SUPREME COURT OF QUEENSLAND

CITATION:	*Syben v Mackay TFS Pty Ltd* [2009] QSC 367
PARTIES:	**PAUL GODFREY SYBEN** **V** **MACKAY TFS PTY LTD**
FILE NO/S:	
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	13 November 2009
DELIVERED AT:	Cairns
HEARING DATE:	3-5 August 2009
JUDGE:	Jones J
ORDER:	**1. Judgment for the plaintiff against the defendant in the sum of $877,271.22** **2. Each party has liberty to make written submissions on costs within the next 14 days.**
CATCHWORDS:	DAMAGES – PERSONAL INJURY ASSESSMENT OF DAMAGES – *Griffiths v Kerkemeyer* – MEASURE OF DAMAGES where the plaintiff has suffered a series of injuries from different incidents with damages to be assessed on the resultant injury – whether s 308C prohibits award of damages for costs of domestic services to be incurred in the future STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – whether gratuitous services were of a kind to prohibit award of damages pursuant to s 308C of *Workers' Compensation and Rehabilitation Act* 2003 (Qld) – whether occupants of shared accommodation were members of a household for the purpose of definition of "**gratuitous services"** under s 308A *Workers' Compensation and Rehabilitation Act* 2003 (Qld) Chapter 5 Part 10, s 308, s 308A, s 308C, s 622 *WorkCover Queensland Act* 1996 (Qld) s 315, *Gray v Insurance Corporation of British Columbia* (1987) 46 DLR 269 *Griffiths v Kerkemeyer* (1977) 139 CLR 161

Kingsland v McIndoe (1989) VR 273
Lawrence v Public Trustee [2001] NSWSC 375
London Borough of Hackney v Ezedinma [1981] 3 All ER 438
Re Cormick; In the Marriage of Cormick (1984) 156 CLR 170
Simmons v Pizzey [1979] AC 37
Van Gervan v Fenton (1992) 175 CLR 327

COUNSEL: P Lafferty for the plaintiff
G Houston for the defendant

SOLICITORS: Roati & Firth Solicitors for the plaintiff
MacDonnells Law for the defendant

[1] In a series of work related incidents between 15 November 2002 and 8 April 2004, the plaintiff suffered personal injuries. By this proceeding, he claims damages for those injuries. The defendant has admitted liability to pay those damages but does not agree as to the extent of the injury caused by the incidents nor as to the quantum of applicable damages.

[2] The plaintiff was born on 8 September 1955 and was thus 47 years old at the time of the earliest incident and 48 ½ years old at the time of the last. He was, prior to the incidents, physically fit and capable of doing quite heavy work. He was employed by the defendant as a permanent/casual farm labourer on a banana plantation in Far North Queensland. His primary function was to place bags around the fruiting bananas – a task which involved the use of an elevated platform and which required a high level of physical fitness. The task was usually given to men in their 20s and 30s. On the defendant's farm, the plaintiff was the oldest bagger and was effectively in charge of the other employees engaged in that task.[1] He was paid on piece rates, meaning that the more bags he applied the greater the earnings. He claims that he consistently was the leading bagger on the defendant's farm.[2]

[3] The plaintiff's pre-accident fitness was demonstrated also by his leisure pursuits which included hiking, mountain bike riding, martial arts, jogging, fishing and boating. He was a single man living alone in a beach location. He engaged in travel which included trekking in the Himalayas.

[4] The first injury on 15 November 2002, occurred when the plaintiff was operating a bagging machine working from an elevated basket. The support boom broke causing the plaintiff to fall to the ground. He suffered an injury to his back which, at the time, was diagnosed a soft tissue injury. He returned to work after four days but only on light duties. He returned to heavy work after three weeks.

[5] The second incident on 18 September 2003 involved another fall when the machine boom broke, resulting in the plaintiff falling three metres to the ground. The injury was diagnosed as a muscular strain. He returned to full work duties after one month off work.

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1 Transcript 1-53/10-50
2 Transcript 1-53/42-50

[6] The third pleaded injury on 8 April 2004 concerned the failure of a latch on the gate of the elevated platform and this time the plaintiff fell some two metres. This incident resulted in the plaintiff being hospitalised and undergoing various investigations. He was off work for six weeks returning on 22 May 2004 but only on light duties, de-leafing banana plants. On 29 July 2004, whilst engaged in this light activity he felt "horrendous pain in his back and just about collapsed with it".[3] He ceased work on 4 August 2004 and has not worked since.

[7] He describes his back pain as varying in intensity, radiating to the left and right buttocks and on occasion down each leg. He underwent various investigations. In particular, a CT scan on 4 May 2004 found at the L5-S1 level there was a mild central disc protrusion[4]. He was referred to Dr Guazzo, neurosurgeon, who advised against any surgery. To this time the plaintiff had been treated by analgesics, some physiotherapy and rest.

[8] On 30 November 2004, he was assessed by a general practitioner, Dr Crilly, on behalf of WorkCover Queensland. Dr Crilly assessed the plaintiff as having nil disability in respect of the incidents of November 2002 and September 2003 but for the April 2004 incident, he diagnosed a disc prolapse with nil assessment for compensation, and a psychological injury which he assessed as having a 10% impairment of the whole person.[5] Dr Crilly's assessment of the physical injuries is at odds with all other practitioners.

[9] For the purpose of these proceedings, the plaintiff has been examined by a number of medical consultants who have provided reports as follows:-

Dr Giles, Clinical Anatomist – reports 19/4/05, 21/8/06, 9/4/07
Dr McGuire, Orthopaedist – reports 11/8/05, 1/3/06, 14/5/08
Dr English, Orthopaedist – report 22/2/07
Dr Campbell, Neurosurgeon – reports 26/8/06, 1/5/07, 27/2/08
Dr Michael Weidman – report 15/2/07
Prof Basil James, Psychiatrist – Report 25/5/06
Dr Lotz – Report 13/2/07

[10] The plaintiff's physical capacities have been assessed by two occupational therapists – Ms Kathryn Purse and Ms Angela McNamee.

[11] The reports of the psychiatrists show that the plaintiff has unresolved feelings of anger and frustration which has made difficult any reliance upon the statements he made to some of the consultants. There is, however, clear evidence of physical injury which has undoubtedly impacted on his emotional state. I should deal firstly with those physical injuries.

[12] The radiological investigations of the plaintiff's spine include a number of x-rays, CT scans and MRI investigations. The latest MRI was performed on 9 July 2009. It is unnecessary to refer to each of these investigations since it is accepted by all relevant specialists that the scans show a distinct central disc prolapse at the L5-S1 level. Whilst the prolapse is referred to as being small in size, it was noted on the MRI scan to be "indenting the contiguous epidural space with potential mass effect

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3 Transcript 1-56/20
4 Ex 2 p 18
5 Ex 6

on the left nerve root S1 at that level".[6] The report notes that all neural exit foramina are clear. The most recent MRI scan notes the following finding about this area of damage –

> "Focal posterior hyper-intense signal suggestive of annular tear with a posterior central disc protrusion abutting the thecal sac with no associated canal stenosis or foraminal compromise."[7]

The radiological findings also include some evidence of degenerative changes manifested by bony changes in the spine and desiccation in some of the discs.

[13] The various specialists have interpreted these radiological signs differently. Whilst each acknowledges that the prolapse is a sign of the fresh injury, two specialists (Drs English and Weidmann) express the view that other signs suggest advanced degenerative changes which would account for much of the plaintiff's symptomatology. Dr Weidmann suggested an apportionment between the naturally occurring condition and the injury to be 50% - 50%. His opinion, like that of Dr English, was partly based on the lack of any compromise of the nerve root at the intervertebral foramin. Dr Weidmann assessed a 5% impairment of the whole person as being due to the incidents whereas Dr English suggested a 4% impairment.

[14] By contrast, each of the reports of Drs Giles, McGuire and Campbell attach more significance to the prolapse disc impacting on the spinal canal. Dr Giles, referring to MRI reports, explains the consequences in the following terms:-

> "The axial view at the L5-S1 disc level (Figure 4) shows the disc protrusion pressing on the anterior side of the pain sensitive dural tube/thecal sac, with some pressure on the adjacent left S1 nerve root. The position of the posterior to left sided disc protrusion adjacent to the left S1 nerve root could cause your client to experience some symptoms in his left leg but the size of the protrusion may well cause symptoms in either leg, particularly if there is leakage of disc material against pain sensitive neural structures."

[15] He confirms that a fall of the kind described by the plaintiff would cause the injury as he found it to be.[8]

[16] Prior to these incidents, I accept that the plaintiff was in good health and capable of carrying out demanding physical labour. The degenerative changes in his spine revealed by later investigations were normal for a person of his age group and they were asymptomatic. The onset of symptoms in his back is directly related to these incidents. It is not possible to say when, if ever, symptoms relevant to naturally occurring degenerative changes would have manifested themselves. The changes between the early CT scans and the most recent MRI investigation are consistent with the progression of the injury. On this topic I prefer the opinion of Dr McGuire when replying to a suggestion that 50% of the plaintiff's back symptoms are attributable to degenerative changes. He said:-

> "I don't see how you can proportion 50% for something that's asymptomatic.

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6 Ex 2 p 10

7 Ex 13

8 Transcript 2-53/35

> But there was an incident back in 2000 wasn't there? – yes, but that was only for a brief period of time and then he continued in heavy manual work and also his martial arts without interruption. So therefore it can't be 50%. I just think that's too big a proportion…
>
> I acknowledge that he did have some degenerative changes in his scans from his heavy manual work but I don't believe he had any significant proportion in it because he was working a very heavy manual job and he was highly active and very fit, undertaking martial arts prior. So therefore, to me, he was working at his maximum capacity."[9]

[17] The radiology imaging does show widespread degenerative changes in the spine which have been given different emphases by the consultants. For example, Dr Weidman found that:-

> "The MRI clearly demonstrates a long standing degenerative condition of the lumbar spine with dehydration of at least two discs. This generally takes some years to develop. As he admits he suffered minor injuries only on 15/11/2002 and 22/05/2003, it would not be reasonable to attribute degenerative changes to these injuries. In my opinion, it is highly likely that he did have a pre-existing degenerative condition affecting his lumbar sacral spine, which may well have been asymptomatic…trauma alone does not result in lumbar disc herniations. It is essentially a degenerative process although trauma may contribute to this process."[10]

[18] Dr Giles opined that the first scans showed only early marginal osteophytic reaction in keeping with the plaintiff's age.[11] Dr Giles refers to the earlier incidents as contributing to the signs of degeneration demonstrated in the later scans. He also challenges a number of the assumptions about the effect of degeneration as relied upon by Drs Weidmann and English.[12]

[19] On balance I prefer the opinions of Dr Giles. His explanation of the injury is consistent with both the radiological signs and the onset of the plaintiff's symptoms and the nature of his continuing symptoms. Dr Giles' opinions about the effect of pre-existing degenerative changes in the plaintiff's spine, is consistent with the unchallenged descriptions of the plaintiff's work capacity and his general pre-accident physical fitness. The later increase in the degenerative signs was contributed to by the impact of the earlier injuries. As Dr Giles explains, the objective signs in the imaging do show that the disc changes "have not been of very long standing".[13] The MRI findings of 9 July 2009 showed modic changes which Dr Giles opined was "evidence of degeneration due to a earlier injury".[14]

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9 Transcript 1-41/30-50
10 Ex 8 paras 8.4 and 8.5
11 Ex 2 at p 7
12 Report date 9 April 2007 – ex 2 at pp 29-34
13 Transcript 2-37/40; 2-43/20
14 Transcript 2-49/10

[20] Dr Campbell, neurosurgeon, regarded the radiological signs as "normal age related change that any 50 year old man would have[15]…but the majority of any injury is going to be the cause of the disc protrusion not the normal age related changes that you find."[16]

[21] By contrast, the opinions of Drs Weidmann and English to the effect that 50% of the plaintiff's present spinal symptoms are attributable to natural causes, appear to be based on assumptions which do not accord with the MRI signs as explained by Drs Giles and Campbell. In cross-examination, Dr Weidmann conceded that the radiological sign of dehydration shown in the MRI scan of October 2005 was "consistent with having been caused in the time frame of November 02, September 03 or April 04."[17] In addition, the imaging report of 14 April 2004 described the "early marginal osteophyte reaction is indeed very early at the L5-S1 level and is in keeping with this man's age".[18]

[22] Assessing the manner in which the symptoms have affected the plaintiff's enjoyment of life and his capacity for work is not without some difficulty. The plaintiff presented in Court on crutches appearing to have more difficulty than one would have expected, even taking the description of his injury at its highest. The plaintiff does not require crutches for mobility. He is quite capable of walking. His resort to the use of crutches and walking sticks aroused suspicion in the minds of some examiners that he may have been exaggerating his symptoms. This was not helped by the plaintiff's overt anger towards WorkCover and his hostility to the medical practitioners who examined him at the request of WorkCover. The plaintiff explains his use of crutches as giving support while standing and when changing his positional posture as he does constantly to alleviate pain.

[23] The plaintiff has three sources of pain in his lower back. Firstly, there is the effect of the lumbar disc protrusion putting pressure on the thecal sac. Secondly, there is the consequence of the tear in the disc which creates instability and pain. Thirdly, there are the consequences of the biomechanical stresses in the facet joints.[19] The pressure on the nerve in this instance is not at the site of the foramin but is within the spinal cord itself.[20] Whilst there is direct pressure on the nerve root, pain is unavoidable.[21] Whilst that pressure is there, there will be deterioration because of the interference with the blood supply to that particular nerve root.[22] Consequently, the plaintiff experiences varying symptoms on a daily basis. I regard the plaintiff's use of crutches and walking sticks as providing assistance in ameliorating his pain and not as being indicative of exaggerating his symptoms. I find that the plaintiff's physical symptoms and limitations are entirely due to the incidents, that they are likely to be ongoing and without much prospect of being lessened by treatment.

[24] The plaintiff has suffered a psychological reaction to his injuries and this has wrought changes in his life. Professor Basil James who saw the plaintiff on one occasion in May 2006, opined that the plaintiff suffers from an adjustment disorder

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15 Transcript 2-63/20
16 Transcript 2-63/35
17 Transcript 2-79/50
18 Ex 2 at p 7
19 Ex 2 at pp 22-3; 31-2
20 Transcript 2-50/45
21 Transcript 2-41/15
22 Transcript 2-44/25

with depressed mood "of a severity which could be described as moderate to severe".[23] Professor James rates the plaintiff's function level as having been reduced from 80 to 50 on the Global Assessment of Functioning (GAF) scale. With treatment his functioning might be improved to the 60 level. Dr Lotz who saw the plaintiff on one occasion in February 2007, agrees with that assessment of the plaintiff's functioning but assessed the plaintiff as having a narcissistic personality which underpins his complaints. Dr Lotz however ultimately accepted a diagnosis of adjustment disorder with mixed emotions.[24]

[25] The plaintiff gave evidence of having suicidal thoughts at different times. Professor James found that the plaintiff's thought contents were generally depressive but there was no evidence of psychiatric anomalies. Other medical practitioners spoke of depression secondary to chronic pain. The plaintiff for the past three years has been receiving visits from a community funded psychologist, Ms Sharon Jones, who unfortunately was not consulted about the plaintiff's condition. The plaintiff's own evidence, however, was to the effect that he received considerable benefit from Ms Jones' counselling in dealing with his depression[25]. Given that there is little likelihood of any significant amelioration of his chronic pain, the plaintiff will have to deal with the effects of secondary depression to which he is prone.

[26] In summary then, the plaintiff suffers with moderate to severe pain in his lower back which is likely to continue in the future. He is offered little hope of the pain being relieved in any significant way. He has a life expectancy according to the recent tables of 31 years. The limitation on his mobility, his activities and general enjoyment of life is quite profound having regard to the level of his pre-accident physical activities. I assess general damages at $100,000 of which $30,000 should relate to the past period. Interest will be allowed on $30,000 at 2% for 5.5 years, totalling $3,300.

Loss of earning capacity

[27] The physical and psychological sequelae of his injuries makes it clear that the plaintiff will not return to fulltime active remunerated work. The opinions of the occupational therapists are respectively stated in these terms:-

> **Ms Purse**: "He has significant restrictions in his capacity to engage in the normal activities of daily living. It is reasonable that he could not continue living alone, due to being unable to manage the necessary household tasks. He currently manages only a minimal number of household duties and is quite reliant on the help of his housemates. He is no longer able to engage in his usual recreational pursuits. Necessary care and assistance is averaged and estimated at 8 hours per week from the date of the injury to the present. He will continue to require assistance unless his condition improves…[26]
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> **Ms McNamee**: "He would therefore currently have difficulty performing work in any occupation as it is likely that his thought processes would prevent him from doing so. If he responded well to psychological intervention it is likely that he would regain the

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23 Ex 2 at p 90
24 Ex 9 at p 8
25 Transcript 2-12/50-2-15/30
26 Ex 2 pp 54-55

> capacity to return to the workforce…it is likely that he could manage employment of a sedentary nature on a part-time basis, however it would need to be a job which enabled him to alternate his posture between sitting and standing as required."[27]

Ms McNamee postulated that the plaintiff could be involved in computer work or working part-time in a video store, as examples of the range of work. The plaintiff was questioned about these possibilities which are outside the range of any prior experience. He was concerned also about his reliability in performing even simple tasks because he cannot be sure when he will be totally incapacitated for a short period by pain.

[28] I regard the prospect of the plaintiff gaining any remunerated employment as being remote, except in the setting of charitable employment where his incapacities and unpredictability could be tolerated. The likelihood of gaining employment of this kind in Tully where he presently resides does not lead me to make any significant allowance for future employability.

[29] To assess the loss of his earning capacity, the plaintiff seeks to draw a comparison with the past and continuing earnings of another worker who has been engaged in the same tasks as would the plaintiff had he not been injured. These details show this worker has earned in excess of $200,950 since August 2004 and is currently earning approximately $960 per week net.[28] The plaintiff argues that at the time when he was working his income exceeded that of this worker, and that, had he continued working, he would have earned in excess of these amounts. The defendant does not particularly argue against making the comparison but points out that the relevant employee is much younger and questions whether the plaintiff would continue to achieve higher levels of performance as he aged.

[30] I am satisfied that the comparison is appropriate. The plaintiff's work performance may have exceeded that of that employee for the early part of the period but this would have averaged out to be equivalent over the whole period. I therefore see no reason why there should be any discounting of the allowance to be made for that period. For the future, I would anticipate that the plaintiff would have continued working at his pre-accident capacity for some short period but gradually would reduce his output or change from working on piece rates to a less demanding, and perhaps even, a supervisory position. He was considering starting his own business as a contractor to the banana industry but no details were given of likely profits for such a venture.[29] I assess past loss of earnings at $200,000. I allow interest on $140,000 taking account of the sums received by the plaintiff in lieu of wages in that period. The interest component will be at 5% for a period of 5.5 years. This calculates to the sum of $38,500. Loss of superannuation on past earnings will be $18,000.

[31] For the loss of future earning capacity I allow $950 per week for six years (271) and $600 per week for the seven years thereafter (502 – 271). This calculates to a sum of $396,050 from which some contingency deduction must be made to take account of the heavy nature of the work and its impact on the plaintiff's physical capacities. I therefore allow for loss of future earning capacity the sum of $360,000.

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27 Ex 11 p 15

28 Ex 5

29 Transcript 1-63/5

Loss of future superannuation benefits should be allowed on this sum at 9% which computes to an allowance of $32,400.

Domestic Services

[32] The question of whether the plaintiff is entitled to maintain a claim for the provision of domestic services under the *Griffiths v Kerkemeyer* principle is a matter of some contention in this case. In his Statement of Claim the plaintiff alleged that he "has and will in the future require the services of others to carry out some of his daily tasks".[30] However, he made no claim for any past services, paid or gratuitously provided.

[33] The defendant contends that the plaintiff is precluded from claiming such an allowance by virtue of the provision contained in Chapter 5 Part 10 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (WRCA). The plaintiff argues that at the time of the plaintiff's first incident on 15 November 2002, the relevant legislation was the *WorkCover Queensland Act* 1996 (Qld) (the 1996 Act) and the plaintiff's rights were governed by s 315 of that Act. The plaintiff further contends that the provisions of WRCA, as amended, do not by their terms apply to him. As a consequence, he claims to be entitled to damages for the costs of providing future services.

[34] The evidence does not suggest that the earlier incidents gave rise to any need for services. The relevant injury for this purpose is the final one which occurred after the coming into effect of the WRCA on 1 July 2003. Consequently, the plaintiff's right to have damages awarded for the tortiously inflicted need for such services must now be determined under the new statutory regime as set out in Chapter 5 part 10 of WRCA as amended on 18 November 2004. These new provisions operate retrospectively as provided by s 622 of WRCA which is in the following terms:-

> "**622.** Chapter 5, part 10, as in force immediately before the commencement of this section, continues to apply to a proceeding for damages only if the trial in the proceeding was started before the commencement."

[35] The relevant sections are:-

> "**308A** In this part –
> ***gratuitous services*** means services, other than paid services, that are provided to a worker by a member of the worker's family or household, or by a friend of the worker.
>
> ***paid services*** means services that are provided to a worker at commercial rates by another person in the person's professional capacity or in the course of the person's business.
>
> ***services*** means services of a domestic, nursing or caring nature.
>
> Examples of services –
> - Assisting with personal hygiene needs
> - Changing bandages
> - Cleaning

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30 Statement of Claim para 16

- Cooking
- Dressing wounds
- Gardening housekeeping
- Mowing the lawn

…

308C

(1) This section applies if, before the worker sustained the injury, the worker usually performed particular services.

(2) A court can not award damages for the cost or value of services of substantially the same type that have been provided to the worker after the worker sustained the injury, or that are to be provided to the worker in the future as either gratuitous services or paid services, if the services that have been provided to the worker after the worker sustained the injury are gratuitous services."

[36] Prior to these incidents the plaintiff lived alone, was physically fit and carried out his required domestic services for himself. He did not require or receive the assistance of any person in the provision of services as defined in s 308A.[31]

[37] Since he sustained the subject injuries, the plaintiff initially lived alone and did not receive any services. Later, he moved into shared accommodation with two other males in the township of Tully. In this setting the domestic chores were shared between the three occupants performing various tasks in accordance with each's respective capacity. The plaintiff typically did some of the indoor household tasks while the other two housemates attended to the gardening and mowing tasks to which the plaintiff made no contribution.

[38] The plaintiff, in his quantum statement, described his move to shared accommodation in the following terms:-

> "[39] Prior to the accident I was living alone in a rented home on the beachfront at Tully Heads and I undertook all of the domestic duties in my home. After the accident I was unable to manage alone and I was forced to move into shared accommodation in Tully with other adult males. Since the accident I have had extreme difficulty managing domestic duties and have been reliant on the help of my housemates doing their share of duties in the communal home." [32]

Whether his inability to manage alone related to his financial position or a need for personal assistance or a need to be close to medical services or any combination of them is not clear.

[39] In cross-examination he elaborated on this in the following exchange:-

> "Well, I suggest to you that you're capable of doing your own cooking? – I'm capable of – of feeding myself, but cooking is – is a chore, and – for me at this stage, and I – I certainly would hope that,

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31 ***services*** means services of a domestic, nursing or caring nature.

32 Ex 1 para [39]

> you know, in the future when – when my condition worsens that I will be able to have that, you know, definitely have that care.
>
> But when you were living in the house in Tully for those five years before you moved to the flat, you were basically looking after yourself, weren't you? – That's right, I was, yes.
>
> And you did your own – you cleaned your own room and looked after that? – I – I did to the best of my ability, yes.
>
> All right. You did your own cooking? – To start off with, I was, yes.
>
> And – and you shared the cooking with others, didn't you? – To start off with, I was, yes."[33]

Also in his quantum statement said:-

> "However, I had not received any gratuitous care since the accident as I have no family support in Australia and I have not wanted to ask any friends to help me as I simply did not feel comfortable in doing so. I had not been able to afford paid care and assistance."[34]

[40] The occupational therapists in their respective reports, referred to the plaintiff's description to them of his coping with his domestic needs since the injury. She saw the plaintiff on two occasions and reports as follows:-

14 September 2005	**31 March 2008**
4.1 Personal Care	**4.1 Personal Care**
Mr Syben said that he has copied with all personal care tasks since the injury.	Mr Syben does not require personal care assistance.
4.2 Household Duties	**4.2 Household Duties**
Prior to his injury Mr Syben undertook all of the domestic duties in his home. He has had extreme difficulty managing these tasks since the injury. He described that prior to moving to Tully his home became quite untidy and almost squalid as he was unable to clean it and keep it in order.	Mr Syben has continued to manage some of the domestic tasks in the home, and he is more consistent in those tasks as he has adjusted to his ongoing disability and pain. He does the vacuuming but has to pace the task out. He prepares the evening meal about once per week, and he continues to do the household shopping. He does his own laundry.
4.3 Home Maintenance and Gardening	4**.3 Home Maintenance and Gardening**
Prior to his injury Mr Syben managed all of the outdoor tasks. He has been unable to mow or garden since his injury and is reliant on the help of his housemates.	Mr Syben has been unable to resume gardening or mowing. [35]

Ms McNamee reports:

> ***Grocery shopping***
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> Mr Syben reported he is able to walk to the local grocery store once/week to collect a couple of items only. He stated he currently

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33 Transcript 2-10/30-50

34 Ex 1 at para [42]

35 Ex 1 p 52 and p 58

> has access to the Home Care program and they perform his grocery shopping once/fortnight.
>
> ***Cooking and Meal Preparation***
> Mr Syben reported he is able to prepare quick and light meals but only cooks for himself as he doesn't feel he is capable of preparing good enough meals for his flat mates. He stated his meals generally consist of cereal, sandwiches, boiled eggs and potato wedges.
>
> ***Cleaning***
> Mr Syben reported he likes to feel like he is "pulling his weight" around the house but is unable to perform many of the cleaning tasks. He stated that he performs the vacuuming slowly and is able to wipe benches and clean dishes for short periods. He reported he is unable to clean the bathroom or move heavy furniture to clean around it.
>
> ***Gardening and Home Maintenance***
> Mr Syben reported his flat mates perform the lawn mowing and gardening as he is unable to."[36]

[41] There are some mixed messages in this body of evidence but there is no suggestion that the plaintiff has received services of a personal nature. I find on this evidence that the plaintiff has not, since his injury, received any services relating to his own personal care and associated personal domestic needs. It seems to me therefore, that the Court is not prohibited from awarding damages for meeting his future need for personal domestic services. The only question then is whether the plaintiff's avoidance of lawn mowing/gardening were gratuitous services as defined in s 308A because these are the only future services of "substantially the same type" as may have been provided.

[42] None of these statements about the domestic arrangements within the shared accommodation necessarily demonstrates a "need of the plaintiff" for gardening services whilst he was living in that accommodation. There is no evidence that he had any obligation to mow the lawn. It may be that there was a trade-off between the occupants as to who would perform which tasks. It may be little different to that of living in an establishment such as an hostel where gardening was the responsibility of the owner. When he moved into a council flat in early 2009, his situation remained the same, he is simply not required to do any gardening himself and therefore does not have the need for services to be provided.[37] It thus becomes a moot point as to whether the plaintiff has in fact received services of a kind referred to in the legislation. The question then is whether those circumstances result in the plaintiff being precluded from making a claim in respect of services to be provided to him in the future.

[43] For the future, the plaintiff intends to continue to live on his own. There is no doubt that the plaintiff, though he has not received personal domestic services in the past, has demonstrated that he has an existing and future need of those domestic services. This fact is recognised by each of the occupational therapists, though their opinions

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36 Ex 11 at pp 7-8

37 Transcript 2-11/10

differ as to the extent of the services required. Ms Purse suggests his need is "averaged and estimated at 8 hours per week".[38] Ms McNamee expresses the view that "the assistance he requires is six hours per fortnight as per Appendix A".[39]

[44] The right at common law to claim damages for such a need has been well understood since the decision of *Griffiths v Kerkemeyer*[40] which lends its name as the descriptor of this type of claim. In *Van Gervan v Fenton*[41] the majority (Mason CJ, Toohey and McHugh JJ) said:-

> "Consequently it should now be accepted that the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her and that the plaintiff does not have to show, as Gibbs J held, that the need "is or may be productive of financial loss"."[42]

[45] The plaintiff's level of need occasioned by the injury will vary depending on whether he remains in the council flat and not using a car or whether he moves into his own house with increased responsibility for its maintenance. The anticipated award of damages from these proceedings would make the latter scenario more likely. The services, which he will need in the future will most likely be paid services and the parties, have agreed that $28 per hour is the appropriate hourly rate.[43] I would assess the plaintiff's need at six hours per week with a resultant weekly expense of $168. This requirement is projected over a 20 year period (666) by which time the plaintiff would have needed of some assistance in any event. The global amount calculates to $111,888. Allowing some discounting for contingency, I would assess the need at $90,000.

[46] The issue remains whether s 308C precludes the court from awarding these damages which but for the section would be allowable. The intention of the legislature to reduce common law rights for this type of claim has been evident since the 1996 Act where, by virtue of s 315, claims of this type were restricted. This prohibition was continued by s 308 of the WCRA when it passed into law. That intention to further reduce those common law rights is evident in the November 2004 amendments to the WCRA. The Explanatory Note to the Bill by which these amendments were proposed, states the amendment "clarifies the circumstances in which a court is prevented from awarding a worker damages for the value or cost of domestic, nursing and caring services where those services have been provided to the worker by a member of the worker's family, household or friend. It also confirms the original intention of s 308 that awards for damages for future paid domestic, nursing or caring services are unable to be made if a worker has been in receipt of the services gratuitously in the past." The Explanatory Note also refers to the provision of statutory compensation benefits under Chapter 3 of WCRA for payment in lieu of awards under the common law. The plaintiff in this case, like the vast majority of injured workers, was not eligible for the statutory compensation provided under WCRA.

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38 Ex 2 at pp 54-55
39 Ex 11 at p 15
40 (1977) 139 CLR 161
41 (1992) 175 CLR 327
42 Ibid at p 333
43 Transcript 3-3/20

[47] The earlier enactments have been the subject of judicial comment, but I am informed by counsel that there has not yet been any reported case dealing specifically with s 308C or the cognate sections introduced by this amendment.

[48] Mr Houston of counsel for the defendant argued that the plaintiff has "not provided detailed evidence of the precise assistance provided by his housemates, nor have any schedules of assistance been provided, or evidence called from the housemates." I would take the view that as it is the defendant who seeks to rely upon the statutory prohibition, the defendant bears the evidentiary onus to show the applicability of the section. The plaintiff's case is that he received no gratuitous services following the injury. The other occupants of the share accommodation, are simply described as adult males. There is no evidence of who they were, or whether it was the same persons residing there for the whole period of the plaintiff's occupancy. These occupants were not stated to be family members, nor even friends of the plaintiff. Can either of them, in order to satisfy the definition, be characterised as "a member of the plaintiff's household"?

[49] The word "household" is variously defined, depending on the context in which it is used. In *Kingsland v McIndoe*[44] Gobbo J undertook a wide ranging review of cases in which the word "household" had been defined. He referred to a statement of Lord Hailsham in *Simmons v Pizzey*[45] who considered the Oxford dictionary and the Words and Phrases definitions of the term "household" and concluded:-

> "I do not find any of these references particularly helpful except to make clear to me that I would have supposed in any case that both the expression 'household' and membership of it is a question of fact and degree, there being no certain indicia the presence or absence of any of which is by itself conclusive."[46]

Many of the cases reviewed by Gobbo J related to family law or domestic violence situations which might give the word a special context. In one such case, *In the Marriage of Cormick* Gibbs J referred to "household" as "a wide word which would include any relative, friend or servant ordinarily living in the house"[47] and Deane J took the view that being a member of a household inferred "a special form of familial relationship".[48]

[50] In *London Borough of Hackney v Ezedinma*[49] May J expressed the view that:-

> "Premises comprising a number of separate rooms let singly…cannot be said to form a single household."[50]

[51] Closer to the situation here, the remarks of Master McCreedy in *Lawrence v Public Trustee,*[51] accepted the Oxford Dictionary to the effect –

> "The holding or maintaining of a house or family; housekeeping; domestic economy… the inmates of a house collectively; an

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44 (1989) VR 273
45 [1979] AC 37
46 Ibid at pp 441-2
47 (1984) 156 CLR 170 at p 178
48 Ibid at p 262
49 [1981] 3 AllER 438
50 Ibid at p 441
51 [2001] NSWSC 375. See also Macquarie Dictionary – "The people of a house collectively; a family …including servants; a domestic establishment"

> organised family, including servants or attendants, dwelling in a house; a domestic establishment."

[52] Finally, I should refer to a decision of the Court of Appeal of the High Court of British Columbia in *Gray v Insurance Corporation of British Columbia*[52] where Carrothers JA, when dealing with the question of whether insurance benefits were available for members of the household of the insured, said:-

> "I consider the use of the word "member" to be significant. The legislature could have used such words as "tenant", "resident" or "occupant" but it chose the word "member". To my mind to be a "member" of a household implies a constituent, an integral part or a component of a whole, thus supporting the trial judge's concept of a bond or affinity as an essential element of what constitutes a member of a household…
>
> 'The word "household" in the statute implies a "householder" which in turn implies some form of relationship between the "member" and the "householder". This relationship imposes on the "member" a certain deference to the "householder", compliance with a degree of propriety and responsibility and an active sense of participation in "household" functions and to defer to the wishes of the "householder" in this regard."[53]

[53] Adopting the approach which found favour with Carrothers JA, I am not satisfied on the material before me that any of the adult males who remain unidentified and whose relationship is undefined was a member of the plaintiff's household as contemplated by the definition of **gratuitous services.**

[54] The result is that the defendant has not made out a case for the application of s 308C(2) and the prohibition against the awarding of damages contemplated by the subsection does not apply in the circumstances of this case. I propose therefore to make the allowance in the assessed damages for the costs of future services as assessed above.

[55] Damages to be awarded in respect of out-of-pocket expenses and future expenses as well *Fox v Wood* have been agreed between the parties. I therefore assess damages as follows:-

General damages	$100,000.00
Interest thereon	$ 3,300.00
Out-of-pocket expenses (as agreed)	$ 10,000.00
Interest thereon	$ 1,000.00
Past economic loss	$200,000.00
Interest thereon	$ 38,500.00

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52 (1987) 46 DLR 269

53 Ibid at p 273-4

Loss of future earning capacity		$360,000.00
Loss of superannuation benefits		
Past	$ 18,000.00	
Future	$ 32,400.00	$ 50,400.00
Future services		$ 90,000.00
Future expenses and *Fox v Wood* (as agreed)		$ 33,000.00
		$886,200.00
Less refund to WorkCover		$ 8,928.78
		$877,271.22

[56] I give judgment for the plaintiff against the defendant in the sum of $877,271.22.

[57] I allow each of the parties 14 days within which to make written submissions on costs.