SUPREME COURT OF QUEENSLAND

CITATION:	*Shaw v Menzies and Suncorp Metway Insurance Limited* [2010] QSC 390
PARTIES:	**JOHN SHAW** (plaintiff) **v** **ANDREW DAVID MENZIES** (first defendant) AND **SUNCORP METWAY INSURANCE LIMITED (ABN: 83 075 695 966)** (second defendant)
FILE NO/S:	BS9569 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	29, 30 September 2010
JUDGE:	Martin J
ORDER:	**The plaintiff is to bring in minutes of order**
CATCHWORDS:	TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – ROAD ACCIDENT CASES – where the first defendant was driving a truck that had a wide load and occupied two lanes when attempting a left-hand turn – where the plaintiff motorcycle rider sought to overtake the turning truck on the left – whether the plaintiff should have given way to the first defendant – apportionment of liability TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO GIVE WARNINGS OF SIGNALS – GENERALLY – where the first defendant was driving a truck that had a wide load and occupied two lanes when attempting a left-hand turn – where the plaintiff motorcycle rider sought to overtake the turning truck on the left – whether the truck's indicator lights were visible

TORTS – NEGLIGENCE – ROAD ACCIDENT CASES – LIABILITY OF DRIVERS OF VEHICLES – FAILURE TO LOOK-OUT – GENERALLY – where the first defendant was driving a truck that had a wide load and occupied two lanes when attempting a left-hand turn – where the plaintiff motorcycle rider sought to overtake the turning truck on the left – where the first defendant was aware of the plaintiff's presence on the road – whether the first defendant exercised sufficient care in making the turn

Civil Liability Act 2003 (Qld), s 59, s 60
Motor Accident Insurance Act 1994 (Qld), s 51
Transport Operations (Road Use Management – Road Rules) Regulation 1999 (Qld), r 28(2)

Kriz v King & Anor [2007] 1 Qd R 327
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529
Rains v Frost Enterprises Pty Ltd [1975] Qd R 287
Sibley v Kais (1967) 118 CLR 424
Vos v Hawkswell (2010) 55 MVR 271

COUNSEL: R A I Myers for the plaintiff
S C Williams QC, with him J B Rolls, for the second defendant

SOLICITORS: Jon Kent Lawyers for the plaintiff
Jensen McConaghy solicitors for the second defendant

[1] On 12 May 2006 John Shaw was riding his motorcycle home from work. He collided with a prime mover being driven by Andrew Menzies and suffered serious injuries. He seeks damages. Both liability and quantum are in issue.

Liability

[2] The accident took place at the intersection of Balham and Granard Roads at Rocklea.

[3] Mr Shaw was riding a Yamaha 650cc motorcycle. Mr Menzies was driving a Kenworth prime mover to which was attached a trailer about 12 metres in length. The trailer was 2.4 metres wide but its load of steel sheets was 3.1 metres wide. As a result, there was an overhang of 750 millimetres on each side of the trailer. The prime mover had an indicator and brake lights on its mudguards and a flashing amber light on the roof of the cab. It also had indicator lights on the front of the prime mover but these could only be seen by those in front of the vehicle. There was a flashing amber light on the back of the trailer, as well as a number of red and yellow delineator signs, an "Oversize" sign and a "Do Not Overtake Turning Vehicle" sign. There were indicator lights on the rear of the trailer and about half way along its length.

[4] Both Mr Shaw and Mr Menzies were driving in a westerly direction along Granard Road. The relevant part of the roadway is between the intersections of Beatty and

Granard Roads and Balham and Granard Roads. At that point, Granard Road is a three lane carriageway in each direction.

[5] Mr Shaw had been proceeding along Granard Road in the middle lane. Mr Menzies entered Granard Road from Beatty Road and it is agreed on the pleadings that his vehicle occupied the middle lane. The defendants plead that, about 150 yards [sic] from the intersection with Balham Road, Mr Menzies caused his vehicle to move so that it occupied both the middle and the left-kerb lanes.

[6] As both vehicles approached the intersection of Balham and Granard Roads, the vehicle driven by Mr Menzies made a left hand turn into Balham Road across the path of travel of the plaintiff's motorcycle. The plaintiff says that the turn was made without warning. The motorcycle collided with the side of the prime mover. Both it and Mr Shaw were thrown over the top of the bonnet of the prime mover and Mr Shaw hit the side of a vehicle standing at the traffic lights in Balham Road.

[7] After the accident the plaintiff was briefly questioned by Constable Duff, a policeman who attended at the site. He told the policeman the following:

- He was going down Granard Road beside the truck.
- He was about a metre past the rear of the truck.
- The other driver came left around the corner.
- He tried to get around him but had nowhere to go and hit the cab.
- He was travelling in the left hand lane.
- The other vehicle was in the middle lane and turned into Balham from that lane.
- He did not see any indicators because, he says, he was beside the truck.
- He did not notice whether the truck was oversized but assumed it was.
- He did not see any sign such as "Oversize".

[8] In the submissions from the second defendant it was said that the plaintiff gave two versions of what occurred – the version he gave to Constable Duff and the version he gave in court. I think it is important to bear in mind that the version given to the policeman was given very shortly after the plaintiff had been thrown from his motorcycle and hit another vehicle with such force that his helmet was shattered. He could not be expected to provide a calm and complete recitation of all that had occurred.

[9] At the trial Mr Shaw said that the prime mover and trailer were travelling in the centre lane of Granard Road when, at a point about 70 metres before the intersection, the prime mover and trailer moved into the left hand lane which was then occupied by the plaintiff. This caused the plaintiff to brake and sound his horn. After that the first defendant's vehicle moved completely back into the middle lane. The plaintiff said that he had been in the middle lane behind a motor vehicle which was, in turn, behind the prime mover and trailer. He said that he moved into the left hand lane and brought his motor vehicle to a point where he was alongside the trailer. The plaintiff described his actions following the return of the prime mover to the middle lane in the following way:

> "He went back into his lane, and as he went back into his lane, I thought he'd seen me because I'm on the horn, I've got a big light on there. I proceeded to drive forward, like because I'm at the back of

> the truck now, we're pretty much approaching the intersection, and as we've got to the front of the – towards the intersection I've noticed his front of his truck coming around, I've realised what he's about to do, and by this stage the back of the truck is coming over, and if you're on that corner you know that if a truck goes around that – the bend, the back wheels almost clip the gutter. So anything in between there's going to be under the back wheels. So I decided to try to get around the front and sped up and just didn't make it."

[10] The manoeuvre described by the plaintiff as being performed by the prime mover and trailer was denied by Mr Menzies. Mr Menzies has about 27 years experience driving large vehicles and he said that to execute that sort of manoeuvre would have required twice the distance in which it was said to have been done by the plaintiff.

[11] Mr Menzies said that he had been travelling for some considerable distance along Granard Road occupying both the kerb and middle lane. He explained this as an action he took in order to prevent a motor vehicle attempting to come up along side him on the left as he intended to turn left into Balham Road. That evidence is contrary to the pleadings of the defendants. There was evidence from two people – Mr Moore and Mr Luckman – who had been sitting in vehicles stationary in Balham Road waiting for the traffic lights to change. Mr Moore and Mr Luckman could have seen both the prime mover and the motorcycle but on the evidence of the photographs would have had a very restricted view of the lane markings and so their opinions of the positions of the vehicles at various times are not accepted by me as being anything other than informed guesswork.

[12] In my opinion, neither of them was in a satisfactory position to assess where the prime mover was on the road in relation to the lane markings. Mr Menzies said that having assumed that position as he approached the intersection with Balham Road, he turned the cab of the prime mover slightly towards the right in order to afford a greater "angle of attack" for the turn into Balham Road.

[13] There was much examination and cross-examination about distances between vehicles, distances of vehicles from various points on the roadway, positions of vehicles with respect to lane markings and the like. These events took place in a very short space of time. Both Mr Menzies and Mr Shaw were in moving vehicles and thus were not in the best position to assess relative speeds and positions.

[14] I accept that the prime mover and the trailer had their indicator lights on and that these were able to be seen by Mr Shaw. It was argued that, because of the overhang of the steel plates, he could not have seen the indicator light halfway along the trailer. Whether he could have seen that or not would have depended upon his distance from the trailer laterally. Nevertheless, I do not doubt that the indicator light on the mudguard of the prime mover was visible to him at all relevant times. Mr Shaw had proceeded from being, at one stage, behind the prime mover to a point either behind it to its left or alongside it on its left hand side. In order to reach either point he would have had the opportunity to see: the flashing amber light on the trailer, the delineator signs, the "Oversize" sign and the "Do Not Overtake Turning Vehicle" sign. All of those matters, together with the left hand indicators being activated, should have placed Mr Shaw on alert. Another important point is that prior to the execution of the left hand turn, Mr Menzies caused his vehicle to slow significantly. The plaintiff accepted that it had slowed virtually to a crawl at that

point. He should, then, have realised that the vehicle was going to turn left in front of him. Rather than slowing the motorcycle he accelerated in an attempt to overtake the prime mover and trailer on the left and failed.

[15] It was suggested to Mr Menzies that he was under some time pressure to deliver the balance of the steel sheets on the trailer. He did not accept that and I do not find that he was attempting to make up time by travelling faster than he ought otherwise.

[16] Mr Menzies was also interviewed by Constable Duff at the scene of the accident. More pertinently, on 12 August 2006 he gave a statement to an assessor engaged by the second defendant. On that day, only three months after the accident, he said that due to the fact that he had a wide load he took two lanes – the left and middle lanes. Contrary to the evidence of all other witnesses and his own evidence at the trial, he told the assessor that he had stopped at the red light at the corner of Balham Road. He said that he had just commenced to turn left when he felt the impact of the motorcycle. He could not explain the difference between his statement to the assessor and his evidence in court. He attempted to explain the difference in his account by referring to the length of time which had elapsed between the accident and the interview with the assessor. As I have noted, he was interviewed only three months after the accident whereas his evidence in this trial was given just over four years after the accident.

[17] Evidence was given as to his conduct after the accident. He did not seek to exchange particulars with the plaintiff; in fact, when the plaintiff was asking the group of people who had gathered around where the driver was, Mr Menzies did not volunteer himself.

[18] In cross-examination, Mr Menzies made much of what he said was his right of way to make the left turn. It is correct that under the *Transport Operations (Road Use Management – Road Rules) Regulation* 1999 ("the Regulation"), a vehicle like Mr Menzies' does have the right to turn left from the middle lane and other vehicles are required to give way to it. In cross-examination he said that "if you've got a wide load, we're permitted to take both lanes". He was quite insistent that he had the right of way as his trailer was turning.

[19] I have been unable to find any support in the Regulation for his statement that, if you've got a wide load, then you're permitted to take both lanes. It would be correct, though, that a wide vehicle would, in making a turn, take both or a large part of both lanes. In re-examination he said that once he started to turn he lost sight of objects behind him except for what could be seen in the blind spot mirror. Mr Menzies maintained at all times that he did not see the motorcycle travelling alongside his trailer; rather he saw it behind his vehicle and to the left. (There is a response in the interview with the assessor where he says he saw it in the right-hand mirror but, on the balance of the evidence, that was impossible and I expect that it was a mistake in the statement).

[20] Regulation 28(2) of the Regulation sets out the criteria to be satisfied in order that such a turn can be made in that way. I am satisfied that the vehicle being driven by the first defendant was entitled to move from the middle lane when it sought to turn into Balham Road. But, the right to make such a turn is not absolute. All manoeuvres on the roadway must be exercised with care and with due observance of the circumstances obtaining at the time.

[21] I was referred to the decision of the Full Court in *Rains v Frost Enterprises Pty Ltd* [1975] Qd R 287 where Dunn J said (at 294):

> "The essence of that relation [i.e. the relationship between a car being overtaken and the overtaking car] is that the follower is in a better position than the leader to observe, and thus is able to make a choice between creating a hazardous situation, as, by a failure to steer clear, and a safe situation, as by steering clear, or by stopping, if it is in doubt as to the leader's intention."

[22] However, as was pointed by Muir JA in *Vos v Hawkswell* (2010) 55 MVR 271 at [31], Dunn J was referring to a situation where there was a special relationship brought about by the two cars being "on a quite long straight stretch of road, in conditions of good visibility". Justice Muir (with whom the other members of the Court agreed) said that Dunn J's analysis does not suggest that the driver of the following car is inevitably liable should his vehicle collide with the vehicle in front. There is no such principle. Liability must be determined by reference to the particular facts of each case.

[23] The manoeuvre being undertaken by the first defendant in turning left was an inherently dangerous one, notwithstanding that it was authorised by law. A driver in such a situation must remain alert for other drivers who may not be complying with the rules of the road. This is a situation in which the well known statement in *Sibley v Kais* (1967) 118 CLR 424 at 427 (per Barwick CJ, McTiernan, Kitto, Taylor and Owen JJ) should be borne in mind:

> "[Road rules or regulations] are not definitive of the respective duties of the drivers of such vehicles to each other or in respect of themselves: nor is the breach of such regulations conclusive as to the performance of the duty owed to one another or in respect of themselves. **The common-law duty to act reasonably in all the circumstances is paramount**. The failure to take reasonable care in given circumstances is not necessarily answered by reliance upon the expected performance by the driver of the give way vehicle of his obligations under the regulations; for **there is no general rule that in all circumstances a driver can rely upon the performance by others of their duties, whether derived from statutory sources or from the common law. Whether or not in particular circumstances it is reasonable to act upon the assumption that another will act in some particular way, as for example by performing his duty under a regulation, must remain a question of fact to be judged in all the particular circumstances of the case.**
>
> Therefore, it is, in our opinion, rightly said that the '"right hand rule" is not the be all and end all in relation to questions of civil responsibility'. **The obligation of each driver of two vehicles approaching an intersection is to take reasonable care**. What amounts to 'reasonable care' is, of course, a question of fact but to our mind, generally speaking, reasonable care requires each driver as he approaches the intersection to have his vehicle so far in hand that he can bring his vehicle to a halt or otherwise avoid an impact,

> should he find another vehicle approaching from his right or from his left in such a fashion that, if both vehicles continue, a collision may reasonably be expected." (emphasis added)

[24] As might be expected, the evidence of both Mr Shaw and Mr Menzies had elements of reconstruction and justification. It should not be expected that any person would retain a completely accurate memory of what occurred in these circumstances. It is the case, though, that on any version of the evidence Mr Shaw must have seen:

(a) the myriad of warning signs on the rear of the trailer; and
(b) if not all of the indicators on the trailer, then, at least, the indicator on the prime mover's mudguard.

[25] I do not accept that the prime mover and trailer executed the manoeuvre described by the plaintiff. The path of travel could not have occurred in the space described by Mr Shaw due to, at least, the size and speed of the vehicles involved.

[26] The plaintiff was the author of his own misfortune. He failed to observe the obvious – the indicators and the slowing of the prime mover and trailer. He was obliged under the Regulation to give way to the vehicle turning left. In his attempt to overtake he miscalculated the distances and relative speeds and the collision was the result.

[27] The plaintiff, though, was not solely responsible. Mr Menzies had seen the plaintiff travelling behind him in the kerb lane. His long involvement with driving trucks let him know that, as a prime mover turns, its side mirrors reflect less and less of what is behind the cab until the angle becomes so acute that it only reflects an image of the trailer. Knowing that the plaintiff was in a vulnerable position, Mr Menzies failed to keep him under observation or, at least, take extra care in turning.

[28] This is a case in which it is appropriate to apportion responsibility for the accident. The lack of care by the plaintiff was far greater than that of the first defendant. Mr Shaw should bear the majority of blame for the collision.

[29] The nature of the task in assigning degrees of fault was described in *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529 at 532-533 per Gibbs CJ, Mason, Wilson, Brennan and Deane JJ:

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris*) and of the relative importance of the acts of the parties in causing the damage: *Stapley v Gypsum Mines Ltd*; *Smith v McIntyre* and *Broadhurst v Millman* and cases there cited. **It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination.** The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance."

(emphasis added)

[30] It was the plaintiff who departed from the necessary standard of care to the greater extent. On the whole of the evidence as to the conduct of each party I find that the plaintiff was responsible for the accident to the extent of 70% and that the first defendant was 30% responsible.

Quantum

[31] The plaintiff's damages are to be assessed pursuant to the provisions of the *Civil Liability Act* 2003 (and the associated Regulation) ("the Act").

General Damages

[32] The injuries suffered by the plaintiff include a compressed comminuted fracture of the C5 vertebra, a sublaxation of the left C5/6 facet joint, a fracture of the mid shaft to the right ulna and a fracture to the right femur.

[33] There was also evidence that he suffered an adjustment disorder with mixed and anxiety and depressed mood.

[34] The plaintiff was treated in hospital for three days. On release he was fitted with a halo brace and a full torso brace. The braces were worn for four months, after which he wore a soft collar for six weeks.

[35] In October 2006, the plaintiff started physiotherapy and, about four weeks after that, a course of hydrotherapy.

[36] It is agreed between the parties that the injuries to the plaintiff's neck should be assessed as a "serious cervical spine injury" under item 86 of the fourth schedule to the Regulation. That provides for an Injury Scale Value of 16 to 40.

[37] Dr Pentis's opinion was that the plaintiff has an impairment in the cervical region approximating a 20% whole person impairment.

[38] In assessing the appropriate ISV for the plaintiff's injuries I need, in this case, to determine the dominant injury. This is clearly the injury to his neck. His other injuries were not the subject of any detailed comment and can be accommodated within the range allowed for the neck injury.

[39] I have taken into account the following: the plaintiff's age (36 at the time of the accident, 41 today), the pain and suffering he endured and the inevitable degeneration that would have occurred had this accident not occurred, the level of adverse impairment and the injuries other than the neck injury.

[40] According to the commentary to item 86 an RSV near the top of the range will be appropriate only if there is a whole person impairment for the injury of more than 25%. In a range which spans 24 points (16-40) I think that the appropriate RSV, after taking into account all matters referred to above, is 35. That realises an award under this head of **$56,000.00**.

[41] No interest can be awarded under this heard of damage (s 60 of the Act).

Special damages

[42] Special damages (including a *Fox v Wood* component) are agreed at **$37,472.00**. Interest was also agreed at **$164.00**.

Past economic loss

[43] At the time of the accident the plaintiff was in secure employment. Through his working life he had demonstrated a good employment record and I am satisfied from the evidence that he was a useful and valued employee. His injury now precludes him from performing the work he previously performed as a glazier or, for that matter, any other heavy work requiring lifting or bending. He has a capacity to carry out light duty activities, but not for a full day as the pain he suffers increases with the work performed. He is incapable of returning to full-time work of the type in which he has previously engaged. Since the accident he has obtained some limited qualification and even more limited experience in the IT industry. The qualifications he has obtained are at a fairly basic level in web design which, if he was able to obtain work, would provide him with an income of approximately $30 an hour. Despite some modest enquiries on his behalf, he has not been able to obtain such employment.

[44] It was argued on behalf of the plaintiff that his past and future loss can be calculated according to the remuneration earned by his brother who was and is employed at the same place of work. I do not accept that that is appropriate in this case. It was obvious on the evidence that his brother has different skills and that while it was possible for the plaintiff to have been promoted, it was not likely.

[45] In the financial year in which the accident took place the plaintiff was earning $593 a week. The evidence was that had he remained in his employment, then in the succeeding financial year he would have earned $660 a week and in the period since then he would have earned $950 a week.

[46] It was submitted for the plaintiff that his average weekly earnings for that period would have been $834 a week but that was based upon his income equating with that of his brother, which I have not accepted. The loss which he suffered then was:

• 12 May 2006 – 1 July 2007	-	$593 a week =	$35,156.43
• 2 July 2007 – 23 April 2008	-	$660 a week =	$27,708.57
• 24 April 2008 – 22 October 2010	-	$950 a week =	$123,500.00
			$186,365.00

[47] The defendant submitted that from that amount should be subtracted a small amount to recognise the residual earning capacity of the plaintiff which arose from his completing studies in web design in April this year. That submission is based upon the assumption that such a capacity immediately arose upon the completion of the course. That is not a practical consequence of completion of a course, especially in an area where, on the evidence, there is competition in the market and there are other aspects to web design which require further study. I do not, therefore, reduce that amount in any way.

Loss of superannuation entitlements

[48] Both parties agree that there is a need to recognise that the plaintiff has lost superannuation entitlements both for the past and the future. For past loss the amount is **$16,772.85.**

Future loss

[49] The appropriate base figure to work on is a weekly income of $950. The defendant submitted that the plaintiff had a residual capacity to undertake web design and that he could, in future, earn up to $500 a week. The submission acknowledged that it would take time to achieve that amount and that this should be recognised by providing for a residual earning capacity of $300 a week for 5 years.

[50] The evidence does not allow for such an optimistic view of the plaintiff's earning capacity. As I have observed above, the qualification he has is of a very low level and very confined. It may be that he can obtain more advanced qualifications and there seems to be no reason why that could not occur. However, the current qualification he has is not such as would allow me to find with any confidence that he has an earning capacity of more than a few hours a week for some considerable time.

[51] I have to consider his remaining work life of 26 years. On the evidence put before the court I can accept that he is both capable of and likely to work and earn for about 10 hours a week on average for the rest of his working life. At $30 an hour that requires a reduction of the $950 figure to $650 a week. After discounting for contingencies the plaintiff's future economic loss is assessed at **$424,710.00**.

Superannuation on future loss

[52] The loss, assessed at 9%, produces an award of **$41,750.00**.

Care

[53] The plaintiff makes a claim for care and such a claim is regulated by s 59 of the Act which provides:

> "**59 Damages for gratuitous services provided to an injured person**
>
> (1) Damages for gratuitous services provided to an injured person 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) 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 institute."

[54] The plaintiff submits that he had a significant need in the immediate post-accident period and that, in the initial four months following the accident, care totalled 5½ hours a day. That excluded some minor items.

[55] Before damages under this heading can be awarded, a plaintiff needs to demonstrate that there was a need for care for six hours a week for at least six months. I accept that there was a need for intensive care for the four months following the accident. That care though diminished once the plaintiff was removed from the braces which had been applied.

[56] The proper application of s 59 of the Act was considered by McMurdo P in *Kriz v King & Anor* [2007] 1 Qd R 327, where at [18] her Honour observed:

> "Because s 59 restricts a claimant's previously unfettered common law right to seek damages for gratuitous services, the section should only be regarded as limiting that common law right if it does so clearly and unambiguously: *Potter v Minahan* ((1908) 7 CLR 277, O'Connor J, 304) *Bropho v Western Australia*; ((1990) 171 CLR 1, Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 18) *Coco v The Queen* ((1994) 179 CLR 427, Mason CJ, Brennan, Gaudron and McHugh JJ, 437) and *Grice*. For that reason s 59(1)(c) should be interpreted in the way which least diminishes a claimant's common law rights to damages for gratuitous services. Giving the words their ordinary meaning and applying that important principle of construction, it is my view that s 59(1)(c) of the Act has the effect that damages for gratuitous services are not to be awarded unless the services have been provided or are to be provided for both six hours per week and for at least six months; once that threshold is met then damages for gratuitous services can be awarded even if the services thereafter are provided or are to be provided for less than six hours per week. This approach is consistent with that taken by McGill DCJ in *Carroll v Coomber & Anor* and with the submissions of senior counsel for the appellant at trial. The judge was required under the common law and consistent with s 59 of the Act to make the assessment of damages for future gratuitous services on the evidence accepted by him."

[57] Evidence from an occupational therapist was called for the purposes of demonstrating how much care would have been necessary during the period following the accident. The assessment given by Ms Stephenson falls into a familiar category. While I do not doubt that she held the views expressed in her report, they must be considered in light of a number of matters, not least that they are based entirely upon the recollections and history provided by the plaintiff and, then, her assessment of what would have occurred in the circumstances of this particular family.

[58] The submission on behalf of the defendants was that Ms Stephenson's evidence with respect to items such as meal preparation, dishwashing, shopping, cleaning, laundry, and home maintenance was unsatisfactory. I agree. In arriving at her conclusions, Ms Stephenson appears not to have taken into account that there were other members of the household (apart from the plaintiff's wife there were three children in the family) and there is nothing to suggest that anything additional was required to be done, for example, for meal preparation, to that which would have been done for other members of the household. Her failure to take that into account applies to many, if not all, of the matters I have listed above and, in doing so, results in an overestimate of the time which can properly be ascribed to the needs of the plaintiff.

[59] I do not accept her evidence with respect to the four month period following the accident and I find that the plaintiff has not demonstrated that the threshold established by s 59 of the Act has been crossed. It follows that the claims for care are not maintainable.

Future needs

[60] There is some likelihood that the plaintiff will require future treatment and, possibly, a spinal fusion. The costs of such a fusion have been estimated at $7,000 to $10,000. Given the medical evidence with respect to his injuries, an appropriate way to deal with this is to award a sum of **$7,000.00** which will take into account the inevitable extra costs associated with surgical procedures.

[61] The plaintiff also seeks damages in respect of pain medication. That does not appear to have been the subject of any other award. He seeks an ongoing cost of $25 a week for 35 years in respect of pain relieving medication. I make an award of **$20,000.00** in respect of that after discounting for contingencies.

Refund

[62] Pursuant to s 51 of the *Motor Accident Insurance Act* 1994, the second defendant is entitled to a refund from the net judgment after contribution of $4,000.

General damages	$56,000.00
Special damages	$37,472.00
Interest on special damages	$164.00
Past economic loss	$186,365.00
Loss of superannuation entitlements	$16,772.85
Future loss	$424,710.00
Superannuation on future loss	$41,750.00
Future needs	$7,000.00
Pain medication	$20,000.00

TOTAL	**$790,233.85**

Order

[63] The plaintiff is to bring in appropriate minutes of order.