SUPREME COURT OF QUEENSLAND

CITATION:	*Williams v Partridge & Anor* [2009] QSC 278
PARTIES:	**MAUREEN KAY WILLIAMS** Plaintiff **v** **CASSIE MAREE PARTRIDGE** First Defendant And **ALLIANZ AUSTRALIA INSURANCE LIMITED** Second Defendant
FILE NO/S:	S1 of 2009
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court Bundaberg
DELIVERED ON:	8 September 2009
DELIVERED AT:	Rockhampton
HEARING DATE:	13,14 August 2009
JUDGE:	McMeekin J
ORDER:	**Judgment for the plaintiff against the second defendant in the sum of $611,196.36.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - MEASURE OF DAMAGES – PERSONAL INJURIES – where the plaintiff was injured in a motor vehicle accident – where liability is admitted – where damages are assessed under the Civil Liability Act 2003 (Qld) – where no exercise of earning capacity over 18 years - whether past or future economic loss – where the plaintiff's capacity to perform work is adversely affected. DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - MEASURE OF DAMAGES – PERSONAL INJURIES – where appropriate home modifications discussed - whether adequate proof of loss. DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT - MEASURE OF DAMAGES – PERSONAL INJURIES – Damages for gratuitous services - where

services necessary - whether carer's benefit an offsetting benefit

Civil Liability Act 2003, s 55, s 59, s 62

Civil Liability Regulation 2003, ss 3,4 schedule 3, regulations 11, 12

Motor Accident Insurance Act 1994 s 51(4), 51(9)

Golden Eagle International Trading Pty Ltd and Others v Zhang (2007) 229 CLR 498

Hughes v Grogan [2007] QSC 046

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638

Mallett v McMonagle [1970] AC 166

Munzer v Johnston & Anor [2008] QSC 162

Van Gervan v Fenton (1992) 176 CLR 327

Scarf v State of Queensland [1998] QSC 233

COUNSEL: S C Williams QC with A J Williams for the plaintiff

G Crow for the defendant

SOLICITORS: Payne Butler Lang for the plaintiff

Sciaccas Lawyers for the defendant

[1] The plaintiff, Maureen Kay Williams, claims damages for personal injuries suffered in a motor vehicle accident on 26 September 2004. Liability is admitted. It is necessary to assess the quantum of damages.

[2] Ms Williams was born on 19 April 1961 and so is presently aged 48 years. She was aged 43 years when injured.

[3] Ms Williams suffered multiple and severe injuries. Those injuries included:

(a) a compound fracture of the tibia and fibula of the left leg;
(b) a closed fracture of the tibia and fibula of the right leg;
(c) a ruptured spleen requiring laparotomy and splenectomy;
(d) left and right haemopneumothoraces;
(e) fractured ribs;
(f) mesenteric tears requiring repair during laparotomy;
(g) a probable cerebrospinal fluid leak.

[4] Ms Williams' recovery was complicated by the onset of severe lung disease, probably as a result of aspiration pneumonia, as well as a deep venous thrombosis in her left arm and the development of osteomyelitis due to infection from the staphylococcus aureus organism.

[5] Ms Williams underwent multiple episodes of debridement, skin grafting and attempts to lengthen the fractured bone in the left leg. The ankle of the left leg was

eventually fused. She wore an external fixation device on each leg - the one on the left leg for two-and-a-half years approximately.

The *Civil Liability Act* 2003

[6] The assessment of damages is governed by the provisions of the *Civil Liability Act* 2003 ("*CLA*") and the *Civil Liability Regulation* 2003 ("the *Regulation*").

[7] I have set out my analysis of the relevant provisions in *Munzer v Johnston & Anor*[1] and I see no need to repeat the views that I expressed there. There has been no submission made that my approach was wrong in that case.

General damages

[8] As Ms Williams suffered multiple injuries I am required by the *CLA* to determine the dominant injury as it is defined, having regard to the Injury Scale Values (ISV's) applicable to that injury, determine where in the range of ISV's provided for that injury it should fall, and then determine whether the maximum ISV in that range adequately reflects the adverse impact of all the injuries. If the maximum dominant ISV is not sufficient then the ISV may be higher but not more than 100 and only rarely more than 25 per cent above the maximum dominant ISV selected.[2]

[9] Both parties relied upon the assessments of permanent impairment undertaken by an orthopaedic surgeon, Dr D Van der Walt, but could not agree on which one of the two he supplied was appropriate. His assessments were based on the "Guides to the Assessment of Permanent Impairment" published by the American Medical Association, 5th edition ("the AMA 5 Guide") which is the preferred method under the Regulation.[3]

[10] In one approach he assessed the impairment due to gait derangement. He assessed Ms Williams as falling into the severe category and so assessed a 50% whole person impairment. In his alternative approach he assessed a 34% impairment based on his specific analysis of the impact on the joints and bones of the legs. Both assessments brought into account the disability to both legs.

[11] Mr Crow, who appeared for the defendants, was critical of the adoption of the "gait" approach. He pointed out that the AMA5 Guide provided:

> "Whenever possible, the evaluator should use a more specific method. When the gait method is used a written rationale should be included in the report."[4]

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1 [2008] QSC 162.
2 See ss 3 and 4 of schedule 3 of the Regulation.
3 See ss 11 and 12 of Schedule 3 of the *Regulation*.
4 See p 529 of the Guide which is Exhibit 18.

Mr Crow's point is that a more specific method is provided for in the AMA5 Guide, that no written rationale is provided in Dr Van der Walt's report supporting the "gait" method, and that a proper interpretation of the AMA5 Guide clearly requires the more specific method to be adopted.

[12] Plainly enough it was possible to use a more specific method than the derangement to gait as Dr Van der Walt did so in his alternative approach to the assessment. The difficulty with the "gait method" is that it is quite subjective and, as cross-examination indicated, the gait that Dr Van der Walt assumed for the purpose of his assessment does not seem to reflect Ms Williams' current condition as displayed in her evidence.[5] In my view the method that the AMA 5 guide prefers is the more specific one, it is more indicative of Ms Williams' condition at the time of trial, and that is the method the legislation intends should be preferred.

[13] It is common ground here that the dominant injury is the injury to the left leg.

[14] The contest between the parties is whether the assessment should be made based on Item 133 of Sch 4 of the *Regulation* or on Item 134. Item 133 is described as "extreme lower limb injury" with an ISV range of 31 to 55. Examples provided of an injury that would fall within Item 133 are "[t]he most severe injury short of amputation, for example, extensive degloving of the leg, gross shortening of the leg, or if a fracture has not united an extensive bone grafting has been done" and "a lower limb injury causing whole person impairment of 40 per cent".

[15] In support of an assessment under this item the plaintiff relies on the 50% impairment arrived at using the gait derangement method and asserts that there was significant shortening of the left leg. There was conflicting evidence about the leg length shortening. The most convincing evidence was provided by the person most qualified to assist the court - Dr Van der Walt. Although the transcript does not appear to record his evidence it was to the effect that he had measured the leg length and could find no significant discrepancy.[6]

[16] Item 134 is described as "serious lower limb injury" with an ISV range of 21 to 30. The examples provided are "a multiple fracture that is expected to take years to heal and has caused serious deformity and limitation of mobility" and "a lower limb injury causing whole person impairment of 30 per cent."

[17] Dr Van der Walt's assessment of a 34 per cent whole person impairment included an assessment of the right leg as well as the left. Dr Van der Walt allowed a 5 per cent whole person impairment for "displacement plateau fracture right leg".[7] I assume then that approximately 30 per cent of the whole person impairment he attributes to the left leg.

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5 See T1-90-92.
6 T1-81/10-30
7 See p 10 of Exhibit 3.

[18] It seems to me that the injury to the left leg suffered by Ms Williams falls squarely within Item 134, matching as it does, both examples provided. She has significant derangement of her gait and considerable impact on her mobility as a result. Effectively she must use two canes, crutches or a wheelchair to mobilise. She wears what she calls a "moon boot" to provide support for her leg at all times. She "furniture walks" about her home.

[19] In my view she would fall at the most serious end of the ISV range and so I attribute an ISV of 30 to the left leg injury.

[20] Dr Van der Walt's analysis indicates that there is some small permanent impairment of the right leg and scarring. There was some limitation of the function of the right knee. As I have mentioned, the only whole person impairment that I can identify from Dr Van der Walt's analysis is five per cent attributable to the right leg. I assess the right leg injury as falling within Item 135, "moderate lower limb injury". The impairment assessment suggests that an ISV at the bottom of the range is appropriate given the comment contained in Item 135.[8] I assess an ISV of 12 to the right leg.

[21] For the fractured ribs and the bilateral haemopneumothoraces I assess the injury as falling within Item 39 "minor chest injury". There is no suggestion here of any significant long term effect on lung function and, while no doubt distressing at the time, it would seem there has been a complete recovery within a matter of weeks or months. I assess an ISV of five.

[22] With respect to the loss of the spleen, schedule 4 provides two possible items that may be relevant – Item 80 or Item 81. The loss of the spleen necessarily means that Ms Williams is subject to an increased risk of infection. However, there is no suggestion that she is at any increased risk over and above what might be considered "normal" for someone who undergoes a splenectomy. In Ms Williams' case the risk of future infection is estimated at one per cent per year by Dr Parkes.[9] Thus, it seems to me her condition falls within Item 81 described as "loss of spleen or gall bladder (uncomplicated)". The ISV range is given as zero to seven. I assess an ISV of four.

[23] I had the opportunity of seeing Ms Williams' left leg in the course of the trial and it is substantially deformed by the procedures that she has undergone, including skin grafting, and is significantly swollen. Schedule 4 to the Regulation provides for an allowance for scarring albeit that there is some allowance for scarring in the individual items.[10] I am satisfied that a further allowance is justified here. The ISV range is 0 to 25. An assessment near the top of the range is justified "if there is gross permanent scarring over an extensive area… with ongoing pain and other symptoms". In my view that applies here. I asses an ISV of 25.

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8 "An ISV at or near the bottom of the range will be appropriate if there is whole person impairment for the injury of 8%"

9 See p 11 of Exhibit 4.

10 See general comment to Part 7 of Schedule 4

[24] The "maximum dominant ISV" is therefore 30. The defendant concedes that an ISV of 30 is not sufficient to reflect the level of impact of the various multiple injuries. Ms Williams' mobility and independence has been significantly affected by these injuries. Prior to the subject accident she was responsible for the care of four of her six children. She carried out all the usual domestic chores that that would involve. Now most activities cause her increased pain and swelling in her leg. The pain in her leg is constant. She mobilises on a stick or crutches but needs a wheelchair at times, particularly when accessing the bathroom due to the risk of slipping. She is not comfortable sitting in the one spot for any length of time as she suffers numbness in the leg. She has developed disuse osteoporosis. She has the future risk of infection that I have referred to. There appears to be no suggestion of any likelihood of deterioration in her orthopaedic condition or any need for future surgery. She bears unsightly scarring on her legs.

[25] I am conscious of the plaintiff's evidence that she has fallen twice and is scared of falling again, that she has disturbed sleep and restless nights, of the frequent need to attend to the soaking of the skin of her injured left leg, the need to peel off the dried skin periodically, and the pain in her right leg which she says can at times be worse than her left.

[26] I bear in mind that I am required to bring into account the possibility that the effects of multiple injuries can overlap. Here the impact on her mobility, which is a very significant matter and provides the justification for taking the ISV for the left leg injury to the maximum allowed, is also contributed to by the injury to the right leg.

[27] Section 4 of Sch 3 of the Regulation makes plain that it would be a rare case where an increase of more than 25 per cent above the maximum dominant ISV would be allowed. Each side urged a 25% increase albeit from a different base. Both parties urged on me a comparison of this case to my assessment in *Munzer* each arguing that this case was comparatively worse or better as suited their submission.[11] I record that my impression is that Ms Williams is less disabled than Ms Munzer where I assessed an ISV of 44. Ms Munzer had significant impairments of both legs and the maximum dominant ISV related to her right arm. She was wheelchair bound by lunchtime most days through gross fatigue. Her condition was likely to deteriorate over time and she faced further surgical procedures. As well she had unsightly scarring to her legs and arm.

[28] In my view the significant impact on Ms Williams' mobility and the gross disfigurement to her legs calls for an increase here of the maximum that is to be usually considered namely 25 per cent. Rounding off the ISV as I am required to do[12] I assess the ISV at 38.

[29] Applying s 62(h) of the *CLA* I calculate general damages at $63,200.

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[11] Section 1 of Schedule 3 records the legislative intent that there be consistency in awards and so it is appropriate that comparisons be made.

[12] Section 14 of Schedule 3 to the *Regulation*

Past economic loss

[30] The plaintiff seeks $161,150 under this head of loss based on an assumed income of $550 per week from 1 January 2005. The defendant contends that there should be no award at all.

[31] Mr Williams QC who appeared with Mr AJ Williams for the plaintiff submitted that the most likely source of work that the plaintiff would have pursued would have been field work i.e. picking and packing fruit and vegetables in the Bundaberg area. The evidence from a local employer, Mr Purcell, indicates that there was ample work available. Mr Crow objects that there was no evidence from the plaintiff that she had any intention of pursuing such work but that is not right – the reasonable inference from the plaintiff's evidence was that field work was one of the only two options open to her.[13] The real issue in the case concerns the plaintiff's attitude to undertaking such work and her ability to do so, given her health and fitness, assuming that the subject accident had not occurred.

[32] At the time of the subject accident the plaintiff had been out of the paid workforce for a very considerable length of time, perhaps in the order of 18 years.[14] The paid work that the plaintiff had last engaged in had involved part-time work cleaning hotels and offices and fruit picking.

[33] The plaintiff had never worked in any clerical capacity and had an education to a grade 9 standard. Over the years she had cared for her children and received what she described as a parenting payment from CentreLink. She had had six children and had received no significant assistance from their fathers.

[34] The basis for the claim that Ms Williams was likely to return to the paid workforce despite that long period of time out of it is that prior to the subject accident the plaintiff received correspondence from CentreLink dated 22 April 2004 which she construed as putting in doubt her continued entitlement to receive CentreLink benefits. The letter spoke of a plan to help Ms Williams "improve [her] job prospects."[15] Because of that correspondence Ms Williams contacted the author of the letter, an officer at CentreLink, and underwent an interview. Her understanding of her position was that CentreLink required that she do a course at TAFE to improve her prospects or find work and perhaps voluntary work in order to maintain her entitlements.[16]

[35] As a result of the suggestion that she might do a TAFE course to improve her prospects she was provided with an enrolment application at the local TAFE. She partially completed that document but did not send it to the local college.[17] Her evidence was that she was interested in doing a course that would provide her with qualifications to become a cook.

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13 T1-16/1-10
14 T1-48/50; 1-49/20 but the evidence varied on the point.
15 Exhibit 8.
16 T1-13(5).
17 See Exhibit 9.

[36] Effectively, by the time of the subject accident on 26 September 2004 Ms Williams had done nothing to advance the proposal that she undertake a TAFE course. She had not obtained employment. Effectively things had gone on following the receipt of the correspondence from CentreLink and the interview as they had done before.

[37] The plaintiff's case was that her continued entitlement to a form of parenting benefit was limited as her children were growing up and the youngest, aged 14 years, would soon leave school. Thus any continued entitlement to benefits from CentreLink would of necessity have eventually been on a different basis. The officers at CentreLink would expect her to at least endeavour to obtain employment to justify the continued receipt of benefits.

[38] The assessment of this component of the loss is, of necessity, quite speculative. One possibility is that Ms Williams' attitude is displayed by her general lack of interest in pursuing the TAFE course or obtaining employment of any sort in the period from April to September 2004. That tends to suggest that she was not overly enamoured of the prospect of returning to the paid workforce and would justify the nil assessment urged by the defendants.

[39] Ms Williams' capacity to pursue employment depends to some extent on my findings in relation to the effects of a fall that she suffered on 14 May 2004. Her counsel contend that the fall was a minor one with no significant sequelae. If that is so then her interest in obtaining work seems to have been minimal.

The 14 May 2004 Incident

[40] On 14 May 2004 Ms Williams fell at a local IGA store, suffering injuries to her neck, back and left shoulder areas.

[41] Ms Williams' evidence-in-chief was to the effect that her symptoms consequent upon the injury had resolved prior to the subject accident. She said that she suffered a "swollen neck and tingling sensations up my arm". She contended that by the time of the subject accident the symptoms were not affecting her.[18]

[42] Whilst I accept that Ms Williams was a patently honest witness and endeavouring to give an accurate account of herself, there seems to be a deal of evidence suggesting that the problems with her neck were ongoing and that her present recollections of her problems are not accurate.

[43] The initial treatment indicates that the symptoms were very significant. Her general practitioner, Dr Ishri, prescribed narcotics to control her symptoms. The general practitioner wrote a letter of referral to the Orthopaedic Spinal Unit at the Royal Brisbane Hospital on 11 July 2004, that is two months after the accident, describing the existing symptoms as follows:

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[18] T1-15/40.

> "Swelling at the left side of base of neck, with tingling, numbness, and pain likened to electric shocks in the left arm and forearm and hands."[19]

It appears that Ms Williams did not follow up that referral immediately. Her counsel contended that demonstrated that the symptoms were not so significant. While that failure to follow up the referral is consistent with Ms Williams not having so significant a condition as the letter might suggest, other evidence indicates that Ms Williams had difficulty in affording the journey to Brisbane.

[44] On 8 November 2005 a Dr Day, a specialist connected with the Spinal Unit at the Royal Brisbane Hospital, responded. Although not entirely clear it would seem that he had seen Ms Williams the previous day. He recorded the same symptoms as Dr Ishri and said that Ms Williams had had the symptoms "since May 2004". His advice was that she would probably require surgery and that for expediency, surgery should be performed by a vascular surgeon.[20]

[45] Radiological examination by way of a CT scan performed in 2004 showed evidence of a cervical rib associated with the left C7 vertebra. It was apparent that the specialist thought this was the probable cause of her continuing symptoms.

[46] On 23 October 2006 Dr Ishri referred Ms Williams to Dr Neil Robinson at the Bundaberg Base Hospital, a local orthopaedic surgeon. He again related the same symptoms as previously. The only reasonable inference to draw is that at this stage symptoms were continuing at a reasonably significant level.

[47] Ms Williams was eventually referred to a vascular surgeon at the Royal Brisbane Hospital in 2007, Dr Won. His letter of 12 February 2007[21] records:

> "She predominantly complains of pins and needles in the left hand mainly in the palmer aspect associated with burning pain. This is worse when she uses her hand. I also note that she has some mild symptoms on the right side as well."

Dr Won's letter concludes:

> "She was also seen by Dr Foster who agrees with this finding [concerning the cause of her symptoms] and given that the patient does not want any intervention as her symptoms are relatively minor, we do not think she warrants any surgery at this stage."

[48] The letter refers to the possibility of a worsening of the symptoms and to revisiting the decision not to have surgery in the future if that occurred.

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19 Contained in the practitioner's records Exhibit 12.

20 *Ibid*

21 *Ibid*

[49] It seems from the history that Ms Williams has given to various practitioners she has continued to have pain in her neck. For example, she saw a physician, Dr Parkes, on 9 May 2008 and the doctor recorded that:

> "Ms Williams also suffers pain in her neck, and, if this is severe, she experiences a migraine characterised by throbbing, left sided pain associated with hypersensitivity to light and noise and nausea. This may be relieved by paracetamol but may last for some hours and on occasion she requires an injection to relieve her pain."

[50] See also the pain diagram that the plaintiff completed for Mr Hoey on 7 March 2008. [22]

[51] In the course of her cross-examination Ms Williams said she had had two injections for migraines in the previous 12 months. She denied that her migraine problems were associated with neck pain.[23]

[52] Mr Williams QC pointed to the absence of any record of attendance on the GP after 7 July 2004 as indicative of a resolution of symptoms. The difficulty with that submission is the apparent severity of the complaint that triggered the letter of referral in July and the description of significant symptoms to later specialists. A failure on the part of the GP to successfully treat the symptoms can also explain the lack of attendance.

[53] My impression is that the fall in the IGA store in May of 2004 triggered symptoms of pain in the neck and into the left arm which were a continuing and significant problem up until the time of the subject accident. Whilst the injuries suffered in the subject accident overwhelmed the effects of the May 2004 incident, it is evident that the plaintiff had continuing problems with symptoms sufficient to justify referral to a specialist surgeon and that cannot be attributed to the subject accident. I accept that with time these symptoms have resolved to a large degree but they continue albeit sporadically.

Assessment of Past Economic Loss

[54] Whilst these findings explain to a significant extent Ms Williams' failure to pursue the TAFE course option, or any employment, there remains little reason to think that Ms Williams was greatly motivated to seek work. There had been no communication with Centrelink apparently in the 5 months leading up to the subject accident. She had been out of the paid work force for nearly two decades. She was in her early 40s. The work that Ms Williams was most likely to contemplate performing, that of a field worker, is physically demanding work. Mr Purcell acknowledged that field work could be demanding on a person's neck or back.[24]

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22 See paragraph 63 of Exhibit 5.
23 T1-47/20-50.
24 T2-39/55.

[55] As well Ms Williams had the demands of child rearing. By the time of trial her six children were aged between 14 and 29 years. Thus at the time of the accident her youngest child was about nine years of age. It was said in the course of the opening that the trigger for Ms Williams to seek work was that her youngest child was now a fulltime student but that must have been the case for three or four years prior to the subject accident. I think it clear that Ms Williams had conflicting demands on her time and energy and that her inclination was to maintain her position as a fulltime carer for the children who remained living at home, and indeed who did so up to the time of trial.

[56] Added to the difficulties of assessment is that field work is seasonal work and whilst, according to Mr Purcell, the work is steady through the year, the physical demands no doubt vary depending on the precise tasks performed and the type of crop in issue. Quite apart from Ms Williams' attitude to returning to work her neck and associated problems would have constituted a significant barrier.

[57] Mr Purcell's evidence suggests that the income that a field worker can earn can vary widely depending upon their efficiency and attitude. He spoke of workers earning up to $2,000 per week and others earning $50 per week. Older and slower workers earned a minimum of $15 per hour under Mr Purcell's workplace agreements.[25]

[58] In assessing damages in respect of a past hypothetical event I am required to "make an estimate as to what are the chances that a particular thing … would have happened and reflect those chances, whether they are more or less than even, in the amount which [I] award.": per Lord Diplock in *Mallett v McMonagle*[26] cited by Brennan CJ and Dawson J in *Malec v JC Hutton Pty Ltd.*[27] I assess the probabilities of Ms Williams obtaining and persisting in such work from accident to now as being relatively low.

[59] Section 55 of the *CLA* is relevant to this assessment. It provides:

> "**55 When earnings cannot be precisely calculated**
>
> (1) This section applies if a court is considering making an award of damages for loss of earnings that are unable to be precisely calculated by reference to a defined weekly loss.
>
> (2) The court may only award damages if it satisfied that the person has suffered or will suffer loss having regard to the person's age, work history, actual loss of earnings, any permanent impairment and any other relevant matters.
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> (3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.

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25 T2-42/25.
26 [1970] AC 166 at 176
27 (1990) 169 CLR 638 at 640

…"

[60] I have received no submissions on the interpretation that should be applied to the section. I assume that it simply repeats the position at common law.

[61] Balancing out all these considerations as best I can I assess a global component of $15,000 for past economic loss. Essentially I assume:

(a) that field work was readily available;
(b) that with at least two dependent children at home there were strong reasons for Ms Williams to maintain her previous life style;
(c) that given her home commitments and the neck and left arm problems Centrelink would not have brought too great a pressure to bear;
(d) that a full time worker of Ms Williams age and background could expect to earn about $15 per hour;
(e) that with the easing of symptoms as reflected in Dr Won's letter the plaintiff would have pursued some occasional work

Future economic loss

[62] The various factors that I have mentioned in relation to past economic loss remain relevant. It would seem that the problems associated with the C7 rib reduced over time. As well, Ms Williams' children were older and no doubt more independent. Thus her energies could be freed up to work outside the home. Nonetheless it is plain that the report to Dr Parkes that I have mentioned and the pain diagram that the plaintiff completed for Mr Hoey both indicate that neck problems were continuing.

[63] Ms Williams' increasing age is against the proposition that she was likely to be involved in demanding physical work.

[64] It is probable too that Ms Williams would have come under increasing pressure from CentreLink to obtain paid employment. How significant that pressure might be and how effective it might be is not really shown by the evidence. Mr Purcell, a significant employer of field workers in the Bundaberg district, seemed to think that the availability of CentreLink benefits was a positive disincentive to work. He said:

> "We have a lot of meetings with CentreLink. They come once a month from Brisbane and go through our employee records. Its based on a lot of our local labour that will come and work for two days, then tell you they can't work the third or fourth day, because they don't want to lose their CentreLink benefits or their child welfare benefits."[28]

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[28] T2-39/20-30.

[65] Given the presence of a pre-existing problem in Ms Williams' neck and the left C7 rib problem, and the physical nature of the work, it is probable that these conditions would have worked against significant long term employment.

[66] Given her pre-existing problems I think it likely that Ms Williams would have endeavoured to maintain her CentreLink benefits but top them up with casual work. The defendant made no submission that Ms Williams had any residual earning capacity. Whilst Mr Fraser pointed out various occupations that were theoretically open, I think in a practical sense it is most unlikely that in her present state she would ever obtain gainful employment.

[67] My assessment is that Ms Williams would probably seek to obtain work about two days per week, earning $15 per hour. Assuming eight hours work per day she had a prospective earning capacity of $240 per week. That loss should be applied through to approximately age 60, say 12 years. I assess the damages at $95,000.[29]

Past domestic assistance

[68] Because of her significant injuries the plaintiff required and received assistance from two of her sons. The services that they rendered to her were generally of a domestic kind such as the preparation of meals, the doing of washing and the cleaning of the home. As well there were some personal services such as assisting her after attending to her toileting or bathing. It is now of course well recognised that the need for such services is a compensable loss and that that loss is measured by, in general, the market cost of providing the services: *Van Gervan v Fenton.*[30] The parties were agreed that the market cost of provision of services was $22 per hour for the past claim and $26 per hour for the future claim.

[69] The assessment of damages under this head is governed by the provisions of s 59 of the *CLA* which provides as follows:

> "**59 Damages for gratuitous services**
> (1) Damages for gratuitous services are not to be awarded unless—
> (a) the services are necessary; and
> (b) the need for the services arises solely out of the injury in relation to which damages are awarded; and
> (c) the services are provided, or are to be provided—
> (i) for at least 6 hours per week; and
> (ii) for at least 6 months.
> (2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.
> (3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.

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[29] $15/hr x 16 hrs/wk x 474 (5% discount multiplier for 12 years) = $113,760 x 85% = $96,696.

[30] (1992) 176 CLR 327.

> (4) In assessing damages for gratuitous services, a court must take into account—
>
> (a) any offsetting benefit the service provider obtains through providing the services; and
>
> (b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

[70] The defendants concede gratuitous services are necessary as a result of the subject injury and that services have been provided for at least six hours per week for a minimum of six months as required by s 59(1)(c) of the *CLA.*

[71] There is the usual difficulty in forming any accurate view as to the number of hours of care that would be appropriate. Mr Hoey, an experienced occupational therapist, provided a table which he said was based on his interview with the plaintiff which the plaintiff contends provides an accurate summary of the past assistance. That table is as follows: [31]

Period	Hours of assistance per week
3 March 2005- 31 August 2005	27.5 hours
1 September 205 – 30 June 2006	22 hours
1 July 2006 – 14 July 2006	Nil (inpatient)
15 July 2006 – 7 October 2007	20 hours
8 October 2007 – 31 August 2007	12.5 hours
1 September 2007 – 14 September 2007	Nil (inpatient)
15 September 2007 – 13 October 2007	16.5 hours
14 October 2007 – 31 January 2008	11.5 hours
1 February 2008 – 10 February 2008	Nil (inpatient)
11 February 2008 – 3 March 2008	14 hours
4 March 2008 – present	11.5 hours

[72] The plaintiff's amended claim of $98,923.00 under this head of loss was based on this table but an allowance of 10.5 hours per week was made for the periods of hospitalisation and 14 hours per week for the period since 4 March 2008.

[73] Ms Williams gave evidence that she considered that her present day requirements equated to a need for assistance in the order of about 11 and a half hours.[32] It is evident that she was aware of Mr Hoey's table and estimates. In my view evidence of this type, expressing as it does the witnesses' conclusion as to the final issue rather than providing evidence to support the conclusion, is of little assistance. Whatever effect it may have had was somewhat undone but Ms Williams' acceptance of the proposition put to her by Mr Crow that a "more reasonable estimate" of the care required would be in the order of seven to ten hours per week.[33]

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31 See para 18 of his report Ex 5

32 T1-40/60,

33 T1-74/40.

[74] That latter range was suggested by the occupational therapist called by the defendant, Mr Cameron Fraser. Mr Fraser did give his breakdown of the range. He said that it would include three to four hours for indoor cleaning, two to three hours for laundry activities, under two hours for grocery shopping and one hour for lawn and garden maintenance.[34]

[75] I do not have the evidence that would enable me to be satisfied that Mr Hoey's table is necessarily accurate. Obviously enough Ms Williams' needs were much greater closer to the accident than they are today. Mr Fraser took a more broad brush approach to the problem, suggesting that in the first three months following her discharge from hospital Ms Williams would have needed about an hour per day assistance with self care and two to three hours per day with assistance with domestic tasks, that thereafter until a time about two years after the accident she would have needed no assistance with self care and about two to three hours per day assistance with domestic tasks, and thereafter up to 1.5 hours per day assistance with domestic tasks.

[76] Mr Crow points out that Ms Williams required extensive hospitalisation and that s 59(4)(b) of the *CLA* requires that there be no allowance for care provided in these periods. That is not what the legislation provides. It is only where someone is hospitalised and "has not required" the services claimed that there is to be no allowance. Mr Gordon Ellis said that he attended at the hospital at the request of the treating specialist to tighten the external fixation device three times each day. Where, as here, services were in fact provided, albeit at a fairly limited level, there needs to be some allowance made.

[77] Mr Crow has set out the periods of hospitalisation in his submission. The periods included in Mr Hoey's table during which Ms Williams was hospitalised were from 3 March 2005 to 21 March 2005 and from 10 February 2008 to 20 February 2008 – a total of 28 days. I accept that there must be some moderation of the claims made for those periods but not to nil as the defendant contends.

[78] The difficulties in any precise calculation were exemplified by Mr Williams' cross-examination of Mr Fraser. Whilst Mr Fraser rejected the proposition that the plaintiff would require assistance of a carer on every outing from her home he accepted that she would need support on "certain outings" depending on the length of the outing and the environment that she was facing. He made no allowance for those situations. Nor could he make any allowance for occasions where Ms Williams might fall ill and because of her disabilities be more incapacitated than she otherwise would have been and hence require assistance that she would not otherwise have required. As Mr Williams pointed out, the plaintiff is at greater risk of infections and the like because of the loss of her spleen.

[79] Given the lack of sufficiently detailed evidence supporting Mr Hoey's summary I think that Mr Fraser's approach offers the more reliable guide to the past needs. Further, I think that the adoption of Mr Fraser's opinions, given that they are more

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[34] T2-55/30.

moderate than Mr Hoey's approach, fairly brings into account the defendant's arguments that there should be no allowance made for care provided to other family members.[35] I am conscious that at least in one of his answers Mr Fraser seems to indicate that he has taken into account Ms Williams' need to care for others in her home, particularly her two younger children[36] but there was no closer examination of the issue and his analysis of the seven to ten hour range that he gave suggests to me that he could not have allowed any great amount, if any, for such assistance.

[80] I therefore assess the past provision of care as follows:

Period	Number of weeks	Hours per week	Rate per hour	Total
21.3.05 – 21.6.05	43	24.5	$22	$7,777.00
21.6.05 – 29.9.06	64.43	17.5	$22	$24,805.00
29.9.06 – present	145	10.5[37]	$22	$33,495.00
				$66,077.00

[81] To allow for the hospital attendances I will round up the figure to $70,000.00.

[82] Mr Crow for the defendants then makes the following two submissions:

(a) the plaintiff had a pre-existing disability related to her neck and left arm and her migraine condition which would have necessitated the provision of some services. Section 59(1) and (2) of the *CLA* prohibit damages being awarded in those circumstances for that component;

(b) the carers in this case, that is Ms Williams' two sons, have each received a carer's benefit from the Federal government, totalling $52,640, and this is in the nature of an "off-setting benefit" that must be brought into account under s 59(4) of the *CLA*. Mr Crow also submits that an off-setting benefit included the benefit derived from residing in the plaintiff's home which one of the sons, Mr Alan Thompson, did.

[83] The difficulty with the first submission is that there is no evidence that any care was provided as a result of the neck and left arm problems. Whilst I could accept that when significantly disabled there was the probability of a need for care I cannot see that there is any basis in the evidence on which I can proceed to discount the damages to allow for that.

[84] I have two difficulties with the submission that there should be some discounting of the damages to allow for any benefit that Mr Thompson received from living in the plaintiff's home. First, what that submissions seems to me to ignore is that s 59(4) requires that the benefits that must be off-set are those that are received "through providing the services" in question. Here Mr Thompson is the plaintiff's son. There is no suggestion that the only reason that he resides in his mother's home is

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35 Any assessment must exclude time taken in the providing of domestic services for those members of the household other than the plaintiff: see *CSR v Eddy* (2006) 226 CLR 1

36 T2-46/5.

37 Mr Crow conceded 10.5 hours as reasonable for this period in his submission.

because he provides caring services. It is commonplace these days for children of Mr Thompson's age and older to reside in their parent's home. I am not satisfied that it is shown that the benefit he receives is a result of the provision of the services to his mother.

[85] Secondly, there is a real difficulty with the notion that the legislature could have intended that such a circumstance go in diminution of the award of damages. This head of damage is to compensate Ms Williams for the accident created need for domestic and personal services. The defendants' contention is that Ms Williams provides this "benefit" out of her own pocket. The assumption, unexplored in the evidence, is that she is the one who pays the rent, the electricity bills etc. To reduce her damages by an amount reflecting her provision of a benefit to her care giver seems perverse. In truth, in such a case, she would be worse off, not better off, as a result of the provision of the so-called "off-setting benefit". The cases that led to the formulation of the principle of compensation for this head of loss[38] demonstrate that the concern was that the burden of providing care was falling onto family members and not the tortfeasor. It was to meet this iniquity that damages were provided. To characterise a "benefit" emanating from the plaintiff as going in diminution of her award is to undo the point of the compensation. Very clear words would be needed to bring about such a perverse result and s 59(4) does not supply them.

[86] I turn then to the question of whether a reduction of $52,640 should be made from the amount allowed for past domestic assistance. The only authority to which counsel could direct me in which the matter has been expressly considered is *Hughes v Grogan*,[39] a decision of A. Lyons J. Her Honour's decision concerned the application of s 55D(4)(a) of the *Motor Accident Insurance Act* which was identical in its terms to s 59(4)(a) of the *CLA.* Her Honour was not prepared to make the deduction sought there in the absence of any authority to support the proposition and in the absence of any submission concerning the meaning of the words "off-setting".

[87] The underlying rationale of s 59(4)(a) seems to be that the impact on the care giver should have some relevance to the assessment of damages. The difficulty is that the provision so construed ignores the principle worked out in the cases that the loss in question is the plaintiff's need for services and the impact on the service provider is irrelevant. Hence the wages foregone by the service provider was discarded as the proper measure of the damage suffered: *Van Gervan v Fenton*.[40]

[88] Since 1998, when White J decided in *Scarf v State of Queensland*[41] that the decision in *Van Gervan* required it, a non-refundable carer's pension has been disregarded in the assessment. That, so far as I am aware, has remained the unchallenged position in this State. That is so despite the fact that the provision with which Lyons J was concerned was introduced into the *Motor Accident Insurance Act* in 2000. In the nine years that have passed since there must have been dozens of cases in which

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38 *Donnelly v Joyce* [1974] QB 454 at 462; *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Van Gervan v Fenton* (1992) 176 CLR 327.

39 [2007] QSC 046.

40 (1992) 176 CLR 327 cf *Veselinovic v Thorley* [1988] 1 Qd R 191 at p 199-200

41 [1998] QSC 233 at [122]

care has been provided by family members who were in receipt of a carers' pension and yet there has been only the one decision even considering the point.

[89] Mr Crow's submission thus requires that this long–standing proposition, and one based on a significant underlying rationale of the assessment of damages of this head of loss, is to be fundamentally altered. I confess to some hesitation in taking such a step.

[90] Further as the plaintiff submits, the argument means effectively that the payment and receipt of the carer's benefit becomes one for the benefit of the tortfeasor – a proposition for which there is no authority.

[91] To complicate matters further the provision provides no guidance as to the circumstances in which it would be appropriate to offset such a benefit. Normally one would expect there to be some correspondence between the "benefit" to be offset and a reasonable assessment of damages. As Lyons J pointed out, the crucial word is "offsetting". When can any benefit that a carer receives be an "offsetting" one? How in fairness can one offset a benefit derived by one person against a loss suffered by another? As will be seen, the facts in this case demonstrate the real difficulty in seeing how the provision can ever apply.

[92] As I have endeavoured to demonstrate above any benefit emanating from the plaintiff adds to the plaintiff's burdens and if anything merits some increase in the award.

[93] The problem is no clearer if one assumes a benefit from a third party. While the imposition on the carer's finances and good will might be assuaged by the benefit conferred it has no impact on the loss suffered by the plaintiff which is the accident created need to be now cared for. Does the provision intend that the loss not fall on the tortfeasor but be put back onto family members, or others who assist, despite having no legal obligation to do so, unlike the tortfeasor? As I have said, that was the very iniquity that the damages were intended to meet. And what of the position where the third party has had the plaintiff enter into a contract to repay from any damages the value of the accommodation? It remains a benefit in the hands of the carer but if the value was brought into account in diminution of the award the plaintiff would be doubly disadvantaged. And why should the position be any different if there is no contract? Why should a strong moral obligation to repay not bring about the same result? If it does not it would mean that those better advised would obtain more damages than those who were not. So artificial a result is not particularly appealing.

[94] It may be that these difficulties are avoided if the legislative intent was to catch benefits provided by a third party which reduced the imposition on the carer and in respect of which the plaintiff was under no legal or moral obligation to repay. With considerable hesitation I will assume so and that a carer's benefit potentially falls into that category, although I note that I have received no submissions on the construction of the relevant provisions of the *Social Security Act 1991* (Cth).

[95] That then brings me to the facts in this case. The question, it seems to me, is whether that potential benefit is one that ought, in some way, be brought into account here. The plaintiff's submission is that there is in fact no offsetting benefit demonstrated because:

a) The provision of the services has been "particularly demanding" (Gordon Ellis: T1-98-40);

b) It involves a significant "burden" (Gordon Ellis: T1-98-36);

c) In Ellis' case, it involved daily travelling;

d) In the case of each care provider it necessitated daily care for seven days of each week;

e) Each care provider has been prevented from obtaining remunerative employment during the period that each has devoted to his mother.

f) The salary presently earned by Gordon Ellis of $40,000 per annum (T1-98-50) is a net weekly income of $653. He had a job interview at the time of the accident which he was unable to attend. To care for his mother, he has potentially suffered a loss of net income of that order for the period of three years during which he was her care provider;

g) The Centrelink payment Ellis received was between $420 and $460 per fortnight, which is averaged to $440 per fortnight or $220 per week. Hence he has been "out of pocket" on a weekly basis in the sum of not less than $433 for three years;

h) Alan Thompson has been similarly disadvantaged, though the current amount of the Centrelink benefit narrows his loss slightly;

i) Neither financial loss represents the true value of the services which have been provided, for in each case the care provider has had the responsibility of the unremitting burden of caring for a heavily disabled woman on a seven day per week basis with, at times, quite distasteful and repulsive duties (Gordon Ellis: T1-99-10); and

j) Further, even if the carers hadn't obtained employment, they would have been in receipt of another Centrelink payment (Newstart, unemployment benefit, Austudy, etc) of a similar amount as the carer's pension actually received. Thus, there is no true benefit obtained by the carers which they could not have accessed otherwise and in other circumstances.

[96] In my view there is substantial force in these submissions. To be no better off financially than you would probably have been otherwise, and yet be burdened with the obligation of caring for a disabled mother, no matter how well loved, is not, in any sense, to be benefited.

[97] I propose to make no deduction.

Future Gratuitous Assistance

[98] The principal difference between the parties in their respective assessments lies in the life expectancy adopted. On the plaintiff's side 41 years is contended for and on the defendant's side 36 years. I have called for supplementary submissions which make plain what was only previously implied and that is that the difference is due to

the adoption on the plaintiff's side of prospective life tables rather than historical tables in reliance on the decision in *Golden Eagle International Trading Pty Ltd and Others v Zhang.*[42]

[99] Mr Crow submits that *Zhang* only authorises the adoption of prospective life tables as opposed to historical tables where there is actuarial evidence supporting their application, as was available in that case.

[100] In *Zhang* Kirby and Hayne JJ were of the view: "The Court of Appeal held that 'it is appropriate for the courts to make their estimations on the basis of the best information available: the projected tables would appear to be a more accurate assessment of future trends than the historical tables.' There is no reason to doubt that the Court of Appeal was correct in its conclusion that the projected tables published by the Australian Bureau of Statistics were more likely to give an accurate estimate of future life expectancy than the historical tables published by the Bureau. That being so, it follows that the Court of Appeal was right to conclude that, despite the then prevailing practice in the courts of New South Wales, the primary judge should have used the prospective rather than the historical tables."[43] Gummow, Callinan and Crennan JJ agreed that the "best evidence rule" required that "courts should act upon the least speculative and most current admissible evidence available. To prefer the prospective rather than the historical life expectancy tables is to do no more than that."[44]

[101] Plainly the approach in *Zhang* was not dictated by the individual circumstances of the parties. The decision of the High Court involved acceptance of the proposition that prospective tables provide the more accurate guide to life expectancies and should be adopted where that is relevant. I accept the plaintiff's approach as the correct one.

[102] Neither side have proved what statistical life tables show as the probable life expectancy for a woman of the plaintiff's age on either of the bases contended for. Each asserts that the Australian Bureau of Statistics (ABS) data supports their position but without reference to the claimed published table. Neither side contradict the other's assertion or confirm it. Presumably I am required to do my own research.

[103] I accept that I am entitled to take judicial notice of statistics published by the official statistician such as life expectancies: *Schiffman v Jones.*[45]

[104] Mr Crow refers to a life expectancy of 37 years which is supported by Table 7.6 of the ABS Australian Historical Population Statistics 2008 (3105.0.65.001). I am unable to locate any projected life table published by the ABS that reflects the claimed improved mortality figures. It would appear that actuaries publish tables

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42 (2007) 229 CLR 498; [2007] HCA 15
43 At [70]
44 At [4]
45 (1970) 92 WN (NSW) 780 at 791-792

that take the medium life expectancy data published by the ABS and, using their expertise, calculate the improved life expectancy that results. Tables published by actuaries such as Cumpston Sarjeant indicate that a 40 year life expectancy is appropriate for a 48 year old female.

[105] While I have no reason to doubt the accuracy of the calculation in my view I am not permitted to take judicial notice of such calculations involving as they do methods that may be disputed. In the absence of better evidence I adopt 37 years as the appropriate life expectancy for a 48 year old female.

[106] One side contends for 11 hours care per week and the other 11.5 hours. As previously noted the assessments by the occupational therapists did not take into account the need for assistance in outings or any extra care required in periods of ill health. There needs to be brought into account potential benefits that will probably be derived from living in a more suitable home. The parties agree that there should be an allowance for certain aids and equipment which should assist the plaintiff in being more independent. My impression is that Ms Williams was of a stoical nature and gets by at times when assistance could reasonably be needed. Whether she can maintain that stoicism as she ages is doubtful. Balancing these factors as best I can I adopt the higher of the two figures.

[107] Again the defendants contend for a reduction in reliance on s 59(4)(a) *CLA*. In my view there is no good reason to apply any deduction. As the plaintiff's counsel submit, in addition to the arguments applicable to past care, the argument for the future component has other deficiencies. First, there is no basis upon which to conclude that any carer's benefit will be paid by the Commonwealth after the receipt of the plaintiff's damages. The plaintiff will be precluded from receipt of Centrelink benefits for a period.[46] Secondly, the plaintiff is not obliged to seek to engage a gratuitous carer to provide her future services, and thus attempt to access such Commonwealth benefits as may be available to the carer. There is no evidence that such gratuitous care will necessarily be available to her in the future.

[108] I assess the damages under this head at $267,300.[47]

Home Modification Costs

[109] There is a claim for home modification costs. It is not in dispute that some adjustments to the plaintiff's home would be of benefit to her. Effectively the plaintiff needs to use a wheel chair at times principally to be secure in the bathroom and to have some independence in the kitchen.

[110] The defendant submits that there is no admissible evidence as to the quantification of the costs of the provision of such a home and so no allowance can be made.

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[46] A carer's payment is defined as a "compensation affected payment" in s 17(1) of the *Social Security Act* 1991 and so may not be payable during any preclusion period – see Part 3.14 Division 1 of that Act

[47] 11.5 hrs/wk x $26/hr x 37 yrs (894)

[111] Mr Hoey gave evidence of a project that he is presently engaged in where adaptations to a disabled person's home are being made of the general type that the plaintiff might require. Those costs amounted to about $38,000 taking the mid-point.

[112] In my view that evidence provides some guide to the proper measure of the loss. It cannot be known what particular home Ms Williams might eventually choose to live in and how it might compare to the project on which Mr Hoey is engaged. She presently rents accommodation. She expressed an interest in owning her own home. Because of these facts it is impossible for the plaintiff to lead more precise evidence than she has done.

[113] Mr Fraser pointed out that modern homes typically have greater areas within which to move about and so are more wheel-chair friendly, and can be purchased at a lesser cost than older homes. That would lessen the probable cost of adapting a suitable home as, acting reasonably, Ms Williams should seek to acquire a home that best meets her present needs. It seems to me unlikely that she would find a home with the precise adaptations that she will require and that Mr Hoey mentions in his report.[48]

[114] Doing the best I can I will allow $30,000 by way of general damages under this head. That takes the bottom of the range provided by Mr Hoey for a house that he said had no uncommon features.[49]

Cost of Future Aids & Equipment

[115] There is a claim for the provision of aids and equipment in the future. The only dispute relates to the period over which the claim should be allowed. Again that centres on the use by the plaintiff of projected life tables rather than historic. I adopt a 37 year life expectancy and assess the loss at $20,300.00.

Future Treatment Costs

[116] The plaintiff claims costs of attendances on a general practitioner at $11,000, pharmaceuticals at $128,000 and the cost of a pain clinic of $15,000 – a total of $154,000. The defendant allows a total of $11,031.

[117] The reason for this wide discrepancy is that the defendants' submissions assumed that the plaintiff's claims would be restricted to those mentioned in the Statement of Loss and Damage and so suggested that there was an agreed approach on some items. The plaintiff apparently feels unconstrained by the notice previously given of her claims. The plain intent of the Rules is that the Statement of Loss and Damage must be accurate. In his supplementary submission Mr Crow objects to any departure from the claims made in the Statement. For reasons that I explain later I

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48 See para [26] of Ex 5

49 T2-22/55

propose to restrict the plaintiff to the items of which she has given notice in her Statement as required by the Rules.

[118] The plaintiff has an ongoing need for medication and will be required to attend on general practitioners. The defendant concedes the amount claimed in the Statement of Loss and Damage of $9,071.36. That is said to cover visits to a general practitioner, the expense of obtaining Warfarin, and travel costs of attending the pharmacy and the general practitioner.

Pain Clinic

[119] The plaintiff claims the cost of attendance at a pain clinic in the sum of $15,000 relying on the report of a physician, Dr Parkes. The plaintiff's submission is that these items are undisputed. Dr Parkes' was not called but his report tendered.

[120] Evidence was led by the plaintiff from Mr Hoey of rehabilitation being available at a "multidisciplinary, cognitive behaviourally based clinic" at a cost of $3,400.[50] I assume that the benefit to Ms Williams will be a moderation of her need to consume medication and perhaps an increase in her independence.

[121] Mr Crow has pointed out that the plaintiff's claim as formulated in her Statement of Loss and Damage is restricted to the sum mentioned by Mr Hoey.[51] The defendant, in my opinion, is entitled to rely on the notice given of the plaintiff's claims in determining whether to cross-examine or not. In any case the plaintiff's submission assumes that lack of cross–examination means that there can be no critical analysis of a doctor's opinion. I don't accept that as necessarily so.

[122] Where, as here, there is conflicting evidence of the costs of such a program then there needs to be some demonstrated advantage that makes it just for the defendant to pay the greater expense. Dr Parkes offers no evidence of what advantage will accrue to the plaintiff from attendance at the clinic he envisages, let alone why the defendant should be responsible for the cost of it.

[123] I propose to allow the modest costs claimed and assume it will have some beneficial effect justifying some moderation of the claims for future pharmaceutical and treatment costs.

Hydrotherapy Costs

[124] A claim is made for hydrotherapy costs. Mr Hoey suggested that such therapy would be beneficial in maintaining Ms Williams in her present condition.[52] His opinion was not challenged and notice of the claim was given in the Statement of

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50 Ex 5 at para [22]
51 See Ex 15 at p 8 Item (k)
52 Ex 5 at [23]

Loss and Damage. He suggested an annual cost of $450. A claim is made for the sum of $4,674 which I will allow.

Holiday Expenses

[125] Additional holiday expenses are claimed for the costs associated with carer travel and increased hours of attendance in the global sum of $3000 per annum and in a total of $53,930. The Statement of Loss and damages claims a total of $35,000 again on a global basis. The defendant submits there is no medical evidence to support the claim. The question is not so much a medical one but one of reasonableness given the obvious disabilities that Ms Williams bears.

[126] The claim was based on Ms Williams' assertion that she needed someone with her when she travelled and that she would like to take a trip to Brisbane with her daughter a few times a year and that to do so she would need to travel by plane rather than car or train as the journeys by the latter means were too stressful for her.

[127] In my view it is plain that Ms Williams would have considerable difficulty travelling given the restrictions on her mobility. By reason of her condition Ms Williams is now required to incur the expense of air travel. I am satisfied that she would not otherwise have done so.

[128] While there would be a need for carers, at least to get Ms Williams to and from airports, I think that burden is covered by the adoption of the higher figure of 11.5 hours per week in the future care component. It will be recalled that there was evidence indicating that Mr Fraser's range of 7 to 10 hours per week was a reasonable one.

[129] Ms Williams' desire to travel will probably lessen as she ages. The evidence led about a desire for international travel was not pursued in the submissions and with good reason. There is no precise way of calculating the probable future increased cost of travel. I will allow a global sum of $5,000 reflecting the approximate additional expense involved in two to three trips by air to Brisbane per year over 20 years.

Additional Pharmaceutical Expenses

[130] A claim is made for pharmaceutical expenses in the sum of $128,049. It was based on what was claimed to be uncontested evidence from Dr Parkes. The defendant described the claim as "grossly objectionable" in its submission in reply. No notice of the claim had been given in the Statement of Loss and Damage.

[131] The rules require that the plaintiff fully and accurately plead her claims for special damages so as to ensure that the defendant is not taken by surprise.[53] Here the

[53] See rules 150(1)(b) and 155 *UCPR*

pleading of the damages claimed refers the reader to the Statement of Loss and Damage.[54]

[132] Rule 549 *UCPR* requires that the Statement of Loss and Damage be accurate when served and be kept accurate up to the time the proceeding is entered for trial. Thereafter the obligation is to supply any further documentation received to the defendants' side.

[133] The vice in the plaintiff's approach here is that despite having Dr Parkes' report of 15 May 2008 when the Statement was prepared on 24 February 2009 the Statement was not framed to include claims which his opinions would have supported. Thus from the defendants' viewpoint there was no need to cross-examine the witness as, where his opinions may have been controversial, there appeared to be no reliance on them.

[134] In my view there is no answer to this complaint. The Plaintiff is bound by the particulars given in the Statement of Loss and Damage.

[135] In any case Dr Parkes' opinions assume a weekly cost of about $138 over the next 41 years. The costs incurred to date come nowhere near that level – although not analysed by the parties I estimate the costs at about $30 per week or a little less. It is not immediately apparent as to why there should be a significant increase in the costs in the future. What evidence there is suggests the contrary - the assumed attendance at a Pain Clinic, the use of hydrotherapy, the provision of a better adapted home, and the various aids that are allowed for in this award, all are against the assumption that there was likely to be a four or five fold increase in the need for medication as Dr Parkes envisaged was necessary.

[136] I will make no allowance under this head.

Special Damages

[137] There is an argument about special damages. It concerned whether an amount paid by the insurer of $15,703.43 by way of rehabilitation expenses should be included in the award. These expenses can only be included in the assessment if a notice under s 51(4) of the *Motor Accident Insurance Act* was provided to the plaintiff before providing the services: s 51(9) of the *Motor Accident Insurance Act*. No such notice was provided here, or at least there is no evidence of such a notice.

[138] I assess the special damages in the balance agreed of $15,000, of which I was told $7,000 should bear interest.

Summary

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[54] Paragraph 11 of the Statement of Claim

[139] In summary I assess the damages as follows:

Pain Suffering and loss of amenities of life	$63,200.00
Past economic Loss	$15,000.00
Interest on past economic loss[55]	$2062.50
Past loss of Superannuation Benefits[56]	$1,350.00
Future Loss of Earning Capacity	$95,000.00
Future Loss of Superannuation benefits	$8,550.00
Past Gratuitous Services	$75,000.00
Future Domestic Assistance	$267,300.00
Home Modification Costs	$30,000.00
Cost of Aids & Equipment	$20,300.00
Costs of Attendance at Pain Clinic	$3,400.00
Future Cost of Attendance on GP and pharmaceuticals	$9,071.36
Future Cost of Holidays	$5,000.00
Special damages	$15,000.00
Interest on $7000 of special damages[57]	$962.50
Total Damages	**$611,196.36**

Orders

[140] There will be judgment for the plaintiff in the sum of $611,196.36.

[141] I will hear from counsel as to costs.

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55 $15,000 x 2.75% x 5yrs

56 Past and future calculated at 9% - s 56 *CLA*

57 At 2.75% over 5 years