SUPREME COURT OF QUEENSLAND

CITATION:	*Aldridge v Allianz Australia Insurance Ltd* [2009] QSC 257
PARTIES:	**LOUISE RUTH ALDRIDGE** (applicant) **v** **ALLIANZ AUSTRALIA INSURANCE LTD** **(ABN 15 000 122 850)** (respondent)
FILE NO:	4937 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	31 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2009; further written submissions on 20 August 2009 and 24 August 2009
JUDGE:	Applegarth J
ORDER:	**The applicant prepare and submit proposed minutes of order.**
CATCHWORDS:	INSURANCE – THIRD-PARTY LIABILITY INSURANCE – MOTOR VEHICLES – COMPULSORY INSURANCE LEGISLATION – GENERALLY – QUEENSLAND – where applicant is a paraplegic due to a motor vehicle accident – where respondent insurer has admitted liability – where the applicant has applied to Court to determine what kind of accommodation constitutes reasonable and appropriate rehabilitation services in the circumstances – which of the accommodation options canvassed by the parties is reasonable and appropriate in the circumstances *Acts Interpretation Act* 1954 (Qld), s 14A, s 14B *Motor Accident Insurance Act* 1994 (Qld), s 3, s 4, s 51, s 65 *Lynch v Lynch & Anor* (1991) Aust Torts Reports 81-117, cited *Massingham v AAMI Insurance Ltd* (2007) 48 MVR 235; [2007] QSC 174, cited *McMullen v Suhr* [1998] 2 Qd R 406, applied *Moriarty v McCarthy* [1978] 2 All ER 213, cited *Munzer v Johnston & Anor* [2009] QCA 190, applied *Re Walker* (1995) 22 MVR 245, applied *Weideck v Williams* [1999] NSWCA 346, cited

COUNSEL:	M Grant-Taylor SC and C C Heyworth-Smith for the applicant S C Williams QC and S J Williams for the respondent
SOLICITORS:	Shultz Toomey O'Brien for the applicant Moray and Agnew for the respondent

[1] The applicant is a paraplegic as a result of a motor vehicle collision that occurred on 22 June 2008. On 7 January 2009 the respondent, a compulsory third party insurer, admitted liability for the collision. Before she was injured the applicant lived with and supported her three teenage daughters in her own home at Pacific Paradise on the Sunshine Coast. Even with modifications that have been made to enable the applicant to access its lower level and to live downstairs, the applicant's two-level home is unsuitable for her accommodation and rehabilitation. On this application under s 51(5)(b) of the *Motor Accident Insurance Act* 1994 (Qld) ("the Act") I am required to decide "what rehabilitation services are, in the circumstances of the case, reasonable and appropriate". In particular, I am required to decide which of the following accommodation options is reasonable and appropriate in the circumstances:

1. The extensive, further modification of the applicant's home.

2. The construction of a new "project home" that is designed and built to meet her needs.

3. The identification and rental of an existing residence that is modified to meet her needs.

4. The identification and purchase of an existing residence that is modified to meet her needs.

It is envisaged that the costs of acquisition in the second and fourth options would be partly funded by the net proceeds of sale of the applicant's home.

The statutory scheme

[2] One of the objects of the Act is "to promote and encourage, as far as practicable, the rehabilitation of claimants who sustain personal injury because of motor vehicle accidents".[1] Once liability has been admitted on a claim under the Act, the insurer must, at the claimant's request, ensure that "reasonable and appropriate rehabilitation services" are made available to the claimant.[2]

[3] The term "rehabilitation" means "the use of medical, psychological, physical, social, educational and vocational measures (individually or in combination) –

> "(a) to restore, as far as reasonably possible, physical or mental functions lost or impaired through personal injury; and
>
> (b) to optimise, as far as reasonably possible, the quality of life of a person who suffers the loss or impairment of physical or mental functions through personal injury."[3]

---

1 The Act, s 3(d).
2 The Act, s51(3).
3 The Act, s 4.

[4] Section 51 of the Act relevantly provides:

"**51 Obligation to provide rehabilitation services**

(1) An insurer may make rehabilitation services available to a claimant on the insurer's own initiative or at the claimant's request.

(2) An insurer that makes rehabilitation services available to a claimant before admitting or denying liability on the claim must not be taken, for that reason, to have admitted liability.

(3) Once liability has been admitted on a claim, or the insurer has agreed to fund rehabilitation services without making an admission of liability, the insurer must, at the claimant's request, ensure that reasonable and appropriate rehabilitation services are made available to the claimant.

(4) If the insurer intends to ask the court to take the cost of rehabilitation services into account in the assessment of damages, the insurer must, before providing the rehabilitation services, give the claimant a written estimate of the cost of the rehabilitation services and a statement explaining how, and to what extent, the assessment of damages is likely to be affected by the provision of the rehabilitation services.

(5) The claimant may, if not satisfied that the rehabilitation services made available under this section are reasonable and appropriate –

(a) apply to the commission to appoint a mediator to help resolve the questions between the claimant and the insurer; or
(b) apply to the court to decide what rehabilitation services are, in the circumstances of the case, reasonable and appropriate.

(5A) ... [these subsections relate to the appointment of a mediator]

(5B) ...

(5C) An application may be made to the court under subsection (5)(b) whether or not there has been an earlier attempt to resolve the questions between the claimant and the insurer by mediation.

(5D) On an application under subsection (5)(b), the court may decide what rehabilitation services are, in the circumstances of the case, reasonable and appropriate and make consequential orders and directions.

(6) The insurer must bear (or reimburse) the cost of providing rehabilitation services under this section unless the insurer's liability is reduced -

(a) by agreement with the claimant; or

(b) by order of the court under subsection (8).

(7) The insurer may, if of the opinion that the cost of rehabilitation services is unreasonable –

(a) apply to the commission to appoint a mediator to help resolve the questions between the claimant and the insurer; or

(b) apply to the court to decide what rehabilitation services are, in the circumstances of the case, reasonable and appropriate or to decide to what extent the insurer should contribute to the cost of rehabilitation services.

(7A) ... [these subsections relate to the appointment of a mediator]

(7B) ...

(7C) An application may be made to the court under subsection (7)(b) whether or not there has been an earlier attempt to resolve the questions between the insurer and the claimant by mediation.

(8) On an application under subsection (7)(b), the court may decide the questions raised on the application and make consequential orders and directions.

(9) The cost to the insurer of providing rehabilitation services under this section is to be taken into account in the assessment of damages on the claim if (and only if) the insurer gave a statement to the claimant, as required under subsection (4), explaining how and to what extent the assessment of damages was likely to be affected by the provision of the rehabilitation services.

> (9A) If the cost of rehabilitation services is to be taken into account in the assessment of damages, the cost is taken into account as follows –
>
> (a) the claimant's damages are first assessed (without reduction for contributory negligence) on the assumption that the claimant has incurred the cost of the rehabilitation services as a result of the injury suffered in the accident;
>
> (b) any reduction to be made on account of contributory negligence is then made;
>
> (c) the total cost of rehabilitation services is then set-off against the amount assessed.[4]
>
> (10) An insurer who is induced by a claimant's fraud to provide rehabilitation services for the claimant may recover the cost to the insurer of providing the services, as a debt, from the claimant."

[5] Section 51 is to be construed beneficially from the perspective of claimants.[5] The provision of accommodation in a house that has features that enable a paraplegic to "optimise the quality" of her life may involve an expense, such as rent, that is incidental to ordinary living. Yet, having regard to the remedial intent of s 51, and subject to there being provision for recovery of the expenditure on rehabilitation services in accordance with s 51(9), "no narrow view should be taken of the obligation imposed on an insurer under s 51(3)".[6]

[6] In *Re Walker*[7] Moynihan J stated:

> "… the plaintiff's remedy remains damages designed to restore him, so far as money is able, to his pre-accident condition and to satisfy, again in so far as money can, needs caused by his injury; see for example *Van Gurven v Fenton* (1992) 175 CLR 327; 17 MVR 29. The present case is concerned with interim measures with the overall consequences of the applicant's injuries to be assessed later.
>
> Section 51(5) provides a test in broad terms. The elements would seem to be 'the circumstances of the case', 'reasonable'

---

4 The following example appears in the Act:
Suppose that responsibility for a motor vehicle accident is apportioned equally between the claimant and the insurer. Damages (exclusive of the cost of rehabilitation) before apportionment are fixed at $20000. The insurer has spent $5000 on rehabilitation services. In this case, the claimant's damages will be assessed under paragraph (a) at $25000 (that is, as if the claimant had incurred the $5000 rehabilitation expense) and reduced to $12500 under paragraph (b), and the $5000 spent by the insurer on rehabilitation will be set off against this amount, resulting in a final award of $7500.

5 *Re Walker* (1995) 22 MVR 245 at 247*; McMullen v Suhr* [1998] 2 Qd R 406 at 408*; Massingham v AAMI Insurance Ltd* (2007) 48 MVR 235 at 237 [8]; also cited as *Delaney v AAMI Insurance Ltd* [2007] QSC 174.

6 *McMullen v Suhr* [1998] 2 Qd R 406 at 408.

7 *Re Walker* (1995) 22 MVR 245 at 247-8.

> and 'appropriate'. 'Reasonable' would appear to connote no more than its usual meaning as founded on reason as distinct from arbitrary or capricious. 'Appropriate' would appear to connote 'suitable or fitting for a particular purpose' in this case 'rehabilitation' as defined.
>
> Subsection (5) appears to require the court to form its own opinion. Although there may be a role for expert opinion in some aspects of applications under subs (5), that should be limited by the nature of the jurisdiction and to evidence of expert opinion properly defined. The court must make up its own mind at the interim stage in a broad rather than refined way."

The Options

[7] The following discussion of the four options includes reference to specific properties, such as a rental property at Lows Drive, Pacific Paradise and an existing residence that might be acquired at Sassifras Street, Mudjimba. The parties do not propose that an order refer to a specific property. Instead, the evidence in relation to these and other properties assists in identifying issues requiring consideration in respect of each option.

The extensive, further modification of the applicant's home

[8] Before the accident the applicant, a single mother then aged 42, supported herself and her three teenage girls by operating a driving school business. They lived in a two-storey home. After the accident some modifications were made to it to enable the applicant to be released from hospital and return to her family. Even with these modifications which enable the plaintiff to live downstairs, the home is quite unsuitable.[8] Extensive further modifications, including the installation of a lift, have been considered and costed. The modifications would be very expensive. They would cost approximately $279,000.[9] Even after the modifications the applicant's home still would not be suitable for her accommodation and the care of her daughters. Ms Ainsworth, an occupational therapist familiar with the applicant's circumstances, gave evidence that the applicant's function would be compromised and she would continue to experience difficulty accessing the upstairs level.[10] The applicant explained that in a two-storey home it was impossible to properly be involved in supervising and monitoring her three teenage daughters. One daughter has significant health problems, including regularly suffering asthma attacks, and the applicant is required to monitor her health. It could take ten to fifteen minutes to access the second storey by a lift.[11]

[9] The applicant and her daughters would be disturbed, and quite possibly would have to vacate the premises, whilst modifications were performed to it. The applicant accurately described the required modifications as a "massive undertaking". Such a modified two-storey dwelling would be unsuitable for both the applicant's short-term and long-term needs, and her rehabilitation.

---

8 The problems with the property are detailed in the applicant's affidavit filed 29 May 2009 Court File Index (CFI) 3. See also Ms Ainsworth's evidence at Transcript 1-9 line 1-15; 1-13 lines 1-8 and Ms Cox's evidence at Transcript 1-23 line 15–1-24 line 45.

9 Affidavits of Mr Lok filed 8 July 2009; CFI 16 and filed 16 July 2009 CFI 18.

10 Transcript 1-9 line 5.

11 Transcript 1-13 line 8.

[10] It would be wasteful to undertake such modifications, even if the applicant wanted them performed, which she does not. Substantial expert evidence was assembled for the hearing, and some experts were required for cross examination. However, the applicant's evidence under cross examination and which was given by telephone distilled the matter nicely:

> "I thought a single-storey home, one, it wouldn't cost as much to change it and it's something I can live in for the rest of my life. Like, eventually this house, even if they change it, eventually I will have to move out of it because it will just be too big for me to look after, where if I go into a single-storey home it will be something I can eventually look after myself and I would like to."[12]

[11] It is surprising in the light of the evidence that the respondent submitted that with modifications the applicant's existing home would provide a "reasonable and appropriate level of rehabilitation insofar as accommodation is concerned". The respondent acknowledged that it was not "the best solution" but it was said to provide a "functional short-term solution".[13]

[12] This option is neither reasonable nor appropriate in the circumstances for the plaintiff's rehabilitation. It is costly, inconvenient and not suited to the plaintiff's rehabilitation compared to the applicant living in a single-storey home.

The construction of a new "project home" that is designed and built to meet the applicant's needs

[13] The applicant proposed that the respondent fund the acquisition of a block of land in her locality, construct a reasonable home upon it and that the respondent receive the net sale proceeds of her existing home. The applicant did not suggest that she needed a home that was designed by an architect and would be content with a modified project home. Vacant blocks in the area range from the mid to high $300,000 to $600,000, and a comparable block to the applicant's would be in the order of $400,000 to $500,000. The cost to build a single story home with modifications for the applicant's condition is likely to be between $300,000 and $400,000.[14]

[14] The applicant's rehabilitation co-ordinator, Ms Cox, expressed the opinion that it would be "sensible (and cost effective) to consider purpose building a residence which allows [the applicant] to maximise her function and corresponding independence".[15] Ms Ainsworth, an occupational therapist, expressed the following opinion:[16]

> "I recommend the construction of a new home that has been built to the Adaptable Housing Standard (AS 4299) with some alterations in measurements to suit the client's specific requirements. The new construction option will probably be more cost effective compared to modifying her current home at considerable expense. The provision of a new home may achieve better outcomes for Ms

---

12 Transcript 1-37 lines 50-57.

13 Transcript 1-51 lines 13-20.

14 Applicant's affidavit filed 7 August 2009, CFI 27; and see the affidavit of Ms Hookham filed 5 August 2009, CFI 26 that the cost of a modified project home would range from $250,000 to $400,000 depending on the extent of the modifications and inclusions.

15 Exhibit SC1 to Ms Cox's affidavit filed 3 June 2009, CFI 6 at 6.

16 Exhibit TS14 to the affidavit of Mr Schultz filed 29 May 2009, CFI 2 at 138.

> Aldridge in terms of home and community participation in the long term."

[15] These and other opinions do not precisely address the question that I am required to address, and the respondent submits that "each opinion blurs the necessary distinction between the applicant's ideal housing requirements (i.e. damages) as opposed to her reasonable and appropriate rehabilitation requirements". More generally, the respondent submits that the application is limited to consideration of the applicant's "rehabilitation", not her long-term, optimum accommodation requirements, and how she might choose to spend her own funds on accommodation for herself and her family.

[16] It will be necessary to return to the interplay between the insurer's statutory obligation to ensure that "reasonable and appropriate rehabilitation services" are made available to the claimant[17] and the resolution of a claimant's damages claim. In short, the obligation under the Act is not concerned with only short-term solutions, whereas an award of damages, and only an award of damages, provides a long-term solution to accommodation needs that were caused by the accident. A reasonable and appropriate rehabilitation service that an insurer is required to ensure under the Act may satisfy both short-term and long-term accommodation needs.

[17] The principal difficulty with the modified project home option is that it does not address the applicant's immediate need and her need over at least the next twelve months for suitable accommodation in order "to optimise, as far as reasonably possible, the quality of [her] life".[18] This is because it was estimated to take between 12 and 16 months "starting from scratch" for a modified project home to be completed.[19] This involves identifying and purchasing a block of land, preparing a plan, having it approved by council, engaging a builder and then completing construction of the modified project home.

[18] The claimant was prepared to tolerate this period of delay, even to the extent of remaining in her home without further modification and the problems that it presents to her personally and in attending to her children's care.[20] The option of the applicant remaining in her present circumstances with the difficulties that it presents for her rehabilitation, and to then move in over a year's time and close to any trial to a modified project home built at the respondent's cost is an unattractive option. It may provide a long-term solution to the applicant's accommodation needs, but it does not assist her rehabilitation in the meantime.

[19] In response to this fact, the applicant's counsel raised the prospect that I also order in the meantime that the respondent fund a rented, modified single-storey home. That option requires consideration, including the costs of modifying and reinstating a rental property, and whether a more reasonable and appropriate option would be:

1. for the respondent to fund the rental of a modified single-storey home up until the date of trial, leaving the applicant to fund the acquisition of a modified project home with the proceeds of the sale of her home and damages, including damages awarded in respect of her need for modified housing (the third option); or

---

17 The Act, s 51(3).
18 The Act, s 4.
19 Evidence of Mr Lok, Transcript 1-15 lines 50-60.
20 Applicant's oral submissions, Transcript 1-66 lines 10-16; evidence Transcript 1-35 line 20.

2. the identification and purchase of an existing residence that is modified to meet her needs (the fourth option).

The identification and rental of an existing residence that is modified to meet the applicant's needs

[20] This option emerged for consideration when the application was originally returnable on 12 June 2009. Various possible rental properties have been reviewed since then. Of those only one was the subject of submissions, namely a single level four bedroom home at 60 Lows Drive, Pacific Paradise ("Lows Drive"), although there is evidence that similar houses come on to the rental market fairly regularly.[21]

[21] Concerns were expressed by the applicant that about the lack of security of tenure, and the respondent sought to address these by obtaining an "agreement in principle" from the owner of Lows Drive to rent the premises for a period of up to 24 months in the first instance. The respondent is prepared to fund the rental of the premises during that period, or if the applicant's claim for damages is resolved by compromise or judgment within that period, then until compromise or judgment monies have been paid. If the applicant's claim for damages is not resolved at the expiry of the 24 month rental period, the respondent will use its best endeavors to extend the lease for a period until such time as the applicant's claim for damages has been resolved and compromise or judgment monies have been paid.

[22] The cost of modifying Lows Drive to suit the applicant's needs is estimated by Mr Lok, a licensed builder specialising in the design and construction of home modifications for the disabled and the elderly, to be between $43,470 and $58,710.[22] In a letter dated 20 July 2009, Mr Lok said that the cost of reinstatement depended on what the landlord required to be reinstated, and at worst the cost would be the same as the total costs of modification, keeping in mind future increases in labour and material costs. His oral evidence was that if the premises were reinstated "completely back to normal", it would be at least the same cost as the cost of performing the modifications.[23]

[23] The respondent:

- has sought, and received, the owner's consent to carry out those modifications;
- will fund the applicant's reasonable removal and ancillary costs from her existing home to those rental premises;
- will fund the "make good" costs on the rental premises and also cleaning costs in accordance with the recommendations in a rehabilitation report;
- expects the applicant to make all reasonable effort to rent her existing home at a commercial rate of rental and that the gross rental received by the applicant net of agent's fees be applied to off-set the rental paid by the respondent on the premises in which she would be housed;
- is prepared to treat all costs incurred in the proposal as rehabilitation expenses under the Act.

---

21 Affidavit of Ms McNabb filed 16 July 2009, CFI 17, para 12.

22 Affidavit of Mr Lok filed 3 August 2009, CFI 23, para 5.

23 Transcript 1-16 line 25.

The applicant has inspected the property, and her evidence[24] is that the area where the Lows Drive property is located is not safe. The home also is located on a busy road and is affected by constant and considerable traffic noise. She says that the driveway to the premises, even after it is concreted, is too steep, such that she would not be able to get up or down the driveway in her wheelchair. However, Ms Cox[25] and Ms Zeeman[26] who inspected the property did not identify a problem with the level of the driveway, and I find that it is likely that the driveway could be modified to address the applicant's concerns. The applicant believes that the property in its present state could not be made sufficiently secure to prevent her dog escaping. There is no swimming pool, whereas her existing residence has a pool.

[24] The applicant says that there is insufficient space for her hoist and medical equipment, that there is insufficient storage space and that if modifications are made there would be even less space. She describes the long corridor with an L-turn at the end as "problematic". Her uncontested evidence is that when she attempted to manoeuvre in her wheelchair down the corridor and make this turn, it was extremely tight and she had great difficulty in doing so. It was so awkward that she took skin off her knuckles. Ms Zeman's evidence in the context of another rental property with a hallway width of 1060 mm is that a corridor with that width would be "generally deemed appropriate for wheelchair access".[27] The hallway width at Lows Drive was described in her report as follows:

> "Narrow hallway to bedrooms, bathroom, and laundry. Hall width 840mm. Access to hallway is NOT direct, and accommodates a turn around a 90 degree junction point. The narrowest width required to be transversed (sic) at this junction point is 800mm."

[25] An unresolved issue remains about the size of the powered wheelchair that the applicant expects to soon acquire, and whether it could be manoeuvred in the Lows Drive home, even with the modifications that Ms Zeman recommends in her report. Other deficiencies were raised by the applicant concerning the state of the back deck, and the risk that rotten boards would not support the applicant and her wheelchair.

[26] The applicant's evidence is that the home is simply unsuitable and she would not want to live there given the constant noise and its close proximity to a busy road. I accept her evidence about the lack of space, the difficulties she has with her wheelchair in negotiating its hallway, the noise from the busy road and that she has genuine concerns about her safety at that location.

[27] The applicant submits that implementation of the respondent's proposal would inevitably mean that she would have to move house at least twice, as opposed to the single move that would be entailed were she to move into her own residence (whether new or existing).

[28] Ms Cox, the rehabilitation provider appointed to address the applicant's needs, gave evidence that the applicant's recent selection of a power wheelchair would need to be taken into consideration in determining the suitability of Lows Drive, along with

---

24 Affidavit filed 3 July 2009, CFI 25.
25 Affidavit filed 7 July 2009, CFI 11, report 30 June 2009 at 3-4.
26 Affidavit filed 21 July 2009, CFI 19, report 16 July 2009 at 5.
27 Transcript 1-41 line 32.

the applicant's other concerns.[28] Ms Cox's earlier expressed concerns about security of tenure might be addressed by an appropriately long lease, and a notice period that gave adequate notice to enable the applicant to relocate to suitable premises.[29]

[29] Even with these protections, Ms Cox had concerns with "shorter-term solutions" from a rehabilitation perspective. They were not the most suitable and made it difficult for the applicant to move on to other rehabilitation goals, such as a return to recreational activities and a return to work, which the applicant was keen to pursue. The applicant wanted to return as fully as possible to her role as a mother and as a member of the community. Ms Cox's opinion was that "whilst her physical environment is either unstable or unsure, as it may be in a rental property as opposed to the security of her own home" it may be difficult for her to move on to these goals in the manner and the timeframe that they should be progressed.[30] I accept Ms Cox's opinion.

[30] Although single-level, four bedroom homes like that at 60 Lows Drive, Pacific Paradise may come onto the rental market fairly regularly, the respondent and the experts found only two out of the eight that they inspected that were said to come close to meeting the applicant's needs, and then only after modifications. There were no available rental properties that required little or no modifications. Of the two, only Lows Road was advanced by the respondent as offering security of tenure under an agreement in principle with the landlord.

[31] The cost of modifying Lows Drive is substantial, and those costs may double if the landlord requires the condition of his home to be reinstated. Issues exist concerning the physical suitability of Lows Drive. If the corridor in Lows Drive proves unsuitable for the applicant's power wheelchair, or if the applicant encounters the problems that she experienced in her existing wheelchair despite modifications to the corridor, then it will be unsuitable. It may not be simple to find another rental property that suits the applicant's requirements.[31] In recent months the only rental property that the respondent claims to be suitable and that the respondent was able to find was one on a busy main road in an area which the applicant thought was unsafe for her and her daughters. This provides little assurance that a suitable rental property that provides security of tenure to the applicant can be found in the near future.

[32] Although the parties are agreed that it is not my task to decide upon a specific property, such as Lows Drive, it exemplifies problems with the "modify and rent" option. A suitable property must be found that the landlord is willing to rent for a substantial period in order to provide the applicant with security of tenure up until the trial or settlement of her action, and beyond it until such time as she is able to move into a home of her own. At least two moves, with disturbance to the applicant and her daughters, would be involved. The rental property must be suitable in terms of the applicant's physical needs, and if Lows Drive is any indication the cost of modification and any reinstatement is likely to be substantial. The cost of

---

28 Transcript 1-19 lines 10-20.
29 Transcript 1-19 – 1-20.
30 Transcript 1-22 line 48 – 1-23 line 10.
31 cf Transcript 1-41 line 10 (Ms Zeman).

modification may be as high as the cost of modifying the design of a project home,[32] or modifying an existing home that is purchased, and these options do not involve the additional costs of reinstating modifications at the end of a lease.

[33] Even if the rental property can be modified to make it physically suitable for the plaintiff's needs, it's location may not be suitable to the applicant's rehabilitation. Lows Drive illustrates the problem. Assuming that can be made suitable for the applicant's wheelchairs, and provide her with suitable access, mobility and storage, it is on a busy and noisy road. The applicant's evidence about the area not being safe and her concerns about the security of her family living there were not contested. Such a state of affairs does not provide the stability required for the applicant's rehabilitation.

[34] In the absence of evidence that there are suitable rental properties that are likely to become available on a long-term lease in the near future in the vicinity in which the applicant lives and her daughters attend school, I am reluctant to conclude that the "rent and modify" option is a reasonable and appropriate option.

[35] Even if it was assumed that such properties would become available in the near future, and could be modified to meet the applicant's rehabilitation requirements, the cost of modification is uncertain, as is the cost of reinstatement. If Lows Drive is any indication, the "rent and modify" option is likely to involve considerable expense to the insurer in funding modifications and any requested reinstatement, the disruption and cost of at least two moves by the applicant and her family, and a location that is ill-suited "to optimise, as far as reasonably possible, the quality of life" of the applicant.

The identification and purchase of an existing residence that is modified to meet the applicant's needs

[36] This option has the advantage over the modified "project home" option that the applicant will not have to wait between 12 and 16 months to occupy it. Subject to identifying such a residence, and completing its purchase, it can be occupied once modifications are performed. If they are modifications of a similar extent to those required to Lows Road, this may be a matter of several weeks. If the premises are already of an open plan kind, the cost of modifications will be less and the delay will be shorter.

[37] In recent weeks the applicant identified a property situated at Sassifras Street, Mudjimba which has a number of features that the applicant says make it suitable for her needs. It has four bedrooms and is on a single level. It has an open plan design and as such, there are no hallways. The kitchen is easily accessible; however, minor modifications would need to be made to the benches and the like. The bathroom and en-suite are big enough for the applicant to access in her wheelchair, however, minor modifications would need to be made to allow her to utilise them. The property has a double lock up garage with an electric garage door, and the property can be accessed from the garage. The main bedroom is large enough to

---

[32] The cost of modification of Lows Road is between $43,470 and $58,710 (not including the cost of reinstatement). No estimate was given of the additional cost of modifying a project home to accommodate the needs of the applicant, but the cost of constructing a single story home with all necessary modifications was said to be between $300,000 and $400,000 depending upon finishes: affidavit of the applicant filed 7 August 2009 CPI 27; see also affidavit of Ms Hookham filed 5 August 2009 CFI 26.

store the applicant's hoist and bed, with enough room to manoeuvre around in her wheelchair.

[38] The applicant's evidence is that she can access every room of the house and the doorways would not need to be widened. The home has large sliding doors to assist access to rooms, including the main bedroom, laundry and living area, and the applicant also can access the back patio.[33]

[39] The property is situated about half a kilometre from the applicant's current home and is only one street away from local shops. The applicant would be able to wheel down to the shops which would obviate the need for her to take her car. The property is situated at the end of a cul-de-sac and in an area in which the applicant would feel safe living.

[40] Because it was only recently identified by the applicant, it has not been inspected by rehabilitation consultants who prepared reports and gave evidence. The applicant says that it is suited to her needs with only relatively minor modifications. Although its owner, a clinical nurse, did not profess to be an expert on the design of homes for someone who is wheelchair dependent, his evidence was that the open plan design lends itself to such a person.[34] On that topic Ms Zeman states:

> "Newer residential estates accommodate newer houses, which have necessarily been built in line with more recent building codes of practise (sic). In line with such, these residences tend to be open plan, with only minor bathroom and kitchen modifications required to improve wheelchair accessibility."

The applicant's evidence is that she can move around the whole house without changing it much. She was of the view that the only significant modifications that would be required are to the bathroom and to the kitchen, and ramps would need to be installed. Far less modification was required than to her existing home or to the rental property at Lows Drive.[35] This accords with Ms Zeman's report that:

> "...newer style residence's (sic) which are open plan are likely to have fewer modification requirements, and thus are able to be modified at a lower cost."

[41] The applicant described the Sassifras Street as "just basic" and what she needed. The property is for sale at a "negotiable" price of $725,000.

[42] The applicant is prepared to move within a fairly large area to find a suitable home, but wanted to stay close to her present location to enable her daughters to go to their high school by bus, and to stay close to their father, who lives nearby and with whom the applicant and her children have a good relationship.

[43] The evidence suggests that there are similar open plan homes to the Sassifras Street property that were built in the last few years on the same estate but there was no evidence that any are available to rent, and the owner of the Sassifras Street property was not interested in renting it.[36] The applicant is willing to attempt to acquire the Sassifras Street property or one like it with funding from the respondent,

---

33 Transcript 1-38 lines 27-30, applicant's affidavit filed 3 July 2009, CFI 25, para 10.
34 Transcript 1-31 lines 45-51.
35 Affidavit of applicant filed 3 August 2009, CFI 25 para 12.
36 Transcript 1-31 lines 53-56; 1-38 line 40

have relatively minor modifications made to it, and then have the net proceeds of the sale of her existing home paid to the respondent.

[44] The Sassifras Street property or one like it presents a number of advantages over other options:

1. as mentioned, it does not involve the 12-16 months delay associated with the "project home" option;

2. The cost of modifications is likely to be substantially less than the cost of modifying a rental property such as Lows Drive.

3. If the cost of modification is moderate, and less than the cost of modifying Lows Drive, then the cost of acquisition and modification is likely to be less than the cost of acquiring a project home that is modified to the applicant's needs.[37]

4. It is unnecessary to negotiate a long-term lease and a lengthy notice period to provide the applicant with security of tenure.

5. The applicant would only be required to move once, not at least twice.

6. Unlike a modified rental property, no costs will be incurred in reversing modifications at the end of a lease.

7. Its open plan design, other internal features and location make it more suitable than Lows Drive for the applicant's rehabilitation.

[45] An issue for consideration is whether, notwithstanding these advantages, the cost of this option to the respondent and other matters relied upon by the respondent mean that it is not a "reasonable and appropriate" rehabilitation service in the circumstances. Another issue for consideration is whether the shorter-term option, namely the "rent and modify option", constitutes a reasonable and appropriate rehabilitation service in the circumstances, despite the problems associated with this option that I have discussed.

Consideration

[46] The application is concerned with the applicant's "rehabilitation" and the "reasonable and appropriate rehabilitation services" to be provided by the respondent insurer, not her long-term, optimum accommodation needs, and how she might choose to satisfy them out of the proceeds of the sale of her home and an award of damages. The respondent's obligation under s 51 of the Act is to provide "reasonable and appropriate" rehabilitation services, not the applicant's long-term housing needs, a substantial part of which would have existed had she not been injured in June 2008.

[47] The insurer's obligation under s 51(3) of the Act to ensure that "reasonable and appropriate rehabilitation services are made available to the claimant" is to be construed in accordance with the remedial intent of the legislation, and not constrained so that services will only be found to be reasonable and appropriate if they and their cost match a head of damages in a personal injuries action. The requirement that the services be "reasonable and appropriate" and directed towards

---

[37] See para [13] above.

rehabilitation governs the insurer's obligation under s 51(3). The expected outcome of the personal injuries action is a relevant consideration in deciding what is "reasonable and appropriate" in the circumstances of the case. However, a distinction exists under the Act between "rehabilitation" which is concerned with measures to optimise, as far reasonably possible, the quality of life of a claimant, and the assessment of damages in a legal proceeding.[38]

[48] Decisions under s 51(5)(b) are made in the shadow of the future trial or settlement of a damages claim. In deciding what rehabilitation services are "reasonable and appropriate" I should have regard to the applicant's personal injuries claim and the likely date of trial[39] at which she will receive an award of damages, the purpose of which is to restore her to her pre-accident condition and satisfy her accident-caused needs, so far as money can. However, it would be an error to treat rehabilitation as necessarily a short-term process, and the rehabilitation services to which a claimant is entitled under the Act as necessarily limited to short-term measures that are designed to see the claimant through until the trial of the action or its settlement, at which point the claimant's future needs are funded from a damages payment. To take a simple example, a specially-modified car or a powered wheelchair may be reasonably necessary for a claimant's rehabilitation, so as to optimise, as far as reasonably possible, the quality of the claimant's life, and also last for years after the trial.

[49] Although the insurer's obligation under s 51(3) is, in a sense, separate from and additional to, its obligation to indemnify under the policy of insurance that is a schedule to the Act, the determination of what is "reasonable and appropriate" occurs in the shadow cast by the common law claim for damages to which the insurer has admitted liability. The expectation is that at a trial or earlier resolution of that claim, the applicant will receive a damages award that will seek to restore her, so far as money is able, to her pre-accident condition, and satisfy, so far as money can, needs caused by the accident. Short-term measures may be reasonable and appropriate if they enable the applicant to restore, as far as reasonably possible, physical or mental functions, and to optimise, as far as reasonably possible, the quality of her life. The further restoration of those functions and the optimisation of

---

[38] A licensed insurer such as the respondent is bound by the provisions of the "industry deed" which may provide direction and guidance for licensed insurers about initiating, managing, monitoring, and measuring the effectiveness of, the provision of rehabilitation services for injured claimants: The Act, s 65; *Massingham v AAMI Insurance Ltd* (supra) at 237–242 [9]-[11]. The *Motor Accident Insurance Act 1994 Industry Deed* is in Schedule 5 to the *Motor Accident Insurance Regulation* 2004. Clause 4 of the relevant deed provides that the commission may issue rehabilitation standards and guidelines to insurers. Chapter 2 ("Principles of rehabilitation in the CTP insurance scheme") of the Commission's *Rehabilitation Standards for CTP Insurers* includes the following statement:

> "A distinction needs to be made between (i) the rehabilitation process, which is about optimising the injured person's recovery, and (ii) the medico-legal process, which comes later in the life of a claim when the overall consequences of the person's injuries are assessed by medico-legal experts and used in formulating the damages likely to be recovered."

[39] Estimates of the likely trial date varied. The respondent's solicitor anticipated that a compulsory conference would occur before the end of this calendar year and in the event that the claim was not settled at conference the applicant would file proceedings and the claim could be resolved by trial before 30 June 2010: affidavit of Mr Lang filed 31 July 2009 CFI 20, para 9. The applicant's solicitor did not expect that a compulsory conference would be convened until May 2010, that proceedings could be issued in July 2010 if the matter was not resolved and that it would be not possible for such a claim to be set down for trial until some time in 2011: affidavit of Mr Schultz. filed 5 August 2009, CFI 30 paras 10-12.

the quality of her life can also be addressed by choices the claimant makes about how to use her own funds, including a damages award.

[50] Understandably, the evidence of witnesses and submissions sometimes are cast in terms of "short-term solutions" and "long-term solutions". However, the Act does not use these or similar terms. In some circumstances, short-term solutions will be reasonable and appropriate. In other circumstances, they will not "optimise, as far as reasonably possible, the quality of life of a person who suffers the loss or impairment of physical or mental functions through personal injury".[40] In some cases, the provision of a particular service will address both a short-term and a long-term need that must be satisfied for a claimant's rehabilitation.

[51] The provision of what is found to be "reasonable and appropriate rehabilitation services" might result in the insurer being required to fund services at a cost greater than the quantum of an associated head of damages in a personal injuries award. For instance, an order to pay the rent on suitably modified premises may require the insurer to pay that part of the rent that the claimant would have incurred in any event on rental accommodation had the accident not occurred.[41] Such a possibility raises for consideration the operation of s 51(9), which, prior to amendments to the Act in 2000, was found in *McMullen v Suhr*[42] to provide for recovery of the insurer's expenditure through a reduction in damages. The applicant points to s 51(9) of the Act in this regard, and the provision in s 51(4) for an insurer in such a case to give a statement explaining how the assessment of damages is likely to be affected by the provision of the rehabilitation services. The respondent disputes that s 51(9) operates in this way to effectively permit recovery by the insurer of the cost of rehabilitation services, and submits that s 51(9A) requires the cost of rehabilitation services to be taken into account in the assessment of damages only in the way s 51(9A) provides. In a case in which there is no reduction on account of contributory negligence, the respondent submits that s 51(9A) applies so that the costs of the services funded by the insurer are simply added to the award, then set-off. According to the respondent, the insurer is not refunded any part of them, and the damages award is not reduced on account of them. I will later address this issue of interpretation. My conclusion is that the applicant's submission concerning the operation of s 51(9), namely that it permits the recovery of the insurer's expenditure through a reduction in damages in an appropriate case, notwithstanding the provisions of s 51(9A), is to be preferred.

[52] The respondent submits that the applicant's preferred options, namely options 2 and 4, would require it to pay for rehabilitation costs that cannot be taken into account in its favour by a reduction in damages. Whilst I do not accept the respondent's interpretation of the Act in that regard, it is appropriate to consider the extent to which those options may result in overcompensation to an extent that renders them neither reasonable nor appropriate in the circumstances, despite provision for recovery pursuant to s 51(9).

[53] The assessment of the applicant's damages is, of course, a matter for the judge hearing the trial of the proceedings if they are not earlier settled, based upon the

---

40 The Act, s 4.

41 In *McMullen v Suhr* (supra) at 408 Byrne J concluded that the extent of the obligation imposed under s 51(3) may extend to the payment of rent that is an expense incidental to ordinary living, and I respectfully follow that approach.

42 Ibid at 408 lines 20 and 48.

evidence at trial. However, the parties' submissions on this aspect, and their relevance to determining whether the applicant's preferred options requiring the respondent to assist with the cost of acquiring a modified project home (option 2) or a modified existing home (option 4) is "reasonable and appropriate" in the circumstances require me to address the issue of whether, and the extent to which, those costs are likely to be reflected in an assessment of damages.

[54] The general principles governing assessment of damages, as encapsulated in the quotation from *Re Walker*, are not in dispute. The function of an award of damages is not to provide the applicant with the cost of her and her dependent children's long-term accommodation needs, since these needs would have existed had the accident not occurred.

[55] For the reasons given by me, the further modification of the applicant's existing home is neither an acceptable short-term nor long-term solution to the accommodation needs that have arisen as a result of the accident, and those modifications will not restore the applicant to a situation in which she is able to care for her family. The costs of modifying her existing home would be high, and not result in a satisfactory outcome for her personally or enable her to fulfil her responsibilities for the care of her children. In circumstances in which her two-level home, even with modifications, would be unsuitable to her needs, she is entitled to damages to compensate her for the cost of relocating to accommodation that is suited to her accident-related needs.

[56] It is erroneous to frame either the issue of common law damages, or the issue of the obligation under the Act to ensure that reasonable and appropriate rehabilitation services are available, as if the respondent was being asked to buy the applicant a new home. The issue is not whether the respondent is obliged to pay for the cost of a new home in circumstances in which the applicant does not presently own a home. Instead, the issue for my decision is whether the respondent should be obliged under s 51(3) to assist financially with the costs of the applicant purchasing a new or existing home that is suitable to her needs, following which the respondent will receive the net proceeds of the sale of the applicant's existing home.

[57] The parties are in dispute over whether an injured plaintiff may be entitled by way of damages to the cost of erection of a new house. The respondent submits that it is well established that, exceptional circumstances aside, on an assessment of common law damages an injured plaintiff is not entitled to damages for the capital cost of the acquisition of land, or the cost of erection of a new house.[43] The applicant replies that the respondent's submission is repudiated by the recent decision of the Court of Appeal in *Munzer v Johnston*.[44] The resolution of that issue only assumes importance if I reach the conclusion that reasonable and appropriate rehabilitation services should be provided by the construction of a new house, and the respondent's financial contribution to such a construction could not be taken into account in the assessment of damages or secured by a suitable arrangement entered into between the parties. However, a similar issue arises in respect of other options,

---

[43] It cites *Lynch v Lynch & Anor* (1991) Aust Torts Report 81-117 at 69,099; *Moriarty v McCarthy* [1978] 2 All ER 213 at 219-220; Luntz, *The Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, 2002, para 4.1.7.

[44] *Munzer v Johnston & Anor* [2009] QCA 190, especially at [20].

and therefore it is necessary to address the issue. Professor Luntz in *Assessment of Damages for Personal Injury and Death*[45] states:

> "Assuming that it is reasonable for the plaintiff to live at home and that this requires the home to be modified or a special house to be purchased, in principle the plaintiff should be entitled only to the additional costs incurred as a result of the disability and not ordinary expenditure on housing that would have been incurred anyway.
>
> ...
>
> The next issue is whether the plaintiff must give credit for the increased capital value of the house, if any. It is only an increase that will be realised at some time in the future, when the plaintiff dies or leaves the accommodation, say, to enter an institution, that is relevant. Some modifications – such as wider doorways, ramps or lower doorhandles – may not increase the value at all, in which case the costs should be allowed in full. But an extra bedroom for a live-in carer probably would increase the capital value of the house; a swimming pool to be used for hydrotherapy may do so. An evidential onus lies on the defendant to show such increase in value." (citations omitted)

[58] *Munzer* applied these principles. Ms Munzer's entitlement to damages for home modifications was limited to "the additional costs reasonably necessarily incurred as a result of her accident-related disability".[46] It was reasonable for her to take "the utilitarian cost-effective approach of building a one level barn" with further modifications for her disabilities that were found to be reasonably necessary. The authorities relied upon by the parties turn on their facts but *Munzer* shows that the statement that "the capital cost of a new house cannot be awarded by way of damages"[47] admits of exceptions. The compensatory principle is that the assessment should, as far as money can do, place the plaintiff in the same position as if he or she had not sustained the injuries. There is no "fixed principle that the cost of a notional basic home is necessarily excluded from an award of damages".[48]

[59] A conventional approach is to "identify and compensate the additional cost imposed upon the plaintiff derived from her disabilities in providing and maintaining comfortable habitation for herself".[49] In some cases damages will be the cost of modifying an existing home. In other cases, it will be the "extra cost" of building a new house, the design of which is altered in order to make it fit for the plaintiff's purposes.[50]

[60] In a case in which an injured plaintiff must move from an existing home to another home, which is either purpose-built to meet her disabilities or modified to do so, the defendant may be given credit in damages awarded for the increased capital value of the purpose-built or modified house.[51] The defendant carries the evidentiary onus

---

45 Luntz, *The Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, 2002, para 4.1.7.

46 [2009] QCA 190 at [20].

47 *Moriarty v McCarthy* (supra) at 219j.

48 *Munzer v Johnston* (supra) at [19] citing *Weideck v Williams* [1999] NSWCA 346 at [10].

49 *Lynch v Lynch* (supra) at 69,099.

50 *Moriarty v McCarthy* (supra) at 219-220.

51 *Munzer v Johnston* (supra) at [21].

to prove that the damages should be modified because of an increase in capital value.[52]

[61] These principles will arise for consideration and application in the assessment of the applicant's damages claim if the matter is not settled. They serve to highlight that there is no fixed rule that the cost of a new home will not be taken into account in the assessment of damages when the plaintiff must move from an existing home to another home that is more suited to the plaintiff's accident-related disability. How the cost is taken into account, and how the value or net proceeds of sale of the house that the plaintiff vacates is taken account, are matters for the court's assessment in arriving at a proper measure of compensation. Whether or not the modification of the plaintiff's existing home or the acquisition of another home into which the plaintiff moves results in the plaintiff making a capital gain for which the defendant should be given credit in a damages award depends upon the assessment of the facts. For instance, if a paraplegic is required to move to an existing, single-level, open plan home, then the capital cost of "upgrading" from a comparable home with corridors that cannot be negotiated in a wheelchair, may appear to involve a capital gain if the open plan home has a higher market value than the plaintiff's existing home. However, the plaintiff may reasonably argue that the extent to which the market value of the open plan home is enhanced by that feature is not a capital gain for which the defendant should be given credit, but is a cost that is incurred in order to acquire a home that has features that meet the plaintiff's accident-related needs and that the capital cost forms part of the plaintiff's compensation.

[62] Neither the policy of the Act nor its terms suggest that what is required by way of compensation in respect of a particular head of damages should equate with the cost of reasonable and appropriate rehabilitation services required under s 51(3). In some circumstances, the cost of rehabilitation services will be to fulfil a short-term need. For instance, it may be possible for the insurer's obligation under s 51(3) to be fulfilled by paying the rent of a suitably modified home, leaving the plaintiff to fund the acquisition and modification of a new home out of the sale proceeds of her home and a damages award, which includes a component on account of the accident-related accommodation costs. An assessment of damages generally would not include the total cost of renting the modified premises, since the claimant may have incurred certain rental costs in any event. [53] In other circumstances, the insurer's statutory obligation to "ensure that reasonable and appropriate rehabilitation services are made available to the claimant" may oblige it to assist the claimant financially to move to suitable premises to be owned by the plaintiff, for example, if available rental properties are not suited to optimise, as far as reasonably possible, the quality of life of the claimant, or the costs to modify and reinstate them is inordinate and wasteful compared to the costs of modifying the home which the claimant proposes to own and occupy in the long term. In short, the Act does not establish that a "rent and modify" accommodation option is necessarily the most reasonable and appropriate rehabilitation service. Whether or not it is depends on the circumstances of the particular case.

[63] In this case, the second and fourth options do not involve an unqualified obligation to purchase the applicant another home. They require the respondent to assist

---

[52] Ibid citing *Campbell v Nagle* (1985) 40 SASR 161 at 187.

[53] It was because the insurer's expenditure under s 51(3) might extend to an expense such as rent "incidental to ordinary living" that Byrne J in *McMullen v Suhr* contemplated the insurer recovering part of its expenditure through a reduction in damages.

financially in the applicant's transition to a form of accommodation that is necessary for her rehabilitation and to meet needs caused by the accident. That financial assistance is to be reduced by the payment of the net proceeds of sale of the applicant's home, being a home which no longer can suitably accommodate her and her family as a result of the accident for which the respondent has admitted liability. As I have previously found, it is not necessary for the financial consequences to the insurer of fulfilling its statutory obligation under s 51(3) to match the quantum of a head of damages. In any event, it should not be assumed that the damages assessed in respect of the accident-related accommodation needs in a case such as this will be small, and that the second and fourth options would result in overcompensation to such an extent that they would be neither reasonable nor appropriate.

[64] The tortfeasor's conduct having created the need for the applicant to move to a single-level dwelling, and an open plan design being the most suited to her needs, the applicant has a strong claim to damages based on the financial cost of relocating to such a home in the vicinity of her present home. Such an award of compensation is subject to credit being given to the defendant, if required, for a capital gain. However, it should not be assumed that any capital gain would be as large as appears from a simple comparison between the market values of the applicant's existing home[54] and the home to be acquired. To purchase an open plan home in a nearby area, such as the Sassifras Street property, may involve the applicant moving to a newer home, the features of which are necessary to meet her accident-related needs. These features, such as the design of the house, the size of her bedroom and en suite bathroom and its car accommodation, may also be features which give the home a higher market value than a home without those features. It does not necessarily mean that the plaintiff's acquisition of such a property results in her making a capital gain to which the respondent is entitled to credit in an award of damages. If, however, there is some element of upgrading[55] beyond that required to meet the applicant's accident-related accommodation needs, then the assessment of damages, unaffected by the possible application of s 51(9A), may bring this into account.

[65] In summary, common law damages in such a case as this may be assessed by a variety of approaches, including the additional cost of modifying a project home to meet the claimant's accident-related needs. The assessment is a matter for the judge who tries the action based on the evidence at trial. The case is not an exceptional one in which common law damages would be assessed simply on the basis of the cost of building a new project home or the cost to acquire a suitably-modified home, since the object of an award of damages is not to award the plaintiff the cost of her long-term accommodation requirements, including requirements that would exist if the accident had not occurred. However, the applicant is entitled to damages on account of the reasonable accommodation costs incurred or to be incurred as a result of her accident-related disabilities, and these would appear to include the cost of relocating to a suitable, single-level home which is either designed or modified to suit her accident-related needs.

---

54 Estimated to be between $500,000 and $550,000: applicant's affidavit filed 7 August 2009, CFI 27, para 3.

55 In a case in which an injured plaintiff must move from an existing home to another home more suitable to the plaintiff in his or her injured state, the standard of the accommodation in which the plaintiff was accustomed to live is a relevant factor in the assessment of damages: *Weideck v Williams* [1999] NSWCA 346 at [10] cited with approval in *Munzer v Johnston* (supra) at [19].

[66] The tortfeasor's conduct having created the need for the applicant to move to such a home to meet both her short-term and long-term accommodation needs, it is neither reasonable nor appropriate that the applicant be accommodated in rented accommodation, especially if, as appears, the available rental accommodation is unsatisfactory to her rehabilitation, will prove expensive to modify and offers only a short term and somewhat unstable solution.

[67] The acquisition of an existing home such as the Sassifras Street property which requires relatively few modifications provides both a short-term and a long-term solution to the plaintiff's rehabilitation. The applicant has a reasonable claim to damages for the costs associated with relocating to such a home, including certain capital costs which are incurred to acquire a home with features that are required to meet her accident-related needs.

[68] This fourth option has advantages over the other options that I have canvassed that make it a reasonable and appropriate option in the circumstances. The option of modifying the existing home at very substantial cost is not reasonable or appropriate. Even in a modified state, it is not suitable to either the applicant's needs and would not optimise, as far as reasonably possible, the quality of her life. The fourth option avoids the wait of 12-16 months associated with the modified project home option, and it is not apparent that the cost of modifications to an existing home (of which Sassifras Street is an example) would be any greater than the costs to modify the design of a project home to be built (option 2) or the costs to modify a rental property such as Lows Drive and to reinstate it, if required, at the end of a lease (option 3).

[69] The disadvantages of the "modify and rent" option have been addressed earlier, and make it an option which is not as well suited to the applicant's rehabilitation as the fourth option. A combination of the "modify and rent" option as a short-term measure and the "modified project home" option for the applicant's long-term rehabilitation is too expensive to be reasonable and appropriate in the circumstances compared to the fourth option.[56]

[70] The respondent pointed to the risk that it might incur the costs associated with the acquisition of a property and, in the event that the applicant died before trial be prejudiced in its recovery of those costs through a reduction in damages. There is no evidence that the applicant's life expectancy has been reduced as a result of the accident, and, as Byrne J did in *McMullen v Suhr*, I shall proceed on the basis that it is almost certain that the applicant will survive for many years. In any case, the applicant instructed her Counsel to give an undertaking to agree to any proposals put forward in reasonable terms to protect the respondent's position by way of security over her existing home and/or any premises in which she resides either by way of a newly constructed project home or a modified existing dwelling that is registered in her name.

The interpretation of s 51(9) and s 51(9A)

[71] The remaining issue is whether, as the respondent contends, s 51(9A) operates to prevent a reduction in damages in respect of part of the cost of rehabilitation services, in particular to the extent to which the capital costs of the acquisition

---

[56] The affordability of compulsory insurance is a matter to which regard should be had in determining what is a reasonable rehabilitation service: see the objects of the Act, s 3(aa) and Chapter 2, clause 6 of the Commission's Rehabilitation Standard.

would not be recoverable by the applicant as part of her damages claim. For the reasons that I have already given, the extent of any capital gain to which the defendant would be entitled to credit on an assessment of damages should not be overstated. After all, the applicant is not proposing to move from the backstreets to the beachfront. She proposes to move to a location near her present home to a home with the same number of bedrooms, and a substantial part of the difference between the market value of her existing home and such a home may be due to its more modern, open style design and other features that the applicant requires to meet her accident-related needs. However, I shall assume that the provision of financial assistance to acquire such a home may result in her receiving a benefit to which she would not be entitled on an assessment of damages, and which would be brought into account in the ordinary assessment of damages.

[72] The applicant contends that the respondent will suffer no prejudice as the mechanism provided for by s 51(4) of the Act will enable the respondent henceforth to ask the court to take the cost of the rehabilitation services that it provides into account in the assessment of damages. In a case in which the insurer contends that the provision of the rehabilitation services is likely to affect the assessment of damages, and has given the claimant the statement required under s 51(4), the cost to the insurer of providing rehabilitation services under s 51 may be taken into account pursuant to s 51(9) through a reduction in damages.

[73] The provisions of s 51(9A) arguably compel a different result, by dictating how the cost is to be taken into account "[I]f the cost of rehabilitation services is to be taken into account in the assessment of damages". The applicant contends otherwise, and submits that s 51(9A) is specifically concerned with the assessment of damages in cases involving contributory negligence, whereas in a case such as this the assessment is governed by s 51(9). I am not persuaded that s 51(9A) only applies where contributory negligence is found. The use of the words "any reduction" rather than "the reduction" at the start of s 51(9A)(b) tends to suggest that in a case in which the cost of rehabilitation services is to be taken into account in the assessment of damages, and in which there is no reduction of damages on account of contributory negligence, the claimant's damages are assessed on the assumption that the claimant incurred the cost, and then the cost is set-off against the amount assessed.

[74] The literal reading of s 51(9A) supports the respondent's submission, but that interpretation produces an apparently unintended result. Section 51(9) appears to be intended to achieve the purpose of permitting the costs of providing rehabilitation services under s 51 to be taken into account in the assessment of damages to the detriment of the claimant, only where the claimant has received notice by a statement under s 51(4) of such an effect before the services are provided. A literal interpretation of s 51(9A) would preclude the reduction of damages in a case in which they should be reduced in accordance with ordinary principles of compensation, and in which the claimant was on notice of such a possible outcome before receiving the services. It would be an odd result if s 51(9A) operates as the respondent contends so as to result in overcompensation.

[75] Section 51(9A) was introduced, along with other amendments to s 51, by the *Motor Accident Insurance Act Amendment Act* 2000. Reference to the relevant

Explanatory Notes[57] does not suggest that these amendments were intended to alter the operation of s 51(9) envisaged by Byrne J in *McMullen v Suhr*[58] and to prevent recovery of rehabilitation costs through a reduction in damages. The Explanatory Notes to clause 28 (which amended s 51) state that one of two "fundamental changes to the existing arrangements" (the second being the introduction of a mediation process) was:

> "a requirement for the insurer, **if it wishes to recover any costs incurred in the rehabilitation of the claimant**, to give a written notice stating how the cost of rehabilitation is to be taken into account in assessment of damages. A typical example would be where there is some contributory negligence. If a notice is not given, other than in the case of fraud, the insurer is not entitled to seek any recovery of costs." (emphasis added)

The Explanatory Notes support the view that an insurer may seek to recover rehabilitation costs notwithstanding the enactment of s 51(9A).

[76] Prior to the 2000 amendments s 51(9) simply provided that:

> "The cost to an insurer of providing rehabilitation services under this section must be taken into account in the assessment of damages on the claim."

The amendment in 2000 to s 51(9) provided that this was to happen only if a statement had been given under s 51(4). Any ambiguity concerning the meaning of s 51(9) and s 51(9A) should be resolved by reference to the Explanatory Notes which indicate that the legislature intended an insurer to be able to seek to "recover any costs incurred in the rehabilitation of the claimant". The respondent's construction of s 51 does not permit this.

[77] An interpretation that accords with the purpose of s 51(9) should be adopted. Provided the insurer has given the claimant the statement required by s 51(4), s 51(9) permits the cost to the insurer of providing rehabilitation services to be taken into account to the insurer's benefit in an appropriate case, and, in effect, to recover all or part of the cost through a reduction in damages. Such a reduction will be open where the cost incurred by the insurer has the effect of placing the claimant in a better position than he or she would have occupied were it not for the wrong. An example is the payment of expenses incurred in respect of ordinary living expenses, such as rent, to the extent that such expenses would have been incurred by the claimant had the wrong not occurred.

[78] In other cases in which a statement under s 51(4) has not been given, and in which there is no fraud,[59] there is no scope for a reduction in damages on account of the cost of rehabilitation services. Section 51(9A) applies on the assumption that the claimant has incurred the cost of the rehabilitation services as a result of the

---

57 Consideration of the Explanatory Notes is appropriate in this case pursuant to s 14B(1) of the *Acts Interpretation Act* 1954 (Qld) to resolve any ambiguity about whether recovery of rehabilitation costs is permissible notwithstanding the enactment of s 51(9A) and to confirm the interpretation that s 51(9) permits such recovery, being an interpretation that is conveyed by the ordinary meaning of s 51(9) in its context.

58 (supra) at 408 lines 20 and 43.

59 Fraud cases permit recovery pursuant to s 51(10).

accident, and then, subject to any reduction to be made on account of contributory negligence, the total cost of rehabilitation services are set off.

[79] In this way ss 51(9) and (9A) operate to permit a reduction in damages. A typical example will be where there is some contributory negligence, but that is not the only example. The reduction contemplated in *McMullen v Suhr* is permitted. A reduction also is permitted in a case in which the defendant discharges its evidentiary onus of proving that a capital gain should be brought into account. The statute only permits such a recovery of rehabilitation costs where notice is given by a statement under s 51(4), other than a case of fraud which is governed by s 51(10). The recovery of costs in an appropriate case, provided the claimant has been placed on notice of this possibility, achieves the purpose of the Act and s 51. The rehabilitation of claimants is facilitated, and in appropriate cases the cost of rehabilitation services may be brought into account in reduction in damages. Claimants are suitably rehabilitated and not overcompensated.

[80] The insurer's statement given under s 51(4) does not automatically entitle it to recover the rehabilitation costs, since whether it is entitled to recover any such costs and the extent of recovery is a matter for the Court's assessment. The amendments in 2000 make the giving of such a statement a pre-condition to the costs being taken into account in the assessment of damages. The manner in which they are taken into account is a matter for the court, subject to the requirements of s 51(9A).

[81] If the respondent's contention is correct, the only occasion for recovery of costs incurred in the rehabilitation of the claimant would be in a case of contributory negligence pursuant to s 51(9A). Yet, the apparent purpose of s 51 is to permit the recovery of costs in other instances. These instances should include cases where the provision of rehabilitation services provided pursuant to s 51(3) would result in overcompensation unless there was a reduction in damages.

[82] Section 51(9A) avoids the complexity of damages being assessed, subject to refunds. In a case in which there has been no contributory negligence the assessment pursuant to s 51(9A) is made on the false assumption that the claimant incurred the cost of the rehabilitation services and then the cost is set-off against the amount assessed. Contrary to the respondent's argument, the applicant's contentions do not render s 51(9A) redundant. Section 51(9A) creates the simple fiction that the claimant incurred costs, and avoids the risk of overcompensation by providing that those costs will be set-off against the amount assessed. It avoids the complexity of assessing damages on a different basis, for instance that the claimant is entitled to have damages assessed on the basis of a need created for services that were paid for by the insurer, which becomes entitled to a refund out of a damages award.

[83] Section 51(9A) addresses the assessment of damages, including cases in which a reduction in damages is to be made on account of contributory negligence. It does not oust other principles governing the assessment of damages, including the principle that damages may be reduced on account of a gain made by a claimant. Section 51(9) is to the effect that recovery of rehabilitation costs by way of a reduction in damages is only permissible where a statement under s 51(4) is given. Permitting such a recovery achieves the purpose of the Act and accords with the intent of the legislature, as expressed in the Explanatory Notes to the 2000 amendments, that rehabilitation costs may be recovered by the insurer, provided a

notice is given under s 51(4).[60] The interpretation of s 51 contended for by the respondent does not accord with the purpose of the Act that claimants are suitably rehabilitated and not overcompensated.

[84] Accordingly, I prefer the applicant's interpretation of the operation of s 51. If, however, s 51(9A) has the operation contended for by the respondent, leaving no scope to bring a capital gain or other benefit into account in an appropriate case, then this feature of the statutory scheme would point to the need for caution in not readily concluding that the provision of services that would result in overcompensation should be found to be "reasonable and appropriate" in the circumstances. I do not consider that the fourth option is likely to lead to overcompensation that makes that option unreasonable or inappropriate, provided the purchase price of the home is kept within reasonable limits, and, as envisaged, the net proceeds of sale of the applicant's home help fund the acquisition.

[85] I conclude that the fourth option is a reasonable and appropriate rehabilitation service in the circumstances. The respondent's position can be adequately protected in the event that its contention about the operation of s 51(9A) is adopted by the trial judge, by the provision by the applicant of appropriate security in accordance with the undertaking offered, or some other form of agreed security. The applicant accepts that upon the giving of a statement under s 51(4) she may be required to bring into account in the assessment of damages under the general principles of compensation and pursuant to s 51(9) of the Act, a capital gain or other benefit to which she is not entitled by way of damages. This understanding should be reflected in the terms of any security to be provided to the respondent.

Conclusion

[86] I have decided that the fourth option, namely one in which the respondent is to fund the purchase of a single-storey, wheelchair-accessible dwelling and then receive the net proceeds of the sale of the applicant's current home, is a rehabilitation service that is reasonable and appropriate in the circumstances of the case.

[87] This option has distinct advantages over the other options that I have canvassed. It avoids the delay associated with the "modified project home" option. It is more suitable for the applicant's rehabilitation than the "modify and rent" option for the reasons that I have canvassed. The fact that it also addresses long-term accommodation needs that were caused by the accident does not disqualify it from being a "reasonable and appropriate rehabilitation service" within the meaning of s 51(3) of the Act in the circumstances. Those circumstances include the present absence of a suitable rental property that has an open plan and other features that make it suitable for the applicant's rehabilitation. The fourth option provides greater stability for the applicant than the "modify and rent" option.

[88] The perceived problems with the fourth option are overstated, and do not render that option unreasonable or inappropriate. It does not require the respondent to sustain the total cost of buying an existing home for the applicant, since the net proceeds of the applicant's current home will be paid to the respondent, and the respondent's legitimate interests can be protected by appropriate security. The risk of such an option overcompensating the applicant can be addressed by the terms of an order, including specification of a maximum purchase price above which the respondent is

---

60 *Acts Interpretation Act* 1954 s 14A, 14B.

not required to consent to funding. The risk or extent of overcompensation by the acquisition of a property a single-story, open plan home such as the Sassifras Street property should not be overstated, given the likely award of damages on account of the accommodation needs that were caused by the accident, including the need for the applicant to move from her current two-storey home. The respondent's interests may be protected by it giving a statement under s 51(4), and the operation of s 51(9) which permits the costs of rehabilitation to be taken into account in reduction of damages, notwithstanding s 51(9A). If my interpretation of s 51(9) and s 51(9A) is not followed by the trial judge, who concludes that s 51(9A) prevents such a reduction in damages to take account of a proven capital gain to which the applicant in not entitled by way of damages, then the respondent's interests may be protected by a suitably-worded term in the undertakings to be given by the applicant to the respondent.

[89] Senior Counsel for the respondent requested that draft orders be dealt with after I had given my reasons. This is a sensible course. The draft orders submitted at the hearing by the applicant in respect of this option will be of assistance to the parties in bringing in minutes of order, and the parties can also negotiate terms that secure the respondent's position in the event that the option results in the provision of a capital gain or other benefit. The only order that I will make at this stage is a direction that the applicant prepare and submit proposed minutes of order. Subject to any further submissions on costs, the success of the applicant in having one of her preferred options accepted, and her success on the issue of interpretation justify an order that the applicant be paid her costs of and incidental to the application.

[90] In conclusion, the fourth option is a reasonable and appropriate rehabilitation service, and the most suitable option in the circumstances. It meets both short-term and long-term accommodation needs that were caused by the accident, and which should be met to optimise, as far as reasonably possible, the quality of the applicant's life. The option is reasonable and appropriate because any capital gain that the applicant receives above that required to meet her accident-related needs, and which the respondent proves at trial, may be brought into account according to well-established principles governing the assessment of compensation, provided a notice is given under s 51(4). The respondent's legitimate interests will be protected by the terms of the order to be submitted.