLA provides for the calculation of general damages according to the assessment of the injury scale value ("ISV") and the formulae set out in s 62.

[58] The *Civil Liability Regulation* 2003 ("the Regulation") in s 6 provides the ranges of ISV for particular injuries referred to in s 61(1)(c)(i) of the CLA.

[59] Section 6 of the Regulation provides, relevantly,

"(1) Schedule 4 provides the ranges of injury scale values for particular injuries for s 61(1)(c) of the Act.

(2) For an injury not mentioned in schedule 4, a court, in assessing an injury scale value for the injury, may have regard to the ranges prescribed in schedule 4 for other injuries.

(3) Schedule 3 provides matters to which a court is to have regard in the application of schedule 4.

..."

[60] Section 3 of schedule 3 of the Regulation provides for multiple injuries:

"(1) Subject to section 4, for multiple injuries, the range of ISVs for the dominant injury of the multiple injuries is to be considered by a court in assessing the ISV for the multiple injuries.

(2) To reflect the level of adverse impact of multiple injuries on an injured person, the court may assess the ISV for the multiple injuries as being higher in the range of ISVs for the

> dominant injury of the multiple injuries than the ISV the court would assess for the dominant injury only."

[61] Schedule 7 of the Regulation, the dictionary, defines "dominant injury" of multiple injuries as meaning

> "(a) if the highest range for 2 or more of the injuries of the multiple injuries is the same – the injury of those injuries selected as the dominant injury by a court assessing an ISV; or
>
> (b) otherwise – the injury of the multiple injuries having the highest range."

[62] Section 8 of Schedule 3 refers to other provisions to which the court must have regard when assessing general damages. It provides

> "(1) In addition to providing ranges of ISVs for particular injuries, schedule 4 sets out other provisions relevant to using the schedule to assess an ISV for similar particular injuries.
>
> (2) In assessing an ISV, a court must have regard to those provisions to the extent they are relevant in a particular case.
>
> (3) The fact that schedule 4 provides examples of factors affecting an ISV assessment is not intended to discourage a court from having regard to other factors it considers are relevant in a particular case."

Additionally, in assessing an ISV, a court may have regard to other matters to the extent they are relevant in a particular case, s 9. The examples given are the injured person's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life and in assessing an ISV for multiple injuries, the range for and other provisions of schedule 4 in relation to, an injury other than the dominant injury of the multiple injuries.

[63] Section 10 of schedule 3 of the Regulation provides that the extent of whole person impairment is an important consideration "but not the only consideration affecting the assessment of an ISV". If a medical report states a whole person impairment percentage, it must state how the percentage is calculated including

> "(a) the clinical findings; and
> (b) how the impairment is calculated; and
> (c) if the percentage is based on criteria provided under AMA 5 –
> (i) the provisions of AMA 5 setting out the criteria; and
> (ii) if a range of percentages is available under AMA 5 or an injury of the type being assessed – the reason for assessing the injury at the selected point in the range."

[64] The dictionary, (schedule 7) defines AMA 5 to mean "the 5th edition of the Guides to Evaluation of Permanent Impairment published by the American Medical

Association" (exhibit 5). The purpose of the Guide, relevantly for this matter, is set out in the introduction to Chapter 15 – The Spine

> "This chapter provides criteria for evaluating permanent impairments of the spine, including how they affect an individual's ability to perform activities of daily living (ADL)."

The chapter identifies the principles that should be employed by the medical specialist in assessing the degree of injury of the relevant part of the spine. Great weight is to be given to a medical assessment following the AMA Guidelines 5 ed than one not based on those criteria. Whilst medical specialists are all, no doubt, familiar with AMA 5, it will probably prove irksome to those who have engaged in medico-legal work to be directed so particularly by s 11 of schedule 3 as to how reports are to be written.

[65] The following are the injuries suffered by the plaintiff in the motor vehicle accident on 18 February 2003

(i) graze to left shoulder;
(ii) bruising to left ankle;
(iii) bruising to left lower leg;
(iv) bruising to left hip;
(v) bruising to chest and stomach;
(vi) dental injury (cracked tooth);
(vii) cervical spine injury with associated muscle tension headaches;
(viii) a lumbar spine injury.

The injuries numbered 1-6 were not challenged. They are to be found set out in the Kedron Park 24 hour Medical Centre summary notes for 24 February 2003 (exhibit 19). There was no challenge to the plaintiff's evidence that she cracked a back tooth in the accident and that a piece of it dislodged when she was eating later and that she has not sought any further treatment.

[66] Pursuant to the CLA and the Regulation each injury must be categorised with an item from schedule 4 of the Regulation and an ISV assigned to it. Even though the dominant injury may be obvious so that its ISV can be selected, in order to give effect to schedule 3, s 3(2) each injury needs to be identified and assessed.

(i) Graze to left shoulder

[67] Item 98 is "minor shoulder injury". Examples of the injury are "soft tissue injury with considerable pain but almost full recovery in less than 18 months and "fracture from which the injured person has made an uncomplicated recovery". The range is 0 to 5 and if assigning a range would give a 1.

(ii) Bruising to left ankle

[68] Item 144 is "minor ankle injury". Examples of the injury are "a sprain, ligamentous or soft tissue injury or minor or undisplaced fracture." That seems to describe best

the nature of the plaintiff's injury. The range is 0 to 5 and an ISV of 1 is notionally assigned.

(iii) Bruising to lower left leg

[69] Item 136 is "minor lower limb injury". The example given which best fits the plainitff's injury is

> "An ISV near the bottom of the range will be appropriate if –
> (a) there are soft-tissue injuries, lacerations, cuts, bruising or contusions, all of which will fully or almost fully recover; and
> (b) any residual disability will be minor."

A notional ISV of 1 is assigned in a range of 0 to 10.

(iv) Bruising to left hip

[70] Item 128 is "minor pelvis or hips injury". The comment states "An ISV at or near the bottom of the range will be appropriate if there is a soft tissue injury from which the injured person fully recovers." The range is 0 to 10. A notional ISV of 1 is assigned.

(v) Bruising to chest and stomach

[71] Item 39 "minor chest injury" seems best to fit this injury. The relevant comment – "An ISV at or near the bottom of the range will be appropriate if there is a soft tissue injury, with full recovery within a couple of weeks." The ISV range is 0 to 10. A notional ISV of 1 is assigned.

(vi) Dental injury

[72] Item 18 is "injury to teeth or gums." Item 18.3 states as comment "Loss of or serious damage to 1 tooth, minor gum injury or minor gum infection." The ISV range is 0 to 2. A notional ISV of 1 is assigned.

(vii) Cervical spine injury

[73] The expert medical opinion has described the plaintiffs' injury in this part of her body as

- A whiplash injury to the cervical spine with left sided cervical facet joint injuries and associated muscle tension headaches – Dr Todman;
- A flexion/extension injury – Dr White;
- A flexion/extension acceleration injury with ensuing musculo-ligamentous injury – Dr Morgan;
- A "soft tissue injury" – Dr Weidmann.

[74] Mr Grant-Taylor contends for item 88 for the injury "moderate cervical spine injury – soft tissue injury." The comment is

> "The injury will cause moderate permanent impairment, for which there is objective evidence, of the cervical spine."

The further comment about the appropriate level of ISV is

> "An ISV of not more than 10 will be appropriate if there is a whole person impairment of 8 per cent caused by a soft tissue injury for which there is no radiological evidence."

[75] Mr Douglas contends for this injury to be characterised as item 89 "minor cervical spine injury". The comment for that item is

> "Injuries with this item include a whiplash injury with no ongoing symptoms, other than symptoms that are merely a nuisance, remaining more than 18 months after the injury is caused.
>
> There will be no objective signs of neurological impairment."

The example of the injury is "A soft tissue or whiplash injury if symptoms are minor and the injured person recovers, or is expected to recover, from the injury to a level where the injury is merely a nuisance within 18 months after the injury is caused." Of assistance in interpreting that example is the comment about the appropriate level of ISV "An ISV at or near the bottom of the range will be appropriate if the injury will resolve without any ongoing symptoms within months after the injury is caused" and "An ISV at or near the top of the range will be appropriate if the injury, despite improvements, causes headaches and some ongoing pain."

[76] The ISV range for item 88 is 5 to 10 and for item 89 is 0 to 4.

[77] The description of the plaintiff's cervical spine injury seems to fall between 88 and 89. Dr Todman assessed the plaintiff's injuries as equating to an 8 per cent whole person impairment (excluding pain and headaches). Dr Morgan assessed the impairment at one per cent. The plaintiff's medical specialists were closely cross-examined by Mr Douglas for their compliance with AMA 5.

[78] Despite vigorous cross-examination about the methodology which he employed and a close examination of his application of the Diagnosis Related Estimate (DRE), Dr Todman was confident that he had carried out his investigation in accordance with the definitions in AMA 5. A DRE Lumbar Category II in which Dr Todman placed the plaintiff is a 5-8 per cent impairment of the whole person. The plaintiff, he considered, fell within the first of the three descriptions

> "Clinical history and examination findings are compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymetric loss of range of motion, or non-verifiable radicular complaints defined as complaints of radicular pain without objective finding; no alteration of the structural integrity and no significant radiculopathy."

However, as has been mentioned, the plaintiff says that these symptoms have significantly abated. However, it would not be correct to characterise those

symptoms 18 months after the injury as "merely a nuisance." Dr Weidmann assessed the plaintiff's cervical spine condition as falling between the definitions of DRE Cervical Category I and Category II. In his view the plaintiff had a two per cent partial permanent impairment of the whole person as a result of that injury. At this stage in the assessment a notional 7 ISV is assigned.

(viii) Lumbar spine injury

[79] An MRI scan performed on 3 August 2004 demonstrated desiccation at L4/5 "loss of disc height and associated annular bulging ... no detected nerve root effect" Dr White, exhibit 1. Dr White opined that it was more likely that the L4/5 desiccation had been caused by the accident trauma than age related as suggested by Dr Morgan largely because the plaintiff had the same limitations in movement after the accident as before. Dr White noted the coincidence of complaints of tenderness shortly after the accident and that the affected discs were not the lowest which would more likely indicate age than trauma. Dr Todman attributed the plaintiff's intermittent symptoms of midline and left hip lower/leg pain to trauma to the lumbar spine sustained in the accident.

[80] Dr Morgan particularly noted Schmorl's nodes at the L2, L3 and L4 levels which relate to development defects in the vertebral body end plates and are not related to any specific traumatic event. He noted symptoms in her lumbar spine of mild tenderness more to the left side and mild limitation of back movement, some of which was consistent with her pre-accident capacity, for example only reaching half way down her shin, concluded that her lumbar spine condition would fall within the definition of DRE Lumbar Category I with 0 per cent permanent impairment. After he had viewed the MRI of the plaintiff's spine he concluded that it was essentially normal with minor degenerative changes consistent with age including the degeneration seen at L4/5.

[81] I was not persuaded to the requisite standard that the desiccation shown on the MRI at L4/5 was related to the trauma sustained in the accident.

[82] If am incorrect in that conclusion the items which come closest to the injury are found in Division 2 – "Thoracic spine or lumbar spine injuries". I cannot agree with Mr Grant-Taylor's submission that if the "minor annular disc bulging" as noted in the radiology report (exhibit 14) is accepted as having been caused by the trauma of the accident. Item 92 "Moderate thoracic or lumbar spine injury – fracture disc prolapse or nerve root compression or damage" is apt. At best the injury would lie in Item 93 "Moderate thoracic or lumbar spine injury – soft tissue injury". The comment for that item is "An ISV of not more than 10 will be appropriate if there is a whole person impairment of 8 per cent caused by a soft tissue injury for which there is no radiological evidence". It is accepted that there is radiological evidence of the desiccation of L4/5 but the impairment which has been identified pursuant to AMA 5 is 0 per cent or 1 per cent.

Conclusion on ISV

[83] Where there are multiple injuries then the "dominant injury" must be identified. The moderate cervical spine injury and the moderate lumbar spine injury (supposing it to be caused by the accident) both have ISV ranges of 5 to 10. I propose to

disregard the lumbar spine injury for the purposes of the assessment as I have not been persuaded of its link to the accident. Clearly the cervical spine injury is to be designated the "dominant injury".

[84] It is necessary to determine whether the ISV range for that injury is sufficient to allow an ISV to be allocated within that range which adequately reflects the combined adverse impact of all injuries. To reflect the level of impact, the court may make an assessment of the ISV for the multiple injuries that is higher than the maximum dominant ISV, s 4(2) of schedule 3. Section 4(3)(b) notes that should this occur the higher ISV value should rarely be more than 25 % higher than the maximum dominant ISV.

[85] I have suggested that an ISV of 7 for the cervical spine injury as appropriate. To take account of her other injuries, including the loss of the tooth and the severe impact which her injuries have had on her quality of life it is appropriate to increase that to an ISV of 9. Mr Grant-Taylor urged that I consider the case of *Coop v Johnston* [2005] QDC 079, a decision of Britton DCJ of 24 March 2005 said to be the only decision made under the CLA. This is because s 61(1)(c)(ii) of the CLA mandates that a court in assessing the ISV is to consider values attributed to similar injuries in prior proceedings. I have been greatly assisted by his Honour's careful analysis of the legislation and approach but the plaintiff's injuries in that case were more substantial and enduring with facial injuries, including a fractured nose as well as orthopaedic injuries and scarring. I am not persuaded that an uplift of 25 % as contended for by Mr Grant-Taylor is appropriate.

[86] By reference to s 62(b) the formula is

> "if the scale value of the injuries is assessed at 10 or less but more than 5 – by adding to $5,000 an amount calculated by multiplying a number by which the scale value exceeds 5 by $1,200".

That results in an amount of $9,800 for general damages ($5,000 plus 4 times $1,200).

[87] There can be no doubt that this is substantially less than the plaintiff would have obtained had her claim for damages been calculated at common law. But it is not appropriate to seek to go behind the detailed regime which now replaces the assessment of damages at common law.

[88] The plaintiff is entitled to interest on the past component of her general damages notwithstanding s 60 of the CLA which precludes the award of interest because s 4(3) of that Act provides that s 60 only applies in relation to a breach of duty happening on or after assent which occurred on 9 April 2003. Interest is allowed at 2 per cent per annum on three quarters of the plaintiff's general damages for two and two-third years amounting to $392.

(b) Past loss of earning capacity

[89] The plaintiff claims damages for past loss of earning capacity from 4 August 2003 when she stopped work to judgment. I have accepted that the plaintiff's injuries sustained in the accident were the cause, in the relevant sense, of her resignation from her employment. Mr Douglas contends that even if that be accepted (which he

does not) the plaintiff was, on any view, except that of Dr Todman, capable of returning to work on the anniversary of her resignation, that is, 4 August 2004, even if only part-time. I accept that physically she was able to engage in some part-time work from about that date. But Mr Hoey's evidence, as I have mentioned, advanced two other matters – the difficulty in actually obtaining part-time work with an articulated disability and the plaintiff's failure to understand her symptoms and deal with them. For this she seems to need professional assistance which she could neither afford nor was directed to.

[90] Ms Jordan's evidence suggested that should the plaintiff seek a position in the Southbank TAFE she would be considered sympathetically. Taking all those factors into account I have concluded that the plaintiff should be compensated for this past lost until December 2004 at the rate of her position as an AO2. From then until judgment it should be assumed that she was able to undertake part-time work consistently with Mr Hoey's evidence of four days per week (I note that he suggested from February 2004) and thereafter there is no precisely quantifiable loss. This seeks to balance the respective interests of the plaintiff and the defendants in light of the specialist and other evidence.

[91] The plaintiff's net weekly earnings as an AO2 at the date of the accident were $516.95 ($552.60 actual earnings as an AO3). From 4 August 2003 to early January 2005 is approximately 70 weeks. That gives a figure of $36,187.

[92] From January 2005 to judgment is approximately 9 months (38 weeks). The loss is calculated at one fifth of the plaintiff's full-time earnings calculated as an AO2 at $516.95 per week which gives a figure of $3,929. The total for loss of past earning capacity is $40,116. Those figures ought not be discounted because the plaintiff had talent and ambition and was well regarded at work and might well have secured at least an AO3 position had she not been injured.

[93] The plaintiff has been in receipt of social security benefits since her resignation. As at 31 May 2005 she had received $19,733.52. Applying that figure pro rata to judgment gives an amount of approximately $23,962. The loss upon which interest is awarded is $16,154. The calculation is $16,154 multiplied by 2.75 (as agreed by the parties) over 100 multiplied by 116 which gives an amount of $991.

Loss of superannuation benefits

[94] The rate for loss of past and future superannuation benefits is agreed at 12.9 per cent. Applied to $40,116 is $5,115 for past loss.

Future loss of earning capacity

[95] Mr Grant-Taylor submitted that the plaintiff should be allowed a full loss of income as damages for two years into the future at $589 net per week. The second step is to assume that the plaintiff would be likely to obtain gainful employment limited to part-time work of about 20 hours per week for the rest of her working life. The total amount claimed for loss of future earning capacity is almost $200,000.

[96] On the other hand, Mr Douglas submitted that the plaintiff has been or will be in the near future capable of returning to full-time employment in the same capacity and at the same remuneration which she previously enjoyed. He submits that the

appropriate approach would be an award of no more than $15,000 to comprehend this loss, including superannuation loss.

[97] In the absence of any psychological or psychiatric impairment which would preclude the plaintiff from working in the future I am unable to accept Dr Todman's analysis that the plaintiff will be unlikely to return to full-time work at all. As I have mentioned previously Mr Hoey, with his extensive experience, thought in February 2004 the plaintiff was capable of some work – up to four days a week, and Drs Morgan, Weidmann and White considered that there were no physical barriers to her engaging in similar kind of work to that which she did prior to the accident. In Dr White's case he conditioned his opinion upon the plaintiff being able to move around from time to time. It is the case, however, that the plaintiff may experience difficulties from time to time due to neck pain because the nature of the work in which she is proficient requires her to sit at a computer or at a desk or at an easel. Section 55(2) of the CLA deals with the situation where earnings cannot be precisely calculated. I accept Mr Douglas' submission that it is appropriate, for the future, to award a global figure to take account of the real possibility that from time to time the plaintiff will be unable to work because of intermittent pain due to the injuries sustained in the accident. I allow a figure of $20,000 to include future superannuation losses under this head of damage.

Past care

[98] At the date of the plaintiff's injury her damages for gratuitous care were governed by s 55D of the *Motor Accident Insurance Act* 1994, as mentioned above. The defence concedes that the plaintiff required 20 hours of care and assistance a week for the first six months following the accident. The agreed rate is $18.10 per hour. That gives a figure of $9,412. Thereafter, in accordance with the findings I have made above, from September 2003 to June 2004 (43 weeks) the plaintiff needed 6 hours of care and assistance per week at the agreed rate which gives a figure of $4,670. From July to December 2004 (26 weeks) the plaintiff needed 4 hours of assistance per week which is $1,882. From January to December 2005 I have concluded that the plaintiff needed and will need 2 hours of assistance per week. I have not discounted the future amount as it will (notionally) be expended almost immediately. That gives a figure of $1,882. The total figure for care is $17,846. Interest as agreed between the parties amounts to $1,259.

Future treatment

[99] The defence has accepted that the treatment suggested by Mr Hoey at a pain clinic in the sum of $2,800 together with equipment to assist in office work in the sum of $1,000 ought to be allowed. That amounts to $3,800.

Special damages

[100] Out of pocket expenses have been agreed, including interest, in the sum of $500.

Summary of damages

Description	**$**

General damages	$9,800.00
Interest	$392.00
Past loss of earning capacity	$40,116.00
Interest	$991.00
Past superannuation benefits loss	$5,115.00
Future economic loss including superannuation	$20,000.00
Past gratuitous services	$17,846.00
Interest	$1,259.00
Future rehabilitation and equipment	$3,800.00
Special damages including interest	$500.00
TOTAL:	**$99,891.00**

[101] There is judgment for the plaintiff in the sum of $99,891.

[102] Subsequent to the delivery of judgment the parties agreed to the following costs orders:

1. The Second Defendant pay the Plaintiff's costs of and incidental to the action to be assessed on the standard basis on the District Court Scale applicable to matters in which the sum recovered exceeds $50,000; and
2. It is certified, pursuant to Item 27(3) of the District Court Scale of Costs, that the Registrar may allow a higher amount for Item 27 costs that the Registrar considers proper in the circumstances.