SUPREME COURT OF QUEENSLAND

CITATION:	*Yamaguchi v Phipps & Anor* [2016] QSC 151
PARTIES:	**MINA YAMAGUCHI** (plaintiff) **v** **ROBERT WILLIAM FRANCES PHIPPS** (first defendant) and **QBE INSURANCE (AUSTRALIA) LIMITED** **ABN 78003191035** (second defendant)
FILE NO:	SC No 10061 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	7, 8, 9, 10 and 11 March and 22 June 2016
JUDGE:	Applegarth J
ORDER:	**The parties to confer in relation to the calculation of administration and management fees, and to submit within 21 days draft orders based on these reasons.**
CATCHWORDS:	DAMAGES – PARTICULAR AWARDS OF GENERAL DAMAGES – QUEENSLAND – where plaintiff suffered multiple injuries as a result of a motor vehicle accident – where these injuries included a brain injury, a major depressive disorder and a number of orthopaedic injuries – whether the brain injury or the major depressive disorder is the dominant injury for the purposes of assessing an injury scale value ("ISV") for the multiple injuries under the *Civil Liability Regulation* 2003 (Qld) DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – EXPENSE FLOWING FROM PLAINTIFF'S INABILITY TO WORK – GRATUITOUS AND COMMERCIAL CARE – where the plaintiff's cognitive impairments and severe depression create need for daily care – where plaintiff presently unemployable and unable to live independently of her parents – whether

there is any significant prospect of her not continuing to need care in the future

Civil Liability Act 2002 (NSW), s 15C
Civil Liability Act 2003 (Qld), s 56, s 59, s 60, s 61, s 62
Civil Liability Regulation 2003 (Qld), Sch 3, Sch 4, Sch 5, Sch 6, Sch 7
Evidence Act 1977 (Qld), s 92
Motor Accident Insurance Act 1994 (Qld), s 51

Allwood v Wilson [2011] QSC 180 cited
Australian and New Zealand Banking Group Ltd v Cawood [1987] 1 Qd R 131; [1986] QSC 479 cited
Clement v Backo [2007] 2 Qd R 99; [2007] QCA 81 cited
CSR Ltd v Eddy (2005) 226 CLR 1; [2005] HCA 64 cited
Heywood v Commercial Electrical Pty Ltd [2013] QCA 270 cited
Malec v J C Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20 cited
Mazzoni v Boyne Smelters Ltd [1998] 1 Qd R 76; [1995] QSC 214 cited
McQuitty v Midgley [2016] QSC 36 cited
Najdovski v Crnojlovic (2008) 72 NSWLR 728 considered
The National Insurance Co of New Zealand v Espagne (1961) 105 CLR 569; [1961] HCA 15 cited
Phillips v MCG Group Pty Ltd [2013] QCA 83 cited
Shaw v Menzies [2011] QCA 197 cited
Waller v McGrath & Suncorp Metway Insurance Limited [2009] QSC 158 cited
Waller v Suncorp Metway Insurance Ltd [2010] 2 Qd R 560; [2010] QCA 17 cited
Wynn v NSW Insurance Ministerial Corporation (1995) 184 CLR 485; [1995] HCA 53 cited

COUNSEL:	S C Williams QC, with A J Williams, for the plaintiff G F Crow QC, with N Jarro, for the defendants
SOLICITORS:	MBA Lawyers for the plaintiff McInnes Wilson Lawyers for the defendants

[1] The plaintiff is a young woman, and a Japanese national. She was badly injured when struck by a bus on a pedestrian crossing in Cairns on 30 December 2011. She suffered brain damage, orthopaedic injuries and various other injuries. She suffers from cognitive impairments and major depression, which have had a devastating effect on the quality of her life.

[2] Before her multiple injuries, the plaintiff was a socially active, 23 year old female in full-time employment. She enjoyed a range of sporting and recreational activities and good relationships. She lived in her own apartment, independent of her parents. She had secure employment and prospects of promotion.

[3] She now leads a sedentary and sad life. Despite attempts at rehabilitation and a period of work in protected conditions with her sympathetic former employer, she could not continue in gainful employment. Her cognitive impairments and major depressive illness mean she cannot live independently of her parents. Her cognitive impairments include:

- memory loss;
- a severe slowing of information processing speed; and
- difficulties with executive functioning.

She requires regular prompting by her mother or father in order to eat or shower regularly. Her difficulties with short-term memory, and lack of any sense of smell, create a concern about her ability to live independently. There have been occasions when she has left the gas stove on after cooking. She is heavily dependent on her parents. Her various conditions mean that she is unable to go grocery shopping on her own, cook meals for herself or attend to household chores such as washing clothes, cleaning and mopping. Her mother keeps her company most days until her mother goes to work. Her father also supports her and attends to her needs. The plaintiff will only go into the community when prompted to do so, and when accompanied by a friend or a family member. She can drive only short distances. Her severe depression means that she is not motivated to complete tasks which might be within her physical capacity.

[4] The pain and limitations associated with the plaintiff's orthopaedic injuries, coupled with her cognitive impairments and major depression, create a need for daily care. Her current state renders her virtually unemployable.

[5] Liability is not in issue. Quantum is; despite a generally high level of agreement between specialists in their respective fields about the nature and extent of her injuries. An issue, debated in submissions, is her dominant injury. According to the defendants, the major impediment to the plaintiff's working again and having a more independent existence without the need for a high level of care from her parents is her major depressive disorder. The occupational therapist engaged by the defendants, Mr Fraser, holds out some hope for an improvement in this regard. The plaintiff's case is that the idea of her obtaining gainful employment in the open labour market and not needing substantial care from her parents is altogether too optimistic. It ignores the nature of her cognitive impairments, the tried and failed attempt to work again and the failure of extensive therapy and treatment over recent years to improve her condition. If anything, according to the plaintiff's submissions, her mental illness has become worse in recent times.

[6] The resolution of the issues I have mentioned has implications for the quantum of a number of heads of damage, including impaired earning capacity and future care. An issue in the case is the cumulative effect of the plaintiff's injuries. The statutory framework for the assessment of general damages demands attention to the assessment of an injury scale value ("ISV"), the determination of a "dominant injury" and a consideration of the adverse impact of multiple injuries in order to determine whether the ISV for all the plaintiff's injuries should be higher than the maximum ISV of the dominant injury. This requires consideration of whether the plaintiff's cognitive impairments or her psychological injuries are dominant. It also requires care to ensure that the effects which are attributable to both conditions are not doubly compensated.

[7] Other issues include the prospect that her psychological condition will improve, and the extent to which any improvement will affect her future earning capacity and reduce her need for care.

The plaintiff before her injuries

[8] The plaintiff was born on 1 August 1988. After graduating from high school, she attended college and was awarded a Diploma of Business Information in March 2009. From April 2009 she was employed by Sanco Industries in Toyohashi City, Japan. Sanco makes parts and components for automobiles and cameras. The plaintiff's clerical position related to the handling of shipments of company products.

[9] Prior to the accident, the plaintiff engaged in sport, recreation and hobbies. She attended the gym on average three times a week and played different sports. She had a number of close friends and they would have fun together, go out, go shopping and travel. In the winter they went to a ski field where the plaintiff enjoyed snowboarding. The plaintiff enjoyed overseas travel and the accident on 30 December 2011 occurred on the first day of her holiday to Australia, when she was in the company of one of her friends.

[10] Before the accident the plaintiff had her own apartment. She had a boyfriend and rarely spent time alone. She worked full-time and was valued by her employer. She intended to work to at least the age of 65, and probably longer.

The accident and its aftermath

[11] The accident inflicted a serious closed head injury. Brain damage was confirmed by a CT scan which demonstrated a frontal contusion with oedema, a fracture of the left mastoid and intra-cranial air. There were contusions and a haemorrhage within the right frontal region of the brain and within the left temporal lobe with subarachnoid blood around the left frontal lobe. The plaintiff's orthopaedic injuries included:

- a fracture of the ramus of her pelvis;
- soft tissue injury to her cervical spine;
- soft tissue injury to her thoracolumbar spine.

She has experienced a complete loss of the sense of smell (anosmia).

[12] The plaintiff was hospitalised at the Cairns Base Hospital for 18 days, during which time her mother and father spent substantial time speaking to her by phone and in communication with medical staff and travel insurers. She was discharged from that hospital on 16 January 2012 and, accompanied by a carer, returned to Japan where she was transferred to the Toyohashi Municipal Hospital, from which she was discharged on 26 January 2012. Her treatment continued with a variety of specialists.

[13] The plaintiff appeared to make a reasonable recovery, but had to use crutches and she was fatigued and distressed at times.

[14] On 26 March 2012 she returned to work, and was given light duties and generally accommodated by her employer. But she had great difficulty in performing even limited duties. She tried to overcome her memory difficulties by taking written notes. Her

employer was sympathetic to her situation and there was some flexibility in her hours of work. Other staff took over a number of her responsibilities. For example, they undertook the lifting and carrying of items and any of the more physical duties that had previously been connected with her job. However, those arrangements could not continue over the long term.

[15] On 12 November 2012 she was given notice of termination by Sanco and her employment ended on 20 March 2013. The termination of her employment with Sanco came as a great disappointment to her. She had worked for it for a number of years and had enjoyed her work. The loss of her job caused her great anxiety, since there was no apparent alternative employment opening for her.

[16] In addition to consulting specialists for her continuing physical ailments, the plaintiff consulted a psychologist for her psychological problems.

[17] The plaintiff found that she needed the support of her parents and others. She maintained the rental agreement for her own apartment and has spent time there on occasions, away from her parents' home when she has felt well enough to do so. However, she resides with her parents. They assist her with numerous domestic chores. They need to prompt her to do ordinary things such as to eat and to attend to self-care.

[18] By the time of the trial the plaintiff was still receiving a variety of treatments. These include physiotherapy two to four times a week, orthopaedic consultations twice monthly, consulting her neurologist for medication and consulting her psychiatrist regularly, who has prescribed medications to treat her depression and anxiety, sleep problems and pain.

Expert evidence

[19] It is unnecessary to refer in detail to the numerous medical reports that became exhibits. This is because some of them are dated and, in the main, there was no significant disagreement between experts in the same field. Most experts in the same field met and produced joint reports.

Neurological evidence

[20] There is no doubt that the plaintiff suffered a traumatic brain injury. It has produced ongoing memory and other cognitive symptoms, as well as loss of smell and headaches. She will not recover from her organic brain injury. In terms of assessment, Dr Cameron and Dr Todman had slightly different approaches to an impairment rating, depending upon whether matters such as ongoing neck pain and post-traumatic headaches should be included in the assessment. Dr Todman assessed her head injury at six per cent whole person impairment whilst Dr Cameron assessed it at seven per cent. Dr Todman identified an increased risk of post-traumatic epilepsy of about three to four per cent. The plaintiff's head injuries explain a number of her complaints, including dizziness, unsteadiness, headaches and fatigue. For example, she passed out on an occasion. Dr Todman ascribed a three per cent whole person impairment to her olfactory nerve injury, whilst Dr Bird, an Otorhinolaryngologist, found that her anosmia is permanent, resulting in a complete loss of smell and reduced taste. This gave rise to a five per cent whole person impairment.

[21] Dr Cameron relied upon the plaintiff's return to work after the accident and her ability to drive a car short distances as suggesting an ability to live independently. In his oral

evidence, he questioned whether the plaintiff's psychiatric conditions and her severe depression in particular, explained her inability to work and to care for herself. The answer to the question which Dr Cameron raised depends upon the contents of the other medical reports and the evidence of others, including the psychiatric evidence, to which I will turn.

[22] Dr Todman opined that the condition which he reported would continue to affect the plaintiff in her day to day activities and employment. Any return to work depended on an improvement in her symptoms from future treatment. She had difficulty with any full-time work involving concentration or physical tasks or even being seated at a desk. At best, she might cope with part-time work of up to 20 hours per week, but she would require physiotherapy and massage therapy indefinitely. Her condition also required assistance with certain domestic activities.

Neuropsychological evidence

[23] Dr Douglas and Ms Anderson were agreed in their assessments. Their joint report of 30 June 2015 remarked about the consistent evidence of visuospatial memory impairment and significantly reduced information processing speed. Precision in the neuropsychological assessment in this case was impeded by the fact that the assessments were undertaken by Australian specialists on an individual for whom English is not her first language. This excluded tests of language or verbal memory. The limitations on testing as a result of language difficulties may have underestimated her cognitive difficulties.

[24] While the plaintiff's perceptual reasoning (non-verbal problem solving) was about average, her processing speed was slow, being in the "borderline range".

[25] Attention and concentration testing placed the plaintiff in the average range as she could adequately attend to the task at hand. However, her ability to learn and remember new information was poor. Her ability to retain information after delays was in the borderline range. The assessment was that she had a "clinically significant impairment of visual memory function".

[26] As for executive functioning, the tests administered by Ms Anderson of higher cognitive functions that are required for planning suggested that the plaintiff was in the borderline to extremely low range on two out of three tests. Her practical visuomotor problem solving tests were, however, in the average range. In summary, the plaintiff demonstrated difficulties on measures of abstraction and classification, and moderately impaired non-verbal idea generation.

[27] Applying the AMA 5 Table 13.6, Ms Anderson's view (with which Dr Douglas did not disagree) was that the plaintiff should be classified as having a Class 2 impairment. Class 2 translates to a whole person impairment of between 15 and 29 per cent. She was said to require "supervision and direction in everyday life due to her cognitive difficulties". Ms Anderson observed that the severity of the plaintiff's condition "may well be underestimated because of the natural limitations of this assessment".

[28] As for the future, Ms Anderson reported that the majority of recovery from brain injury usually occurs in the first two years and it is unlikely that there will be significant change in the plaintiff's cognitive performance across time. Both Ms Anderson and Dr Douglas

agreed that the plaintiff should continue to receive ongoing psychological/psychiatric treatment to help manage her difficulties in coping. Ms Anderson remarked that the plaintiff might also benefit from some further rehabilitation advice with a view to obtaining some supported employment.

[29] Ms Anderson observes that whilst the plaintiff had problems continuing in her employment due to physical symptoms, her employer noted her reduced productivity. Ms Anderson's testing suggested that it is likely that "her productivity was quite severely affected due to the slowed information processing speed". Ms Anderson concluded that the plaintiff is likely to "find it very difficult to find alternative employment given these cognitive limitations". Any work would be confined to "very simple work, with a high level of supervision and assistance". The plaintiff's "fatigue and low mood" are likely to also affect matters.

[30] As to the effects of the plaintiff's condition on her domestic and social activities, Ms Anderson expressed the opinion that "based on her current level of function it does not appear likely that this would change significantly in the near future".

[31] The plaintiff places reliance upon the respective and joint opinions of the neuropsychological experts, including Ms Anderson's opinion that there should be a Class 2 impairment assessment under AMA 5 Tables 13.5 and 13.6. The defendants' submissions noted that there were inconclusive findings with respect to executive functioning which might be the result of limitations on the testing. It submitted that the Court should not make any positive finding of a deficit in executive functioning ability and that this is inconsistent with the plaintiff's ability to drive for "extended periods". However, the evidence suggests that the plaintiff can only drive for relatively short periods, and only when she feels well. It is unnecessary to reach any definitive conclusion about the precise extent of impairment of executive functioning. The results which I have summarised speak for themselves. The assessments show some impairment of executive functioning.

[32] There is no doubt, based upon the agreed assessments undertaken by the experts in this field, that the plaintiff suffers from a substantial impairment of her pre-accident cognitive ability. It is most pronounced in relation to her speed in processing of information, and in her ability to learn and retain information. Both these aspects have major consequences for her ability to obtain and maintain employment and on her domestic and social activities. They impair her ability to live independently. These impairments exist independent of her physical symptoms, which also impair her capacity to obtain and maintain employment and to live the kind of life which she did before her multiple injuries.

Psychiatric evidence

[33] Drs Clark and Chalk gave reports in 2013 and generally agreed about the plaintiff's condition. The defendants submit that the plaintiff has a major depressive disorder, which persists despite treatment. The plaintiff's dosage of Cymbalta (an anti-depressant and anti-anxiety medication) has been increased twice in recent years by her treating psychiatrist. The defendants submit that this suggests that before then she had been receiving "non-therapeutic levels of anti-depressant drugs". The plaintiff submits that the increased dosage is evidence of the worsening in her condition. The plaintiff's previous treatment in Japan and the dosage that she received may have been inadequate. There is

some evidence that it was, but the treating doctors' reasons for that previous dosage and its increase were not explored. The increase in dosage may have been due to a decline in her condition. More important for present purposes is the plaintiff's present condition and any prognosis from the expert psychiatrists about an improvement in it.

[34] The plaintiff's psychiatric condition was assessed in October 2014 as a Category 3 impairment with a 15 per cent disability on the Psychiatric Impairment Rating Scale. The *Civil Liability Regulation* 2003 (Qld) categorises this as a "moderate impairment". Despite treatment, this condition has persisted for a substantial time and according to recent observations of the plaintiff by her mother and father, her condition is worsening. It certainly is not improving.

[35] In addition to her inability to carry out many domestic tasks, the plaintiff's major depression with significant anxiety episodes result in her not socialising. She avoids crowds and noisy places. She rarely drives. She is withdrawn and worries. She is unable to live without the support of her parents. She is hypervigilant, easily upset and startled, and irritable.

[36] Despite some hope in Dr Chalk's 9 July 2013 report that there would be an improvement in the plaintiff's condition and a consequent reduction in her psychiatric disability, this does not appear to have occurred. Dr Clark considers that the plaintiff's condition is stable and is unlikely to dramatically change in the foreseeable future. I am inclined to agree.

[37] The plaintiff consults a psychiatrist once a week or perhaps once a fortnight. When she was assessed by Dr Chalk in June 2013 she was taking Xanax .25 mg as needed and Cymbalta 30 mg each day and, according to Dr Chalk, she was on another anti-depressant but he had "no idea what that was". Dr Chalk thought that the dose of 30 mg of Cymbalta was inadequate. In any event, according to the plaintiff's 16 September 2013 statement, as at August 2013 she was receiving a range of medications including two 20 mg Cymbalta capsules each day. There is no suggestion from Dr Clark or anyone else that this dosage was inadequate. The plaintiff also took medication for anxiety. Her dosage of Cymbalta was increased to three 20 mg capsules per day in the last year.

[38] The essential fact is that in recent years, and despite intensive counselling and increases in dosage of a particular anti-depressant, the plaintiff remains afflicted by a Major Depressive Disorder.

[39] The plaintiff has not been recently examined by either Dr Clark or Dr Chalk. They were briefed in September 2014 with additional medical reports, but no new psychological reports and seemingly no witness statements concerning the plaintiff's condition at that point. They conferred on 2 October 2014 and produced a joint report, including a PIRS assessment. Their allocations of Class 2 impairments in some categories, such as travel and social functioning, do not accord with the plaintiff's evidence and other evidence which I accept concerning the plaintiff's condition by late 2014. Dr Clark's October 2013 PIRS rating of 18, with a whole person impairment of 24, appears to more accurately reflect the plaintiff's degree of impairment in 2013-2014.

[40] Both psychiatrists, in their respective reports, appropriately deferred to anticipated neuropsychological tests which would determine the plaintiff's cognitive deficits. Relevantly, they did not include problems associated with loss of memory, slow

processing of information or poor executive functioning as part of their assessment of the plaintiff's psychiatric illness. Incidentally, Dr Clark opined that in addition to the plaintiff's Major Depressive Disorder she also had an Organic Personality Disorder which resulted from her injuries. In any case, there is no dispute that the plaintiff suffers, as the defendants put it, a "serious and severe Major Depressive Disorder which has profoundly affected [her] life since the accident".

Orthopaedic evidence

[41] There is no disagreement between the orthopaedic experts about the nature of the plaintiff's orthopaedic injuries. She suffered a pelvic injury and a whiplash injury to her cervical spine and lumbar spine. The experts disagreed as to her level of impairment. It is unnecessary to outline in detail the extent of their disagreement. Dr Pentis was not available for cross-examination. This inclines me to adopt Dr Morris' assessment where the experts differ. Both experts were agreed that the plaintiff's orthopaedic injuries restricted her to light work such as clerical work which does not require repetitive bending and lifting. Dr Morris thought that sporting activities would be beneficial to the plaintiff's recovery. However, the plaintiff's father who is a certified Physical Trainer has encouraged her to exercise.

[42] To the extent that Dr Morris hoped or expected the plaintiff's pain to resolve with time, progressive exercise and psychological treatment, this has not happened. Dr Morris did not doubt that the plaintiff experienced pain. Nor do any of the other experts in the case. Instead, Dr Morris reported in June 2013 that the degree of the symptoms she was experiencing in the cervical spine were in excess of what "one would expect from such an injury at this time."

[43] The pain which the plaintiff experiences restricts both the work that she can perform and her ability to undertake sport or other recreational activities which place a strain on her spine or pelvis. It also affects her ability to undertake certain domestic chores.

Occupational therapists' evidence

[44] Despite a forensic contest over whether I should prefer the opinion of Ms Hague (who was called by the plaintiff) or Mr Fraser (who was called by the defendants), the extent of their disagreement about the plaintiff's present condition should not be overstated. The real matter in issue between the parties is the likelihood of a future improvement in the plaintiff's capacity for work and a future reduction in her need for care.

[45] In summary, Ms Hague's opinion is that "the complex interplay of physical, psychological and cognitive sequelae mean that this woman's future employment opportunities have been significantly curtailed. Her injuries and associated occupational disability now place her at a significant disadvantage on the open labour market." Ms Hague considered that the plaintiff's unemployed status is "unlikely to change in the foreseeable future".

[46] There was no challenge to Ms Hague's view that the plaintiff will face a number of barriers in attempting to return to the commercial workforce. These include her time out of work, her history of an injury, and her lack of experience in a purely sedentary position. The plaintiff's cognitive and psychological conditions that resulted from the accident will limit her to "low-level, highly structured roles". Importantly, Ms Hague reports that the

plaintiff "would require an empathetic employer and would be restricted to part time working hours only".

[47] Ms Hague noted that the plaintiff's post-injury employment required regular time away from work. On the open labour market a poor attendance at work does not lend itself to sustainable employment. Ms Hague thought it unlikely that the plaintiff would be able to source an employer who was willing to accommodate her occupational restrictions. As a result, the plaintiff is now limited to "sedentary, casual employment in a highly structured and supervised position undertaking basic work tasks".

[48] Ms Hague supplemented her original report dated 27 November 2015 with the opinion that the plaintiff's multitude of disabilities result in the loss of any prospect for any employment in the future. She observed that even if the plaintiff was accepted to participate in an interview with a prospective employer, such an exercise would be a large hurdle for her and would prove virtually impossible. The ability to learn tasks in any new job would be very difficult since the plaintiff would not retain the memory of instructions given from one day to the next.

[49] As for the plaintiff's need for assistance and prompting with daily activities, including basic tasks such as showering, eating, choosing clean clothes to wear, taking medication and attending appointments, Ms Hague expressed the opinion that the plaintiff needs assistance of the kind she presently receives from her parents. The plaintiff is unable to independently prepare her own meals, has limited capacity to complete grocery shopping independently and her physical symptoms restrict her capacity for indoor chores, cleaning and laundry tasks.

[50] In summary, Mr Fraser agrees with many of Ms Hague's opinions about the plaintiff's current capacity for work and need for care. Because of her conditions, including her psychological conditions, any employment would be of a sedentary nature only. In her present state, the combined effect of the plaintiff's symptoms results in "her being unable to secure and sustain commercial employment on the open labour market in any capacity".

[51] Mr Fraser had a difficulty in providing a definitive opinion about the plaintiff's physical capacity for work now and in the future, and thought that the plaintiff's reported ongoing symptoms are likely to have been magnified by "non-organic factors". Psychological factors were said to have resulted in a greater vulnerability for development of "chronic symptomatology" and affected the plaintiff's current presentation and her prospects of recovery.

[52] According to Mr Fraser, psychological factors have been and continue to be "the most influential" in terms of the plaintiff's recovery and capacity to return to work. His expertise in being able to express that opinion and the weight of that opinion in the light of other evidence, were challenged by counsel for the plaintiff. In any case, Mr Fraser expressed the concluding opinion that successful treatment or better management of the plaintiff's psychological condition and the settlement of her claim are likely to result in a reduction in the severity of her reported ongoing symptoms and an associated increase in her functional capacities for work.

[53] This opinion seemingly was based upon the proposition that if she was residing in Australia, the plaintiff would have received case management support during her return

to work with her previous employer to provide her with strategies to minimise the impact of her symptoms on her capacity for work. She would have been referred to an experienced vocational rehabilitation provider to provide her with assistance in various aspects of obtaining commercial employment and may have benefitted from a work trial/host employment placement. Although Mr Fraser did not have any direct experience with the labour market and the provision of vocational rehabilitation services in Japan, a reputable article suggested that vocational rehabilitation services are provided in Japan. Mr Fraser recommended that future occupational rehabilitation endeavours be performed on a "graduated/structured basis" and that such vocational rehabilitation has the greatest chance of success following the end of litigation. The success was said to be also heavily dependent upon the participant's motivation levels. He observed that from other reports and from the plaintiff's self-report at his assessment, the plaintiff currently lacks any sense of purpose and has low levels of motivation and self-efficacy for activity as a result of not performing any productive work or recreation.

[54] In summary, Mr Fraser concluded that the plaintiff "is unlikely to be successful in securing and sustaining commercial employment on the open labour market in the future without professional assistance and better management (or removal) of the barriers identified above …". The barriers referred to are similar to those reported by Ms Hague and include:

- the severity of her reported ongoing physical, cognitive and psychological symptoms;
- her motivation and poor self-efficacy for activity;
- her time away from the workforce;
- her current medication intake; and
- her involvement in the litigation process.

[55] Purely from a cognitive perspective, Mr Fraser thought that the plaintiff would be suited to performing simple, office-based reception and administrative activities on a part-time basis (in the order of 20 hours per week). He thought that fatigue was likely to affect her capacity to tolerate full-time working hours and there would be a need for ongoing attention to "good ergonomics", her working postures and work practices, together with a need for exercise and techniques to minimise aggravation of her physical symptoms. Mr Fraser acknowledged that the plaintiff's cognitive impairments (particularly of short-term memory and concentration and attention) would limit the pool of occupations for which she is suited in the open labour market. The effect of her ongoing cognitive impairments and psychological symptoms on her capacity for work (and productivity levels) would be reduced by "structure and routine in terms of both her working environment and the duties required to be performed".

[56] As for the plaintiff's requirements for care and assistance, Mr Fraser reported similar difficulties to those reported by Ms Hague and other witnesses about the plaintiff's ability to complete minimal domestic activity. He remarked that she had developed a high level of dependence on her family. Nevertheless, he expressed the opinion that successful treatment (or better management) of her psychological condition is likely to result in improvement in her "perceived levels of dependence and concerns for safety with performing activities of daily living". Mr Fraser even thought that the plaintiff could be

successfully transitioned to living independently in her own residence with appropriate support from a professional therapist. A level of ongoing supervision and support would be required for a period of approximately six months after she commenced residing in her own residence to ensure that she was completing all activities of daily living regularly and safely, and managing her finances.

[57] In each of their assessments, Ms Hague and Mr Fraser recorded the plaintiff's self-report about variation in her pain from day to day. This consisted of head, neck and spinal pain. They separately measured her range of movement, and Mr Fraser observed that the plaintiff moved more freely, without evidence of significant symptomatology or restriction, and generally presented with no obvious signs of physical impairment when not being formally assessed. He did not suggest that the plaintiff was attempting to deliberately exaggerate the restrictions on her movement. Each occupational therapist assessed the plaintiff as having poor power and being unable to lift more than a few kilograms without reporting aggravation of her neck, shoulder and back symptoms. The plaintiff was easily fatigued.

Prospects of improvement

[58] I shall leave to one side the question of whether Mr Fraser's opinions about "psychosocial" or "psychological" factors having adversely affected the success of treatment and rehabilitation efforts, and being "the most influential" in terms of her recovery and capacity to return to work, are beyond his qualifications as an occupational therapist. The plaintiff's submissions note that the opinions are not supported by the psychiatric evidence.

[59] I find that psychological factors have influenced the plaintiff's recovery and her capacity to return to work. The shared view of the experts is that the plaintiff's cognitive deficits, her physical symptoms and her psychological state affect each other. The physical, cognitive and psychological consequences of her injuries combine so that she is unable to secure employment on the open labour market in any capacity, and was unable to adequately perform the work that was assigned to her by an understanding employer.

[60] Mr Fraser acknowledges in his report that the plaintiff has sought appropriate intervention for her injuries since the accident and it appears that "extensive treatment and rehabilitation has [sic] not resulted in any significant increase in her functional capacities for activity (i.e. work, activities of daily living and recreation)". Mr Fraser's opinion that the plaintiff has prospects of achieving an improvement of her symptoms and her functional capacities for work seems to depend upon assumptions that Japan has similar vocational rehabilitation services to Australia, that the plaintiff will be able to access those services and participate in a work trial/host employment placement, and that this will maximise the likelihood of a successful reintegration into the commercial workforce.

[61] Mr Fraser refers to professional assistance of the kind that she would receive if she were residing in Australia, including participation in a work trial or host employment placement. This raises the question of whether the plaintiff will obtain such rehabilitation services and has any real prospect of participating in a work trial/host employment placement. It begs the question (assuming, as Mr Fraser does, that Japan has vocational rehabilitation services similar to those in Australia) as to why the Japanese system, and the various professionals who have treated the plaintiff and continue to treat her, have not engaged her in such a rehabilitation program. No point is raised about the plaintiff failing

to mitigate damages by not participating in an available program. The present issues are why the plaintiff has not accessed any such program to date and the prospect that she will do so, so as to improve her capacity for work and reduce her need for assistance and care.

[62] One possible answer to the question is that the Japanese system may not be as good in providing vocational rehabilitation services as Mr Fraser assumed it to be. Another possible answer is that a work trial was tried and failed. Some aspects of the plaintiff's return to work may not have been ideal. However, she was able to leave work early and was able to stay away from work when she felt she could not attend. She was given light duties and support. Perhaps the return to work was too soon, but no-one gives any evidence about that. In any case, a work trial failed and the question is whether (assuming one is on offer) a future work trial is likely to prove any more successful. Barriers include the time which the plaintiff has now spent away from the workforce. Another is the general deterioration in her psychological state. Even then, and assuming a work trial was possible, the plaintiff suffers fatigue. She would only be suited to performing very basic tasks. Her cognitive impairments restrict her ability to learn tasks.

[63] There is no evidence that there are host employers in Japan who would be willing to offer the plaintiff a work trial in those circumstances, as well as providing her with the aids that she would require at work to not aggravate her physical problems and her pain.

[64] Whilst a successful work trial might improve the plaintiff's depression, there is no reliable evidence that such a work trial is available. Even if it was, the plaintiff's psychological condition would need to improve before she had any real prospect of successfully completing such a work trial. The evidence of the psychiatrists does not hold out any great hope for an improvement. In the past, Dr Clark expressed the opinion that the plaintiff's psychiatric conditions were unlikely to change dramatically in the foreseeable future. Assessments have altered from time to time and neither expert whose psychiatric opinion was in evidence before me suggested that alterations in medication in recent years were likely to resolve the plaintiff's psychiatric conditions. They do not appear to have done so.

[65] In summary, even if it was assumed that further and different treatment for the plaintiff's psychiatric condition could reduce her depression and anxiety and increase her motivation to engage in a work trial program, the plaintiff would need to find and participate in such a program and, after completing it, find a sympathetic employer who was prepared to accommodate her cognitive impairments and the physical constraints on doing other than sedentary work. This seems very unlikely.

[66] As noted, Mr Fraser opined that a barrier to the plaintiff's success in securing and sustaining commercial employment was her involvement in the litigation process. He thought that the successful treatment or better management of her psychological condition and the settlement of her claim were likely to result in a reduction in the severity of her symptoms and an associated increase in her functional capacity for work. The basis for his opinion that settlement of her claim would have this effect was not developed in his report. Under cross-examination, Mr Fraser said that the basis for this opinion was his experience assessing and treating patients involved in ongoing litigation. I accept that Mr Fraser has experience with the benefits of resolving litigation on the prospects of a rehabilitation program. I was not directed to any studies about the extent to which plaintiffs involved in litigation are motivated (at least subconsciously) to accentuate or overstate the degree of their disability and the extent to which these reported problems

reduce or resolve after litigation. If there are such studies and if evidence of them had been placed before me, it still may not have been possible to make any finding about whether the plaintiff, with her particular personality and problems, was likely to follow some general trend which had been proven with appropriate scientific rigour in respect of either Australian or Japanese plaintiffs.

[67] I should add in the context of the effect of litigation on the plaintiff, that there was no evidence that involvement in the litigation process had caused her unusual distress above that which might be expected of a plaintiff in her position. Her father's opinion under cross-examination was that involvement in the legal process had not caused her to have a significantly worse mental state. She was anxious about travelling to a foreign country for the trial, but that is hardly unusual. I should also add that neither of the psychiatrists suggested that resolution of the litigation would do much to improve the plaintiff's psychological conditions and her capacity for work.

Residual work capacity

[68] The evidence, which is not in serious dispute, is that the combined effect of the plaintiff's cognitive, physical and psychological conditions which have resulted from the accident, mean that she has no present capacity to return to work. As Mr Fraser observed, her current conditions mean that she is unable to secure and sustain commercial employment in the open labour market in any capacity.

[69] The main issue is whether she has any real prospect of obtaining employment in the future. An important fact in that regard is that her cognitive impairments and her physical impairments limit her to sedentary, casual employment in a highly structured and supervised position undertaking basic work tasks. As Ms Hague observed, the plaintiff would have great difficulty in learning tasks in any new job since she would not retain the memory of instructions given from one day to the next. This is a significant obstacle in obtaining employment. Even with some substantial recovery in her psychological condition (and neither of the psychiatrists thought that any significant improvement was likely) the plaintiff will remain at a significant disadvantage on the open labour market. In short, it is unlikely that her capacity to obtain and maintain employment will improve.

[70] The possibility of this occurring should not be dismissed since, with time, her psychological condition may improve, just as it may deteriorate with time. However, even with such an improvement, the plaintiff must find a willing host employer as part of a rehabilitation program. None has been proposed to her in the years since her employment was terminated. Even if her rehabilitation was advanced by participation in a work trial, she would struggle to find a suitable position and prevail at a job interview in competition with applicants who do not have similar problems. She would need to find an employer who was prepared to accommodate an employee with her cognitive impairments, including her slow processing speed and memory problems.

[71] As Ms Hague observed, there is a difference between setting up a work trial (where the host does not pay) and gaining employment when the work trial finishes (where the employer has to pay). Ms Hague was persuasive in her evidence that the plaintiff would have difficulty obtaining an interview and then acquiring a job. She noted that after the plaintiff's injury she had difficulties turning up for work every day and on some days would have to turn up late or leave early because of her symptoms. At the risk of stating the obvious, Ms Hague stated during her cross-examination: "If you're not able to attend

regularly or are always late or you're leaving early, that's not looked favourably upon by many employers."

[72] Whilst Mr Fraser gave some evidence, based upon an article which he had read, that Japanese employers are required to have certain percentage quotas of employees with an impairment or disability, there is no evidence that the plaintiff's disabilities are such that she is likely to be engaged by an employer. The evidence of the plaintiff's former work colleagues and others suggests a highly competitive labour market. Someone with the plaintiff's cognitive impairments would struggle to obtain an interview, let alone be employed. The prospects of the plaintiff obtaining an employer who was prepared to accommodate her disabilities, her unreliability, her poor productivity and need for constant retraining are poor. It is one thing to say that the plaintiff's physical problems and pain symptomatology might be accommodated by her undertaking work as a receptionist with suitable ergonomic support. However, the evidence of the neuropsychologists, and of a number of lay witnesses who have observed the plaintiff's problems with memory in work and social settings, makes it almost fanciful to suppose that the plaintiff would be employed as a receptionist.

[73] The chances of the plaintiff finding a suitable work trial, and then gaining employment are very small. In the circumstances, the plaintiff is likely to remain unemployed well into the future and quite probably for the entirety of what would otherwise have been her working life.

Domestic care

[74] I have already summarised the ordinary activities of daily life with which the plaintiff requires assistance, including prompting. There is no dispute between the occupational therapists that the plaintiff's present condition, including her cognitive impairments and physical condition, have created a substantial need for assistance on a daily basis.

[75] Again, but in this context, Mr Fraser gives an opinion that "successful treatment (or better management) of [the plaintiff's] psychological condition, is also likely to result in improvement of her perceived levels of dependence and concerns for safety with performing activities of daily living." However, the prospect that the plaintiff's psychological condition will be successfully treated is not high. It seems likely that she will continue to have a need for daily assistance as a result of the complex interplay of cognitive impairments, physical limitations and psychological problems. She will remain dependent on others for assistance, including prompting. The possibility of her transitioning within a relatively short time to living independently in her own residence, a scenario outlined by Mr Fraser, is altogether too optimistic. The likelihood is that she will not transition to living independently. Some of the risks of living independently, such as forgetting to turn the stove off and not being able to smell leaking gas, may be able to be addressed by inventive technology or other processes. However, the risk of a fire or some other disaster is only one aspect of the plaintiff's need for care on an ongoing basis.

[76] I do not exclude the possibility of the plaintiff's psychological condition improving with further treatment, the passage of time or an improvement in her self-esteem if she is able to gain some form of employment and undertake recreational pursuits. However, the chance of this occurring is not high. Attempts at rehabilitation through a return to work

were tried and failed. The plaintiff has had ample and ongoing assistance from a range of doctors and therapists. She has had the support of parents.

[77] It is easy to be critical of the attitude of her parents and to suggest that they perceive that her need for assistance is greater than it actually is. The plaintiff may have developed "a high level of dependence on her family in terms of her capacity to perform activities of daily living". However, this does not mean that needs were imagined or that she is the victim of excessive "mothering". Given the plaintiff's conditions, and the devotion and sacrifices made by her mother towards her care, I decline to find that any "mothering" has been excessive. The plaintiff's parents have tried to improve their daughter's life. They aided her return to work. They helped maintain the lease over her separate flat where she could go on occasions in the hope of maintaining some semblance of an independent life and the hope that she might, one day, return to her old flat on a long-term basis. Her father encouraged the plaintiff to undertake physical exercise. The plaintiff tried to go on a trip with her friends. It ended in disaster. She has been encouraged by her parents to spend an occasional night on her own at her flat. They have encouraged her to go out. Her mother encourages her to go shopping, even though the plaintiff can be of no real assistance to her mother. The plaintiff's parents have ensured that she attends medical appointments and treatment. I do not regard these things as "mothering" or "parenting" in the form of assistance which does not meet an actual need. The needs are actual, not simply perceived. They are actual because the plaintiff's overall condition requires this kind of assistance which, fortunately for the plaintiff, is able to be provided by loving and devoted parents.

[78] The plaintiff has a substantial need for domestic assistance. She needs assistance on a daily basis and she is likely to require assistance for a long time. I will return to the extent of her needs in greater detail and, in due course, assess reasonable compensation for them. At this point, I conclude that the plaintiff has a substantial present need for care. I also conclude that her need for care is likely to remain substantial. The prospect of a significant improvement in her overall condition, as a result of a significant improvement in her psychological condition, is poor. The plaintiff's psychological condition may decline. Any future improvement is not one which the psychiatrists predict. Her psychological problems are unlikely to resolve completely. She is likely to remain in a predicament in which the interplay between her cognitive impairments, her psychological conditions and her accident-related physical problems and pain create an ongoing and substantial need for daily care.

General damages: method of assessment

[79] General damages are assessed in accordance with an injury scale value ("ISV") on a scale running from 0 to 100.[1] The parties accept that I must assess the ISV in accordance with the *Civil Liability Regulation* 2003 (Qld), and have regard to the ISVs given to similar injuries in previous proceedings. In assessing the ISV for an injury mentioned in Schedule 4 of the *Regulation*, I must consider the range of ISVs stated in Schedule 4 for the injury.

[80] This case involves multiple injuries, and so ss 3 and 4 of Schedule 3 to the *Regulation* apply. Their effect was summarised by McMeekin J in *Allwood v Wilson*[2] as follows:

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1 *Civil Liability Act* 2003 (Qld), s 61(1)(a).
2 [2011] QSC 180 at [20].

> "… it is necessary to determine the dominant injury as it is defined[3], have regard to the range of ISVs applicable to that injury, determine where in the range of ISVs provided for that injury it should fall, and determine whether the maximum ISV in that range ("the maximum dominant ISV") adequately reflects the adverse impact of all the injuries.[4] 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% above the maximum dominant ISV selected.[5] In arriving at an appropriate ISV the court needs to bear in mind that the effects of multiple injuries commonly overlap.[6]"

[81] The purpose of the range of ISVs for the injuries mentioned in Schedule 4 is to reflect the level of "adverse impact of the injury on the injured person".[7] In assessing an ISV, a court may have regard to other matters to the extent they are relevant in a particular case.[8] The matters include the injured person's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life. In assessing an ISV for multiple injuries, the range for, and other provisions of Schedule 4 in relation to, an injury other than the dominant injury of the multiple injuries, may be considered.[9]

[82] A whole person impairment in relation to an injury is an estimate, expressed as a percentage, of the impact of a permanent impairment caused by the injury on the injured person's overall ability to perform activities of daily living other than employment. The extent of whole person impairment is an important consideration, but not the only consideration affecting the assessment of an ISV.[10]

[83] In assessing an ISV, I must give greater weight to a medical assessment of a whole person impairment percentage based on the criteria for the assessment of whole person impairment provided under AMA 5 than to a medical assessment of a whole person impairment percentage not based on the criteria.[11] Section 6 of Schedule 3 of the *Regulation* applies if, in assessing an ISV, a psychiatric impairment rating scale ("PIRS") rating for a mental disorder of an injured person is relevant under Schedule 4. The PIRS rating for the mental disorder is the PIRS rating to be accepted and a PIRS rating is capable of being accepted only if it is assessed by a medical expert as required under Schedules 5 and 6 and provided to the Court in a PIRS report as required under Schedule 5, s 12.

[84] General damages must be calculated by reference to the general damages calculation provisions applying to the period within which the injury arose.[12] This means that despite the passage of more than four years since the accident and an increase in the amounts prescribed by regulation, the general damages calculation provisions are those which applied at the date of the accident on 30 December 2011. The Court cannot order the payment of interest on the award for general damages.[13]

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3 See Sch 7 of the *Regulation*.
4 Sch 3 s 3 and s 4.
5 Sch 3 s 4(3)(b).
6 See notes to Sch 3 s 3.
7 Sch 3 s 2(2).
8 Sch 3 s 9.
9 Sch 3 s 9.
10 Sch 3 s 10.
11 Sch 3 s 12.
12 *Civil Liability Act* 2003 (Qld), s 62.
13 *Civil Liability Act* 2003 (Qld), s 60(1).

General damages: submissions

[85] The plaintiff's ultimate submission is that her dominant injury is either her moderate brain injury (Item 7) or her serious mental disorder (Item 11) and that an injury scale of 40 should be adopted for either of those items with an increase of at least 50 per cent to account for her multiple injuries. As a result, an ISV of 60 should be adopted, resulting in a general damages assessment of $147,350.

[86] The defendants submit that the plaintiff's major depressive disorder, being a "Serious Mental Disorder" (Item 11), is her dominant injury. In isolation and having regard to the ISV range, they submit that an ISV of 19 would be appropriate if the major depressive disorder were the only injury. They submit that the brain injury should be designated a minor brain injury (Item 8), attracting an ISV below 20. They rely on the neurologists' assessment of a six to seven per cent whole person impairment, and contend that this should approximate to a similar ISV in that she has made a good recovery from the brain injury. Having regard to the other injuries in the case and the overlapping symptoms, the defendants submit that the ISV should be 40, resulting in an assessment of general damages of $82,550.

The dominant injury

[87] The plaintiff's brain injury and her major depressive disorder are each in contention as her dominant injury for the purposes of assessment. Whichever is chosen, the other major injury and the other injuries need to be taken into account in accordance with the method of assessment described above.

[88] As for the brain injury, I have earlier summarised the neurological evidence and the evidence of the neuropsychologists. Ms Anderson, applying the AMA 5 Table 13.6, considered the plaintiff should be classified as having a Class 2 impairment. This Class covers a whole person impairment range of 15 to 29 per cent. Ms Anderson in her June 2013 report thought that the plaintiff would be most likely at the bottom of this range, namely in the 15 to 20 per cent range. Dr Douglas did not use the AMA 5 or AMA 6 guidelines when she reported on the plaintiff's condition in June 2015, but wondered whether the neurological opinion of a six to seven per cent whole person impairment might change with regard to the current test data. Ms Anderson and Dr Douglas met in June 2015 and agreed that the plaintiff's pattern of cognitive impairment was identical at both their assessments. In summary, their evaluations identified clinically significant impairments both in visual memory function and information processing speed, and moderate difficulties with executive function.

[89] I take account of the whole person impairment assessments made by Dr Todman and by Dr Cameron, including the dates at which they were made in June 2013 and the material which was before them at the time of those assessments. I also take account of Dr Cameron's oral evidence about the use of neuropsychological testing and the complications involved in determining the influence of the plaintiff's psychiatric condition. The assessments undertaken by the neuropsychologists as a result of their detailed testing are significant. Neither Dr Todman nor Dr Cameron had the results of those assessments when they arrived at whole person impairments of six per cent and seven per cent in June 2013. Dr Todman in his oral evidence acknowledged this. His evidence is that, in addition to what is ascertained in a clinical interview, a neurologist would take account of neuropsychological testing done by other professionals.

Dr Todman was not asked prior to trial to review his 2013 whole person impairment in the light of Ms Anderson's and Dr Douglas' testing. He did, however, acknowledge in his oral evidence that a further assessment under Table 13.5 in the light of the plaintiff's condition would require a clinical judgment, based on neuropsychological testing done by other professionals, and the effect of memory loss on "day-to-day affairs and activities of daily living, for example, does it affect keeping appointments or remembering to take tablets or remembering to attend to normal duties without prompting or reminding." I did not understand Dr Todman to be adhering to the whole person impairment he gave on 11 June 2013 as indicating the plaintiff's current impairment, since those neuropsychological assessments had not been performed and reported upon at the time he wrote his report.

[90] On 18 June 2013 Dr Cameron reported upon the severe brain injury that had resulted from the accident, but remarked upon the plaintiff's reasonable recovery. The plaintiff's symptoms suggested frontal temporal lobe impairment contusions as a consequence of brain injury and that the injury produced a memory disturbance. Dr Cameron remarked upon the plaintiff's depression and thought that with psychiatric and psychological support she might be able to return to simple office activities. His assessment of a seven per cent impairment of whole person function was distinct from the separate assessment by a psychiatrist and separate to his assessment of a three per cent impairment due to anosmia.

[91] In 2014 Dr Todman and Dr Cameron conferred by telephone, and in a report noted their agreement about the plaintiff's traumatic brain injury with ongoing memory and cognitive symptoms as well as loss of smell and headaches. Their points of difference related to the plaintiff's ongoing neck pain and post-traumatic headaches. Dr Cameron took the view that these symptoms were covered by the impairment ratings for the head injury. Dr Todman considered that those symptoms reached a threshold of severity that would warrant an impairment rating in their own right. In that regard, Dr Todman had in his 11 June 2013 report assessed, separate to the brain injury, a six per cent whole person impairment for the plaintiff's cervical spine injury, and a further three per cent whole person impairment for her headaches and her anosmia respectively. Dr Todman also ventured an opinion about the hours of assistance the plaintiff would require for heavier domestic activities. There is no need to pursue this issue since I do not rely upon Dr Todman's 2013 opinion or his revised 2016 opinion in relation to the extent of care required. Dr Cameron participated in a pre-trial conference with counsel and signed a file note dated 6 March 2016 in relation to Dr Todman's revised opinion in relation to care and supervision. He expressed opinions about the extent to which Dr Todman's opinion in that regard could be reconciled with his 2013 report.

[92] Neither Dr Todman nor Dr Cameron examined the plaintiff after their respective examinations in June 2013. Dr Cameron's assessment at that time of a whole person impairment of seven per cent using Tables 13.5 and 13.6 was based upon a view that the plaintiff had only slight forgetfulness, only slight impairment in problem solving, only a slight impairment in community affairs and only a slight impairment in her home life, hobbies and intellectual interests. It also was based upon the view that she was fully capable of self-care.

[93] On the basis of those views, Dr Cameron in June 2013 adopted a Clinical Dementia Rating ("CDR") of 0.5 on Table 13.5 and therefore a Class 1 rating on Table 13.6 which contains a range of one per cent to fourteen per cent impairment of the whole person.

[94] In his oral evidence Dr Cameron was cautious about relying upon the neuropsychologists' reports to revise the various assessments of "slight" impairment so that they were given a CDR of 1.0. Dr Cameron acknowledged that the plaintiff's significant impairments with memory function, information processing speed and some moderate difficulty with executive functioning might result in a CDR of 1.0. The reason for his caution was his belief that the plaintiff's psychiatric component might also modify memory and cause forgetfulness. He acknowledged that the psychiatrists had separately assessed the plaintiff's psychiatric condition and that they each had deferred to the neuropsychologists with respect to the plaintiff's cognitive impairments. Dr Cameron, quite properly, did not seek to proffer an opinion about the plaintiff's psychiatric impairment. His original 2013 opinion, as well as his oral evidence, showed that his assessment of a CDR of 0.5 was premised on the plaintiff having slight forgetfulness and other slight impairments. His views in that regard were acknowledged to be based on the fact that the plaintiff maintained her work for about a year. Dr Cameron reasoned that this meant she could act independently.

[95] He acknowledged under cross-examination that an assessment depended on how well the plaintiff did at work and how much accommodation she was given by her employer. He acknowledged that much would depend upon whether there was a sympathetic employer and upon the employer's assessment of her work. There is no evidence that in June 2013 Dr Cameron was aware of the extent of accommodation which the plaintiff's employer had extended to her. His final few answers suggest that he was not. He was aware of her inability to cope with work, but in June 2013 suspected that "most of her inability to cope is due to her depression which is now being successfully treated." In fact, neuropsychological tests which had not then been reported pointed to cognitive impairments as a source of her poor productivity. His view that the plaintiff's psychiatric problems were being successfully treated, and that once she was cleared by a psychiatrist she would be able to return to office work, was not informed by the later neuropsychological tests, or by evidence of the memory and other cognitive problems which the plaintiff presented to her friends, family, work colleagues and a sympathetic employer.

[96] In light of all of the evidence, including the evidence which Dr Todman indicated would be important in reaching a clinical judgment, including the effect of memory impairment on activities of daily living, such as keeping appointments, taking medication and attending to normal duties without prompting or reminding, I consider that limited store can be placed upon the six and seven per cent whole person impairments that were assessed by the neurologists in 2013.

[97] Appropriate account should be taken of the neuropsychological assessments that were performed in 2013 and 2015. The assumptions made in 2013 by Dr Cameron and Dr Todman about the plaintiff's memory problems and the plaintiff's ability to work and act independently are not supported by all of the evidence before me concerning the extent of the problems which the plaintiff has experienced with her memory, both at home and at work. The neurological evidence about her organic brain injury, coupled with the neuropsychological evidence about the extent of her cognitive impairments, leads me to conclude that the plaintiff's brain injury has produced memory loss which interferes with everyday activities. The plaintiff has not experienced only "slight forgetfulness" or "benign forgetfulness" (Table 13.5, CDR 05). She suffers "moderate memory loss" and her condition "interferes with everyday activities" (Table 13.5, CDR 1.0). Her cognitive impairments mean that she is not fully capable of self-care. Instead, she needs prompting.

Her brain injury and her consequential cognitive impairments mean that she is not able to live independently. Nor is she able to return to the kind of office duties she previously performed because of her problems with memory, processing information and executive functioning.

[98] In reaching these conclusions I am not being critical of either Dr Todman or Dr Cameron in reaching the opinions which they did in 2013. Instead, in 2013, and even now, they do not have all the evidence which I have had the benefit of receiving. I take into account Dr Cameron's observation that the plaintiff's psychiatric problems may contribute to her "forgetfulness". However, the psychiatrists appropriately deferred to the assessments undertaken by the neuropsychologists concerning the extent of the plaintiff's cognitive impairments. Those cognitive impairments are such that the plaintiff's impairment as a result of her brain injury warrants an assessment of a CDR of 1.0 and a Class 2 rating in accordance with Table 13.6. That Class reflects an impairment which requires direction of "some activities of daily living".

[99] I have had regard to Exhibit 5, being the AMA-5 Table 13.5 (clinical dementia rating) and Table 13.6 (criteria for rating impairment related to mental status). Having regard to the whole of the evidence, I consider that Ms Anderson's adoption of a Class 2 impairment is appropriate. The plaintiff experiences significant memory loss. Her executive functioning, judgment and problem solving are significantly impaired. Her activities in the community are extremely limited. She needs prompting with personal care. The neuropsychologists' opinions, in conjunction with the evidence of how her cognitive impairments affect her in daily life, warrant a finding of a moderate brain injury (Item 7).

[100] I conclude that the plaintiff's brain injury falls within Item 7 (Moderate brain injury) in Schedule 4 of the *Regulations*. The ISV range for Item 7 is 21 – 55. Viewed in isolation, I would assess an ISV of 40 in respect of the plaintiff's brain injury. This is because the plaintiff has significant cognitive impairments. For all practical purposes she has lost her capacity for employment or has a greatly reduced capacity for employment. She has an increased risk of epilepsy. The consequences of the brain injury are permanent and will afflict her for what is likely to be a long life. She has insight into the effects of her cognitive impairments.

[101] As for the plaintiff's major depression, as earlier noted the plaintiff's psychiatric condition has been assessed at a Category 3 impairment with a 15 per cent disability on the PIRS. Schedule 4 of the *Regulation* categorises this as a Serious Mental Disorder (Item 11). This item provides an ISV range of 11 – 40. The defendants submit that since the PIRS rating must be between 11 and 30 per cent, the finding of a 15 per cent PIRS rating places it about a quarter into that range, and that parity suggests that the ISV should be at around a quarter of the range of 11 – 40, namely 19. While this submission has a mathematical attraction, regard must be had to many matters in assessing an ISV, including the injured person's age, degree of insight, life expectancy and loss of amenities of life. Regard also should be had to the unlikelihood that the plaintiff's serious psychiatric problems would have emerged if she had not been injured in the accident.[14] Viewed in isolation, I would assess the ISV for the plaintiff's Serious Mental Disorder at substantially more than 20. I assess it at 25.

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[14] See *Civil Liability Regulation* 2003 (Qld), Sch 4, Part 2, "General comment for items 10 to 13" for the factors to take into account in assessing an ISV for mental disorders.

[102] The plaintiff's complete loss of smell was assessed by Dr Bird to represent a five per cent whole person impairment. The defendants submit that this ought to be taken into account as a consequence of her organic brain injury, and that it should inform the assessment of the ISV for the brain injury. The plaintiff's submissions treat it as a separate injury, which should be taken into account when assessing an ISV for multiple injuries. Although having its source in the plaintiff's brain injury, the ISV of 40 which I have adopted for Item 7 is on the basis of the her cognitive impairments, and does not take into account her anosmia. A separate assessment of her anosmia accords with the approach taken by the neurological experts in their reports. Item 34 of the *Regulation* provides that a total loss of either smell or taste attracts an ISV in the lower end of a 6 to 9 ISV range. As there is evidence that the plaintiff's anosmia has also had some effect on her sense of taste, I would adopt an ISV of 7.

[103] The other injuries include a minor cervical spine injury (Item 89 with an ISV of 0 – 4), a minor lumbar spine injury (Item 94 with an ISV of 0 – 4) and a minor pelvis injury (Item 128 with an ISV of 0 – 10). The medical experts, including Dr Morris and Dr Pentis, have reported on the plaintiff's symptoms of pain. These symptoms continue. Dr Morris, in June 2013, questioned whether the plaintiff was developing a "chronic pain syndrome", but such a condition has not been diagnosed. During the trial the plaintiff was physically examined by each occupational therapist. On the basis of Mr Fraser's clinical examination on 7 March 2016, and Ms Hague's examination on 9 March 2016, I conclude that the plaintiff has a mild reduction in the range of movement in her cervical spine and of the lumbar spine.

[104] The plaintiff's fracture of the left pubic ramus healed, but she experienced pain due to this injury. In the light of her pelvic injury and the whiplash injury which she received to her cervical spine and to her lumbar spine, the plaintiff has been advised by experts to restrict her work and recreational activities to activities that are not strenuous and which do not place undue strain on her spine or pelvis.

[105] In addition to the pain which the plaintiff has experienced and continues to experience as a result of her relatively minor orthopaedic injuries, the plaintiff suffers severe headaches. Dr Todman considered her frequent post-traumatic headaches were of an "episodic tension type" and were related to her "closed head injury as well as the injury to the cervical spine". He assessed them as representing an additional three per cent whole person impairment based upon AMA 5. I have not included these headaches as part of the ISV applied to the plaintiff's brain injury. If I had, then on the basis of Dr Todman's report I would have taken account of his three per cent assessment. Instead, I shall factor the plaintiff's headaches, together with the pain that she has experienced, into an ISV for her collective orthopaedic conditions, pain symptomatology and headaches, and assess an ISV totalling 10 in respect of them.

[106] I conclude that the plaintiff's brain injury is her "dominant injury".

An ISV for the plaintiff's multiple injuries

[107] In arriving at an appropriate ISV I bear in mind that the effects of some of the multiple injuries overlap. For example, both her brain injury and her serious mental disorder affect her ability to live an independent life. Some of her injuries, for example, her anosmia, present distinct and different impairments. She experiences pain when undertaking normal activities. She experiences persistent headaches.

[108] The cumulative effect of the plaintiff's injuries is to render her incapable of living an independent life and practically eliminates her capacity for employment. The plaintiff has an insight into what she has lost and she has lost many of the amenities of life. The simple addition of separate ISVs would yield a figure in excess of 80, but this is inappropriate because certain effects of her various injuries overlap. However, the number of injuries, their compounding effect, and the distinct aspects of her major injuries warrant an ISV in excess of 50. I consider that the ISV for the plaintiff's multiple injuries should be 55.

[109] Based on this ISV, general damages are calculated in accordance with s 62 of the *Act* at $130,600.

[110] Whichever major injury had been chosen as the dominant injury, the end result of the assessment would be similar. This is because the other major injury itself attracts a substantial ISV. The brain injury has no prospect of improvement. The major depression shows little hope of improvement. If it had been chosen as the "dominant injury" then the maximum ISV in the range for Serious Mental Disorders (40) would not adequately reflect "the level of impact"[15] of all the injuries. An increase of more than 25 per cent of the maximum dominant ISV would have been appropriate because of the extent of her cognitive impairments, and the separate effect of her other injuries.

[111] If the significant cognitive impairments which the neuropsychologists assessed and which the plaintiff's co-workers, supervisors, friends and family have observed on a daily basis are due to her depression, and not her brain injury, they remain significant impairments. The psychiatrists regarded those impairments as cognitive impairments, to be separately assessed by others. If, however, they are assessed as part of her psychiatric illness, then its ISV would be much more than 25. Therefore, if I had acted on Dr Cameron's suspicion that the plaintiff's impairments with memory and processing information are attributable to the plaintiff's psychiatric condition, then the final ISV would be practically the same.

Economic loss

[112] The assessment of economic loss is assisted by Mr Lee's report. Mr Lee has made calculations based on material in evidence, including evidence about the plaintiff's work history, earnings and entitlements. He has calculated past economic loss, future economic loss and loss of pension entitlements based upon records, including the plaintiff's pay records. Mr Lee acquainted himself, as best he could, with aspects of the Japanese pension system including the National Pension and the Employee's Pension Insurance system. The plaintiff gave evidence about her interaction with the local public employment security office after she became unemployed and the extent of her access to unemployment benefits. The defendants submit that insufficient work has been undertaken "to try to determine the nuances of the Japanese social security systems and income tax systems and how they interact". However, I am prepared to proceed on the basis of Mr Lee's report, conscious of the fact that in a case such as this the intricacies of the Japanese pension system are incapable of precise proof. No attempt was made by the defendants to suggest that the plaintiff is entitled to pensions or other insurance benefits for which she has not applied, or that any benefit to which she is entitled should be brought into account in reduction of damages in accordance with the principles in

[15] Section 4(1) of the *Regulation*.

The National Insurance Co of New Zealand v Espagne.[16] The methodology adopted in Mr Lee's report appears sound, and subject to one mathematical error which he corrected in Exhibit 4, the accuracy of his calculations is not challenged. There was, however, an issue concerning his instructions about the salary of a Team Leader with Sanco and his calculations based on the scenario that the plaintiff would have become a Team Leader by 2014.

[113] The plaintiff's prospects of promotion feature in the assessment of both past economic loss and contingencies affecting the assessment of her future earning capacity. The evidence supports the conclusion that the plaintiff had good prospects of long-term employment with Sanco and of being promoted.

[114] The person who was responsible at Sanco for all administrative decisions, including appointments, gave evidence that the plaintiff had very good prospects of advancement within the company before her accident. The plaintiff was very highly regarded. There was "the expectation that she would have advanced firstly to the position of Team Leader within a couple of years, and most likely after a further period of time to the position of Technical Chief". She then had a good chance to become a Department Manager. It could not be said for certain that the plaintiff would have progressed to the position of Team Leader within a couple of years, and then achieved further promotions, as expected. However, the evidence proves her motivation and qualities, and the regard in which she was held by her employer and fellow workers. This evidence was admitted under s 92 of the *Evidence Act* 1977 (Qld), and the employees of Sanco who gave this evidence were not subject to cross-examination. However, there is nothing to contradict their evidence and I am prepared to act upon it.

[115] These individuals vouched for the high regard in which the plaintiff was held within the Sanco organisation. She was described by one fellow worker as a "candidate for advancement" but for the accident. Prior to the accident, the plaintiff was observed to have experience, a high work ethic and to have been well-regarded by her supervisors. The evidence is that her prospects for advancement were based upon the quality of her work, including her high attention to detail, and the fact that she was an "excellent communicator" with her supervisors and with other workers. One of the plaintiff's former work colleagues states that the plaintiff's likely career path was as a Team Leader between the ages of 26 and 35, followed by the position of Chief between the ages of 30 and 40 years, with possible further promotions to Department Manager, Vice-Division Manager and Division Manager. Another work colleague attests to the plaintiff's excellent performance and attendance record. The evidence about the plaintiff's work performance and the high regard in which she was held by her employer provides a sound basis upon which to conclude that she was likely to be promoted, as her employer expected her to be.

[116] The plaintiff's evidence is that she was a strong candidate for promotion within Sanco. She was highly regarded and, due to her experience, had built up her own client base. She says that over time she would have enjoyed an increase in her base salary as well as an increase in her bonus, which are virtually automatic each year, based on the length of experience. She says that her likely career path was to be a Team Leader at about the age of 26. The Team Leader is responsible for a small group of about 20 staff. The plaintiff says that she would have reached the position of Chief at about 30 to 35 years, then

[16] (1961) 105 CLR 569.

Department Manager and finally Division Manager. Advancement to each of these positions would have led to an increase in base salary, together with allowances.

[117] There is a reasonably high probability that the plaintiff would have progressed to the position of Team Leader by the age of 26 (in mid 2014). There is also a reasonably high probability that she would have been promoted to the position of Chief by the time she was 35, and a good chance that she would have become a Department Manager about 10 years later, probably before she was 45. The possibility of further promotion cannot be excluded.

[118] Mr Lee's calculations of past economic loss and future economic loss are based on different scenarios about how the plaintiff's career would have progressed had she not been injured. The first two scenarios are based on a table annexed to Mr Lee's report, which sets out average wage structures in Japan for employees in positions similar to the plaintiff's pre-accident position, broken down by factors including gender, age and level of experience. Scenarios 1 and 2 represent the bottom and top respectively of what the plaintiff would expect to receive based on the averages set out in the tables. Scenario 3 is said to be based on the plaintiff having progressed to be "Team Leader" by age 26. On that basis, her past economic loss to the date of trial, 7 March 2016**,** was calculated by Mr Lee at ¥9,728,187. Scenarios 1 and 2, which did not involve such progression, calculate past economic loss to the same date at ¥6,986,434.

[119] These scenarios require some additional explanation. In Scenarios 1 and 2, Mr Lee has relied upon wage structure statistics from the Japanese Ministry of Health, Labour and Welfare. These labour statistics analyse average monthly salaries and earnings including base salary, bonuses and other benefits for different classes of employees. Appendix 11 to his report sets out the average annual total cash earnings, including base salary, bonuses and other benefits for female computer operators as at 2014. The salaries depend on age and years of experience in that role. A computer operator in her early 20s would earn slightly more than ¥2,600,000 in 2014. More experienced computer operators would earn more. The average for all ages exceeds ¥3,000,000. These figures, which appear in Table 11 of Mr Lee's report, are for computer operators. They are salaries as at 2014 and do not reflect promotions to managerial or other positions. Applying this statistical basis, Mr Lee adopted in the calendar year for 2013 a notional earning of ¥2,600,000 and for the calendar year 2014 a notional salary of ¥2,700,000. In later years there are similar small salary increases of ¥100,000 each year in most years with the salary plateauing in 2022.

[120] The defendant questions the adoption of a notional salary commencing at these figures in 2013-2014 by reference to the plaintiff's income statements. However, as Mr Lee points out, adjustments need to be made to the income which she received after her accident because of substantial absences. At the date of the accident in December 2011, the plaintiff's base wage was approximately ¥176,300 per month or ¥$2,115,600 per annum. To this should be added bonuses which by reference to paragraph 5.7 of Mr Lee's report were close to ¥350,000 per annum. Taking account of salary increments on the basis of wage growth or years of experience, a notional income of ¥2,600,000 in the calendar year for 2013 and ¥2,700,000 in the calendar year of 2014 is realistic. As noted, Scenarios 1 and 2 provide for modest increases in income in later years, consistent with general wage growth and increasing years of experience. They do not include notional promotions to managerial positions and the salary increases which would come with them.

[121] Scenario 3 is said to be based upon the plaintiff's progression to "Team Leader" in 2014. Mr Lee was instructed that the salary of a "Team Leader" was ¥370,000 per month (net of income tax). However, there is no specific evidence of this. The evidence is that ¥370,000 was the monthly after tax base salary of Mr Hirose (or someone in his position) in 2013. His witness statement describes him as a Department Manager, rather than as a Team Leader. In 2013 a Department Manager received a monthly base salary of ¥470,000 before tax and a monthly allowance of ¥65,000 on top of his or her base salary.

[122] Scenario 3 in Mr Lee's report has adopted a figure which approximates the after tax base salary of a Department Manager as the pre-tax earnings of a Team Leader. It may not be an appropriate reflection of the income which the plaintiff would have received assuming, as I do, that she probably would have been promoted to Team Leader by 2014.

[123] Scenario 3 does not calculate, and in fact understates, the income of a Department Manager, since it adopts a gross base salary of ¥370,000, rather than ¥470,000, and does not include the monthly allowance for that position of ¥65,000 (or ¥780,000 per annum). It probably also overstates the income of a Team Leader, since it is highly unlikely that a promotion from the plaintiff's position in 2014 to the position of Team Leader would have resulted in an increase in her annual income to ¥4,500,000. When I raised these matters with the parties, supplementary written and oral submissions were made on 22 June 2016. The plaintiff acknowledges that Scenario 3 overstates the plaintiff's future economic loss to the extent that it accelerates her promotions to Team Leader, Technical Chief and then to Department Manager.

[124] The result is that Scenarios 1 and 2 understate the plaintiff's likely notional salary and loss, whilst Scenario 3 overstates them. In the circumstances, it would be inappropriate to restrict the plaintiff's loss, particularly her impaired earning capacity, to Scenario 1 or 2 since they are based upon an extrapolation of her likely salary, without any increases for promotion. It also would be inappropriate to adopt Scenario 3 without modification to adjust for the unrealistic accelerated promotion, and to adopt amounts for the income including allowances she would probably earn in various positions.

[125] Mr Lee's assessment under each scenario is summarised in his report as follows:

Head of Loss	**Scenario 1**	**Scenario 2**	**Scenario 3**
Past Economic Loss			
01 Jan 2012 to 20 Mar 2013	¥543,484	¥543,484	¥543,484
21 Mar 2013 to 07 Mar 2016	¥6,442,950	¥6,442,950	¥9,184,703
Total Past Economic Loss	**¥6,986,434**	**¥6,986,434**	**¥9,728,187**
Future Economic Loss	**¥45,453,052**	**¥56,741,885**	**¥76,381,294**
Loss of Pension Entitlements	**¥10,998,541**	**¥13,418,573**	**¥18,247,128**

This table from his report requires a small adjustment which would reduce the loss in Scenarios 1 and 2 for the period 21 March 2013 to 31 December 2013 and result in a reduction in past losses of ¥140,690 (or approximately AUD $1,650). The loss in that

nine month period would be ¥1,593,263. This reduces past economic loss under those scenarios to ¥6,845,744.

Past economic loss

[126] There is no real contest that the plaintiff's past economic loss between 1 January 2012 and 20 March 2013 was ¥543,484. As to the subsequent periods until trial, Scenarios 1 and 2 understate the plaintiff's loss for the reasons previously given. On the basis of my findings, the plaintiff very probably would have progressed to the position of Team Leader by mid-2014. It is appropriate to adjust her notional salary and her pre-trial economic loss to account for such a promotion. Having regard to the available evidence about salaries and allowances for certain positions, but the absence of specific evidence about the base salary for a Team Leader, I consider it appropriate to adopt a moderate approach to the increase in base salary which the plaintiff would have achieved upon appointment as Team Leader. A base salary increase of between 20 per cent and 30 per cent seems appropriate in the circumstances. Assuming the plaintiff's pre-promotion income was ¥2,700,000, her post-promotion income as Team Leader would probably be in the range of ¥3,240,000 to ¥3,510,000 in 2014, before the addition of an annual allowance of ¥120,000. I adopt a total figure of ¥3,500,000.

[127] Schedule D to Mr Lee's report calculates a loss after account is taken for various taxes (but not a social insurance deduction).[17] An annual notional salary of ¥3,500,000 yields an annual loss of ¥2,722,250. I will adopt a smaller figure to take account of the fact that the promotion to Team Leader by 2014 was not a certainty. An annual loss of ¥2,500,000 seems appropriate for each of these years.

[128] I assess past economic loss as follows:

1 January 2012 to 20 March 2013	¥543,484
20 March 2013 to 20 March 2014	¥2,124,351[18]
20 March 2014 to 20 March 2015	¥2,500,000
20 March 2015 to 20 March 2016	¥2,500,000
20 March 2016 to 30 June 2016	¥625,000
Total to 30 June 2016	**¥8,292,835**

Loss of earning capacity

[129] For the reasons previously given, the plaintiff is presently unemployable, and is likely to remain unemployable into the future. The assessment of damages for loss of her earning capacity has to take into account a number of contingencies, including the possibility that her psychological condition will improve to the extent that she has a capacity to work with that improved psychological condition, but nevertheless subject to the cognitive impairments and physical limitations that I have previously discussed. Any residual earning capacity in that regard would still depend upon her finding a sympathetic potential employer, prevailing in an interview process against other applicants who do not have her cognitive and other impairments, and being offered work in conditions which are suitably adapted to her impairments.

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[17] I note that account was not taken of the deduction for social insurance which, if brought into account, would reduce net income. However, Mr Lee explained his approach in that regard in his report at 8.11 and 8.12 and in re-examination, which I accept.

[18] An extrapolation of loss for a full year on either Scenarios 1 or 2 of a nine month loss of ¥1,593,263.

[130] I take into account the contingency that future treatment, and perhaps the effluxion of time, may improve the plaintiff's psychological condition. However, apart from Mr Fraser's optimism that a rehabilitation program would have that effect, there is little other evidence to suggest that the chance of a significant improvement in the plaintiff's psychological condition is good. I consider that the chance is fairly low. Even on that contingency, the plaintiff's future earning capacity will not be greatly enhanced because of her remaining problems and the likely absence of a sympathetic employer who will be prepared to accommodate her. In circumstances in which her supportive employer, who valued her past work highly, was unable or unwilling to maintain her in employment, it seems very unlikely that any other employer will engage her in the future. In addition, she has now been unemployed for a substantial period.

[131] Another contingency is that the plaintiff may not have remained within the workforce, or not remained in full-time employment. She may have taken time out from full-time work for personal reasons. However, I think it likely that she would have remained in the workforce for most of her potential working life. I take into account the possibility of her taking a few years leave whilst any children she had were young and the possibility of her choosing not to be employed full-time or at all for certain periods for other personal reasons. But that contingency does not justify a substantial reduction when regard is had to the probable number of years she may have taken leave from the workforce compared to the probable number of years in her working life.

[132] The plaintiff and her family are not independently wealthy. She was motivated to work until at least 65 and planned to. The contingencies I have mentioned need to be assessed, having regard to their probability and the likely period she would have been away from full time paid employment, compared to the total period of her previously expected working life.

[133] Whilst she had secure employment with Sanco and good prospects of promotion, with her working life probably being a long one but for the accident, one cannot be sure that Sanco will not encounter financial or other difficulties in the future, such that the plaintiff might have lost her job. The contingency of unemployment therefore needs to be taken into account. So too must the contingencies of injury, severe illness and death.

[134] As against those and other negative contingencies are positive contingencies, including a promotion beyond the position of Department Manager.

[135] The plaintiff was a young, fit woman with no health issues who intended to work full-time until at least age 65. The plaintiff's evidence is that there is a likelihood, which is typical in Japan, that she would continue to work beyond 65 up to the age of 70.

[136] The defendants submit that there should be a substantial deduction for the usual vicissitudes of life, and that this should be increased because of the existence of a residual earning capacity. Progression through various jobs and various salary levels is said not to have been "any kind of certainty". Particular reliance is placed upon the fact that her psychiatric disability is a significant one and upon the possibility that, with treatment, it may improve. This is submitted to justify "a higher than usual discount".

[137] I accept that account should be taken of the usual vicissitudes of life and the chance of the plaintiff regaining some residual earning capacity, although the chance of her doing so and the residual earning capacity translating into paid employment is small.

[138] Overall, I must take account of both positive and negative contingencies in assessing the plaintiff's loss of earning capacity.[19] I have to take into account future or hypothetical events and do so in terms of the degree of probability of those events occurring.[20] I also need to take account of the point of time at which those events might occur, and their financial consequences.

[139] The starting point, in my view, is the high likelihood that by now the plaintiff would have progressed to the position of Team Leader. She probably would have become a Technical Chief in her early to mid thirties. Her employer says that there was a good chance for her to then become the Department Manager. In assessing that contingency and its benefit, a reasonable working assumption is that she would have achieved that position by the time she was 45. The figure of ¥76,381,294 in Schedule F to Mr Lee's report assumes too generously in the plaintiff's favour the receipt of an annual notional salary of ¥4,500,000 commencing in 2014. However, his Scenario 3 calculations do not provide for any further promotion beyond the position of "Team Leader" over the following decades. Further, his calculations are not based upon the gross salary of a Department Manager. His gross income figure approximates the net base salary for that position, and does not include annual allowances. However, Mr Lee's calculations in Schedule F provide a useful point of reference for the purpose of assessing future losses over various periods.

[140] A further point of reference in order to assess the financial impact of promotions is the plaintiff's supplementary written submissions, which adopted the following base salaries:

- Team Leader ¥3,900,000 per annum
- Technical Chief ¥4,600,000 per annum
- Department Manager ¥5,640,000 per annum

The plaintiff's calculations assume:

(a) a current loss of ¥2,900,000 (before tax) per annum;

(b) a loss as Team Leader from age 28 (in August 2016) of ¥3,900,000 per annum and continuing at that level for seven years to age 35;

(c) a promotion to Technical Chief with an assumed income of ¥4,600,000 (¥383,333 gross per month) by her 35th birthday;

(d) a promotion to Department Manager by age 45 at ¥5,640,000 per annum gross and continuing in that role until retirement at age 65.

[141] This results in the following calculation:

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[19] *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 497.

[20] See generally *Phillips v MCG Group Pty Ltd* [2013] QCA 83 at [74]; *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643; [1990] HCA 20 at [7].

	To age 28 on 1 August 2016	To age 35 on 1 August 2023	To age 45 on 1 August 2033	To age 65 on 1 August 2043
Annual Loss (before tax)	¥ 2,900,000	¥ 3,900,000	¥ 4,600,000	¥ 5,600,000
Less: Tax & Contributions	¥ 637,139	¥ 912,350	¥ 1,095,546	¥ 1,437,904
Annual Loss (after tax)	¥ 2,262,861	¥ 2,987,650	¥ 3,504,454	¥ 4,162,096
Number of Weeks	52.2	52.2	52.2	52.2
Weekly Loss (after tax)	¥ 43,350	¥ 57,235	¥ 67,135	¥ 79,734
5% Discount Multiple	20.79	309.32	412.92	666.35
Lump Sum of Loss	¥ 901,419	¥ 17,703,800	¥ 27,721,406	¥ 53,130,497
5% Deferral Factor	1.000	0.981	0.697	0.428
Present Value of Loss	¥ 901,419	¥ 17,359,554	¥ 19,319,938	¥ 22,730,677
				¥ 60,311,588

[142] These calculations are somewhat conservative since they assume that the plaintiff would only be promoted to the position of Team Leader now, whereas the evidence supports a finding that she probably would have been promoted to that position in 2014. The assumed base salary for a Team Leader is somewhat higher than the one which I have adopted in respect of past economic loss in 2014 and 2015, a figure of ¥3,500,000. The later increase in base salary for the position of Technical Chief is a relatively moderate increase. The plaintiff's calculations take no account of allowances, which, in the case of a Technical Chief were ¥480,000 and in the case of a Department Manager were ¥780,000 per annum in 2013. Their inclusion over a period of decades would substantially increase the figure for loss of future earning capacity.

[143] As against these scenarios with their assumptions of promotions are Scenarios 1 and 2 which I have previously explained. Scenario 1 and Scenario 2 are too conservative in not including the financial benefits of any future promotion. A 20 per cent enhancement of the Scenario 2 figure of ¥56,741,885 produces a figure of approximately ¥68,000,000. Having regard to the various scenarios, and making appropriate adjustments for what various calculations include, do not include or assume, I consider that an appropriate figure to take account of the plaintiff's prospects for promotion is ¥65,000,000.

[144] I must then adopt an appropriate discount for negative contingencies. Contingencies are to be considered in terms of their likely impact on the earning capacity of the plaintiff, not by reference to the workforce generally.[21] The plaintiff submits that the figures which it has advanced are conservative. On that basis, there should be little or no further discounting. I have previously addressed the plaintiff's residual earning capacity and the small possibility that an improvement in her psychological condition will make her suitable for some kind of employment, along with the likelihood of that capacity translating into actual employment. I also take account of contingencies which expose employees to the risk of loss of income such as sickness, accident and unemployment,

[21] *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 497.

and periods out of the workforce on leave taken by choice. I consider that it is appropriate to discount the figure of ¥65,000,000 which I have adopted above by 15 per cent, which produces an assessed loss for impairment of future earning capacity of ¥55,250,000.

Loss of pension entitlements

[145] Mr Lee's report contains material about the Japanese pension system. The material indicates that it has two parts. The first is the National Pension which is a basic public pension system, designed to provide people with common pension benefits. The other is Employees' Pension Insurance. The National Pension is compulsory for all residents of Japan aged between 20 and 59. The plaintiff's father has continued to pay her contributions as required, and it does not feature in an assessment of her loss. The Employees' Pension Insurance is a system which provides an "earning-related pension" on top of the basic pension. If a person works for a company or a factory which regularly employs five workers or more, then the person is subject to compulsory coverage. Others may enrol in the system on a voluntary basis. The employee and the employer contribute equally based upon a monthly standard remuneration and a standard monthly bonus amount. Reforms introduced in 2004 provide for an increase in the annual contribution rate each year. In around 2003 the total contribution was 13.58 per cent (i.e. employer and employee contribution rates were 6.79 per cent respectively). By September 2009 it had increased to a total of 15.704 per cent (i.e. employer and employee contribution rates were 7.852 per cent respectively). The contribution rate rises 0.354 per cent each year. From 2017 onwards the total contribution rate will be 18.30 per cent (i.e. employer and employee contribution rate will be 9.15 per cent respectively). Presently, it is less than 18 per cent and so the current employer contribution is less than nine per cent.

[146] Mr Lee assessed the plaintiff's loss of pension entitlements by comparing her notional pension entitlements (i.e. the assumed level of pension entitlements had the accident not occurred) to her actual expected pension entitlements as a result of the accident. His assessment commenced on 21 March 2013, and is premised on the fact that Ms Yamaguchi has not returned to work since 21 March 2013 and will not do so. Adjustments have been made for income tax in respect of the final pension entitlement. Notional tax rates have been applied to notional contributions. Mr Lee's calculation of the plaintiff's loss of pension entitlements is as follows:

Description	**Scenario 1**	**Scenario 2**	**Scenario 3**
Past Loss of Pension Entitlements	¥1,284,951	¥ 1,257,845	¥ 1,828,022
Future Loss of Pension Entitlements	¥ 9,713,590	¥12,160,728	¥16,419,106
Total	**¥10,998,541**	**¥13,418,573**	**¥18,247,128**

[147] Mr Lee noted s 56 of the *Civil Liability Act* 2003 (Qld), which provides:

> **"56 Damages for loss of superannuation entitlements**
>
> (1) The maximum amount of damages that may be awarded to an employee for economic loss due to the loss of employer superannuation contributions is the relevant percentage of damages payable (in

accordance with this part) for the deprivation or impairment of the earning capacity on which the entitlement to the contributions is based.

(2) The relevant percentage is the percentage of earnings that is the minimum percentage required by a written law to be paid on the employee's behalf as employer superannuation contributions."

[148] He notes that his calculation of the plaintiff's future loss of pension benefits at the rate of 9.15 per cent might appear to exceed the amount stated in s 56. However, leaving aside issues of concessional tax rates on contributions, notional superannuation contributions are based on a contribution rate of up to 9.15 per cent of the plaintiff's *gross* earnings. Mr Lee noted in this regard the decision in *Najdovski v Crnojlovic*.[22]

[149] The defendants submit that loss of superannuation benefits should be allowed at the rate of 9.25 per cent in respect of past benefits and 11 per cent in respect of future benefits.

[150] The plaintiff submits that in the absence of evidence of a statutory requirement upon an employer to pay "employer's superannuation contributions", s 56 is not engaged. In his evidence, Mr Lee was unsure whether the entitlement to Employees' Pension Insurance was a matter provided for by a Japanese statute or was, in effect, a contractual entitlement. However, I infer from the material that the obligation on a relevant employer to contribute equally under the Employees' Pension Insurance is a matter of compulsion under Japanese law. Although styled an earnings-related pension, in the absence of argument to the contrary, I am inclined to treat it as being in the nature of a scheme which provides for "employer superannuation contributions" within the meaning of s 56(1).

[151] The plaintiff relies upon *Najdovski v Crnojlovic* in which Basten JA (with whom Allsop P agreed) concluded that account must be taken of the fact that damages payable for deprivation for impairment of earning capacity are based on net earnings whereas the then minimum percentage required by law to be paid as employer's superannuation benefits of nine per cent was of an employee's "ordinary time earnings". As a result, the calculation of the maximum amount of damages to be awarded under s 15C of the *Civil Liability Act* 2002 (NSW) was assessed on the basis of 11 per cent of earnings net of tax.[23] The defendants' submissions do not question the correctness of that approach and I respectfully follow it. In this case, the employer contribution in the past has always been less than nine per cent. The figure of 9.15 per cent that will apply in 2017 and later years, is calculated on the basis of gross earnings. Having regard to the adjustment required by the decision in *Najdovski v Crnojlovic*, the plaintiff's future loss of pension benefits as a result of the loss of prospective employer superannuation contributions does not exceed the amount allowed under s 56 of the *Civil Liability Act* 2003 (Qld).

[152] The loss will be calculated in accordance with Mr Lee's approach. I have calculated the percentage which his figure for past loss of pension entitlements bears to his figure for past economic loss under Scenarios 1, 2 and 3. Subject to adjustments earlier noted arising from Exhibit 4, the percentage is approximately 18.5 per cent. I apply that percentage to past economic loss of ¥8,292,835 to arrive at a figure for past loss of pension entitlements of ¥1,534,174. As for the future, the figures calculated by Mr Lee

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[22] (2008) 72 NSWLR 728 at 734 [52] - 736 [58].

[23] (2008) 72 NSWLR 728 at 738 [82]; see also *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270 at [56] – [57].

in respect of future loss of pension entitlements compared to future economic loss under different scenarios are approximately 21.5 per cent. I apply that percentage to the figure which I assess for impaired earning capacity of ¥55,250,000 to arrive at a figure for future loss of pension entitlements of ¥11,878,750. The total for lost pension entitlements is ¥13,412,924.

Care and assistance

[153] I have already summarised the evidence about the plaintiff's ongoing need for care and assistance. It has varied over different periods, including the period of her hospitalisation and early rehabilitation, the period when she was able to return to work with difficulty and various periods since then, including periods when she was required to travel to Australia for medical examinations. The evidence of the actual assistance provided to her from time to time, principally by her mother and father, was suitably detailed in witness statements, supplemented by oral evidence. I do not propose to canvass it in all of its detail. However, s 59 of the *Civil Liability Act* and case law require me to consider whether, objectively speaking, the relevant services are truly needed. The essential issues are whether there is a proven need of the plaintiff for the services provided to her, and the extent of that need.

The evidence

[154] Immediately after the accident the plaintiff's parents were involved in medical and administrative tasks to assist her. During her time in the Cairns Base Hospital, the plaintiff was isolated and disturbed and became increasingly worried about her serious injuries. The foreign health care system played on her mind. Family contact was essential to her. Family assistance was also required in dealing with travel agents and her employer. The plaintiff's mother had lengthy conversations with her on the telephone in an attempt to ease her worries. After the plaintiff was transferred to a hospital in Japan her parents attended upon her to provide emotional support and encouragement which could not be met by hospital staff. Ordinarily, in-hospital care by relatives in place of that provided by nursing staff is not compensated.[24] For her period in Cairns Base Hospital, nursing staff could not provide the counselling which the plaintiff's parents were able to. During the 10 days she was in hospital in Japan the plaintiff received emotional support from her parents for two to three hours per day, however, this is not included in my assessment.

[155] After she was released from hospital, she required assistance from her parents and from her then boyfriend to accommodate her needs, including transportation to medical consultations and rehabilitation providers. The evidence, which I accept, is that she required at least four hours assistance per day. Her father also provided assistance with administrative tasks, such as the work relating to insurance and hospital bills. Having regard to the plaintiff's different needs when she was in hospital in Cairns (17 days x two hours per day) and in the two months after she was discharged from hospital in Japan (59 days x four hours per day), I consider that an appropriate assessment is 272 hours.

[156] After 26 March 2012 the plaintiff continued to live at her parents' home. Her parents supported her in a variety of ways. The evidence of her mother and father indicates that

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[24] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560; [2010] QCA 17 at [10] – [11]; *Waller v McGrath & Suncorp Metway Insurance Limited* [2009] QSC 158.

she was assisted with a range of activities, including undertaking domestic tasks in relation to her care and providing transport. Her attempt to return to work proved difficult. The plaintiff's mother would drive her to work sometimes. The plaintiff would return home with an aching body and headaches, and not be able to perform her own cleaning or cook her own meals or do housework. The plaintiff's father typically would devote substantial time each weekend. Although he works as an office worker at a university, he is a certified physical trainer and made concerted efforts to improve his daughter's physical and psychological health. This included taking her to the park as a form of exercise and to change her surroundings. I consider that assistance was required for at least two hours per day between 26 March 2012 and the end of 2012.

[157] I turn to summarise the evidence concerning the period since January 2013, during which there was a decline in the plaintiff's ability to care for herself and a deepening of her psychological problems. Separate assessment is required for an 11 day period in June 2013 when the plaintiff was required to travel to Australia for medical examinations. She was accompanied by her mother and a claim of 10 hours per day for this period is reasonable. Her mother had to take time off work to provide care and assistance to the plaintiff and an assessment of 110 hours for this period is appropriate.

[158] I assess the evidence concerning the plaintiff's need for care and assistance since January 2013 against the background of the plaintiff having been unable to live independently throughout 2012. During 2012 she was unable to undertake domestic duties and self-care without assistance. She needed assistance with cooking and meal preparation. She could not attend to tasks without prompting or "coaching" by her mother or father. On one occasion when she was helping with meal preparation she forgot to turn off the gas, and could not smell it. The smell of a burning frypan filled the entire house and her mother, who was in another room, noticed it. If her mother had not been there, a fire may have started.

[159] The plaintiff continued to require assistance with domestic tasks and self-care due to her impaired memory and her despondency. Her relationship with her boyfriend ended. Her parents' extensive support included assistance with laundry, cleaning her room and food preparation and cooking. Her mother continues to attend to the bulk of grocery shopping. The plaintiff is unable to undertake basic tidying of her room and her mother undertakes tasks such as vacuuming. She continues to receive counselling from her parents in an attempt to improve her mood, including prompting her go outside and to get out of bed each morning. She needs prompting with eating.

[160] The plaintiff's mother estimated that after January 2013 she provided a range of assistance to the plaintiff, including help with personal care, domestic chores and transportation, and prompting of the kind which I have described for about 10 hours per week.

[161] By early 2014 the plaintiff's mother estimated that she was providing care and assistance between one and one and a half hours each day during the week, and a further five to ten hours assistance across the weekend. In addition to assistance with domestic tasks, including lifting items and performing tasks which the plaintiff was unable to undertake because of her physical restrictions and pain, the plaintiff's mother had to spend more time with the plaintiff when she was in a highly emotional state, encouraging her and prompting her. The plaintiff's mother would devote most of her available time when she was not at work to the support and care of her daughter.

[162] By the time of the trial, the plaintiff's mother and father each continued to care and support their daughter with a range of domestic tasks, emotional support and prompting. The plaintiff's mother's witness statement dated 13 August 2015 describes the tasks including housework, laundry, cooking and meal preparation, grocery shopping, prompting with maintaining a healthy diet, emotional support and transport. Her evidence includes estimates of the time taken on a variety of tasks. The plaintiff's mother, having reflected on the types of assistance which she provided and the time involved, estimated it to be 20 hours per week based upon a period of between one and a half and two hours assistance each day during the week and a further period of 8 to 12 hours assistance across the weekend. This is separate to the assistance provided by the plaintiff's father. On occasions the amount of support was greater, particularly when the plaintiff was in a highly emotional state.

[163] The extent of the support provided by the plaintiff's mother to her was such that plans had to change in respect of the plaintiff's mother's proposal to care for her own mother. The plaintiff's grandmother had lived with her daughter and family between 2003 and 2013. She suffered dementia and required support. But arrangements had to be made for her to move to a nursing home. I am inclined to think that the plaintiff's mother's decision for her mother to move to a nursing home was the result of a genuine need to care for the plaintiff.

[164] In her oral evidence, the plaintiff's mother described how by 2013 she was required to attend to the tasks described in her witness statement including cleaning and cooking. The plaintiff's mother's evidence was given with the assistance of an interpreter and she was cross-examined about aspects of the household chores that she undertook for her daughter. She rejected the proposition that the plaintiff was in fact able to do her own cooking and other tasks and that the plaintiff's mother had allowed a situation of dependence to develop. I accept her evidence that there are domestic tasks which the plaintiff cannot do for herself. The plaintiff's mother's evidence disclosed that she encouraged her daughter to cook with her and that the plaintiff could provide some assistance with food preparation and the like, but that she had physical restrictions and reported pain. She encouraged her daughter to do simple light duties, such as wiping things down and sweeping. However, the plaintiff had trouble bending over and could not perform major cleaning tasks. I accept the plaintiff's mother's evidence about her daughter's needs and her various attempts to encourage the plaintiff to assist with cleaning, cooking and other tasks.

[165] The plaintiff's father gave witness statements and oral evidence. In early 2013 he estimated that he was providing assistance to his daughter of about five hours per week, mainly on the weekends when the plaintiff's mother would work. By the time of the trial, the plaintiff's father was continuing to provide practical assistance and support for his daughter. His support was mainly provided on the weekend due to his work during the week and he estimated that he provided about eight to ten hours support per week, largely on Saturdays and Sundays. These were activities which were not required before the accident. He was required to spend more time than he had spent in 2013 because of the deterioration in the plaintiff's mental health. Over that period he has had to take steps to improve her mood and has had to go out with her into the community because she tends to only go out in public if accompanied by a family member or friend. The plaintiff's father gave evidence about the way in which his daughter struggles with following directions. Her comprehension is slow. He may say things to her and a short time later she will have forgotten them or she will remember a topic in a general way, but have

forgotten details. Unlike before the accident, the plaintiff struggles to remember new information. For example, she cannot remember how to use a smart phone and needs to be repeatedly told by her father how to use it. Before the accident, the plaintiff was able to understand how to use electronic devices. The plaintiff may speak to someone on the phone and take a message, but not remember what the message was. The plaintiff's father's evidence confirms the inability of the plaintiff to live independently and her need for care in undertaking daily tasks, including prompting with activities of daily living, such as eating, showering or picking out clothes to wear. There is a legitimate concern for the plaintiff's safety.

[166] Incidentally, the plaintiff's father's evidence confirms the barriers which the plaintiff confronts with any return to employment. He has experience as an interviewer and correctly appreciates the difficulty which the plaintiff will encounter in being accepted into the workforce because of her cognitive impairments and depression. He reports that the plaintiff has difficulty speaking about her accident without breaking down into tears. He reports how she had to resign from her job at Sanco, which had made allowance for her injuries. He points out, what is perhaps obvious, that no-one would employ someone with the plaintiff's known physical and psychological impairments and that she would never last even if she got a job by withholding information about her background. He concludes in his 2 February 2016 statement that she is struggling just to look after her own affairs.

[167] In his oral evidence concerning the plaintiff's need for care, the plaintiff's father explained the family's typical daily routine and how he arrived at his time estimates. I accept his evidence about the extent of care and assistance provided to her and the fact that, despite an increased dosage of an anti-depressant and anti-anxiety medication, the plaintiff's mental health is poor.

Relevant principles

[168] The claim in respect of gratuitous services provided to the plaintiff by her parents is subject to s 59 of the *Civil Liability Act* 2003 (Qld). It 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 institution."

[169] The principles governing a claim of the present kind are well-established by authorities such as *Clement v Backo*[25] and *Shaw v Menzies*[26] which, in turn, refer to leading authorities such as *CSR Ltd v Eddy*.[27] The basis for the claim is the need of the plaintiff for the services that are provided to her. These are services which the plaintiff reasonably needs or which, in terms of s 59(1)(a) are "necessary". The proper approach is to determine objectively what is needed.

Application of these principles and the parties' submissions

[170] The evidence which I have canvassed, particularly the evidence of the plaintiff, her father and her mother and the expert evidence which best illuminates the nature and extent of the plaintiff's needs, satisfies the threshold requirements of s 59(1).

[171] I have had regard to the passages of the cross-examination of the plaintiff and her mother and the defendants' submissions concerning differences between them. I have also had regard to the plaintiff's self-report of her capacity in a document as at 12 June 2013. There are obvious limitations upon the assessment of documents and oral evidence which have been the subject of translation and interpretation. At the best of times, the demeanour of witnesses is an uncertain and sometimes overstated guide to the reliability of their evidence. Some things in this case may have been lost in translation. However, I see no reason to reject the evidence of the plaintiff, her mother and father about her domestic circumstances and the needs which the plaintiff has for daily assistance.

[172] The defendants submit that the plaintiff's mother's "perception of the need for care cannot be unequivocally accepted as a true loss of capacity for self-care". I accept that submission. However, against the background of expert evidence concerning the plaintiff's cognitive impairments, her psychological illness, and the pain and headaches she experiences due to her physical ailments, I consider that the plaintiff's mother's perception of her daughter's need for care is realistic. I accept that she has attempted to have her daughter undertake tasks independently and that, in some respects, the plaintiff's mother and father are well-placed to assess her need for assistance. They would be delighted if the plaintiff was able to live a more independent life. However, the plaintiff's various conditions, including her experience of pain when undertaking physical tasks, create a need for daily assistance.

[173] I consider that the estimates of time spent over recent years are fairly reliable.

[174] The defendants submit that one of the "most troubling features" of the present case is the suggestion that the plaintiff was able to return to work for a period of a year, but still required care. I find no trouble with that suggestion when regard is had to the evidence

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[25] [2007] 2 Qd R 99; [2007] QCA 81.
[26] [2011] QCA 197.
[27] (2005) 226 CLR 1.

of her parents about the daily care they provided during this period and the evidence, including evidence from fellow workers and superintendents, about how the plaintiff struggled at work, despite assistance and being sheltered from physical demands. The plaintiff was often unable to work a full day and often had to have days away from work. She clearly required care during this period and her parents provided it.

[175] Despite attempts at rehabilitation, the plaintiff's condition, including her mental health, has worsened in recent years. The worsening of her mental condition and her overall condition has increased her need for care and support with daily activities.

[176] The evidence given by the plaintiff, her mother and her father about the plaintiff's needs warrants acceptance because it is consistent with the neuropsychological evidence and the psychiatric evidence which I have previously discussed. I note in particular the expert opinion of Ms Anderson, a clinical neuropsychologist, about the plaintiff's cognitive impairments. These impairments include difficulties with executive functioning. Ms Anderson's report, with which Dr Douglas did not disagree, is that the plaintiff's cognitive impairments reflect the long-term sequelae of her brain injury and "underlie her demonstrated difficulties with being unable to return to and maintain employment or live independently". The severity of her impairments may have been underestimated because of limitations on assessment. However, they are confirmed by the evidence about problems the plaintiff has with processing information, remembering things and making decisions for herself. For example, the plaintiff's father has to assist her with the management of her financial affairs. I need not repeat what I have earlier said about the plaintiff's psychological conditions or her orthopaedic conditions and the pain which they create for the plaintiff. They have significant implications for the plaintiff's need for care in the future, to which I will return.

[177] Ms Hague's evidence, which I accept, brings together the evidence of the medical experts. She has assessed the complex interplay of physical, psychological and cognitive sequelae. So far as domestic assistance is concerned, Ms Hague's evidence about the plaintiff's need for assistance and prompting with daily activities is supported by the evidence to which she refers in her report and the evidence which I have accepted from the plaintiff, her mother and her father. I accept Ms Hague's opinions regarding domestic assistance and that the plaintiff needs assistance and prompting on a daily basis, as well as assistance from her parents to manage her finances and budget. Ms Hague did not consider that the breakdown of the assistance which the plaintiff is currently receiving (which was represented in a table in her report and which I reproduce below) was unreasonable. However, that is a matter for me to decide.

[178] In summary, I conclude that the services which I have described, and which the plaintiff's parents provide gratuitously, are necessary. The need for those services arises solely out of the injuries for which compensation is sought in this case. The services are provided, and will be provided, for at least six hours per week and for at least six months. The gratuitous services that are provided to the plaintiff are not services which were provided to her before the accident when she lived an independent life, caring for herself in her own apartment. The services that are provided to her, and which will be provided to her in the future, are needed, as a matter of objective fact, not just as a matter of perception. The sad fact is that the need for these services has increased in recent years because of the plaintiff's inability to undertake paid work, the termination of her employment, the depression which she has experienced reflecting on her future and what her life might otherwise have been, and the pain and limitations which she experiences. The plaintiff's

claim for gratuitous services reflects the deterioration in her condition, including her psychological decline because of the persistence of her physical ailments, the loss of work and the apparent absence of any hope for the future. Given her decline, it is unsurprising that the hours which her parents have had to devote to her care increased after 2013.

[179] So far as the average hours of care provided by her mother each week are concerned, this depends on the state of the plaintiff's condition from time to time, whether one adopts a period of one hour per day or one and a half hours per day on each weekday, and the figure one adopts for the weekend. The plaintiff's mother estimates that she is now spending approximately 20 hours per week (based on one and a half to two hours assistance each day during the week and a further eight to twelve hours assistance across each weekend). This estimate seems supported by the evidence. The plaintiff's father's estimate of providing assistance of between eight and ten hours per week should be adopted.

[180] The plaintiff's mother's and father's estimates are of their own assistance, not assistance provided together. The addition of a period of 20 hours on account of her mother and 8 to 10 hours for her father produces a total figure of between 28 and 30 hours. It derives support from the breakdown of times in their evidence and the daily routine which they described on weekdays and on the weekend. Regard may be had to the table to which I earlier referred in assessing a reasonable number of hours which the plaintiff's mother and father collectively provide by way of domestic assistance for the accident-related needs of their daughter. This table was prepared by Ms Hague on the basis of what she was told about the assistance the plaintiff was in fact receiving. The evidence of the plaintiff's mother and father generally reflect these services and the times spent performing them.

Service	Weekly assistance
Personal care – prompting & supervision	140 minutes
Driving	90 minutes
Grocery shopping	80 minutes
Meal preparation	420 minutes
Washing up/dishwasher	70 minutes
Laundry – wash, hang, fold & ironing	210 minutes
Laundry – changing sheets	30 minutes
Cleaning – bathrooms & vacuuming	100 minutes
Cleaning – car	30 minutes
Community access & solace	480 minutes
Prompting for medication & appointments	30 minutes
Total	28 hours

[181] I have regard to the various witness statements about the nature of the care, times spent per day on average in providing it, and detailed oral evidence about a typical daily routine

and the time taken to attend to certain tasks. These include, for example, cleaning the plaintiff's room (20 minutes), cooking (one hour) and washing (30 minutes). The evidence explained changes over the years in the amount of care the plaintiff required during different periods, and the daily routines of the plaintiff and each of her parents. Necessarily, the plaintiff is left alone in the afternoon on some week days for the hours after her mother goes to work and before a parent returns home. The plaintiff simply lies in her room, depressed. She used to read books, but now what she reads does not "sink in".

[182] The plaintiff cannot cook on her own. She has no sense of smell or taste. She helps her mother with food preparation, but cannot look down for long. She drives only very rarely, and only when she feels well. The apartment is carpeted, and due to pain, the plaintiff finds that she cannot push a vacuum cleaner and she cannot stand its noise. She cannot do cleaning tasks, like cleaning the bath, which require her to bend and stretch, and so her mother or father clean those items. She cannot crouch for long because of pain.

[183] In addition to the time taken on specific tasks, the plaintiff's parents each have to encourage her to attend to self-care, prompt her to eat, take medication and engage in other activities, such as walking in the park or attending medical appointments. This includes keeping her spirits up, as best they can, by counselling her and keeping her company. My impression from all of the evidence is that the plaintiff's parents provide care in response to her complex needs for more hours than are claimed.

[184] The defendants' submissions concede a period after 26 March 2012 of "real need" of up to two hours per day, based on the two hours assistance per day her mother provided after the plaintiff went back to work. Their argument is that the plaintiff could not require more care when not working than she required when working. But the evidence about the decline in the plaintiff's condition, particularly her psychological condition, explains why her need for care has increased since January 2013.

[185] I need to ensure that at times when the plaintiff's mother and father are each there to help her, such as some times on the weekend, their services are not double-counted. However, the plaintiff's mother changed her working life so she now works on Saturdays, when the plaintiff's father has the primary care function.

[186] The evidence supports a finding that presently the plaintiff's mother provides care for her injury-related needs of at least two hours each day during the week, and for several hours on the weekend. In addition, the plaintiff's father spends time during the week, and about eight to ten hours supporting her on the weekends. They do activities they were not required to perform for her prior to the accident when she lived in her own apartment. They do so because of the accident-created needs of their daughter for care. The mother's time may exceed 20 hours and at least eight of the father's time should be added to this. A figure of 28 hours is not unreasonable, having regard to the evidence of the plaintiff's needs and what each of her parents must do every day to meet them.

[187] I assess damages for gratuitous services by reference to the following periods:

Period	Hours
30 December 2011 to 25 March 2012	272
26 March 2012 to 31 December 2012 (280 days)	560
1 January 2013 to 8 June 2013 (22 weeks) at 10 hours per week	220
9 June 2013 to 20 June 2013	110
21 June 2013 to 31 December 2014 (79 weeks) at 14 hours per week	1,106
1 January 2015 to 30 June 2016 (78 weeks) at 28 hours per week	2,184
Total hours	4,452

Future care

[188] In assessing the plaintiff's future need for assistance I have regard to the generally pessimistic view about her prospects of improvement, particularly the fact that there is no prospect for improvement in her cognitive impairments which, on their own, impede the plaintiff's capacity to live independently. Account should be taken of the contingency that her psychological condition will improve, however, the prospects of it doing so cannot be said to be high. If it improves there will be some reduction in the amount of time which needs to be devoted to the plaintiff's care. However, the plaintiff is likely to remain unemployed and effectively house-bound, with rare occasions when she is well enough to be on her own in the community or able to reside overnight at her flat (assuming the lease for it continues).

[189] I conclude that the plaintiff is likely to need continuing care and assistance for the rest of her life. The level of care is unlikely to be much less than provided to her in the recent past. It may prove to be more. The plaintiff's parents are devoted to her, but they will not live forever and they may suffer illness or injury. Even devoted families break down.[28]

[190] The plaintiff's life expectancy has not been reduced by her injuries. At some point when her parents are unable or unwilling to provide her with care, she will require assistance from others such as a live-in carer or someone who will regularly visit her and provide the care, assistance and prompting which her parents presently perform. A live-in carer would be occupied for more than 28 hours per week.

[191] In assessing compensation for future care it is appropriate to include a discount for contingencies, although, as I have indicated, not all other contingencies are positive ones. Nevertheless, a discount in the order of 15 per cent seems appropriate, taking account of both positive and negative contingencies.

[28] *Shaw v Menzies* [2011] QCA 197 at [77].

Rate of compensation and calculation

[192] Regard should be had to the commercial rate.[29] However, regard may also be had to the cost of sourcing the required services directly, and not through an agency, if there is such evidence and it is reasonable to engage carers directly.[30] Ultimately, the rate must be assessed according to a plaintiff's need for services in a particular case.[31] Continuity of care and ensuring an appropriate standard of care justify the use of a commercial agency to provide the services, especially because the plaintiff's parents could not be expected to source directly the individual carers and to assess their suitability for decades to come.

[193] The care costs of various agencies are in evidence. Some rates are for housekeepers, whilst others are for a helper/carer. Having regard to the range of figures and the commentary in Exhibit 8, I adopt the mid-point figure of ¥2,870 per hour.

[194] This produces an award for past care as follows: 4,452 hours x ¥2,870 per hour or ¥12,777,240.

[195] Future care should be assessed on a similar basis to other future losses. I adopt a period of 28 hours per week at the hourly rate of ¥ 2,870, or ¥ 80,360 per week. The plaintiff has a life expectancy of at least the life expectancy of an Australian female of her age. I will adopt a period of 61 years (multiplier 1015). The figure of ¥80,360 per week over a future life expectancy of 61 years results in a present value of ¥ 81,565.400. I will discount that figure by 15 per cent on account of contingencies. The figure for future care is ¥69,330,590.

Special damages

[196] Special damages are agreed at $38,474.79 + $834.00 + ¥1,119,080. Adopting an exchange rate of ¥85.77 to the AUD then gives a total of approximately $52,000. If expressed in Yen it approximates ¥4,500,000.

Future medical, pharmaceutical and travel expenses

[197] The plaintiff claims future expenses as:

(a)	Hospital and medical expenses	¥10,735
(b)	Pharmaceutical expense	¥5,638
(c)	Travelling expenses	¥1,125
	Total	¥17,498 per calendar month

[198] The plaintiff submits that this yields a figure of ¥4,038 per week and a present value of ¥4,098,570. Using an exchange rate of ¥85.77 to the AUD this present value figure is $47,785.59.

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[29] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 Qd R 560; *McQuitty v Midgley* [2016] QSC 36 at [220] – [222].

[30] *Waller v Suncorp Metway Insurance Ltd* [2010] 2 QdR 560 at 567 [27]; c.f. *McQuitty v Midgley* [2016] QSC 36 at [223] – [228].

[31] Ibid.

[199] The defendants submit that, having regard to her need for psychiatric treatment and the possible costs of future rehabilitation measures, a global sum of $30,000 ought to be allowed.

[200] I consider that the quantum claimed by the plaintiff is reasonable, and that a fair assessment is ¥4,000,000.

Interest

[201] I calculate interest at 2.5 per cent per annum on past losses over a period of 4.5 years.

Heads of damage

Heads of Damage	$	¥
General damages	130,600	
Past economic loss		8,292,835
Interest		466,472
Lost earning capacity		55,250,000
Lost pension entitlements		13,412,924
Past gratuitous care		12,777,240
Future assistance		69,330,590
Future special damages		4,000,000
Special damages (as agreed in Exhibit 3)	38,474.79 834.00	1,119,080
Interest on out of pocket special damages		54,644
Total	$169,908.79	¥164,703,785

Currency and exchange rates

[202] An issue arises as to whether certain losses should be calculated in Japanese Yen (¥) and awarded in that currency, or awarded in Australian dollars (AUD), calculated according to historic or current exchange rates.

[203] The plaintiff's position is that her historical earnings and economic losses should be calculated in the first instance in ¥, with any conversion to AUD undertaken at the exchange rate which applies at the date judgment is pronounced.

[204] Although there is power to give judgment expressed in a foreign currency,[32] the Court's duty is to give judgment in the currency which best expresses the plaintiff's loss.[33] Depending on currency fluctuations, the adoption of the exchange rate applicable at the date of judgment in respect of losses may favour a particular party. It may be fairer in

[32] *Australian and New Zealand Banking Group Ltd v Cawood* [1987] 1 Qd R 131.
[33] *Mazzoni v Boyne Smelters Ltd* [1998] 1 Qd R 76.

some cases to calculate the loss in the foreign currency and convert to AUD on the basis of an average exchange rate.[34]

[205] In this case, the plaintiff has suffered progressive losses in respect of past economic loss in the currency of her domicile. Although liability was admitted, there was no payment of rehabilitation expenses pursuant to s 51 of the *Motor Accident Insurance Act* 1994 (Qld) or advance payment on account of anticipated damages for past economic loss. There is no suggestion that the plaintiff has been dilatory in the prosecution of her claim, or strategically brought the matter on for trial at a time when the Australian dollar is historically weak against the ¥ having regard to exchange rates over the past five years. The plaintiff seeks past economic loss to be calculated in ¥ and converted at current exchange rates. She submits that she should not bear an exchange rate risk upon her where she has not been compensated over these years. The second defendant, a large insurer, could have hedged its position against any exchange rate risk.

[206] There is something to be said for this approach. However, if the Australian dollar has a current exchange rate which is less than the average over the relevant period, then the plaintiff may be awarded an amount in AUD, which, when converted into ¥, yields her an amount more than her actual loss in ¥. This seems unfair and unnecessary. I will adopt an average exchange rate over the relevant period for past losses that have been suffered, so that fluctuations in currency fall "evenly on both parties".[35]

[207] I will assess past economic loss (and indeed all heads of damages, save for general damages and some special damages) in ¥. This is because this is the currency in which the loss was suffered and upon which compensation is calculated. The main exception is general damages, which is set by statute.

[208] Presently, I am uncertain as to why it is necessary to covert amounts assessed in ¥ to AUD. If all or most of the judgment sum is to be held in investments in Japan, then it might be more appropriately awarded in ¥. I leave open that possibility, which may be affected by the proposed course of administration of the plaintiff's financial affairs. Awarding a judgment in AUD might simply entail the plaintiff incurring transaction costs in converting a judgment sum into ¥.

[209] If all or part of the sum which I assess for past losses is to be converted, I am minded to adopt an average exchange rate, calculated over the period during which the past losses have been suffered. That should be at a commercial exchange rate. Unless there have been recent significant changes since Mr Lee's supplementary report dated 4 March 2016, I will adopt the average rate of 85.77 (being the average Westpac rate referred to in his supplementary report). Mr Lee's supplementary report explains why commercial rates should be used in preference to the RBA rate (ie the rate at which the RBA buys currency from other central banks), and there was no response from the defendants as to why this should not be the case.

[210] Future losses have been calculated in ¥, and if these are not to be awarded in a judgment given in ¥, then the exchange rate current when judgment is pronounced should be used to convert these amounts into AUD.

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[34] At 79.
[35] At 79.

[211] If a single judgment amount, expressed in ¥, is to be awarded, then the sum assessed for general damages should be converted to ¥, using the exchange rate current when judgment is pronounced, since most of this loss is referrable to the future.

Administration and management fees

[212] The plaintiff is unable to manage her own financial affairs. The plaintiff claims as a component of her claim an amount in respect of administration and management fees. The parties are agreed that the assessment of this figure should be deferred until after reasons for judgment are published, at which point the amount to be entrusted to the administrator will be known and the level of administration and management fees can be calculated.

Orders

[213] I will direct the parties to confer in relation to the calculation of administration and management fees, and to submit within 21 days draft orders based on these reasons.

[214] I will hear the parties, if necessary, on the form of orders, including any issue as to the costs of the proceedings.